THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 3

Case No. 1195 — Case No. 1798

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BOOK 3

BEATTIE—BRAGDON

Case No. 1,195—Case No. 1,798

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FEDERAL CASES.

BOOK 3.

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

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

Case No. 1,195.

BEATTIE v. GARDNER et al.

[4 Ben. 479;[1] 4 N. B. R. 323, (Quarto, 106.)]

District Court, N. D. New York. Jan. Term, 1871.

PREFERENCE—FRAUDULENT JUDGMENT — PROCURING OR SUFFERING PROPERTY TO BE TAKEN ON LEGAL PROCESS.

1. Where a bankrupt had absconded from the state, and four suits had been commenced against him in a state court, by attachment of his property, and publication of the summonses had commenced, and the bankrupt thereafter met one of his creditors and a lawyer who had been and then was attorney for the bankrupt, in Canada, at Niagara Falls, and the bankrupt accompanied them to the American side of the river, where the lawyer served upon him the summonses and complaints in the four suits, on which service judgments were thereafter entered up and executions issued and levies made, and then proceedings in bankruptcy were commenced, and an assignee appointed, who, after demanding the property levied on, filed a bill in equity to set aside the judgments: *Held*, that, on the facts, the bankrupt had procured the property to be seized on the executions with intent to give a preference to the creditors, and that the judgments were therefore void under the provisions of the 39th section of the bankruptcy act [of 1867, (14 Stat. 536.)]

[Cited in Re Rainsford, Case No. 11,537; Haskell v. Ingalls, Id. 6,193; Re Lord, Id. 8,503; Re Heller, Id. 6,337; Curran v. Munger, Id. 3,487; Re Morse, Id. 9,852; Re Jacobs, Id. 7,159.]

[2. Cited in Re Mallory, Case No. 8,991, to the point that the district court of the United States, sitting in bankruptcy, has power to restrain, by injunction, the sheriff of a state court from proceeding to sell the property of a bankrupt under an execution issued out of a state court on a judgment obtained before the commencement of the proceedings in bankruptcy.]

3. An act which directly tends to defeat the purposes and policy of the bankruptcy act, and which was done in contravention of and with the intent to defeat such purposes and policy, is, for that reason, fraudulent and void.

[Cited in Haskell v. Ingalls, Case No. 6,193; Warren v. Delaware L. & W. R. Co., Id. 17,194.]

In equity. This is a bill filed by the plaintiff, [Walter B. Beattie,] as assignee in bankruptcy of Daniel Morse, an involuntary bankrupt, to set aside four judgments recovered and docketed against the bankrupt on the 21st day of May, 1868, one of such judgments being in favor of the defendant, Hiram Gardner, and the other three being severally in favor of said Scoville, Harwood and Stone, respectively. The defendant Ransom was the sheriff of Niagara county, who had levied upon the real and personal property of the bankrupt, by virtue of executions issued on such judgments, on the said 21st day of May, 1868, and who had advertised such personal property for sale on the 27th day of the same month. On the 26th day of the same month, a petition in bankruptcy was filed against Daniel Morse, the defendant in such judgments, and an injunction staying the sale so advertised was granted by the bankruptcy court. The plaintiff was subsequently duly appointed and qualified as the assignee of said Morse, and then, after demanding possession of the property levied on, filed his bill in this suit. The defendants having answered the bill, and the plaintiff having replied to such answers, it was referred to one of the counsellors of this court to take the proofs of the respective parties, and to report the same, with his conclusions of fact thereon.

The report of the referee states in substance, among other things, that the petition in bankruptcy against the said Daniel Morse was filed at the time above stated, and that an adjudication in bankruptcy, and

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

such other proceedings were had thereon that the plaintiff was duly appointed and qualified as his assignee; that thereupon all the estate, property, &c., of the bankrupt was duly assigned to him by the register in charge of the case; that on the 3d day of April, 1868, Morse committed the acts of bankruptcy charged in the bill, viz., that he did, on the 3d of April, 1868, depart out of and from the state of New York of which he then was and, for many years preceding that date, had been an inhabitant, with intent to defraud his creditors, and did on the same day, being a banker in the city of Lockport, in this district, fraudulently stop and suspend, and did not resume, payment of his commercial paper within a period of fourteen days; that after said bankrupt had so departed from the state, and on the said 3d day of April the defendants Scoville and Gardner, commenced their suits against him; that, on the 6th of the same month, the said defendant Harwood, and on the 18th of the same month the defendant Stone, commenced their suits against Morse; that such suits were commenced against the said Morse by summonses only, delivered to the sheriff of Niagara county, to whom attachments in the same cases were also delivered; that on and prior to the 18th of the same month the publication of the summons, as required by the New York Code, was commenced in each of said cases; that the sheriff attached the property of Morse under said attachments; that after leaving the state of New York, on the 3d of April, said Morse went to Detroit, and that, prior thereto, Phineas L. Ely, an attorney and counsellor at Lockport, had been, in some instances, the attorney and legal adviser of said Morse; that, prior to the 30th day of April, said Ely had had some correspondence with said Morse about appearing for him in the aforesaid actions, and had received from said Morse copies of the summonses and complaints in said actions, with a letter from said Morse, stating that the sheriff claimed to have attached in those suits all the household furniture in his house, and that he had two infant children, and directing said Ely to insist upon his exemption, under the New York statutes; that, in consequence of the receipt of said letter and papers, said Ely appeared in said actions for said Morse, for the purpose of protecting his right under the exemption laws; that, excepting as aforesaid, the said Ely had no authority to act for said Morse in said actions; that some time between the 3d and 30th days of April, 1868, said Ely arranged a meeting with said Morse, to take place on said last mentioned day, at Elgin, in Canada; that said meeting was to be held for the purpose of enabling said Morse to consult with said Ely and Judge Bowen, of Lockport, with reference to his children; that said Ely informed the attorneys for the plaintiffs in said actions that said Morse was or would be in Elgin as aforesaid, and that he should try to have him come to Lockport; that one of the attorneys for said Harwood and Stone thereupon, and on the 29th or 30th day of April, 1868, gave to said Ely a copy of the summonses and complaints in the said actions of Harwood and Stone, to serve upon said Morse; that Elgin is situated upon the Canada side of the Niagara river, at the point where the Suspension bridge crosses said river; that said Hiram Gardner was one of the attorneys of said Scoville in his said action; that said Gardner informed said Ely that he would like to see the said Morse, and would go with him for that purpose; that on the 30th day of April, 1868, said Ely and said Gardner went to Elgin, and that while there said Gardner handed to said Ely a copy of the summonses and complaints in the said actions of Gardner and Scoville, for the purpose of having them served on said Morse; that, having finished their business at Elgin, the said Morse, Ely and Gardner left the hotel at Elgin, and walked across the bridge nearly as far as the American side of the Niagara river—the said Ely and Gardner being on their way home, and the said Morse accompanying them, at the request of the said Ely, for the sake of their society; that after reaching a point within the county of Niagara, said Ely served upon said Morse a copy of the summons and complaint in each of the aforesaid actions of Gardner, Harwood, Scoville and Stone against said Morse, and left the same with him; that up to that time the said Morse had had no notice of any of the aforesaid conversations had between the said Ely and the attorneys for the plaintiffs in said actions, or that it was the intention of said Ely to serve said papers upon him, and that he did not procure the service of said copies of said summonses and complaints to be made upon him; that the judgments entered in said actions were entered upon proof of the personal service of the summonses and complaints as aforesaid, and not by virtue of the publication of the summonses therein; that executions upon such judgments in favor of Scoville and Gardner were delivered to the sheriff on said 21st day of May, 1868, at 10:30 a. m., and in Harwood's and Stone's cases ten minutes later; that the real and personal property described in the bill of complaint constituted all the property of said Morse at the times aforesaid, and that he was indebted to other persons besides the plaintiffs in the said judgments and executions, in the sum of about twenty thousand dollars; that at the time of the personal service of said summonses and copies of complaints, and at the time of the seizure of said property upon said executions, the plaintiffs in said suits knew, or had reasonable cause to believe, that said Daniel Morse was then insolvent, and had committed the acts of bankruptcy alleged in the complaint; that such judgments were recovered upon bona fide debts

due from said Morse to said judgment creditors respectively; that the summonses in said actions of Gardner and Scoville were mailed to said Morse, at Detroit, on or about the 18th day of April, 1868; that the summons and copy of complaint in favor of Harwood was so mailed to him on or about the 10th day of April, 1868, and those in favor of Stone on or about the 21st day of April, 1868, and that there was, at the time aforesaid, and ever since has been, a regular communication by mail from Lockport to Detroit.

The referee also found, as conclusions of fact, from the facts before stated in his report (the most material of which are above stated), that the said Daniel Morse did not procure the service of the summonses and complaints which was made on the 30th of April, 1868, as aforesaid, with a view to give a preference to any of his creditors over his other creditors, or with the intent to procure his property to be seized, in violation or in fraud of the provisions of the bankruptcy act, but that such service was made without any procurement of the said Morse. He further found, as conclusions of fact, that at the time of the service of the summonses and complaints on said 30th day of April, 1868, as aforesaid, the said Gardner, Scoville, Harwood and Stone knew, or had reasonable cause to believe, that said Morse was insolvent, and that said service was made, and said suits were conducted, and the subsequent proceedings therein had, with the intent, on the part of said Gardner, Scoville, Harwood and Stone to obtain the payment of their debts in preference to the other creditors of said Morse, and that the said Morse did permit and suffer his property to be seized on the attachments and executions aforesaid, and a part thereof to be sold, but that such seizure and sale were not made by his procurement, and were made without any intent on his part to defeat or delay the operation of the bankruptcy act, or to prevent a distribution of his assets, as provided in said act.

To this report of the referee the plaintiff filed twelve exceptions, the most important of which relate to and oppose the findings, in substance, that the bankrupt did not procure the service of the summonses and complaints aforesaid, and did not procure his property to be taken on said executions, with intent to give a preference to the plaintiffs in such judgments, or to defeat the operation of the bankruptcy act.

On the hearing before the referee, Phineas L. Ely, before mentioned, was cross-examined as a witness for the plaintiff, and cross-examined in behalf of the defendants. He stated, among other things, that he had been in some instances the legal adviser of the bankrupt, and had, he thought, brought a suit for him within three months before the 3d of April, 1868; that he did not remember any consultation with him in regard to his matters within the three months, except the commencement of such suit, until on or about the 3d day of April, 1868, and he thought the day previous, when he had a consultation with him as his attorney and counsel; that he was afterwards informed by Morse himself, that he would be at Elgin on the 30th day of April, 1868; that between the 3d and 30th of said month he knew that the actions of Gardner, Scoville, Harwood and Stone were commenced; that he communicated the fact that Morse was at Elgin to the attorneys for the plaintiffs in such actions on the 29th or the morning of the 30th of April; that he met Judge Holmes, one of the attorneys of Harwood and of Stone, and said to him that "Dr. Morse was at the bridge in Canada, that he (Ely) was going over to see Morse, and that if he desired to communicate with him he would take over any communication; that Holmes asked if he would take some papers and serve on Dr. Morse; that although he did not know that he replied, Holmes or his partner afterwards handed him the summonses and complaints in these actions of Harwood and Stone, and that he took them; that upon the 29th or 30th, he had an interview with Judge Gardner, (the plaintiff in one of said actions, and the attorney for said Scoville), in said Gardner's office; that he could not say how the conversation commenced, or whether Judge Gardner asked him where Morse was, or whether he (Ely) opened the conversation by telling him; that Gardner desired to see Dr. Morse, and said he would go with said Ely to the bridge, and did go; that either at Judge Gardner's office, or on their way to the bridge, Gardner handed him the papers in the cases of Gardner and Scoville, and requested him to serve them; that when he went to Elgin, he and Gardner went to a public house and found Dr. Morse there; that he thought they did not have an interview together, and were only in the room together, momentarily, when they first met there; that Gardner and Morse then had an interview at which he (Ely) was not present; that he then went into the room where they were, and all remained in the room until he and Judge Gardner left; that they were there from a half to three quarters of an hour; that Dr. Morse left the hotel in company with Judge Gardner and himself, and continued with them until nearly across the bridge; that when they got near the gate at this end of the bridge, he served the summonses and copies of complaint in all the four actions upon Morse, and then he and Gardner came home by the cars; that he could not say whether he appeared in any of the actions for Morse, but his impressions were that he did not; that he went voluntarily to Gardner and to Fitts (one of the attorneys of Harwood and of Stone, and the partner of Judge Holmes), and offered to serve the summonses and complaints.

On his examination in behalf of the de-

fendants he testified among other things that he learned in the first instance that Morse was to be at Elgin by telegram; that he never had any correspondence or conversation with Morse, or intimation from him that he was coming to Elgin for the purpose of being served in these suits, and never had any conversation with him about coming there or into the state for the purpose of being served with process; that Morse had not to his knowledge any knowledge or intimation that he was going to serve any papers upon him, or that he was about to give a preference to these creditors through any act of his; and that he did not act in the matter of serving these papers in pursuance of any understanding with him, or instructions from him. On his re-direct examination he stated that he found original notices of his appearance in behalf of Morse in each of the four suits, and did not doubt that copies were served on the plaintiff's attorneys respectively on the 20th of May, 1868. On his further cross-examination for the defendants, he stated that he thought he had had some correspondence with Morse about serving notices of appearance, and that such correspondence was before the 30th of April.

Judge Gardner's testimony in respect to the matter was very brief. He testified on his examination by the plaintiff's counsel, that he handed the summonses and complaints in the Gardner and Scoville cases to Mr. Ely, in the room in the hotel at Elgin; that Morse was in the room, but he could not say that it attracted his attention, and should rather think it did not. On behalf of the defendants he testified that there was no conversation about the papers, in which Morse participated; that in all his interviews with Morse no reference was made to these debts, papers, or suits, by Morse, or by Ely or himself in Morse's hearing to his knowledge or belief. On his re-examination on behalf of the plaintiff, he testified that his impression was that he made some remark to Ely when he handed him the papers; that soon after that something was said about his walking with Mr. Ely, and that they talked about Morse's financial condition.

The examination of the witnesses in the case, except Morse, the bankrupt, was ended on the 30th of December, 1869, and on the 19th day of January, 1870, Morse was examined de bene esse, on behalf of said defendants, before a United States commissioner in Minnesota, without notice to the plaintiff, and of course without any cross-examination in his behalf. He then and there deposed as follows: "My name is Daniel Morse. I am about fifty-five years of age; in April, 1868, I lived in Detroit, Michigan; I went from Detroit to the town of Elgin, in Canada, near the Suspension bridge, on business; I went to see Judge Levi F. Bowen, in regard to becoming the guardian of my children. I went of my own act, and without communication with any person in relation to going there. I had an interview on or about the 30th day of April, 1868, with Phineas L. Ely and Hiram Gardner, at Elgin, and I also saw Judge Bowen there in reference to the guardianship of my children. I think Ely and Gardner came there in the evening. It was after dark. They came to the hotel where I was stopping. I saw Ely and Gardner when they first came together, perhaps not more than fifteen minutes. Mr. Ely remarked, I suppose you want to have a little conversation with Judge Gardner? I told him I did. Ely left the room and was gone, I should think, about half an hour, perhaps more. We sat there some little time after that, talking on general matters; no business subject that I remember of. Mr. Ely remarked to the judge, it was time for them to go or they would lose the train, and asked me to walk with them; I went nearly across the bridge with them, and, as I stopped to bid them good night, Mr. Ely took out certain papers which he handed to me. We then parted, they going on to the shore, and I returning into Canada. I had no object in going on the bridge with them, except Ely asked me to, and to be with them as long as I could. I had no intimation or knowledge that any papers were to be served upon me as I crossed the bridge. I did not know, before I examined the papers, what they were, or in what suit. I did not know at that time, nor had I any intimation that I was about to give preference to any creditor or creditors by any act of mine. I was never asked to come into the state of New York, and the jurisdiction of said court, for the purpose of being served with process, and I never had any communication with or from said Ely or any of the plaintiffs, their agents, or attorneys, or any other person or persons whatsoever, on that subject. No reference was made in the interview between Ely and Gardner and myself to the subject of these suits."

Farnell & Brazee, for plaintiff.
George Gorham, for defendants.

HALL, District Judge, (after stating the case as above.) It is obvious that the efforts of the parties upon the hearing before the referee, as well as on the hearing here, were mainly, if not wholly, directed to the single purpose of showing, on behalf of the plaintiff, that the case was within the express provisions of the 35th section of the bankruptcy act, and the judgments and executions of the defendants therefore void; and on behalf of the defendants, that the case did not fall within the provisions of that section. The finding of the referee upon the questions of fact deemed most material under these provisions, was adverse to the plaintiff; and as the case will be first considered in connection with such provisions, the evidence bearing upon these questions will first be discussed.

It cannot be doubted that the acts of Ely,

in informing the attorneys of the four principal defendants in this suit that Morse would be at Elgin, and offering to take and taking the summonses and other papers to serve upon Morse, and afterwards procuring the momentary return of Morse to the state of New York that he might serve such summonses upon him, and then serving the same, were intended on his part, as well as on the part of the attorneys who furnished him the papers, to give to these four defendants who had attached the property of Morse a right to enter judgments, issue executions, and seize his property thereon, in such manner as would secure to the plaintiffs in such executions a preference over the other creditors of Morse. Nor can it be doubted that if in so doing he acted with the assent and approval of Morse, so that his acts are in law to be regarded as the acts of Morse, the latter must be held to have procured his property to be seized on execution, so as to render the seizure illegal and void, under the express provisions of said 35th section.

In this view of the case, it becomes important to consider whether Ely was, in fact, so acting with the assent and approval of Morse, or was guilty of treachery to his client, in thus endeavoring to give preference to the defendants in this suit, and thus defeat the operation and effect of the provisions of the bankruptcy act.

In considering this question, and the general question whether Morse intended to aid in securing such preference to the defendants, it is to be observed that it would necessarily be the policy of Morse and Ely, as well as of the favored creditors, to proceed with the utmost caution, and, as far as possible, to avoid or conceal every act, declaration or proceeding which would furnish evidence to defeat their purpose. Their conversation and correspondence, and, as far as possible, their acts, would be regulated by this policy; and therefore, in respect to this question, their acts, their omissions to act, and their silence, are more significant than any express declaration of theirs, and must necessarily be most relied upon in determining the questions of Ely's authority and Morse's intentions.

The proof shows that Morse was a banker, and as he was also a doctor, he was doubtless an educated and intelligent person. On or before the 2d of April, 1868, he reached the conclusion that his hopeless insolvency required some action on his part, although it does not appear that, up to that time, his creditors had taken, or contemplated taking, any proceedings against him. Mr. Ely had before been sometimes consulted by him as his legal adviser, and had lately, or at least within three months, been employed by him to bring a suit in his favor. On the 2d of April, and in view of his insolvent condition, Morse again sought the counsel of Ely as his legal adviser. Their consultation was privileged, and what then occurred between them could not be given in evidence. The condition and circumstances of Morse, as shown by the evidence, would naturally lead to the obvious conclusion that the result of such consultation would be a determination on the part of Morse to apply for the benefit of the bankruptcy act, and secure a fair and equal distribution of all his property among all his creditors; unless he desired to give a preference to some or one of them over the others. If he desired to give such preference, Ely could inform him that the bankruptcy act would invalidate any act of his clearly intended to produce that result, and that to effect that object some measure must be taken by the creditors in which he (Morse) should not appear to co-operate. What occurred at this consultation can only be strongly suspected; for it is evident that no entirely reliable conclusion in regard to it can be based upon the then existing circumstances, and the subsequent conduct of the parties.

On the very next day, and possibly without being influenced by anything which occurred at such consultation, Dr. Morse absconded from Lockport; and before three o'clock in the afternoon of that day, the suits of Gardner and Scoville were commenced against him by the delivery of the summonses therein, and attachments against his property, although the publication of said summonses was not commenced until the 18th. It does not appear whether Ely or Morse had or had not communicated to these parties, or their attorneys, the fact of the intended or actual departure of Morse; but they were creditors that Morse or Ely, or both, then or subsequently, intended to prefer, and care was subsequently taken that their judgments should be docketed, and their executions issued, a few minutes in advance of those of Harwood and Stone, although the services on which the judgments were entered were all made at the same time. Indeed, this matter of preference, even between those four judgment creditors, seems to have been carefully regulated and guarded. Gardner was the favorite; Scoville came next, Stone next, and Harwood the last of all. Consequently, Gardner's judgment was docketed one minute before that of Scoville, so as to give him a preference as against Morse's real estate; that of Scoville half an hour before that of Stone; and that of Stone one minute before that of Harwood; and the executions in Gardner and Scoville's cases were delivered to the sheriff ten minutes before the executions in the cases of Stone and Harwood.

The levying of the attachments in these cases did not secure the desired preferences to these favored creditors as against proceedings in bankruptcy commenced within four months after such levy, although it was only by such proceedings that the lien of such attachments could be dissolved, and their object defeated. To fully secure a

preference, a levy on final executions on judgments obtained after personal service upon the defendant, or his appearance in the suits, was necessary; but a voluntary appearance, without such previous service, would, of itself, be almost certain to defeat the attempt to secure such preferences. This was doubtless well known to Ely and Morse, as well as to Gardner, and the attorneys of Harwood and Stone. Prior to the 30th of April, Ely had some correspondence with Morse about appearing for him in these suits, and had received the summonses which had been sent to Morse by mail; but this correspondence being privileged, its precise contents and exact purpose are unknown. But it is apparent that, for some reason, Ely decided not to appear in the suits, at least before personal service of the summonses upon Morse, and that his thoughts had been turned towards some other means of securing a preference to the parties who had prosecuted his unfortunate client. When this correspondence commenced, or when it ended, does not appear; but before the 30th of April, and probably before the 29th, Ely learned by a telegram from Morse himself, that the latter would be at Elgin on the 30th, although Morse swears that he went there of his own act, and without communicating with any person in relation to his going there. Ely then gave notice of that fact to the attorneys who had commenced the suits against Morse, and he procured from them, for the purpose of such service, the summonses which he subsequently served. Ely then went with Gardner, and met Morse at Elgin. It is assumed that he went there to consult Morse in reference to Judge Bowen becoming guardian for Morse's children; but it does not appear that he had any such consultation, or why it was necessary or desirable that he should have one. Ely left Gardner and Morse alone, almost immediatey after they met Morse; and although Gardner had, within the same month prosecuted Morse, and had attached his property in two suits which were yet pending, and there met him for the first time after such suits were commenced, it appears that these parties were careful not to speak of these suits, or either of them, during the half hour they were together. This silence can only be accounted for by the supposition that these parties understood each other, and deemed it most discreet, in view of their common object, to say nothing upon the matters apparently most likely then to be the subject of conversation unless there was some understanding that the matter was in the hands of Ely, and that it was not discreet to interfere with his plans and purposes.

The proof in reference to the alleged motive of Morse in coming momentarily into this state;—his yearning after the society of his Lockport friends, from whom he had been separated nearly a whole month, one of whom had in the meantime attached his property in two different suits, on the ground that he had departed from the state with intent to defraud his creditors, and had not mentioned this circumstance during their half hour's interview, and the other, his legal adviser, the day or day before he so departed, and who was there at his request as his legal adviser in respect to the guardianship of his children, but who was preparing, as it is alleged, in collusion with those who had prosecuted his client, and charged him with an intent to defraud his creditors, to effect a personal service of the summonses in those suits, so as to give such creditors a preference against the will of Morse· and the proofs in respect to the service upon Morse, and what then and there occurred,—have already been sufficiently set forth.

When these papers were served, Morse either knew, or by a single glance at them might easily have ascertained their character. Though served by his own attorney, he made no inquiry as to the meaning and purpose of such service, and manifested neither indignation nor surprise that his own attorney and confidential adviser should have thus lent himself to the opposing parties, and by treachery and trick had induced him to enter the state in order that he might consummate his alleged treachery. He does not appear to have made any effort to avoid the effect of such service, or to have expressed any dissatisfaction with the conduct of his attorney. He did not seek to avoid the effect of the service by voluntarily going into bankruptcy, nor did he give notice of this service to any other of his creditors in order that they might proceed against him in bankruptcy within the twenty days allowed for pleading; and he does not appear to have consulted with any one in regard to any measure to counteract the efforts of Ely, and of the creditors by whom he had been prosecuted.

He was not an ignorant man, unaccustomed to business, and he had consulted counsel upon other and recent occasions. It is assumed that he required the legal advice of Ely even in his consultation with Judge Bowen in regard to the guardianship of his children, and unless he was a willing participant in these proceedings, through Ely, his attorney, it is passing strange that he neither did, nor attempted to do, nor even said anything in disaffirmance or disapprobation of the conduct of Ely, nor consulted with any one in respect to the measures proper to be taken to defeat the purposes of those who had prosecuted him.

"Acta exteriora indicant interiora secreta;" the law judges of a man's previous intentions by his subsequent acts, (Broom, Leg. Max. 139;) "Omnis ratihabitio retro trahitur et mandato priori aequiparatur:" subsequent assent given to what has already been done has a retrospective effect, and is equivalent to a previous command, (Id. 380;) "Qui non pro-

hibet quod prohibere potest assentire videtur:" he who does not prevent that which he can prevent is held to assent, (2 Co. Inst. 308;) "Qui tacet consentire videtur:" silence implies consent, and such consent may be inferred from the parties' subsequent conduct, (Id. 360;) "Qui facit per alium facit per se:" he who does a thing by another does it himself, (Id. 373,)—are ancient, reasonable and well-established legal maxims, and may be properly applied in this case.

If the services made upon Morse on the Suspension bridge were brought about by the fraud and treachery of his attorney, acting in collusion with the attorneys of the opposite parties, and in opposition to the will of Morse, the supreme court, in which the actions were pending, would doubtless have set aside the services. Grah. Pr. (2d Ed.) 137; Williams v. Bacon, 1 Wend. 636; 2 Kent, Comm. 483, note b. Morse, by filing his own petition as a bankrupt, might have avoided the effect of such services; or he might, by communicating the facts to some of his other creditors, have enabled them to effect the same object by filing a petition against him during the twenty days allowed him to plead. But he did nothing of the kind, and seems to have rested in perfect contentment with the preference which he supposed Ely had secured to the four creditors who had prosecuted him.

In short, the conduct of Morse and Ely, before, and at, and after the time of the service of the summonses upon Morse, satisfies me that Ely was acting as the attorney and agent of Morse, without special instructions to do certain specific acts, but with the understanding and assent of Morse, that a preference should, in some way, be secured to these judgment creditors; Morse relying upon Ely to engineer the matter, and consenting to do what Ely requested. Ely, when he gave the information of Morse's expected visit to Elgin, and obtained the summonses, doubtless relied upon Morse's willingness to aid his purposes, and come momentarily into Niagara county, if he requested it, and he expected him to so act that these creditors, and no others, should obtain service of their process upon Morse.

The conclusions just stated, were resisted by the counsel for the defendants upon the ground that they were disproved by the testimony of Ely and Morse; and it was doubtless upon their testimony that the opposing conclusions of the referee were based. But their testimony does not fully meet the question, and is not, necessarily, a denial of what has been assumed. Their language seems to have been well considered, and what they have each sworn to in very nearly the same language, in respect to the service of the summonses, may be literally true, notwithstanding that Morse desired and intended that Ely should in some way secure the preference attempted to be given, and therefore accompanied Ely, at his request, until he reached the New York portion of Suspension bridge, to enable Ely to take such action as he desired to produce that result.

These views require a modification of the referee's report, but there is, perhaps, no necessity for a formal allowance of the exceptions. The second, seventh, eighth and tenth exceptions are, however, considered to be well taken, and as the allowance of these will correct the report so far as it may be necessary, the other exceptions may be considered as disallowed.

Of course, under the views already expressed, the plaintiff is entitled to a decree, but there is another and most important question involved in the case, upon which, in view of its great and general importance, I should probably have ordered an argument if the plaintiff had not been entitled to a decree upon other grounds.

It can scarcely be doubted that an act which directly and manifestly tends to defeat the purposes and policy of the bankruptcy act, and which was done in contravention of, and with the intention to defeat, such purposes and policy is, for that reason, fraudulent and void. "A fraudulent contrivance," said Lord Mansfield in Rust v. Cooper, Cowp. 629, "with a view to defeat the bankrupt laws is void, and annuls the act." And, in Foster v. Goulding, 9 Gray, 50–52, it was said by Thomas, J., after quoting the above language of Lord Mansfield: "This is well-settled doctrine, and, diligently and faithfully applied, would defeat most of the contrivances and indirections by which the just and equal operation of the insolvent laws is prevented." And see the cases cited by Judge Thomas, on page 53.

In this case the acts of Morse, upon which the attachments issued against him in favor of the defendants, were acts of bankruptcy under the bankruptcy act, and in the case of Shawhan v. Wherritt, 7 How. [48 U. S.] 627, Mr. Justice Grier, in delivering the unanimous opinion of the supreme court of the United States, said: "The chief and important question involved in this case is whether the appellants, after an act of bankruptcy, of which they had full knowledge, could, by proceeding in a state court, obtain a valid lien and seize the property of the bankrupt to the exclusion of his other creditors, or whether such a proceeding would not be a fraud on the bankrupt law, and therefore void."

In discussing that question he further said, among other things: "The acts thus enumerated (acts which were deemed acts of bankruptcy under the act of 1841, [5 Stat. 440]) are usually termed acts of bankruptcy, and may be considered as tests of insolvency, showing conclusively the inability of the trader to pay his debts, or carry on his trade. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of a bankrupt among all his creditors.

Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably." Again: "A creditor may always recover and receive payment of his debt, or security for it, from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy, and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt. And if notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by a suit in a state court after such notice could have no better claim to protection, for notice of the act of bankruptcy to the creditor is the test of mala fides which vitiates the transaction."

In Shawhan v. Wherritt, the lien asserted was based upon the filing of a bill in equity against the bankrupt and his assignee under a voluntary assignment professedly made for the benefit of creditors, and a subsequent decree upon the bill so filed. The bill was filed on the 2d of May, 1842, and the petition in bankruptcy was not filed until the 24th of the next September. A decree in favor of the complainants in the state court was entered on the 22d of the succeeding month of October, and on the 4th of the next month the adjudication in bankruptcy was made in the bankruptcy court. The bill of the assignee in bankruptcy, under which the decision of the supreme court of the United States was made, was not filed until August, 1843. The bill was filed in the district court, and that court entered a decree in favor of the complainant. This decree the circuit court affirmed on appeal in November, 1844, [Shawhan v. Wherritt, Case No. 12,728,] and the decision of the circuit court was affirmed by the supreme court in 1849. The case was ably argued in that court, and the opinion of Mr. Justice Grier appears to have had the full concurrence of all the judges of that court.

The lien asserted in that case was based upon proceedings in equity, and the liens asserted in this case are based upon proceedings at law. That case arose under the act of 1841, and this under the act of 1867. But I have not been able to discover, in the reasoning of Mr. Justice Grier, or in the somewhat different language of the two acts, any ground for assuming that the liens insisted upon in this case are not void under the decision made in the case of Shawhan v. Wherritt. Indeed, the learned judge of the southern district of New York, in his well-considered opinion in the Case of Black and Secor, [Case No. 1,457,] applied the doctrine of Shawhan v. Wherritt, in a case where the creditor had obtained a judgment, execution and levy by the neglect of the bankrupt to file a voluntary petition in bankruptcy, and he declared that the doctrines of Shawhan v. Wherritt, held to be applicable to the act of 1841, are much more applicable to the act of 1867. The Case of Black and Secor is, in fact, an authority in point against the defendants, and there are other cases which tend to support the same doctrine. In re Belden, [Case No. 1,240;] In re Black and Secor, [Id. 1,458;] Fitch v. McGie, [Id. 4,835;] In re Wells, [Id. 17,388.]

The plaintiff will have a decree in accordance with this opinion.

BEATTIE, (UNITED STATES v.) See Case No. 14,554.

BEATTY, Ex parte. See Case No. 9,976.

Case No. 1,196.

In re BEATTY et al.

[3 Ben. 233;[1] 2 N. B. R. 582, (Quarto, 177;) 1 Chi. Leg. News, 326.]

District Court, S. D. New York. May 8, 1869.

BANKRUPTCY—DISCHARGE—LOSSES IN SPECULATION.

Where bankrupts appeared to have lost, in twenty-one months, a capital of $120,000, and were left with debts to the amount of $200,000, and it appeared that they had trusted their business almost exclusively to an uncle, in whom they had confidence, and who was able to make them believe that they were making large profits in buying and selling ships, and who, by this means, cheated them, leaving them with a claim against him of $640,000, on which nothing could be realized: *Held*, that, on all the facts, it sufficiently appeared that the bankrupts had not been in any complicity with their uncle, in defrauding their creditors, but had been themselves defrauded, and that discharges would be granted to them.

[Cited in Re Antisdel, Case No. 490.]

[In bankruptcy. Petition by Robert W. Beatty, John C. Beatty, and George R. Beatty, bankrupts, for discharges. Granted.]

James Emott, C. A. Seward, and Converse & Lyman, for bankrupts.

G. M. Speir and C. E. Pratt, for opposing creditors.

BLATCHFORD, District Judge. I have examined, with care, the voluminous testimony and exhibits in this case, with the assistance of the briefs furnished by the respective counsel. The bankrupts have, in my judgment, made a full and correct exhibition of all their dealings, and, although their books, as kept by them during the time they were in business, which was before the passage of the bankruptcy act, [14 Stat. 517,] were not kept in the form which the most correct system of book-keeping would sanction, yet entries are found therein covering, with minuteness of detail, all their transactions, so

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

that those transactions have all been laid bare by reference to the books. I cannot see any evidence of an intention to mislead or deceive any one by the manner in which the books were kept. Their transactions with their uncle, Thomas H. Armstrong, whereby all the capital, $120,000, which they put into their firm, and all the profits they made and realized from their legitimate business of dealing in teas, and all the money they borrowed from other parties, were wasted and lost in the short space of twenty-one months, leaving them insolvent, with an indebtedness due by them of over $200,000, and with scarcely any property, except a claim against Armstrong for over $640,000, sufficiently explain why they were ruined. I see, in these transactions, a haste to be rich by illegitimate means, and a greed of gain, on the side of the bankrupts, which, favored by the relationship of Armstrong to them, led them to trust him with all the money and obligations he asked for, on such representations as he chose to make, without any investigation by them, or any attempt to verify the truth of his statements; and, on the part of Armstrong, one of the most formidable and successful swindles of the time. But I see no complicity in fraud between Armstrong and the bankrupts. Armstrong was engaged all the time, knowingly, in cheating the bankrupts, and they were engaged all the time, negligently, but unknowingly, in aiding him to cheat themselves. The effect of the transactions was to deprive them of all means of paying their creditors; but I see no evidence of any fraud on their part. On the contrary, they were defrauded by Armstrong.

It would seem, on general principles, to be hardly credible, that a swindle of the character of that perpetrated by Armstrong, so transparent in some of its features, could have been carried on through a period of several months, without being detected by persons of ordinary intelligence. But his relationship to the bankrupts, and their terms of intimacy with him, and the fact that they must have thought, if they believed what Armstrong told them, (and everything shows that they did,) that they were making, and not losing, money all the time, account, in a great measure, for what would otherwise seem incredible. It is, indeed, hard to believe that they could have supposed that they had $640,000 worth of ships, with which they were playing as with dice, while, at the same time, they gave no attention to the condition or whereabouts of any of the ships. But this is, perhaps, explainable on the ground, that the ships were, all through, to them a mere matter of purchase and sale, and not at all a matter of employment in traffic. None of them were understood to be held over a few days. Instead of being ships, they might as well have been fancy stocks, or merchandise of any kind. The whole thing, even as the bankrupts viewed it, was a mere gambling transaction, outside of their legitimate business, which they left to be managed by Armstrong. As it existed, in fact, it was a coinage of Armstrong's brain, the bankrupts believing all that he told them, and giving him such moneys and securities as he asked for, to carry out his represented traffic in ships, and receiving from him such moneys as he chose to pay them, and leaving in his hands, invested in the ships, as they supposed, all that he represented to be so invested, and making such entries in their books as corresponded with their dealings with Armstrong, and with his representations as to such investments. It turned out, on the part of the bankrupts, to have been credulity and misplaced confidence, superinduced by the spirit of speculation; but, after all, it differed but little from what, though, perhaps, on a smaller scale, and in different forms, transpires daily, in a community where men are not satisfied with slow and certain gains.

The disposition made by the bankrupts of their tangible property, when they failed on the 1st of April, 1866, was not illegal at the time, nor invalid, nor tainted by fraud. There is nothing to impeach the bona fides of the debts in payment of which such property was appropriated. The charge of willful false swearing by the bankrupts in these proceedings, is not sustained. Nor are any of the specifications supported. Discharges must be granted to all three of the bankrupts.

Case No. 1,197.

BEATTY v. The BROOKLYN.

[See Case No. 1,939.]

BEATTY v. The BROOKLYN. See Case No. 1,938.

BEATTY, (BUCKLEY v.) See Case No. 2,091.

BEATTY, (CLEMENTSON v.) See Case No. 2,884.

BEATTY, (GEORGETOWN v.) See Case No. 5,344.

BEATTY, (HELLEN v.) See Case No. 6,336.

BEATTY, (KURTZ v.) See Case No. 7,950.

BEATTY, (OFFUTT v.) See Case No. 10,448.

Case No. 1,198.

BEATTY v. VAN NESS.

[2 Cranch, C. C. 67.][1]

Circuit Court, District of Columbia. Dec. Term, 1812.

PRACTICE—FILING PLEA OF LIMITATIONS AFTER RULE-DAY.

The court will permit the plea of limitations to be filed after the rule-day, upon an affidavit showing it to be a fair defence under the circumstances of the case.

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

At law. Assumpsit [by Beatty's administrator against Van Ness, administrator of Burnes] for money had and received, brought under the act of Maryland of 1791, (chapter 45, § 5,) to try the title to some city lots claimed by plaintiff's intestate.

The defendant, after the rule-day, moved to file the plea of limitations, upon his affidavit that he ordered the pleas to be filed by his attorney before the rule-day; that this attorney was absent attending the trial of Wilkinson; that Burnes had been in possession more than twenty years, &c.

THE COURT, (nem. con.,) upon this affidavit, permitted the plea to be filed, considering it a fair defence under the circumstances.

[NOTE. Upon the trial of this cause, the jury found a verdict for defendant, and, on writ of error, the supreme court affirmed the judgment of the circuit court, treating the case upon its merits. Beatty v. Burnes, 8 Cranch, (12 U. S.) 98.]

BEATY, (KNOWLES v.) See Case No. 7,896.

BEATY, (UNITED STATES v.) See Case No. 14,555.

BEAUREGARD, (CASE v.) See Case No. 2,487.

Case No. 1,199.

The BEAVER.

[2 Ben. 118.][1]

District Court, S. D. New York. Jan. Term, 1868.

COLLISION OFF QUARANTINE—VESSEL AT ANCHOR.

1. Where a vessel at anchor is struck by one in motion, the presumption of law is, that the collision is caused by the negligence of the latter, unless the former is anchored in an improper place.

2. Where a brig came into New York harbor from sea, and anchored, in a strong wind and heavy sea, about 400 feet to windward of another vessel which was already anchored, dropping but one anchor, and was left without a sufficient watch on deck, and, the wind and sea increasing, her chain parted, and she drifted down upon the other vessel, which had paid out all the chain possible, to avoid her as she drifted, and her other anchor was not dropped till after she was afoul of the other vessel: *Held*, that the brig was in fault in anchoring where she did, under the circumstances, and in not having a proper watch, and in not dropping a second anchor when the wind and sea increased; and that she was liable for the damages.

In admiralty.

W. R. Beebe and A. J. Heath, for libellants.

Stevens & Reymert, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision which took place about six o'clock in the morning of the 16th of August, 1867, at the Quarantine ground in the lower bay, in the harbor of New York, between the brig Julia F. Carney, owned by the libellants, and the brig Beaver. The Julia F. Carney was at anchor, and had arrived from Havana four days previously. The libel alleges, that the Beaver came in from sea during the night before the collision, with a strong southerly and easterly breeze, and anchored too near to the Julia F. Carney, with only one anchor out, her port anchor, and directly to the windward of and ahead of the Julia F. Carney; that, at about six o'clock the next morning, the wind continuing to blow a fresh breeze from the south and east, the Beaver struck adrift, and dragged afoul of the Julia F. Carney, carrying away her bowsprit and all her head gear, and otherwise seriously damaged her; that the Beaver had not at the time a proper lookout and watch; and that the collision would not have occurred if the Beaver had been properly and safely moored a proper distance from the Julia F. Carney, or had suffered her other anchor to run when she first began to drift, or if her braces had been promptly checked so as to give her the proper sheer.

The answer avers, that the Beaver arrived in port from sea at about one o'clock in the morning, in charge of a duly licensed pilot, who anchored her at the lower Quarantine by a good and sufficient anchor and chain cable, about four hundred feet directly ahead of the Julia F. Carney, in the tide way of the anchorage ground; that, by the force of the wind and sea, the chain cable of the Beaver parted, and she struck adrift; that her crew immediately thereafter let go another anchor with a sufficient chain cable; that, by force of the winds and waves, and not by any negligence, she was driven against the Julia F. Carney; that the collision was the result of an inevitable accident; that, when the Beaver struck adrift, the watch on the Julia F. Carney had notice thereof, and were hailed by the crew of the Beaver to pay out chain, and had time and room enough to do so, but failed to do so; and that the collision was caused by such failure.

As the Julia F. Carney was at anchor, and was run into by the Beaver while the Beaver was in motion, the presumption of law is that the collision was caused by the fault of the Beaver, unless the Julia F. Carney was anchored in an improper place. 1 Pars. Mar. Law, bk. 1, c. 7, p. 201, note 8, and cases there cited. It is not shown that it was improper for the Julia F. Carney to anchor where she did anchor. No such defence is set up in the answer, and there is nothing in the evidence to warrant any suggestion of the kind. It is incumbent, therefore, on the Beaver to establish that the collision was not caused by her fault.

I think that the evidence, instead of establishing a case of inevitable accident or vis major, shows that the collision was oc-

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

casioned by the fault and negligence of the Beaver. She anchored, in a strong wind and a heavy sea, within four hundred feet, according to the statement in the answer, of the Julia F. Carney, and directly ahead, and to the windward, of her, in the tide way. She had only her port anchor out, and, as the wind and sea increased, she did not put out another anchor. The chain cable of her port anchor parted, and she began to drift. The tide was flood. The parting took place under water near the anchor, and the fact of such parting was not known until the day after the collision. The crew of the Julia F. Carney, seeing the Beaver drifting toward their vessel, paid out all the chain they could to their own anchor, in a prompt manner, but, notwithstanding this, the Beaver came broadside on against the bows of the other vessel, and it was not until after the collision, that the Beaver's starboard anchor was run out. It was negligence in the Beaver to anchor so near to the Julia F. Carney, and not to put out another anchor when the wind and the sea increased. The Volcano, 2 W. Rob. Adm. 337; The Massachusetts, 1 W. Rob. Adm. 371; The Northampton, 1 Spinks, 152. It was also negligence in her not to have got out her second anchor in season to have avoided the collision. This, on the evidence, might have been done by prompt action on her part. The reason why it was not done is shown by the evidence to have been because there was no sufficient watch on the deck of the Beaver, the drifting of the vessel having been discovered by the cook of the Beaver, who was on deck, and announced it to the master. There was no person but the cook on the deck of the Beaver at the time, and there had not been for some time before. The collision might have been avoided by ordinary care and skill and common foresight on the part of those in charge of the Beaver. If there were in the case nothing but the mere parting of the cable, unattended by any contributory negligence, the case might be different.

There must be a decree condemning the Beaver, with a reference to a commissioner to ascertain and report the damages caused to the libellants by the collision.

Case No. 1,200.

The BEAVER.

[8 Ben. 594.] [1]

District Court, E. D. New York. Dec. Term, 1876.

PRACTICE IN ADMIRALTY—EXCEPTIONS TO RULINGS OF COMMISSIONER.

1. Objections taken to the rulings of a commissioner, as to the admission of evidence in the course of a reference to ascertain damages, may be brought up for review on exceptions, after the report is made, or, if necessary, may be brought up on a certificate of the commissioner pending the reference.

2. The case of The Transit, [Case No. 14,138,] criticised.

In admiralty.

Scudder & Carter, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. A question of practice has been raised in this case which I supposed to have been long considered settled. It is, whether upon a reference in an admiralty cause to a commissioner to ascertain the amount of the damages to which a party has become entitled by an interlocutory decree, it is competent for the commissioner to rule upon objections taken to the admission of testimony upon the ground of irrelevancy, and whether such rulings can be brought up for review on exceptions after the report is made.

Cases may arise where it is proper to take the opinion of the court as to the correctness of a ruling of the commissioner at the time of the objection, as for instance when the commissioner excludes evidence offered to be given by a witness about to go to sea or when the testimony may be lost if not then taken. In such a case an immediate decision of the court may be obtained by means of a certificate of the commissioner as to his ruling. But here no facts are stated showing any necessity for taking the opinion of the court upon a certificate of the ruling that is objected to. In the absence of any such facts the proper practice is for the commissioner to proceed to a report, which, with the evidence and the rulings of the commissioner upon the objections taken to the admission of evidence, can be brought before the court upon proper exceptions taken to the conclusions of the report and to such rulings of the commissioner as were objected to at the time. In this way the reference can proceed to a termination without delay being caused by objection to testimony, and so the cause have dispatch without injustice. This course has often been pursued. To hold that every objection to evidence taken before the commissioner has the effect to stop the reference and transfer the cause into court, to await the determination of the court upon the objection taken, would go far to render such references a means of delaying, instead of furthering, the disposition of the cause.

The case decided by Judge Blatchford—The Transit, [Case No. 14,138]—to which reference is made, I do not consider to be in point. In that case the exceptions appear to have been to the report alone and exceptions to the rulings as to the admission of evidence do not appear to have been taken at the time. If it was intended to decide that the correctness of the commissioner's rulings upon evidence could in no case be examined into after report made, I cannot

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

agree with it. The following cases show a different rule: The Commander in Chief, 1 Wall. [68 U. S.] 44; The Trial, [Case No. 14,170;] Holmes v. Dodge, [Id. 6,637.]

The order must be to the commissioner to proceed with the reference in accordance with the practice here indicated.

BEAVER COUNTY, (WOODHULL v.) See Case No. 17,974.

Case No. 1,201.

BEAVERS v. The NORTH AMERICA.

[N. Y. Times, Jan. 17, 1855.]

District Court, S. D. New York.

COLLISION—TOWS IN HUDSON RIVER—LOOKOUT—MUTUAL FAULT.

[The failure of a vessel to keep a proper lookout is prima facie evidence that an ensuing collision was caused by such neglect. The Genesee Chief, 12 How. (53 U. S.) 443, followed.]

[In admiralty. Libel by George W. Beavers against the steamboat North America for collision. Decree for libellant.

Owens, Betts & Vose, for libellant.

Sanford & Porter, for claimant.

Before INGERSOLL, District Judge.

This suit is brought by the owner of the barge Nancy F. Beavers, to recover damages for injury sustained by her in a collision with the steamboat on the Hudson river. The collision happened just below Magazine Point, about 12 o'clock on the night of June 13th, 1853. The barge was in tow of the steamboat Belle, which was coming down from Albany with a tow of twenty-six loaded barges and canal boats. Three of the barges were ranged on each side of the Belle, the Nancy F. Beavers being the outside one on the larboard side. The Belle rounded Magazine Point at a short distance, and intended to keep the east side of the river, down to West Point, and to pass the North America on the left. Such a course of navigation is usual for steamboats coming down with a heavy tow on the ebb tide, but with a flood tide they keep on the west shore. The evidence was conflicting as to the state of tide at this time.

HELD BY THE COURT, that the North America had no sufficient outlook, according to the rules laid down by the supreme court in the case of St. John v. Paine, 10 How.[(51 U. S.) 557,] and the case of The Genesee Chief, 12 How. [(53 U. S.) 443,] and this is therefore prima facie evidence that the collision was caused by fault on her part.

That the evidence, as given, does not rebut this prima facie case, but rather strengthens it. If she had had such an outlook, the probability is that she would have discovered, and been able to rectify, the mistake of the pilot of the North America, as to the lights, in season to have avoided the collision.

That, on the evidence, the tide was flood, and the navigation of the Belle on the east side of the river was therefore erroneous and a fault on her part.

That the collision was occasioned by the joint fault of the two steamers, and the damages sustained by the libellant must therefore be apportioned. Reference, therefore, to a commissioner, to ascertain the amount.

Case No. 1,202.

BEBEE et al. v. MOORE.

[3 McLean, 387.][1]

Circuit Court, D. Illinois. June Term, 1844.

GUARANTY—CONSIDERATION—DEMAND—EVIDENCE.

1. A guaranty must have a consideration to support it.

2. If given at the time the contract, to which it relates, was entered into, the consideration will be found in the contract. But if entered into subsequent to the contract, it must be founded on a valuable consideration.

3. A receipt of a warehouse man, that he holds one hundred and fifty barrels of flour, subject to the order of A. B. may be explained and impeached, if A. B. has made no advance, nor incurred any responsibility on account of it.

4. To charge a guarantor, on his principal's failure to deliver flour, &c. a demand of the article when due must be made, and a reasonable notice of failure given to the guarantor.

[At law. Action upon a contract of guaranty by Beebe & Brothers against Francis Moore.]

Mr. Johnson, for plaintiffs.

Mr. Logan, for defendant.

OPINION OF THE COURT. This action is founded upon the following guaranty: "Quincy, January 23d, 1844. I hereby guarantee to Beebee & Brothers, of St. Louis, the delivery to them of eight hundred barrels of superfine flour, for account of D. G. Whitney, of this city, and to be manufactured at his mill, and to be sold by Beebe & Brothers, for his account; said delivery to be completed 1st of April next." Signed by defendant.

The third count in the declaration states, "in consideration that the plaintiffs would, at the special instance and request of the said defendant, advance and pay to one G. D. Whitney, a certain sum of money, to wit: the sum of five dollars upon each and every barrel of flour, &c.; eight hundred to be delivered," &c. Under the practice authorised by the statute of Illinois, a motion is made to strike out this count, on the ground that there is no consideration averred to support the guaranty. A guaranty must have a consideration to support it. If the contract of guaranty be entered into at the time of the contract, to which it relates, so as to constitute a part of the consideration of that

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

contract, it is sufficient. But, if the guaranty be subsequent to the contract, there must be a distinct consideration to support it. The understanding of the defendant was founded upon the agreement by the plaintiffs to pay to Whitney five dollars for every barrel of flour, &c. Now this is a valid contract. One party agrees to deliver a certain number of barrels of flour to the other, and that other to pay so much per barrel for the flour delivered. This is a binding contract; it is sufficiently alleged in the count, and the motion to strike out is overruled. On the same day of the guaranty, it was proved a draft was drawn on plaintiffs for eight hundred and seventy-four dollars, by Whitney, which was subsequently paid. As the drawing of this draft and the guaranty bear date on the same day, the inference is a reasonable one, that the draft was drawn and accepted on the assurance the guaranty afforded, and this constitutes a consideration.

As an original ground of action against the defendant, unconnected with the guaranty, the following receipt was given in evidence: "Quincy, February 26th, 1844. Received of D. G. Whitney, in store, at his warehouse, one hundred and fifty barrels of superfine flour, which is to be held subject to the order of Beebee & Brothers, of St. Louis. Signed, Francis Moore." A deposition was offered to contradict this receipt, which was objected to, on which the judges were divided; the circuit judge being favorable to the admission of the evidence, and the district judge against it. On the same day of the date of the above receipt, a bill was drawn on the plaintiffs, by Whitney, for four hundred dollars, payable ten days after date, which the plaintiffs refused to pay. The evidence to impeach the receipt would be inadmissible, if the plaintiffs had incurred any responsibility or done any act on the credit of it; but as there is no such evidence produced, or any such ground assumed by the counsel, the circuit judge held the receipt might be explained or impeached. This is the common principle which applies to receipts. The fact of refusal by the plaintiffs to pay the draft on the credit of this flour, shows the nature of the transaction. It does not, in fact appear, that the plaintiffs had any other interest in this flour, than to sell it as commission merchants—never having made any advance on it, or in any way received prejudice by it.

The proof showed that the one hundred and fifty barrels had not been delivered, and the court instructed the jury that this receipt laid no foundation for a recovery, unless some advance on it had been made by plaintiffs, or some responsibility had been incurred by them. And the court instructed the jury, that to charge the guarantor, a demand of the flour on the 1st of April, and a reasonable notice of a failure to deliver it to the guarantor, must be proved. That the place where the flour was to be delivered by Whitney, not being specially named in the contract, it would be for the jury to determine the place from the circumstances of the case. That the usual place of delivery, if no facts were proved to control it, would be the mill of Whitney, at Quincy, and that if the jury should find that was the place of delivery, the demand was sufficient. Verdict, &c.

Case No. 1,203.

The BECHERDASS AMBAIDASS.

[1 Lowell, 569;[1] 6 Am. Law Rev. 74.]

District Court, D. Massachusetts. April Term, 1871.

ADMIRALTY—JURISDICTION—FOREIGN SEAMEN—PROTEST OF CONSUL.

A libel brought in the United States against a British vessel for wages, by British sailors shipped for a voyage ending in a home port, will not be entertained, against the protest of the British consul, in the absence of special circumstances, such as a clear deviation from the voyage described in the articles, cruelty, or the breaking up of the voyage, although the court may doubt the validity of the articles.

[Cited in The Pawashick, Case No. 10,851; The Carolina, 14 Fed. 426; The Lilian M. Vigus, Case No. 8,346; The Belgenland, 114 U. S. 364, 5 Sup. Ct. 864.]

In admiralty. Libel by the crew of the British ship Becherdass Ambaidass, alleging that they shipped at Liverpool in November, 1869, for a voyage to the East Indies, and thence to Boston; that the ship arrived in safety at this port in February, 1871, where the libellants' services terminated, and they became entitled to their wages as fully stated in their schedule. H. B. M. acting consul at Boston protested against the court taking jurisdiction of this cause, for the reasons that the libellants signed shipping articles in a usual form approved and used in the government shipping offices, and for a voyage not yet ended; that by the merchant shipping act of Great Britain, seamen are not permitted to sue in foreign ports unless duly discharged there, or so ill-treated as to be put in fear of their lives; that neither alternative applies to these libellants, and that it will be for the advantage of both parties to remit them to their home tribunals. The master by his answer reiterates the same grounds of objection, and adds a description of the voyage from the articles, as follows: "From Liverpool to Bombay, and any ports and places in the Indian, Pacific, and Atlantic Oceans, and China and Eastern seas, thence to a port for orders, and to the continent if required, and back to a port of final discharge in the United Kingdom, term not to exceed three years." The shipping articles on inspection agreed with the master's answer, and the libellants admitted that their description of the voyage in

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

the libel was not the true one, and prayed leave to amend by alleging that they were brought to Boston against their will. No objection was made to allowing such an amendment; but none such was made and sworn to.

G. O. Shattuck and O. W. Holmes, Jr., for claimant.

C. G. Thomas, for libellants.

LOWELL, District Judge. The law is well settled in England and America, that courts of admiralty have jurisdiction of suits by foreign seamen for their wages against a foreign ship, or her master or owners who are found within the territorial limits of the jurisdiction of the court. As early as 1795, Judge Peters thus stated his practice: "I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen are concerned. I have in general left them to settle their differences before their own tribunals. On several occasions I have seen it a part of the contract that the mariners should not sue in any other than their own courts; and I consider such a contract lawful," &c. He adds, that where the voyage is ended or broken up here, and no treaty or compact prescribes the mode of proceeding, he had permitted such suits to be brought: The Catharina, [Case No. 13,949.] He makes a very similar statement in The Forsoket, [Id. 17,682.] And there is no substantial change since that time. See The Jerusalem, [Id. 7,293;] Taylor v. Carryl, 20 How. [61 U. S.] 611, per Taney, C. J.; The Maggie Hammond, 9 Wall. [76 U. S.] 452, per Clifford, J.

These three cases do not decide the very point, but they contain dicta of great weight, and the decisions are in conformity with them: Patch v. Marshall, [Case No. 10,793;] The Gazelle, [Id. 5,289;] The Havana, [Id. 6,226;] Davis v. Leslie, [Id. 3,639;] Gonzales v. Minor, [Id. 5,530.] And there are many similar cases in which the rule is shown to be that the admiralty court has jurisdiction, but has a discretion whether to exercise it or not. It is not possible, of course, to lay down a precise rule to govern even the sound and judicial discretion of a court in future cases. Those in which actions have been maintained, against objection by the defendants or claimants (leaving out of view for the present the protest of the consul or minister), are where the voyage ends here by its own terms, and the wages are due here; where it has been wholly broken up by a sale of the ship, whether voluntarily or under legal process; where the ship is so unseaworthy that the crew are not bound to go in her; where they have been forced to leave her by the cruelty of the master.

It has been doubted whether a seaman discharged here by his own consent, should be permitted to sue, and whether a deviation by the master would be good ground for taking jurisdiction. On this last point, see Moran v. Baudin, [Case No. 9,785,] The St. Oloff, [Id. 17,357,] for, and Davis v. Leslie, [Id. 3,639,] and Bucker v. Klorkgeter, [Id. 2,083,] against, suits being sustained, the latter being dicta by Judge Betts, in which he expresses the opinion that the cases in Pet. Adm. [Cases Nos. 9,785 and 17,357] are not well decided. His ground is, that the very question of deviation may present all the difficulties of ascertaining the foreign law and applying it to the contract that induce the courts to decline the jurisdiction of questions arising during the course of a still unfinished voyage. My own opinion is, that a plain departure from an admitted voyage absolves the crew from their engagement by the general maritime law, and authorizes them to leave the vessel at any port where the only inconvenience to the master will arise from the necessity of hiring a new crew, even at higher wages; and that the decision in the former of the two cases cited from 2 Pet. Adm. [Moran v. Baudin, supra,] where it is shown that the crew had been taken on voyages they had never agreed for, was clearly right. Such seems to be the opinion of Mr. Parsons, 2 Pars. Shipp. 227, and Judge Betts's dicta must be taken, not as announcing any general rule, but rather as suggesting important exceptions to a sound rule. There are such exceptions no doubt to any rule that may be attempted to be made. A seaman discharged here may yet have bound himself by a valid contract not to sue here; or we may be bound by treaty not to entertain the suit; or an offer may be made to return destitute seamen to their home, which the court may think they ought to accept, &c. Subject to such exceptions, I consider deviation may be a ground for discharging the crew and ordering their wages to be paid to them, and this upon plain grounds of justice of universal authority.

This is not a case of deviation, strictly so called. The crew in their sworn libel say they were to come to Boston, and that the voyage was to end here. It is admitted now that the voyage was not to end here, and it is said, though not verified by oath, that they were brought here against their will. If this were so, the men must certainly have known it when they filed their libel, and should have alleged it, so as to put it in issue. As the case stands, I cannot take this fact for granted. The voyage described in the articles is broad enough to include Boston within its terms, and the contract seems to have been fully read and explained to the crew, and I understand the real objection relied on by the libellants is, that the articles are void for uncertainty. That is a point which has often arisen in this court; and, so far as our own statute is concerned, it is settled that such a description is too vague. This is not denied by the claimant, nor does he hesitate to admit that the decisions of the high court of admiralty, so far as any such have been reported, seem to

agree very nearly with the American cases; still he insists that I cannot know the English law, and that he ought to have the right to take evidence in England concerning the present law and practice there, if I take jurisdiction at all.

Besides these considerations, there is the protest of H. B. M. acting consul, which affirms the validity of the articles, and protests that the court ought not to take jurisdiction. Several of the authorities above cited refer to the consent or dissent of the representative of the foreign government as being an important fact, but precisely what weight should be given to it is not defined. Judge Sprague, in Hay v. The Bloomer, [Case No. 6,255,] cited in 2 Pars. Shipp. 229, note 2, says: "The usual course in the case of a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and unless there were strong circumstances in the case, the court would not proceed in rem against a foreign vessel, without the assent of the commercial representative here of the foreign government of the country where she belonged." What circumstances would be strong enough to induce action, notwithstanding such a protest, is not stated. Judge Peters appears to have found such circumstances in The St. Oloff, [Case No. 17,357,] where there had been both cruelty and deviation. So did Mr. Justice Curtis, in Patch v. Marshall, [Id. 10,793,] where the defendant appeared to be domiciled in Massachusetts, and the voyage was ended there. In a late case in England it has been decided in conformity with the practice in both countries, that the protest of the foreign consul could not bar the jurisdiction; but that it ought to be respectfully considered and weighed together with the other facts and circumstances upon which the sound discretion of the court must be exercised: The Nina, L. R. 2 P. C. 38. See, too, The Golubchick, 1 W. Rob. Adm. 143; The Milford, Swab. 362; The Herzogin Marie, 1 Lush. 292.

The practice pointed out by Judge Sprague, which agrees entirely with the English practice as shown by these cases, was not followed in this case, and the consul was not notified before the warrant issued; and for the sufficient reason that the libel says nothing about the vessel being foreign, but states simply the case of a voyage ending here, the ship earning freight, and the seamen entitled to their wages; and not only so, but it invokes the immediate action of the court on the ground that the ship was about to proceed to sea within ten days, an allegation made under the statute of [July 20,] 1790, (1 Stat. 134,) which is wholly inapplicable to the case of a British crew shipped in England, as these men are now admitted to have been. A libel so framed in total disregard of the truth of the case is an abuse of the process of the court, and the costs which have resulted from it will justly fall on the libellants if it turns out that no warrant ought to have been granted.

And my opinion is, that justice does not require me to take jurisdiction against the protest of the consul. That objection has weight as showing the opinion of the person who is intrusted with the care of British seamen, that there is no such hardship in this case as required the libellants to be paid here rather than at home. His opinion of the law too must have some weight, because he is in a position to know and act upon it often. Nor can I find in the case any of the strong circumstances such as Judge Sprague refers to, as requiring the protest to be disregarded. The libellants do not appear to have been brought here against their will, and the master professes himself ready to carry them home. The time for which they shipped has not run out, and no reason is given, excepting what under the circumstances of this case may fairly be called the technical one, that their contract is null. It is the policy of all maritime countries to discourage the discharge of their seamen in foreign ports, and if the master undertook to discharge these men here against their will, he would be guilty of a misdemeanor by the terms of the [British] merchant shipping act [of 1854, (17 & 18 Vict. c. 104, §§ 206, 207.)] They say it is in their election to be discharged. If this be so, yet there is no reason given excepting the strict right, and that is precisely what a court of admiralty does not feel bound to enforce without .further reasons. Reserving, therefore, an opinion upon any state of facts not now before me, I must say that I do not find here any good cause for taking jurisdiction.

One of the difficulties in the operation of the well-established course of practice is, that we are obliged to try the case before we can ascertain whether it ought to be tried or not, and I find that difficulty somewhat embarrassing here, for the facts may not have been fully developed in the short hearing already had. I shall retain the libel until the sincerity of the master's professed readiness to take back the men has been ascertained; but if the facts turn out to be as they now appear, I shall not exercise jurisdiction further. Whether I shall do so in any event, unless one or more of the crew shall appear to have been discharged with the master's consent, I do not decide. But in such a case as I have sometimes seen, of a master inducing a crew to desert, and then setting up the act in bar of their wages, his consent to discharge them might be presumed.

NOTE. [from original report.] In the case of The Robert Ritson, [Case No. 11,895,] decided soon after The Becherdass Ambaidass, it was admitted that the libellants had left the port before the ship, which afterwards proceeded to complete the voyage described in the articles. There was, therefore, no offer to take back the men, although the master had been

willing to do so until they went away. The facts were in other respects like those in the principal case, and a similar protest was filed by the acting consul. The court dismissed the libel.

Case No. 1,204.

BECHTEL'S CASE.[1]

District Court, E. D. Pennsylvania. Dec. 16, 1871; Jan. 29, 1872.

BANKRUPTCY—CLAIM OF WIFE AGAINST HUSBAND'S ESTATE—HUSBAND'S TESTIMONY INCOMPETENT—EVIDENCE—LIMITATIONS.

[1. The testimony of a bankrupt husband should not be admitted to prove a claim by his wife against his estate for a sum loaned to him out of her separate estate.]

[Distinguished in Re Bean, Case No. 1,166.]

[2. Where a check book would be competent evidence but for certain interpolations, which should be rejected, the book itself should still be admitted.]

[3. A note for one year was given by a husband to his wife's brother, in trust for the wife, with the privilege of renewal for one year. *Held*, that the relations of the parties made a formal renewal for the additional year unnecessary in order to prevent the running of the statute of limitations from the expiration of that year.]

[In bankruptcy. In re George H. Bechtel. Application by the wife of the bankrupt to prove a claim against his estate. Hearings on exceptions to the register's reports.]

CADWALADER, District Judge. I am of opinion that public policy excludes the testimony of the husband to prove a loan to him by the wife of her separate money, whether a formal trust for her separate use exists, or the money was hers under the [Pennsylvania] married women's act of 1848, [P. L. 536.]

I am also of opinion that the check book is sufficiently verified without the husband's evidence, and that the entries in it, if the interpolations had not occurred, would, as cotemporaneous acts of the husband, showing the derivation of the fund, have been competent evidence, though not with all the consequences contended for on the part of the wife. But the interpolations must be rejected, and thrown wholly aside, in our view of the case. The original entries are not, as I think, rendered inadmissible as evidence by reason of the interpolations.

Independently of the suggestion that the check book appears, when fully examined, to be a special one, applicable only or principally to Mrs. Bechtel's separate funds, and independently of the evidence that a former note of the firm had been given to a trustee for her, the first entries would show nothing more than a conversion by husband and wife of land which they held in her right into money which went at once to his use or that of his firm. It would be premature to decide whether the last-mentioned fact alone would have made her an equitable creditor, without considering all the other circumstances.

On January 29, 1872, this case was heard upon a second report of the register, and his former report and the evidence reported. On the hearing, the note mentioned in the testimony of George A. Eno was produced and exhibited in evidence, which is of the following effect: "Philadelphia, June 1st, 1863. Due to William E. Bechtel, in trust for Anna Margaret Bechtel, thirty-six hundred and sixty two 52/100 dollars, payable June 1st, 1864, with the privilege of renewing the loan to the firm for another year. $3,662.52. (Signed), George A. Eno. Geo. H. Bechtel."

CADWALADER, District Judge. The court is of opinion that this engagement, (of which the sole responsibility appears to have been afterwards assumed by bankrupt, as between him and Mr. Eno,) in connection with the other evidence, establishes a legal or equitable indebtment of the bankrupt to his brother, as trustee for the bankrupt's wife; and that, considering the relations of the parties, no formal act of renewal was necessary in order to postpone the time from which the statute of limitations could run to 1st June, 1865. As the latter date is within six years of the commencement of the proceedings in bankruptcy, proof to the amount of this note or duebill without interest is allowed. The exceptions on the part of Mrs. Bechtel are overruled so far as any greater amount was claimed. But the register is authorized to consider as open the question whether the proof allowed by the court should be considered as exclusive or inclusive of the amount for which he allowed proof.

BECHTEL, (BEECHER v.) See Case No. 1,221.

Case No. 1,205.

In re BECK.

[25 Leg. Int. 164;[1] 1 N. B. R. 588, (Quarto,) 163; 6 Phila. 475.]

District Court, E. D. Pennsylvania. May 7, 1868.

BANKRUPTCY—PROCEDURE — CLAIM BY JUDGMENT CREDITOR.

1. Where, under an agreement of the execution creditor, the property levied on passes into the possession of the assignee in bankruptcy without prejudice to such prior lien, under the levy, as may be sustainable, the assignee and the register should, if the execution creditor asks it, expedite the proceedings for such a decision.

2. But such proceedings, though summary and informal, should not be conducted by ex parte affidavits, nor otherwise in derogation of the rules of evidence.

[3. Cited in Re Marter, Case No. 9,143, to the point that a conveyance may be an act of

[1] [Not previously reported.]

[1] [Reprinted from 25 Leg. Int. 164, by permission.]

bankruptcy, under Rev. St. § 5021, and yet valid as to the grantee, under sections 5128 and 5129.]

[4. Cited in Re Dunkle, Case No. 4,160, to the point that an adjudication of bankruptcy upon an act by a judgment creditor is competent evidence against such creditor in determining the question of the priority of his claim.]

[In bankruptcy. In re Charles E. Beck. Heard on the register's certificate.]

A question having arisen as to an execution creditor's right of priority, which was disputed on the grounds, that his lien was under an execution which, though prior to the proceedings in bankruptcy, was upon a judgment entered on a warrant of attorney given by way of preference, and with intent to defeat and delay the operation of the bankrupt law, and that the bankrupt had procured the execution to be levied. Register Hobart certified that in the course of the proceedings before him the following question arose and was stated and agreed to by the counsel for the opposing parties, viz.: "Whether the facts set forth in the annexed affidavit, if proven, constituted an act of bankruptcy, so as to displace the lien of the execution of James H. Beck, and the levy made thereon, and prevent him from claiming the proceeds of the sale of the goods and chattels levied upon under the said execution, and set forth in the annexed affidavit."

The affidavit referred to was that of James H. Beck, the execution creditor, who deposed that on 29th July, 1867, having heard that a note of the bankrupt had been protested, he called on the bankrupt and urged him to give security, which he refused to do, alleging his ability to go on with his business and pay all his debts, and explaining the protest as having been caused by unexpected disappointments, &c.; that the deponent, not satisfied with the explanation, examined the books of the bankrupt, and becoming convinced that a judgment was necessary for his security, again urged the bankrupt to give him one, promising not to enforce it unless there should be danger; that the bankrupt then declined, but proposed another meeting; that the deponent afterwards sent for the bankrupt and again pressed importunately for a judgment; that the bankrupt finally consented to give a judgment note for the amount of his indebtment, upon the defendant's promise not to enforce it, unless the bankrupt should be pressed by other creditors. The judgment note was accordingly given on the 30th July, 1867, and delivered to the deponent, who kept it until the 20th August, 1867, "when having heard that the creditor whose note had been protested, had commenced a suit upon it," and that judgment would be obtained at the approaching court, which would commence on the first Monday of September, the deponent caused the judgment to be entered on the said 20th August, when execution was issued and a levy made on the next day. There were general denials of collusion or intent to delay or defeat, &c., with an averment that the only purpose of the deponent was to secure if possible the payment of his claim, and a denial that the bankrupt took "the initiative in the confession of said judgment or in the issuing of the said execution," and a statement that the execution was issued without the knowledge of the bankrupt, who, after it had been issued, applied to the deponent to have it withdrawn, alleging that he could work through his difficulties, &c. The proceedings in bankruptcy were commenced on 29th August, 1867. The petitioning creditor averred another act of bankruptcy, in giving a warrant to confess judgment to another creditor, namely, John O. Beck.

CADWALADER, District Judge. The certificate by the register of a question dated 4th instant, is received this morning. He asks my opinion whether the facts set forth in the annexed affidavit of James H. Beck, if proved, constituted an act of bankruptcy so as to displace the lien of his execution, and of the levy under it, and prevent him from claiming the proceeds of sale of the subjects of the levy.

If the register had reported the facts instead of the evidence of them, the certificate would perhaps have been more regular. But I could not then have answered the question in its present form. They may have constituted an act of bankruptcy on the part of the debtor without necessarily depriving the execution creditor of his lien, because the bankrupt may have intended to give a preference without the creditor's knowledge or intention being such as to implicate him. In the present case the adjudication of bankruptcy may, for aught that I recollect, have been pronounced upon the transaction with John O. Beck, without any intimation of an opinion as to the transaction with James H. Beck. The petitioning creditor alleged that the warrant to confess judgment given to James H. Beck was an act of bankruptcy, and further alleged that the bankrupt procured the property to be taken in execution by the creditor. The latter allegation was that of a distinct act of bankruptcy which if committed, can scarcely have been committed without the creditor's privity. It lies upon the assignee representing the general body of creditors, to impugn the apparently prior lien of this creditor. But in such a case very little evidence may suffice at the outset to shift the burden of proof so as to cast it upon him. Here the fact of the warrant of attorney having been given after the protest of the note of the debtor, which protest was known to the creditor who obtained the warrant of attorney, and the admitted facts which followed, certainly required explanation. Whether Mr. James H. Beck's affidavit suffices to relieve him of the burden thus cast upon him, is a question

which, if the affidavit were competent evidence, I could not finally decide without hearing an argument. Nor ought such a question to be decided as upon a sort of demurrer to such evidence, without a definite understanding that the evidence on both sides concerning it is closed.

If the place of transaction of the business in this case were less distant, I would add nothing. But as the counsel on both sides may be incommoded by leaving home, I will make two remarks, one of them on the question of preference, the other on that of procuring the property to be taken in execution. The first remark is that the form of words used in conversations between a debtor and his creditor should be very little regarded where the words were not, in themselves, acts, or inducements to acts. When a debtor's commercial paper has already, with the creditor's knowledge, been protested, the effect of any conversation which follows may be determinable with more or less of reference to the frequency of other intercourse between the debtor and the creditor, and the amount of the latter's knowledge of the details of the former's business. Consanguinity may not be wholly disregarded in weighing the effect of the evidence. A circumstance which may sometimes be regarded is the subsequent continuing knowledge of the creditor, if derived from the debtor, of the movements of other creditors whom the preference may have been intended to defeat. The second remark has, in part, been anticipated in the former connection. This remark is that Mr. James H. Beck, where he deposes that the warrant of attorney of 30th July, 1867, was kept by him until 20th August, 1867, when he heard that the creditor whose note was protested had commenced suit upon it, does not state from, or through, whom, this information was obtained. If it was obtained from, or through, the bankrupt, the fact may not be unimportant.

In administering this part of the business of a case in bankruptcy, the ex parte affidavit of a witness ought not to be received, much less that of a party himself whom the act of congress of 1864 [Rev. St. § 858] makes a witness. Had Mr. James H. Beck been examined by way of deposition, and had he, after cross-examination by the counsel of the assignee, disclosed nothing more than appears in the affidavit before me, the register would probably, in taking the depositions, have asked certain questions to elicit more complete information. Every facility should be afforded to Mr. James H. Beck in obtaining a prompt adjudication of the question upon his claim of priority. The register is authorized to investigate it. His report upon it will be subject to exception. Such a report should be made as soon as the evidence on the part of Mr. Beck and the assignee shall have been fully adduced, and the question argued by counsel. If I have overlooked the intended point of the question submitted by the register, he may restate it. A statement of his own impressions upon it, or of his reasons for presenting it, would not have been out of place in the certificate which he has already furnished.

BECK, (BEALL v.) See Case No. 1,161.

BECK, (BRENT v.) See Case No. 1,835.

BECK, (HILTON v.) See Case No. 6,509.

Case No. 1,206.

BECK v. JONES.

[1 Cranch, C. C. 347.][1]

Circuit Court, District of Columbia. July Term, 1806.

PRACTICE—WRIT OF INQUIRY—CONTINUANCE.

If a writ of inquiry be set aside at the trial-term, the plaintiff is entitled to a continuance of the cause, until the next term at the defendant's costs.

Writ of inquiry set aside, and not guilty pleaded at the present term, when the cause was first called for trial. The cause was then postponed without either party having offered ready for trial; when called again for trial, Mr. Jones, for the plaintiff, insisted on a continuance. Mr. Swann, for the defendant, contended that the plaintiff ought to pay the costs of the postponement.

But THE COURT directed the cause to be continued at the costs of the defendant; he being in default until the present term.

BECK, (MURRAY v.) See Case No. 9,957.

BECK, (PERKINS v.) See Case No. 10,984.

Case No. 1,207.

Ex parte BECKER.

In re NORTH.

[3 Cent. Law J. 495;[2] 22 Int. Rev. Rec. 266; 3 N. Y. Wkly. Dig. 60; 1 Cin. Law Bul. 165.]

District Court, D. Massachusetts. May Term, 1876.

BANKRUPTCY—COMPOSITION — CLAIM FOR BREACH OF CONTRACT—MEASURE OF DAMAGES—NON-DELIVERY OF GOODS BOUGHT FOR FOREIGN MARKET.

[The measure of damages for breach of a contract to deliver goods at Boston for shipment to a foreign market is the difference between the contract and the market price at Boston, since the contract is divisible, thus giving the consignee the right of election as to whether he would receive the goods at such foreign market or Boston.]

[In bankruptcy. In the matter of C. H. North and others. On the application of H.

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

[2] [Reprinted from 3 Cent. Law J. 495, by permission.]

Becker and others to prove a judgment debt against the bankrupts. Granted.]

J. T. Barrett, for creditors.

N. Morse and W. E. L. Dillaway, for debtors.

LOWELL, District Judge. The creditors and debtors respectively submitted to the court the question, what damages should be proved against the assets for an admitted breach of contract. A case between the parties had been tried in the circuit court, resulting in a verdict for the plaintiffs, the creditors, for $1,250 and interest, but being dissatisfied with the rule of damages laid down at the trial, they had filed a bill of exceptions which had been allowed. Since the trial the defendants have become insolvent, and have offered a composition to their creditors, which these plaintiffs are willing to accept for such sum as they could recover at law. The contract was that the defendants should deliver a large quantity of pork of a certain description and quality at Boston, free on board a steamer or sailing vessel during the month of March, to be shipped to Antwerp at a stipulated freight; and they wholly failed to perform this contract. The plaintiffs, who were merchants in New York, claimed to recover the difference between the contact price, and the market price in Antwerp, at the end of March, or some later time, which would give them $5,628; and the defendants admitted a liability for the difference in price at Boston. Correspondence which passed between the parties before and after the breach was submitted de bene, and contained some statement, concerning a loss by re-sale, but such loss was not proved, nor relied on by the plaintiffs.

The distinctions adopted on this subject are very nice, and this case comes near to some that are on each side of the line. The general rule is that the damages for a breach of contract to deliver goods, is the difference in price of that precise kind of goods at the time and place of performance. That rule would give the plaintiffs only the sum awarded by the jury under the instructions of the court, if Boston is to be regarded as the place of performance. It is argued by the plaintiffs that when goods are known to be bought for a particular market, and the seller agrees to forward them to that market, the latter becomes the place of performance or, if not, it becomes the place whose market price is to govern the damages. A passage from Add. Cont. (7th London Ed. 1875) p. 473, is cited to the effect that if a foreigner orders goods in England to be forwarded to a foreign market for sale and the seller knows of this purpose and undertakes to forward the goods, but neglects so to do, the measure of damages is the difference between the contract price and that of the foreign market. The cases cited by Mr. Addison do not sustain this proposition, but I agree to its correctness, as I understand it. The distinction between the case supposed and this case is that the foreigner has no means of indemnifying himself until it is too late; he is not in England nor bound to be there, and the market price there is of no consequence to him, he has a right to go and meet his goods in the foreign country, or to await them there, if it is his own country and his loss arises not only out of the breach of the contract to sell, but also of that to forward the goods. Such a case was Bell v. Cunningham, 3 Pet. [28 U. S.] 69, cited by the plaintiffs; where a correspondent abroad being ordered by a merchant here to ship certain goods to Havana, by a certain vessel, shipped something else and it was held the damages were to be ascertained at Havana.

In the many cases against carriers who have undertaken to deliver goods at a certain place, of course the damage is to be ascertained at that place. Here, both parties were contracting at home and the goods were to be delivered at Boston, on board ship, to be sure; but the contract was divisible, and the plaintiffs would have a clear right to revoke that part which required them to be shipped, and to say, "We will take the goods in Boston and pay the full price." If, then, it had happened that the price had risen here and fallen in Antwerp, so that the plaintiffs would have made a large loss by the shipment, would they not have had the right to offer to take the goods here, and if delivery was refused, to insist on the measure of damages which the defendants now insist on? I think so. And the rule must be the same for both parties, and under both contingencies, excepting that if the plaintiffs still desired the goods for shipment, they may recover any increased charges, such as freight and insurance, in addition to the increased price.

Of the two cases cited by Mr. Addison one was against a carrier for non-delivery at A., and of course the damages were suffered at that place. The other is Borries v. Hutchinson, 18 C. B. (N. S.) 445. In that case two material facts were found: 1st. There was no market price in England; 2d. The seller knew that the buyer bought to sell again; and the court allowed, not the difference of market price in the two places, but the actual profit of the re-sale. A very recent case in England, later even than the last edition of Addison, was decided on the authority of Borries v. Hutchinson. It was this: the seller knew that the buyer was to ship the goods to a foreign country; and upon the breach, there being no market price for such goods in England, and no such goods to be had, the buyer purchased in England such goods as were most like them, and thus filled his sub-contract, and was allowed the increased price of those goods above the contract price. Hinde v. Liddell, L. R. 10 Q. B. 265. It results from these cases; not that the foreign

market is to rule, but that if the domestic buyer cannot indemnify himself by buying the article in the home market, he may have his actual loss, whether that happens to be more or less, and whether it is measured by a domestic or a foreign standard, if this loss was such, as, by reason of notice or contract, the parties may be presumed to have contemplated. I understand, too, that in the last case the court considered that a notice that the goods were for shipment, was equivalent to notice of a resale, or at least of an intent to sell again. In this case no evidence has been given of actual loss; no evidence of a re-sale; of a rise in freights or insurance; of the lapse of a season in the trade; of anything peculiar in the circumstances. The naked facts are presented, of a market price here and a higher market price in Antwerp; and on that showing I say there is no rule of law and no decision known to me or cited in argument that takes it out of the ordinary doctrine of the difference between the market price in Boston, and the contract price. Two American decisions were cited: Messmore v. New York Shot & Lead Co., 40 N. Y. 422; Merrimack Manuf'g Co. v. Quintard, 107 Mass. 127. In the former the defendant undertook to furnish in New York bullets of a certain kind and quality, and was informed that they were ordered to fill a particular contract with the state of Ohio; it was held that the plaintiffs might recover their actual loss in Ohio. In the second, coal was to be delivered in Pennsylvania for use in the plaintiff's factory in Massachusetts, and was delivered, but of inferior quality and later than the contract required, and the damages in Massachusetts were allowed. The latter of these cases is a good illustration of the proposition above cited from Addison, because the plaintiffs had no agent at Philadelphia to inspect or accept the coal. In neither of these cases was it proved or admitted that the plaintiff had an opportunity to recoup himself by buying the article at the market price of the day, at the time and place of the breach; but the contrary is to be clearly inferred from the facts of both those cases.

I do not mean to say that the plaintiffs here might not have recovered not only the considerable sum they ask for, but much more, if the facts were that they suffered more. This decision rests upon the simple ground that evidence of a market price in Boston makes out prima facie the measure of damages claimed by the defendants, and that the plaintiffs should go further, and show, if they can, that they have necessarily lost more in this particular case. That such additional loss, if proved, was or should have been within the contemplation of the parties, is perhaps sufficiently shown by the agreement to ship the goods to Antwerp; but it is not proved, and, in the mode the case is presented, I have the right to infer that it was incapable of proof, though mentioned in some of the plaintiffs' letters.

One word more to prevent misapprehension. It was said that the defendants had prevented the plaintiffs from shipping other goods by promising to make the shipment after the regular time of performance. I do not think the letters of the plaintiffs give any consent to a postponement. They insist throughout that they shall hold the defendants for full damages. But supposing that there was a postponement, the rule of damages would be the same at the end of the extended time as before; and for the reasons already given I cannot find that any other damages were suffered at that or any time.

Debt admitted for $1,250 and interest.

Case No. 1,208.

In re BECKER.

[21 Int. Rev. Rec. 243.]

District Court, E. D. Missouri. July 21, 1875.

INTERNAL REVENUE — POWER OF SUPERVISORS — SUMMONS TO PRODUCE BOOKS AND PAPERS — PARTICULARITY OF DESCRIPTION.

[1. The authority of a supervisor of internal revenue to issue a summons, made co-extensive with that of assessors by Act July 20, 1868, § 49, (15 Stat. 144,) is not affected by the subsequent transfer by statute of the assessor's authority to collectors.]

[2. The validity of a summons which recites as authority for its issuance the appropriate statute and section is not affected by its failure to refer to the section of the Revised Statutes which embodies such statute and its amendments.]

[3. An adjournment of a hearing does not necessitate a new summons for the adjourned day.]

[4. The power of a supervisor of internal revenue to issue a summons calling for the production of books and papers, under Rev. St. §§ 3163, 3173, 3174, does not extend to issuing such a summons to a person not engaged in a business particularly affected by the revenue laws, commanding him to produce all his books and papers. The summons should be limited to books and papers concerning the subject of investigation, which should be mentioned with reasonable certainty.]

[5. Such a summons describes the books with reasonable certainty, within the meaning of Rev. St. § 3174, when it requires a person to produce certain books and papers "of yourself and your said firm, * * * which contain entries relating to grain and malt by you * * * sold * * * to Bingham Bros., at Patoka and Evansville, Ind., and St. Louis, Mo., which entries were made in the course of * * * the business of your said firm, as maltsters, to wit: Each and every ledger kept and used by you * * * now or heretofore, containing any such entries, * * * for or during the years 1873, 1874, and 1875, * * *; each and every journal and day-book and cash-book * * * containing such entries * * * for * * * the years last named; * * * and any and all other books, papers, dray tickets, and documents containing any like entries for each of the years aforesaid, and in your custody and under your control."]

[6. One who in good faith questions the legality of a summons issued by a supervisor of

internal revenue for the production of books and papers is entitled to consideration; and consequently an order for an attachment, when made, will be with the provision that should the witness, in the mean time, obey the supervisor's process, such order will be discharged.]

A final decision was rendered by TREAT, District Judge, in the U. S. district court, E. D. of Missouri, July 21, in the case wherein Frederick Becker refused to obey the order of U. S. Supervisor Meyer, to produce certain books and papers, and wherein an attachment was asked by the supervisor to compel obedience to his subpoena. On the third day of July inst. General Meyer, supervisor of internal revenue, issued his summons on Fred. Becker to appear before him on July 5, in a matter in which Bingham and Bro., of Indianapolis, were concerned, and bring with him all his ledgers, journals, dray tickets, etc., showing shipments from June, 1874, to date. Mr. Becker refused to obey this summons, and on Wednesday, July 7, General Meyer applied to the U. S. district court for an attachment to compel obedience to the summons. The court cited Mr. Becker to appear on the 10th inst., and show cause why the attachment should not issue.

When the case came up, General Noble appeared for Mr. Becker and urged that the summons was void on its face, and that the law authorizing supervisors of internal revenue to summons citizens and require them to show their books and papers—they not being engaged in any business regulated by the internal revenue law—was in violation of the constitution of the United States. But even granting it to be constitutional, it was so far in derogation of common law and common right as to require the utmost particularity of statement by the supervisor, both as to the complaint made by the United States, and the books and papers especially required, and that no general warrant like the one issued could be sustained with safety to individual rights.

Colonel Dyer, U. S. Dist. Atty., represented the government, and made a lengthy argument in support of the supervisor's writ.

TREAT, District Judge. This is an application by the supervisor of internal revenue, under section 3175 of the Revised Statutes of the United States, for an attachment. Under section 3163, the supervisor has issued a summons for respondent to appear before him and produce certain books named. The summons (being an old printed form) recites that said supervisor issued said process by virtue of authority vested in him by section 49 of the act of 1868, which section has since been amended, and, as affected by subsequent amendments, has become section 3163 of the Revised Statutes.

As stated by this court in the recent case wherein Bensberg [unreported] was respondent, reference to certain provisions in the U. S. statutes which had since been reproduced in the Revision are to be held applicable to the said reproduced sections. It is true, that prior to the statute abolishing assessors, certain duties and powers vested in said assessors were also devolved upon supervisors; and it is also true, that when the duties theretofore devolved on assessors were vested in the collectors, these duties and powers in the supervisor were not divested, merely because the collectors were substituted for assessors. The powers of the supervisors as previously established, did not change because there was a change, eo nomine, in the particular officer to whom the power of assessor was transferred. Hence the supervisor, who, under the act of 1868, had certain powers co-extensive with those of assessors, was not deprived thereof when the assessors' powers were transferred to and vested in the collectors. The recital therefore, in the supervisor's summons, of section 49 of the act of 1868, as the source of his authority, did not render invalid his authority to summon respondent, because, through subsequent legislation, changes of names had occurred with respect to those whose powers were also vested in him. Such recital was wholly unnecessary.

It is urged, that inasmuch as respondent did appear at the day named in obedience to the summons, and proceedings were adjourned to the next day, he was no longer subject to the original summons. Such a doctrine cannot be maintained; for when a person is rightfully summoned to appear as a witness on the day named, he still remains under the power of the summons or subpoena until discharged. The adjournment of the hearing until the following or other day does not necessitate a new summons for the adjourned day.

It is true, the supervisor is not, in a technical sense, a judicial officer, but within the provisions of the constitution of the United States, as declared by the U. S. supreme court in the case of Murray v. Hoboken Land & Imp. Co., 18 How. [59 U. S. 272,] he can exercise lawfully the extra-judicial authority in revenue matters vested in him by statute, unless the statute is, in such respect, unconstitutional and void. Following the doctrines of that and other decisions, it must be held that the powers vested in United States supervisors and collectors to examine the premises, books, papers, etc., of persons in certain occupations designated in the internal revenue laws, are valid. The latter enter upon such pursuits with full knowledge of those statutes which subject their premises, books, etc., to such examination, and which provide specific penalties for such refusal to permit such examination, etc. But the more serious question is, to what extent the premises, books, papers, etc., of private citizens, not engaged in such pursuits, are subject to the arbitrary authority of revenue officers. The language of section 3163, dissevered from other sections, is that supervisors have

power to examine all books, papers, accounts and premises. Of whom? An examination of premises, independent of those specified in the internal revenue act as specially liable thereto, as well as of books and papers, must be subject to some limitation for the protection of private rights. Power is granted to collectors even to break into distilleries, etc., under circumstances enumerated in the statutes, but does that power extend to the private homes of every citizen in the land? Is a collector or supervisor armed with arbitrary authority to invade the homes, and seize, or subject to inspection, the domestic correspondence of any person, without a showing that in such homes or correspondence, evidence of violated law may be found? No such arbitrary authority is permissible under the constitution and laws of the United States.

On the other hand, violations of law must not go unredressed; and consequently power, to a well defined extent, must be vested somewhere to investigate, expose and punish. The problem is, to what extent shall power go consistent with individual rights?—a problem which the constitution and laws of the country have solved. In the revenue system those entrusted with its administration are not compelled to resort to judicial proceedings, except so far as defined, and so far as constitutional or statutory provisions control. Revenue officers act under statutes, which define and limit their authority.

What, then, is the authority of a supervisor or collector? In all cases where persons embarking in specified occupations to which are attached restrictions, etc., subject to examination, etc., by those officers, the latter may act pursuant to the extra-judicial authority thus vested in them and inherent in the subject matter. Outside of those occupations and with respect to persons wholly disconnected therewith, and with those engaged therein, can they, except in compliance with constitutional provisions, indulge in searches and seizures, ad libitum? Every man is bound to contribute as the law exacts, towards the revenues of the government. When, within the law, the supervisor insists upon a rightful examination, his authority must be respected, but no further. Under section 3163, his power over persons not engaged in prescribed pursuits, is merely to issue a summons as to books and papers, equivalent to a subpoena duces tecum. It cannot be said that he has a right to search and seize, irrespective of constitutional restraints. Hence if, in the course of his lawful investigations into the books, papers, etc., of distilleries, rectifiers, wholesale liquor dealers, etc., he reaches the conclusion that the premises, etc., of those not embarked in such business ought to be examined, he must comply with the requirements of the constitution, before searches and seizures can be made. If he desires, on the other hand, a mere summons in the nature of a subpoena duces tecum, he may issue the same, according to section 3163, which is a mere repetition of the legal rule as to such subpoenas. The person thus summoned must comply therewith, or submit to the decision of the court to whom application is made for attachment. The court hears such application and all the facts connected therewith, and grants the attachment, and, it may be, after hearing, punishes for the disobedience, as for contempt.

The court acts in rigid conformity to established rules of right. It must decide whether the supervisor or collector was pursuing the strict line of his authority. Congress did not, and could not, commit to either of those officers, judicial functions. They must appear before the court, invoke its aid, submit to it the facts, and there the adverse party can be fully heard. The court must then decide, judicially, what the law upon the facts requires. Thus the case is not left to the arbitrary will of any officer. These remarks are made to avoid misconstruction—to indicate, in marked language, that revenue officers are creatures of the law and have no arbitrary authority over the property, homes, private books, etc., of every citizen. Within the legal authority vested in them, they must act with faithfulness and diligence. They may examine and investigate distilleries, etc., as the internal revenue law authorizes. When they seek information from other sources they must specify in their summons with reasonable certainty what books, etc., they desire. It is not necessary that the summons should state who is charged with an offence, for the work in hand is a mere investigation, possibly to ascertain whether any offence has been committed. Still the summons should indicate to what the proposed evidence relates. If this be not correct, and the broadest interpretation of section 3163, as to all persons, etc., is to obtain, then even the ordinary rules as to subpoena duces tecum for the protection of private rights are overthrown.

In this case (though informally) the summons is for certain books and papers pertaining to the affairs of Bingham Bros. The respondent has chosen to call for the opinion of the court. It is the right in doubtful cases involving grave questions of constitutional law, for the citizen to be heard patiently, especially where new questions are presented. It must be observed that the acts of congress provide for proper judicial review of each case presented by a supervisor or collector, and grant the person summoned a full hearing before final action. He is, therefore, not left to arbitrary control or punishment. If there should be an attempted abuse of power, the court can afford the needed protection. The conclusion is, that a supervisor should state in his summons against private persons, with reasonable certainty, what books, papers, etc., he demands, and it is proper for him also to state to what subject matter said books, etc., are supposed to relate, in order

that the person summoned may not be compelled to subject his domestic or other correspondence disconnected with the subject matter, to unnecessary scrutiny or exposure. If the summons is not obeyed, and the aid of the court is invoked, the latter tribunal will determine whether the books, etc., ought to be produced or not, and act accordingly. No arbitrary rule will suffice for all cases. In this case the supervisor recites, as the source of his authority, an act of congress long ago annulled, and technically repealed. As already stated, that recital may be treated as mere surplusage, and if not, the court may be authorized to take cognizance of what the law on that subject is. His summons requires from a person, not a distiller, etc., the production, in general terms, of all his books, papers, etc., between dates named, without averring that they relate to the investigation of any matter whatever within his province to interfere with. For aught the court can ascertain he has undertaken to assume the quasi-judicial functions of investigating cases of counterfeiting, perjury, etc., entirely beyond his extra-judicial powers. His powers are statutory and limited; within those defined limits he is clothed with great and stringent authority. Outside of them he cannot act. Hence, on the face of all process issuing from him, it must appear that the subject matter, as well as the process, are such as fall within his supervision. He has no arbitrary authority to issue process at pleasure against every person, concerning any matter which he may choose to inquire into. His functions are to investigate, etc., matters arising under the internal revenue laws, and the modes of his investigation into such specific matters are clearly stated. His process. therefore, should clearly state that the production of books, papers, etc., (which he must mention with reasonable certainty), relate to, or are supposed to contain, information concerning some violation of the internal revenue laws, which he is investigating. His powers, in other words, are not absolute and general, but limited. In this, as in all like matters, even in the United States courts, where authority is limited, jurisdictional facts must appear directly. A suit instituted in the United States circuit court, for instance, without the averment of the required jurisdictional fact, is demurrable, and the want of jurisdiction may even be taken advantage of on the trial of a plea at bar, so extra-judicial authority must fully appear, and for even more cogent reasons. These views are elemental, and underlie all jurisdictional questions where authority is limited. Hence, as the summons does not show that the supervisor was acting within the limits of his authority, the court can take no steps to enforce the same.

The objection that no right or power is, or can be, vested in a supervisor to punish, inasmuch as he cannot act judicially, cannot arise under section 3175, for by its terms full hearing is to be had judicially before punishment can be imposed. The technical objection that courts cannot punish under the name of contempt, disobedience of orders or process issued by non-judicial, or extra-judicial officers, rests upon a literal reading of that section. The power of the U. S. courts to punish summarily for contempts is much restricted by acts of Congress, and section 3175 refers to these limitations. But if such a court ascertains on hearing that any one has disobeyed the legal summons of a supervisor, it can order him to appear, produce his books, etc.; disobedience to which order of the court would bring the offender within the doctrine prescribed as to contempts—not of the supervisor's order, but of the order of the court.

In accordance with this opinion of the court, the U. S. supervisor issued the following amended summons: "United States of America. Eastern District of Missouri. Office of Supervisor of Int. Revenue. St. Louis, July 20, 1875. To Frederick Becker, of F. Becker and Co., St. Louis, Mo.: By virtue of the authority vested in me by section 3163 of the Revised Statutes of the United States, you are hereby summoned and required to appear before me, Ferdinand Meyer, a supervisor of internal revenue of the United States, duly appointed, commissioned and qualified as such and assigned to duty in the district of Missouri, Kansas, Arkansas, New Mexico and Indian Territory and Texas, and in said district, at my office therein, to wit, room No. 6, No. 511 Pine street, in the city of St. Louis, state of Missouri, on the 21st day of July, 1875, at three o'clock p. m. of that day, then and there to testify before me, and the truth to say in certain matters depending before me as such supervisor, wherein as such supervisor I am examining into the efficiency and conduct as such of the officers of internal revenue within and for the first collection district of Missouri, and am aiding in the detection and punishment of frauds in relation to the collection of internal taxes, and especially in relation to the fraudulent non-payment of internal revenue taxes, due now and heretofore on liquors, high wines and distilled spirits, distilled in and brought into said district last named; and for the purposes aforesaid you are further summoned and required to produce and have before me, as such supervisor, at the time and place aforesaid, certain books, papers and documents of yourself and your said firm, now and heretofore in your possession, custody and control, and which contain entries relating to grain and malt, by you and your firm sold, shipped and delivered to Bingham Bros., at Patoka and Evansville, Indiana, and St. Louis, Mo., which entries were made in the course of and relating to the business of your said firm as maltsters, to wit: Each and every ledger kept and used by you and your

said firm now or heretofore, containing any such entries as aforesaid, made for or during the years, 1873, 1874, and 1875, and any part thereof; each and every journal and day-book and cash-book kept or used by you now or heretofore, containing such entries as aforesaid, made for and during the years last named, or during any part thereof, and any and all other books, papers, dray tickets and documents containing any like entries for each of the years aforesaid, and in your custody and under your control. Hereof fail not at your peril. Given under my hand, at my office aforesaid, this 20th day of July, 1875. Ferd. Meyer, Supervisor of Internal Revenue."

The case came up for a hearing on this amended summons on Thursday, July 21, and TREAT, District Judge, rendered the following opinion of the court:

When this matter was before me on a prior occasion, I had to decide substantially two propositions. The first was, that in the performance of this extra-judicial duty, which was held by the United States supreme court in the Case of Murray's Lessee, the officers charged with the exercise of such limited jurisdiction must show on the face of the papers that they were acting under it. The second was, that where such authority, comparatively arbitrary in one sense of the term, was lodged in non-judicial officers, and an application was made to the court under the statutes of the United States, to issue an attachment for disobedience of an order made under such limited jurisdiction, the court should insist that the officer should not only bring himself, upon the face of the papers, strictly within the special authority so given him, but also show that he had so pursued the authority as to inform the party against whom process is issued, "with reasonable certainty," in the language of the statute, of what was required of him. Certainly there is a limit which ought to be duly considered and defined in regard to this matter.

Under the statutes of the United States, and pursuant to the rulings of the supreme court, pertaining to the collection of the revenues of the government, certain officers are vested with very large powers. It has been not only considered essential by the legislative branch of the government that such authority should be vested in that class of officers, but the authority thus vested has been upheld by the supreme court of the United States, drawing a broad distinction between judicial and extra-judicial action. I would not attempt to define more clearly than is done by the supreme court, in the Case of Murray's Lessee, the distinction between these two classes of authority.

The supervisor of internal revenue, charged by section 3163 of the Revised Statutes with the performance of certain duties, must show on the face of the process that he is engaged in the discharge of the duties thus devolved upon him. The former subpoena was held fatally defective in that respect. He is charged by law with the investigation of alleged revenue frauds, and of the inefficiency or dereliction of duty on the part of revenue officers; but he is not clothed with authority, outside of those particular functions, to meddle with the business of private citizens.

The present subpoena defines very clearly and distinctly that the supervisor is engaged in the specific duties devolved upon him as such officer. Therefore, full authority is disclosed for him to proceed, leaving open the only other inquiry: Whether the mode of procedure, that is, the particularity of description of what he requires of the witness, is such as to bring the case within the law. The statute itself uses the phrase "reasonable certainty"—that he shall define the papers which he wishes to be produced "with reasonable certainty." As I suggested before, it is impossible to lay down any rule which could in all cases absolutely define the degree of particularity requisite in a subpoena duces tecum; but each case must be determined by its own facts and circumstances. Where it is possible to describe specifically and with extreme particularity the thing desired, the officer should do it; but where he cannot with such exact minuteness define the book or paper which is to be produced, he must describe it as clearly as practicable, always keeping within the rule of "reasonable certainty." Evidently the powers given by section 3163 should be divided into two classes. He has power to examine all persons, books, papers and premises, provided, however, that that examination pertains to the books, papers and premises of persons engaged in the specific business concerning which he is authorized to make investigation, and not of indifferent third parties; because under the power given in the internal revenue act, to search and examine matters pertaining to distillers and revenue officers, no power is embraced or could be embraced thus infringing the terms of the constitution against unlawful searches. The second class evidently relates to indifferent third persons, that is, persons not engaged in the particular occupations mentioned in the internal revenue laws. The language of the statute is, that "he shall have power to examine all persons, books, papers, accounts and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify before him, and to compel a compliance with such summons in the same manner as collectors do." The section in regard to collectors authorizes them (and consequently by section 3163 authorizes supervisors) to summon any person (meaning the distillers, etc.,) or any other person having possession, custody or care of books of account containing entries relating to the

business of such person, or any other person he may deem proper, to appear before him, and produce such books, at a time and place named in the summons, and to give testimony or answer interrogatories under oath respecting any objects liable to tax, etc. Then the statute proceeds to state what is a proper summons, how it should be served, what it should contain, namely: That where the production of books is required, it is sufficient that such books be described with "reasonable certainty."

The case from Simon's Reports, which has been cited, was a proceeding in the nature of a bill in chancery, or information under the corporation act of England, where the attorney-general was nominally the party suing, and the general doctrines there laid down as to the authority of a court of chancery, or of a common law court, to require a third party under a subpoena duces tecum to bring papers before the court, are not strictly applicable in a case like that I am now considering. Here the proceeding is to enforce compliance with a non-judicial, or extra-judicial authority, connected with the general revenue system, the legality and constitutionality of which has been settled by the supreme court of the United States. Following these decisions, and also various decisions which have been recently made in other courts with regard to the exercise of such extra-judicial authority, this court has to determine whether the description contained in the subpoena falls within the purview of the statute requiring "reasonable certainty."

First, it is set out that this supervisor, within the limits of the authority vested in him, was engaged in certain investigations, to effect which he considers it necessary to have before him certain books which this witness is alleged to have in his possession, custody and control, containing entries which may throw light upon that subject—that is, in the language of the statute, they relate to the subject-matter of the investigation. The subpoena particularizes a little farther by saying that they relate to a certain class of shipments; that is, shipments to a particular individual. This particularity, then, is attained so far as the first class is concerned, namely, the books, etc., containing entries relating to shipments from and to Patoka, Indiana, etc., to Bingham Brothers, in the course of business dealings between the witness or his firm and Bingham Brothers. Moreover, it specifies the ledger and journal; and then adds the clause to which objection principally is taken, namely, "and any and all other books, papers, dray tickets and documents containing like entries in each of the years aforesaid in your custody, etc." Now, in the interpretation of this clause, whilst it might have aided the court somewhat if this officer had declared in some form that it was utterly impracticable for him more specifically to define the dray tickets, documents, etc., yet the court must be supposed to have such general knowledge of the course of business in matters of this character as to understand that without access to the books, papers etc., and an examination thereof in detail, it would be impracticable, or, to use the language of the statute, unreasonable, to consider that he could with more particularity specify them. The objection to this conclusion lies in the fact that books generally might be brought before these officers containing not only entries in regard to the particular matters undergoing investigation, but all the business transactions of the party; and it is very properly suggested that a man's general business ought not to be subjected to scrutiny whether of an officer or any one else who chooses to pry into transactions with which the government has nothing to do officially. But in such cases it generally happens that the witness can turn down or seal up all parts of the books that do not contain entries pertinent to the particular transactions. Under this statute the party is to produce such books and papers as relate to particular business transactions which would serve to throw light upon the investigation lawfully undertaken by this officer, and it would be going very far to say that the officer must get the information before he summons the party. He must be able to describe the particular document or entry so that the witness may know what the papers are that have been called for, and learn whether he has them in his possession. But to say in advance that he shall decline to produce any book, paper or document which contains entries pertaining to the particular matter under investigation, because the particular paper or book is not so described as to enable an indifferent party to put his finger on it at once, would be to exact really more than the statute and rules of law require. In other words, taking the subpoena as it is before the court, with its averments in regard to the matter of these papers, books, etc., and the entries connected with this particular business between the witness or his firm and the Bingham Brothers, it is sufficiently definite to comply with the terms of the statute.

General Noble: Suppose the attachment issues: then, as I understand it, there is an inquiry made into the case, and if I am correct, the court said it would inquire into the whole matter pertaining to the investigation.

THE COURT: Not at all. I would inquire into the matter far enough to know whether it is a case in which punishment ought to follow.

General Noble: As far as Mr. Becker is concerned, I would like to have the order made that he will appear to-morrow and proceed with this matter before the supervisor, as far as he is able.

The U. S. Attorney: There is nothing to do in the matter but to obey the order of

the court. When he shall appear is a matter for the supervisor, over which I have no control.

THE COURT: I consider that a party who raises a proposition of law, in good faith, is entitled to consideration. The question should be raised before the attachment issues—and not afterwards.

THE COURT, therefore, makes an order for an attachment, such attachment to be issued as the court shall hereafter direct. In the meantime the witness may appear before the supervisor; and if he does so, and obeys the supervisor's process as it is now held he is bound to do, the order for attachment will be discharged. Should he not so appear, the attachment will issue.

BECKER, (DINGEE v.) See Case No. 3,919.

BECKER, (KURTZ v.) See Case No. 7,951.

Case No. 1,209.

In re BECKERFORD.

[1 Dill. 45;[1] 4 N. B. R. 203, (Quarto, 59;) 10 Am. Law Reg. (N. S.) 57; 4 Am. Law T. 14; 1 Am. Law T. Rep. Bankr. 241.]

Circuit Court, D. Missouri. 1870.

BANKRUPT ACT—CONSTITUTIONAL LAW—MISSOURI EXEMPTION LAWS.

1. That part of the 14th section of the bankrupt act [of 1867, (14 Stat. 522)] which adopts the state exemption laws in force in 1864 as the measure of property to be exempted under proceedings in bankruptcy, is uniform in its operation among the states, and is therefore constitutional.

[Cited in Re Jordan, Case No. 7,514; Re Kean, Id. 7,630; Re Smith, Id. 12,986; Re Jordan, Id. 7,515; Re Smith, Id. 12,996; Darling v. Berry, 13 Fed. 668; Re Van Vliet, 43 Fed. 767.]

2. By the exemption laws of Missouri, in force in 1864, a homestead may be set apart to a debtor out of a leasehold in real estate, or where such leasehold is not susceptible of division he may retain $1,000 out of the proceeds of it.

[Appeal from the district court of the United States for the eastern district of Missouri.]

In bankruptcy. This was an appeal from a judgment of the district court. At the time Beckerford was declared a bankrupt he was the owner of an unexpired term of a leasehold estate. The value thereof, as appeared from a sale made by the assignees, was $1,490. After the sale, the bankrupt, by his counsel, appeared before the register and claimed $1,000 of the proceeds of the sale in lieu of a homestead, which claim was resisted by assignees. The register thereupon certified the case to the district court of the eastern district, and Treat, District Judge, allowed the claim, and ordered the amount to be paid by the assignee, [unreported.] From this order the assignee appealed to this court.

A. Binswanger, for assignee.

In some twelve states no homestead exemptions existed in 1864, while in other states there is a great diversity as to the amount and value of the homestead exempt. In many eastern states a homestead of the value of only $500 is allowed exempt from execution, while in other states a much greater amount is exempt. In California $5,000 in value is exempt. In Wisconsin, Minnesota, and Arkansas there is no limitation as to value or extent of the homestead. These exemptions not being uniform, fall within the inhibition of section 8 of article 1 of the constitution of the United States, which gives congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. Congress cannot do that indirectly which it cannot do directly. Having no power to embody the various homestead exemptions of the several states in the law itself, it cannot do it indirectly by inserting such a clause as this, and there is no uniformity in the law as required by the constitution.

Charles E. Pearce, for bankrupt.

Before MILLER, Circuit Justice, and KREKEL, District Judge.

KREKEL, District Judge. It is admitted that the bankrupt is the head of a family. The 14th section of the bankrupt law, after excepting certain specified articles, goes on to exempt "such other property as now is or hereafter shall be exempted from attachment or seizure, or levy on execution, by the laws of the United States, and such other property not included in the foregoing exceptions, as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." The laws of Missouri in 1864 exempted, among other property, from sale under execution or other process, "when owned by the head of a family or wife who shall be a bona fide resident of the state, any of his or her real estate not exceeding 160 acres of farming land, or one lot in town or city in value $1,000, at the date of such exemption, to be held and enjoyed by such party, as a homestead." After providing for setting apart the homestead and ascertaining the value thereof, the law proceeds to enact that "when the real estate owned by the head of a family is of greater value than the amount allowed as the value of a homestead, and is not susceptible of division, such real estate may be sold, and the officer shall pay over to the defendant in such execution,

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

the amount or value of a homestead exempted under the provision of the act." The act has the usual provision, making it inapplicable to liabilities contracted before the taking effect thereof.

Two questions are presented for our consideration. First, can a homestead be carved out of a leasehold estate? and if so, secondly, is that part of the 14th section of the bankrupt law, making the exemption, constitutional?

The language of the Missouri statute in reference to title is, that he or she must be owner of the real estate in order to have a homestead exempted. It is argued that there can be no such ownership as the law here contemplates, in a leasehold estate, and hence no homestead can be carved out of it. By the 17th section of the Missouri statutes, relating to executions, [Rev. St. Mo. p. 753, § 73,] it is enacted that leases upon land for any unexpired term of three years and more, shall be subject to execution, and sold as real property. The term real property is defined by the 18th section of the general provisions of the same statute, [Rev. St. Mo. § 73,] as including every estate, interest, and right in land. These provisions seem to us to solve the question suggested, in favor of the bankrupt, entitling him to have a homestead set apart in the leasehold owned by him at the time he was declared a bankrupt.

The second question presented and urged with earnestness is the unconstitutionality of that part of section 14 of the bankrupt law, making the homestead exemption.

"Congress shall have power to establish uniform laws on the subject of bankruptcy, throughout the United States," is the language of the constitution by which the grant is made. It is insisted that the 14th section, already cited, having adopted the exemption laws of the state in which the bankrupt is domiciled, and these exemptions having no regard to uniformity, violates the constitutional provision authorizing uniform laws throughout the United States to be passed. It is obvious, from the language employed, that the uniformity here referred to was a uniformity among the states. If congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform throughout the United States. So far as the distribution of the bankrupt's assets—the point under consideration—is concerned, the law is uniform. When viewed with reference to the state exemption laws, there is a uniformity which, on reflection, readily suggests itself. Though the states vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors. Nor does the bankrupt law in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor under the state laws than the unexempted part of his assets, the very thing that is attained by the bankrupt law, which, therefore, is strictly uniform.

To establish the uniformity contended for would have made it necessary for congress to have virtually abrogated all state exemption laws. In doing so it would necessarily have legislated against the debtor class, by making whatever property was exempt, at the time of contracting, subject to distribution. This certainly would not have tended either to uniformity, justice, or equality. But the power to abrogate state exemption laws has never been claimed for congress; on the contrary, such laws have been upheld and declared constitutional, when not applied to obligations incurred prior to the passage of the law. The idea of property in men has grown gradually weaker, and since the abolishment of imprisonment for debt, has nearly vanished.

In lieu thereof, the state, for its own purposes, and the well-being of the individual and family, has secured what are deemed necessaries, against the claims of creditors, and directed the latter to look to the other property and integrity of his debtor for security.

Exemption laws now exist in all the states, and are deservedly becoming more and more popular. There is something so humane underlying them, that courts will not interfere unless they violate a plain mandate of the organic law.

We find nothing in the provisions of the bankrupt law which we are now considering, that is in violation of the constitution of the United States. The order of the district court is affirmed.

Case No. 1,210.

In re BECKET.

[2 Woods, 173;[1] 12 N. B. R. 201; 7 Chi. Leg. News, 243.]

Circuit Court, D. Louisiana. Nov. Term, 1875.

BANKRUPTCY — COMPOSITION WITH CREDITORS — WHAT CLAIMS DISCHARGED THEREBY — DISCHARGE BY COURT.

1. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the court, the bankrupt is thereby discharged only from the claims of the creditors whose names, addresses and debts are placed on the statement produced at the meeting of creditors.

[Cited in Re Shafer, Case No. 12,695.]

2. In such a case, no discharge granted by the court is necessary or proper.

In bankruptcy. A creditor of the bankrupt applied to the circuit judge, during a vacancy in the office of district judge, for further time

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

to file specifications of his grounds of opposition to the discharge of the bankrupt. The application was resisted by solicitors for the bankrupt, on the ground that the bankrupt had proposed a composition to his creditors, which had been accepted at a meeting of the creditors and approved by the court, in compliance with the provisions of the act approved June 22, 1874, [§ 17, (18 Stat. 183.)]

Mr. J. Ward Gurley, for the motion.
Mr. Thomas P. Clinton, contra.

WOODS, Circuit Judge. This motion for further time to state grounds of objection to the bankrupt's discharge, as well as the application for the discharge itself, seems to be founded on a misconception of the effect of a composition under the act of June 22, 1874, [§ 17, (18 Stat. 183.)] When a proposition for composition has been made and accepted by a meeting of creditors and approved by the court, and the terms complied with by the debtor, he is discharged from the claims of all creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor, produced at the meeting of creditors at which the resolution accepting the composition was passed. No other discharge is necessary, for, in the language of the act, the "provisions of the composition shall be binding on such creditors." No general discharge can be granted, for the composition does not affect or prejudice the rights of other creditors. This settlement by composition of the affairs of a debtor, in whose case proceedings in bankruptcy have been commenced, does not contemplate a discharge under the act. The composition may be offered, accepted and approved, even without an adjudication in bankruptcy; for the act provides "that in all cases of bankruptcy now pending or to be hereafter pending by or against any person, whether an adjudication in bankruptcy shall have been had or not, the composition may be offered and accepted."

The act also provides that under certain circumstances "the court may refuse to accept or confirm such composition or may set the same aside, and in either case the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law." These provisions of the law show that the composition is a substitute for the ordinary proceedings and discharge under the bankrupt act. The composition is a compromise of a debtor with his creditors, carried on under the regulations of law, and the supervision and sanction of the court. It absolutely discharges the debts of those creditors whose names, addresses and debts are placed on the statement produced at the meeting of creditors, and no other discharge is needed. The debts of those creditors whose names are not in the statement are not discharged, and the court would not be authorized to grant a discharge as to them. These views are confirmed by the case Re Haskell, [Case No. 6,192,] decided by Judge Lowell, where it is held that the mere fact that the bankrupt, if opposed, would be unable to obtain his discharge, will not necessarily prevent the court from allowing a resolution of composition.

In my judgment, the application of the bankrupt for the discharge is unnecessary and improper, and the motion for time to state grounds in opposition to it is therefore ill advised and improper, and should be overruled.

BECKFORD, (CAHILL v.) See Case No. 2,290.

Case No. 1,211.

BECKLEY v. UNITED STATES.

[1 Hayw. & H. 88.][1]

Circuit Court, District of Columbia. June 2, 1842.

LARCENY OF COIN—INDICTMENT — AVERMENT OF OWNERSHIP AND VALUE.

1. In an indictment for larceny it is not necessary to aver that coins stolen were the property or money of the prosecutor, or of any other person; it is sufficient to state [that] they were the goods and chattels of the prosecutor.

2. Nor is it necessary to state the value of the coins, if it is stated that they were called 25 cents each, &c.

[Motion for a writ of error to the criminal court for the District of Columbia.

[Indictment for larceny against John Beckley, Jr. A verdict of guilty was rendered. Defendant moves for writ of error. Denied.]

Brent & Brent, for plaintiff.
P. R. Fendall, for the United States.

Before CRANCH, Chief Judge, and THRUSTON and MORSELL, Circuit Judges.

The indictment states that: "The jurors, &c., present that Jesse Beckley, the younger, a free negro, on the 31st August, 1841, with, &c., twenty pieces of the current silver coin of Mexico, each of said pieces being called a dollar, and being of the value of one dollar, one piece of the current gold coin of the United Kingdom of Great Britain and Ireland, called a sovereign, of the value of four dollars and eighty-five cents, and divers pieces of the silver coin of the United States, of divers sizes and denominations, some of the said last-mentioned pieces being called fifty cents each, some of the said last-mentioned pieces being called twenty-five cents each, and divers pieces of the silver coin of divers foreign countries, some of the said last-mentioned pieces being called

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

twelve-and-a-half cents each, and some of the said last-mentioned pieces being called six-and-a-quarter cents each; the aforesaid divers pieces of the silver coin of the United States of divers sizes and denominations, and the aforesaid divers pieces of silver coin of divers foreign countries, being together of the value of one hundred dollars and fifteen cents, of the goods and chattels of one Richard Lea, then and there being, feloniously did steal, &c. P. R. Fendall." The prisoner pleaded "Not guilty" to this indictment. The jury, having heard the evidence and arguments of counsel, returned a verdict of guilty. The judgment of the court was that he suffer imprisonment and labor in the penitentiary for the period of two years.

The prisoner, by his counsel, tendered the following bills of exceptions: Upon the trial of this cause the United States offered a free colored witness to give testimony in the same, to which the defendant objected, and offered evidenee tending to prove that the mother of the defendant was a white woman, but his father was a black man.

The court overruled the objection made by the defendant, and permitted the witness to be sworn; to which opinion of the court the defendant excepts, and prays that this bill of exceptions may be signed, &c.

Motion in arrest of judgment:

1. Because the indictment in this case does not aver that the twenty pieces of current silver coin of Mexico, and one piece of the current gold coin of the United Kingdom of Great Britain and Ireland, called a sovereign, were the property or money of Richard Lea, or the "property or money" of any person whatever.

2. Because the indictment aforesaid, among other things, merely avers that the traverser did feloniously steal, take and carry away "divers pieces of the silver coin of the United States, of divers sizes and denominations, some of the last-mentioned pieces being called fifty cents each, some of the said last-mentioned pieces being called twenty-five cents each, and divers pieces of the silver coin of divers foreign countries, some of the said last-mentioned pieces being called twelve-and-a-half cents each, and some of the said last-mentioned pieces being called six-and-a-quarter cents," without stating what was the current value of each of the said above described coins.

3. Because the indictment aforesaid avers that the above-described coins, and the other silver coins therein described, were the goods and chattels of one Richard Lea, whereas it should have averred that they were the property or money of the said Richard Lea.

The motion, for a writ of error, after argument by counsel, was refused, and judgment of criminal court affirmed.

BECKWITH, (BILL v.) See Case No. 1,406.

Case No. 1,212.

BECKWITH v. EASTON.

[4 Ben. 357.] [1]

District Court, E. D. New York. Nov. Term, 1870.

COSTS—WITNESS' FEES—DEPOSITION—COMMISSIONERS' FEES—DOCKET FEE.

1. The fees of witnesses who actually attend a trial are taxable, if it appear that they have been actually paid.

[Cited in Jerman v. Steward, 12 Fed. 276; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 280.]

2. Travel fees for witnesses who live out of the district may be taxed to the extent of one hundred miles, but no more.

[Cited in U. S. v. Sanborn, 28 Fed. 304; Buffalo Ins. Co. v. Providence & Stonington S. S. Co., 29 Fed. 237; The Vernon, 36 Fed. 116; Pinson v. Atchison, T. & S. F. R. Co., 54 Fed. 465.]

3. If a witness is examined de bene esse and also attends the trial and is examined, his fees are taxable, as is also the proctor's fee for taking his deposition, if it is admitted in evidence.

4. A party is entitled to a detailed bill of commissioner's fees which are to be taxed against him, showing the items, and that they are legally chargeable under the act of July 26, 1853, [Act Feb. 26, 1853; 10 Stat. 161,] with an oath attached that the services have been actually and necessarily performed.

5. No docket fee is allowable on exceptions to a commissioner's report.

[Cited in Re Trundy, 18 Fed. 608; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 686.]

[Suit by Rufus K. Beckwith against James T. Easton.]

This case came before the court on an appeal from the clerk's taxation of costs.

BENEDICT, District Judge. The fees of witnesses who actually attended are taxable, and the affidavit must show that the sums charged have been actually paid. The statute only permits the taxation of "the amount paid witnesses." The Highlander, [Case No. 6,474.] Travel fees of witnesses living out of the district may be allowed for 100 miles travel, but for no greater distance. Witnesses living out of the district who do not live at a greater distance than 100 miles from the place of trial, may be reached by subpoena out of this court, [Act March 2, 1793,] (1 Stat. 335, [c. 22,]) and traveling fees to a witness are allowable only to the extent a subpoena will run. 5 Blatchf. 134, [Anon., Case No. 432.]

The fact that a witness was examined de bene esse does not prevent allowance of his fees for attending the trial in person. If he attended the trial in good faith, and was examined, his fees are taxable; and also the proctor's fee for his deposition, if the same was taken and admitted in evidence.

The respondents are entitled to a detailed bill of the commissioner's fees, showing the

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

items, and that they are legally chargeable under the act of July 26, 1853, [Act Feb. 26, 1853; 10 Stat 161,] and it must have, attached, an oath that the services charged therein have been actually and necessarily performed. No docket fee can be allowed upon exceptions to a commissioner's report. The bill of costs will be referred back to the clerk for retaxation in accordance with these views.

BECKWITH, (HALDERMAN v.) See Case No. 5,907.

Case No. 1,213.

BECKWITH v. RACINE et al.

CORNELL v. SAME.

[7 Biss. 142.] [1]

Circuit Court, E. D. Wisconsin. April Term, 1876.[2]

LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS—EQUITABLE ENFORCEMENT OF CONTRACT.

1. Counties and towns are, as to their corporate existence, completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished, by the mere act of the legislature.

[Cited in Mt. Pleasant v. Beckwith, 100 U. S. 535.]

[See note at end of case.]

2. When a town is thus obliterated, an action at law cannot be maintained against it, for it cannot be served by process through its officers, for although the officers of a municipal corporation hold until their successors are elected and qualified, still where no successors could be elected, they cease to hold.

[See note at end of case.]

3. A contract entered into previously, is not destroyed and annulled by the obliteration of the town, for the power of taxation still remains. It is only transferred to other corporations.

[Cited in Garrett v. City of Memphis, 5 Fed. 869.]

[See note at end of case.]

4. When a contract cannot be enforced at law, if there is any fund to which the creditor has a right to resort for the enforcement or payment of that contract, it will be followed by a court of equity.

[See note at end of case.]

5. Where a municipal corporation is legislated out of existence, and its territory assigned to other municipal corporations, the latter must pay the existing debt of the former in the ratio of the amount of territory each obtained.

[See note at end of case.]

[In equity. Bill by Charles Beckwith against the city of Racine, the town of Mt. Pleasant, and the town of Caledonia, and by Latham Cornell against the same, to recover on certain bonds of the town of Racine. Decree for complainants.

[The town of Mt. Pleasant and the town of Caledonia subsequently appealed to the supreme court, which affirmed the decree in Mt. Pleasant v. Beckwith, 100 U. S. 514.]

Fuller & Winslow, for complainants.

Fish & Lee and Jenkins, Elliot & Winkler, for defendants.

Before DRUMMOND, Circuit Judge, and DYER, District Judge.

DRUMMOND, Circuit Judge. On the 2nd of April, 1853, the legislature of this state passed an act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad. [Sess. Laws Wis. 1853, p. 11.]

By that act, the town of Racine was authorized to subscribe $50,000 to this railroad. The third section of the act declares, "that the board of supervisors of the towns whenever the same shall become necessary, shall annually levy a tax upon the taxable property of the town, sufficient to pay the interest upon the bonds, which may be issued as a part of the subscription, after deducting the dividends due to the towns on the shares of the stock."

The stock was subscribed to this amount by the town of Racine, and bonds were issued, and those bonds, according to the allegations in the bill, have come into the hands of the respective plaintiffs for value; they have become, therefore, bona fide holders.

By various enactments of the legislature, subsequent to 1853, which it is not necessary to follow in detail, the town of Racine, which was authorized to subscribe this amount of stock to the railroad, was obliterated in name, and the territory which in 1853 was within the limits of the town of Racine, is now included, or was at the time these bills were filed, in the towns of Mount Pleasant and Caledonia, and the city of Racine. And the question is, what is the effect upon the rights of the plaintiff of this legislation in thus obliterating the town of Racine and bringing within the limits of the towns of Mount Pleasant and Caledonia and the city of Racine, the territory that was in 1853 comprehended within the town of Racine. In relation to those bonds, has the obligation of the contract thus made by the town of Racine been destroyed or even impaired? We think that it has not.

It is not claimed on the part of the defense that there is not a liability, or may not be, but it is insisted that whatever liability exists, is at law; and these being bills in equity, and there being a plain and adequate remedy at law, according to well settled principles, the bills in equity cannot be sustained. If the town of Racine were in existence, and could be sued, how much soever its territorial limits might have been modified, changed or curtailed by acts of the original parties since 1853, then it might be said that there would be a complete remedy at law, because under such circumstances the town

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirmed by the supreme court in Mt. Pleasant v. Beckwith, 100 U. S. 514.]

of Racine supposed to be existing as a corporation, would be subject to suit; process could be served upon it, and it could be brought into court. But can that be done now? It is said that inasmuch as the constitution of the United States protects all contracts and prevents any legislation of a state which tends to impair them, for the purpose of enforcing them a corporation must be presumed still to exist, and subject to process; and so an action can be brought against it. If that is so, these bills cannot be maintained; but is that so in point of law and fact? We think it is not.

Counties and towns, are, as to their corporate existence, completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature. They are absolutely within the legislative control, and there can be no question of the power of the legislature to change or alter the town of Racine, and so to speak, annihilate it as a town or a corporation; and the question is when this is done, is there anybody, any entity in esse that can be sued.

One of the attributes of a corporation is that it can sue and be sued. If a corporation does not exist, how can it sue? It will be admitted that it cannot sue. How can it be sued? Manifestly upon no other ground than that a contract has not been impaired, and there must be a way of enforcing it, and the corporation must still exist for the purpose of suit and enforcement of the contract. Obviously that cannot be so, unless there is some law in existence which creates and continues corporate functions for that purpose; which clothes some persons naturally or artificially with a capacity to be served with process, and brought into court, and to appear by counsel. It is said that by operation of law and in conformity with express enactments, the officers of corporations, of counties and towns continue in existence until their successors are elected and qualified; and inasmuch as in this case, when this town was obliterated by the fiat of the legislature and ceased to exist as a town, there were officers of the corporation in existence; that they have continued to exist as such officers up to the present time; and would as long as there was in existence a contract which could be enforced against a town.

Now, it is, I believe, about 14 years since there was a town of Racine. It is perfectly clear to me that the act of the legislature which is referred to, does not contemplate such a case as this when it declares that the officers of a municipal corporation shall continue in existence until their successors are elected and qualified.

In this case there could be no successors elected or qualified, because the capacity to elect had ceased to exist. And it certainly can only refer to cases where that could be done. Therefore, it seems to me that the conclusion is irresistible, that in this case, these officers did not continue to hold an office to which successors can be elected or qualified.

The act of the legislature contemplates, and it necessarily implies, the continued existence of the corporation; therefore there is no person upon whom service can be had in an action at law, because there is no corporation in existence for the purpose of maintaining a suit at law.

Then the next point is, whether the contract has been destroyed because the legislature has destroyed the corporation. We think it has not. The act of 1853 declares that the interest upon these bonds should be paid in a particular way by the imposition of a tax upon the property at that time within the limits of the town of Racine. That was the fund which was provided for the payment of these bonds, or at any rate of the interest on the bonds; therefore, the creditor had a right to look to the taxing power of the town as his means of payment.

Now, the power of taxation which then existed, and which was recognized in the act of 1853 as the means of enforcing the payment of the debt which might be created is not gone, it has only been transferred to different municipal corporations. Whatever may be said of the personal property, the real, fixed property which could then be resorted to to pay this debt is still there, and the power of taxation still exists.

It is a well recognized principle in equity, as a contract cannot be impaired, that where there is any fund to which the creditor has a right to resort for the enforcement or payment of the contract, it will be followed by a court of equity. It would be a reproach to the jurisprudence of this country, where the principle in the fundamental law of this Union is that no state can pass a law impairing the obligation of a contract, if it were allowed to be impaired or destroyed, simply by the change of boundaries of a town, or by striking out the name of one town and putting in the name of another; by the town of Racine ceasing to exist under legislative enactments, and Mount Pleasant and Caledonia and the city of Racine being substituted in its place.

Then this being so, that the contract still exists, and that a court of equity will enforce it, the question is, whether this is in the predicament of some of the cases that have been referred to, and particularly of the case decided by the supreme court of the United States, where it is said that there are many contracts which cannot be enforced, that there are many debts existing which can never be paid, and therefore, there may be the right without a remedy. I do not think that this case comes within that category. If there were nothing to which the creditor had the right to resort to enforce his contract, it might be so, like the case of the individual who is stripped completely of all means to pay a debt. There is a judgment,

or decree, but the fault is not then in the law; it is because there is nothing which the party has to meet the decree, or satisfy it.

It may be conceded that there are some difficulties connected with the details of such a case as this, and a court of equity possibly in carrying out the objects sought in whole or in part by these bills, may meet with some obstacles in enforcing the obligations of the town of Racine; but it is to be hoped they will be met and overcome. If that cannot be done, it would be a very hard case for the creditors of our municipal towns and corporations, and particularly in this state, because all that it would be necessary to do would be simply for the legislature to pass a law changing all those municipal corporations, making others in their stead and making new boundaries, and in that way some municipalities could get rid of debts which they are now trying to avoid in ways not much more creditable. I do not think that that can be done.

The counsel for the defendant insists that the remedy can only be pursued after a judgment has been obtained at law. His sense of justice and equity revolts at the idea of there being no remedy; but he says it must first be sought in an action at law. I have already stated the reasons why I think that cannot be done.

The principles declared in the case of Curran v. Arkansas, 15 How. [56 U. S.] 304, I think substantially dispose of most of the material questions in this case. It is true in that case the bank charter was not absolutely repealed, and it was undoubtedly competent to enforce the rights of creditors against a fund which the state had undertaken to control in derogation of their rights. But while that case declares that it is competent for the legislature to dissolve a corporation, it asserts that the dissolution of the corporation does not impair the obligation of the contract, and that a court of equity can enforce the contract by any of the various means within its power. There is one remark made by the court which, although it does not absolutely decide this question, still it is clear it was in the mind of the court. The court says, that whatever technical difficulties exist in maintaining the action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in the creditor following the property of the corporation into the hands of any one not a bona fide holder.

It is true that was a bank, but as I have already stated, the control of the legislature over municipal corporations is absolute; and the fact that that was a bank, and this is a town can certainly make no difference. All the technical difficulties in the way of the maintainance of a suit at law, which are referred to by the court in that case, seem to be insurmountable. In fact, I think that it would be found that the counsel for the defense, if these parties had been sued at law, would have objected that no suit at law could be maintained against the town of Racine.

I have said that the power of taxation has not been annihilated. It still exists; it has only been transferred, and as at present advised, I should be inclined to think that it would be competent for the court to apportion this indebtedness among these various defendants in such a way as to make each one of them answerable in proportion to the fund that has come within its control for the payment of this debt. I do not say that that will ultimately be the view which the court may take of it; but as at present advised, I feel inclined so to hold. At any rate, it is clear to my mind that there must be some way by which those parties who have control of this fund, which the legislature set apart for the payment of this debt, can be made answerable for it. Therefore, the demurrer will be overruled. The defendants may have reasonable time to answer.

On the final hearing of the cause, the following was the opinion of the court:

DRUMMOND, Circuit Judge. When these cases were submitted on the demurrer, the court stated its general conclusions on the law, and I see no reason to doubt the correctness of the conclusions then reached. The two cases are substantially alike. They have been presented to a master, who has taken proof, and they have come up now for final hearing, but whether or not the report of the master may be of such a character as to entitle the parties to a decree may be questionable, but there probably can be an arrangement made between counsel by which a decree can be prepared after hearing the opinion of the court. I think the plaintiffs are entitled to a decree.

When the bonds were issued on the 6th of December, 1853, as well as when the act under which they were issued was passed, April 2d of the same year, the town of Racine consisted of all of fractional towns 3 and 4 of range 23, except what was within the limits of the city of Racine, and comprehended not far from thirty sections of land. It was bounded on the west by the towns of Caledonia and of Mount Pleasant, and on the east by Lake Michigan. In 1856 the boundaries of Mount Pleasant were extended to the lake, so as to include nearly one half of the town of Racine, thus cutting off the whole of the south part of the town, and including it within the limits of the town of Mount Pleasant. In 1857 the boundaries of the town were again changed. Caledonia and Mount Pleasant were both extended to the lake, and Racine was left lying between those towns, Caledonia on the north, and Mount Pleasant on the south, the boundaries of Racine being extended from the lake to the western boundary of range 22, being four sections in width north and south, and thus constituted, Racine comprehended, on the east about twelve sections, which it had in 1853, and took in on

the west what was then a part of Mount Pleasant, and of Caledonia, being twelve sections from each town. With these boundaries the name of Racine was changed to Orwell. In 1860, the town of Orwell was vacated and all of its territory attached to the towns of Caledonia and Mount Pleasant; thus Racine, or Orwell, ceased to exist as an organized town. In 1871, there was added to the city of Racine a small part, namely, two or three sections of what was then Mount Pleasant, and of what was a part of that town and of Racine or Orwell in 1857, and a part of Mount Pleasant and of Racine in 1856, and a part of Racine in 1853. The various changes are marked on the plans of the town, which are given by the master in his report of the testimony. This was the condition of the towns and the city of Racine when the bill was filed, and the question is, what are the rights of the parties?

I have already said that it was not competent for the legislature to impair the obligation of the contract made by the town of Racine, as it existed in 1853; when the subscription was made to the railroad stock, and the bonds issued. There was a contract between the parties which could not be affected by any subsequent legislation. When the town, by legislation, was brought within much narrower limits, what was the status of the case when this change was made? I think, according to well settled principles, it must be understood, no legislation being had in relation to the debts of the town, and Racine being left with these curtailed limits, the debt of Racine followed the town. The newly constructed Mount Pleasant, although it had taken in a portion of the old town of Racine, was not required to pay its debt, or any portion of it; it took, therefore, the territory from Racine, without the liability arising from its indebtedness, and the debt remained fastened upon the town of Racine, as it was then bounded. If that is so, what was the condition of affairs when these boundaries were changed, and Caledonia and Mount Pleasant were both extended to the lake, and Racine was left a strip of land four sections in width, from the lake to the western boundary of range 22? It had thus taken in a portion of the old town of Racine, and also a portion of Caledonia and Mount Pleasant, and the north portion of the town of Racine was cut off, and placed within the territorial limits of Caledonia. There had yet been no legislation in relation to the indebtedness of the town of Racine, and I think the indebtedness was cast upon the town of Racine as thus newly constructed by the act of the legislature. A portion of the old territory was taken within the limits of the town; it had taken in also a portion of both Caledonia and Mount Pleasant. It thus had additional territory which it had not in 1853, from which it might be enabled to pay the debts it had then created, but the law of the case is, as I understand, the territorial limits of a town being absolutely within the control of the legislature, it was competent for it to change or alter in any respect, to diminish or add to, the territorial limits of the town, and nothing being said about any indebtedness the debt followed the town as thus newly constructed, whether diminished or enlarged. When the town of Racine had thus been created by the act of the legislature, and the name of the town changed to Orwell, that change of name could not affect the rights of the parties. The obligations of the town still existed, and when Caledonia, Racine or Orwell and Mount Pleasant were created—Caledonia on the north, Mount Pleasant on the south, Racine in the middle, extending from the western boundary of range 22 to the lake—then it was with the indebtedness of Racine, as created in 1853, or of Orwell, as it was subsequently called. This, then, was the position of the case when some important legislation took place upon the subject, and, as it has been stated, in 1860, Orwell ceased to be an organization, and its whole territory was annexed part to Caledonia, and part to Mount Pleasant; then, and afterwards, there ceased to be a corporation municipal which was liable to the plaintiff for the former indebtedness of Racine; and there existed only the corporations of Caledonia and Mount Pleasant. According to the view I take of the case, this circumstance did not impair or destroy the indebtedness of Racine; it was not competent, as I have stated before, for the legislature thus to put an end to the indebtedness. If that had been attempted, it certainly would have been unconstitutional legislation; so that I think Caledonia and Mount Pleasant having taken, as corporations, the territorial limits of what was formerly Racine, or Orwell, must equitably be held to be responsible for its debt. Having taken all the means by which the town of Racine could pay its indebtedness, it must be held that they stand in the place of Racine, and liable for the same. And we cannot take one and leave out the other, because by the same act of legislation the territory of Racine was attached part to one, and part to the other, operating therefore at the same time and upon both towns, and as the debt was against the town of Orwell at the last moment that it ceased to exist as a town, it was then transferred equitably to Caledonia, and to Mount Pleasant. Then in 1871 there was an addition made to the city of Racine. Between two and three sections of land were added to the city and taken from Mount Pleasant.

The act which thus added to the limits of Racine, declared that it should be liable, (there seems now a new element in the legislation, and that there must be some provision made for the debt of the town of Racine,) to pay the debts of the town of Racine in proportion to the territory which it

took, so here we have an act of legislation which makes it incumbent upon the city of Racine to pay its proportion of the indebtedness. If these principles are correct, the city of Racine being obliged by the express term of the law to pay a portion of the indebtedness, and the towns of Caledonia and Mount Pleasant being also obliged, from the nature of the case, the only question is: How is the division to be made between these respective corporations? and it seems to me that it can only be made upon the proportion of territory which each of the towns took from Orwell.

Now the act of 1853 in authorizing the indebtedness of the town of Racine, declared that provision should be made by a tax upon the property of the town to pay the interest on the indebtedness. It did not say in terms, real estate, but upon the property; and it might be presumed to include both personal and real property. But it is obvious, I think, that it is impracticable, in the nature of things, for the court to determine the amount of personal property that may have been taken off from the town of Orwell by Caledonia, or by Mount Pleasant, and it seems to me that the only satisfactory method of determining the part of each is that the debt shall be apportioned according to the territory that each took from the town of Orwell.

A case has been recently decided by the supreme court of the United States, (Laramie Co. v. Albany Co., 92 U. S. 307,) the principle of which is, as it has been stated by the court, that when an indebtedness is created by a municipal corporation, and there are created out of that corporation new corporations, such as counties or towns, the debt of the old corporation follows it within the new territorial limits, and the new municipal corporations are not bound to pay any portion of the indebtedness unless the act of division so prescribes. In that decision this language is quoted and approved by the supreme court, in referring to the case of Bristol v. New Chester, 3 N. H. 534, as to the power to divide towns—"The power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided, is incident to the power to divide the territory. * * * Such a decision must be founded upon the circumstances of each particular case."

Now that principle, it seems to me, applies to the peculiar circumstances of this case, and that the division must be made as I have suggested, namely: Caledonia must pay in proportion to the territory that it has taken from Orwell, and so must Mount Pleasant, and the city of Racine in proportion to the territory that it has taken, as prescribed by the act of the legislature.

[NOTE. On appeal to the supreme court by the town of Mt. Pleasant and the town of Caledonia, the decree of the circuit court was affirmed, the court taking the ground that where the charter of one municipal corporation is vacated, and the whole of its territory annexed to two others, the two enlarged corporations will, in the absence of any legislative provisions, be entitled to all the public property of the one that ceases to exist, and they will become liable for all the legal debts contracted prior to the annexation. In delivering the opinion of the court, Mr. Justice Clifford referred to the act of March 17, 1871, which set off from the town of Mt. Pleasant, and annexed to the city of Racine, a portion of the territory formerly belonging to the old town of Racine, saying: "Enough appears in that provision of direct legislation to show that the city of Racine was thereby made liable for the debts of the extinguished town of Racine in the proportion therein described, and the clear inference from the provision is that the town of Mount Pleasant, prior to the passage of that act, was liable for the debts of that old municipality, in proportion to the whole extent of the territory annexed to her by the prior act, which extinguished the old municipal corporation." Mt. Pleasant v. Beckwith, 100 U. S. 514. See, also, Barkley v. Levee Com'rs, 93 U. S. 258; Broughton v. Pensacola, Id. 266; Meriwether v. Garrett, 102 U. S. 472; Grantland v. City of Memphis, 12 Fed. 287; Brewis v. City of Duluth, 9 Fed. 747.]

BEDDO, (UNITED STATES v.) See Cases Nos. 14,556 and 14,557.

BEDE, (UNITED STATES v.) See Case No. 14,558.

Case No. 1,214.

BEDELL v. The EMILY.

[The cases reported under above title in 6 N. Y. Leg. Obs. 340, are the same as Cases Nos. 4,452 and 4,453.]

Case No. 1,215.

BEDELL v. The POTOMAC.

[2 Int. Rev. Rec. (1865,) 62.]

District Court, S. D. New York.[1]

COLLISION — STEAM AND SAIL — RIGHT OF WAY — DUTY OF SAILING VESSEL TO CARRY LIGHTS.

[1. There is no definite rule of law requiring sailing vessels navigating the high seas at night to carry signal lights. The Delaware v. The Osprey, Case No. 3,763, followed.]

[See rule viii., Act April 29, 1864; Rev. St. § 4233.]

[2. It is the duty of a steamer to keep out of the way of a sailing vessel approaching from an opposite direction, and the failure of the latter to carry lights at night does not excuse the steamer from such duty if the steamer, nevertheless, sees the sailing vessel in time to avoid a collision.]

[See note at end of case.]

[In admiralty. Libel by Mott Bedell, owner of the schooner A. V. Bedell, against the steamer Potomac, for collision. Decree for libelant.

[This was subsequently reversed by an unreported decree of the circuit court, and the decree of the circuit court affirmed by the

[1] [Reversed by circuit court, (not reported.) Decree of the circuit court affirmed by supreme court in The Potomac, 8 Wall. (75 U. S.) 590.]

supreme court in The Potomac, 8 Wall. (75 U. S.) 590.]

Benedict, Burr & Benedict, for libelant. Man & Parsons, for claimants.

Before BETTS, District Judge.

This was a case of collision. The libel was filed by the owners of schooner A. V. Bedell, which was sunk by the steamer in the Chesapeake bay, near the mouth of the Rappahannock river, about midnight on the 7th of July, 1859. The schooner was bound from New York to Alexandria. The steamer was bound from Baltimore to Norfolk, and heading due south. The schooner was running nearly north, close hauled. The weather was calm; stars were visible in the sky, and each of the vessels could see the other when a half or a quarter of a mile apart, so as to distinguish the character of the objects and the direction of their apparent courses. The vessels had neared each other to within a few yards, when it was discovered that they were coming in contact, and each called out to the other to get out of the way. Each vessel attempted to change its course, but, after a few minutes' fright and hopeless outcry on board of both, they came together about end to end, and the schooner was instantly sunk. The claimants insisted that the schooner was in fault in carrying no light, and a good deal of testimony was taken on both sides as to the various manoeuvres of the two vessels, each claiming that the other was not skilfully navigated.

HELD BY THE COURT: That it is needless to attempt to ascertain and adjust the reliable evidence gatherable out of the hurried and indefinite observations and impressions of the witnesses as to which vessel was most skilfully navigated; because, in the opinion of the court, that whole matter was definitely determined as a principle of law as soon as the schooner was discerned from on board the steamer. The testimony had no further agency to fulfil in the case in respect to the rights and responsibilities of the parties, after it had clearly designated that a steam and sailing vessel were exposed to a mutual meeting in the night, approaching head and head in close collateral lines, if not actually on a coincident one.

That, as Judge Grier remarks, 2 Wall. Sr. 273, [The Delaware v. The Osprey, Case No. 3,763,]—no reliable evidence exists in the books that the law requires sailing vessels navigating the high seas at night to carry signal lights,—9 N. Y. Leg. Obs. 232, 1 Spr. 160, [Jones v. The Hanover, Case No. 7,466; Lenox v. Winisimmet Co., Id. 8,248,] Pars. Mar. Law 192, note 3.

That in this condition of the law it cannot be pronounced that the schooner in this instance was guilty of an illegal act, or dereliction of maritime duty in not displaying lights conspicuously at the time. Besides, the evidence is equivocal as to the fact.

That a gross irregularity, and not being clearly explained, constituting a marked fault, was committed by the steamer in continuing to come upon the schooner without stopping, or even easing her engine for a distance of half or quarter of a mile, and during that period it is not proved that any efficient act was done by the steamer for their common protection and safety.

That the actual offence and dangerous fault of the steamer was the disobedience of the plain and peremptory mandates of the law, emphatically declared to managers of steamers who are meeting with sailing vessels, that "the steamer shall keep out of the way of the sailing ship." The corpus delicti of the Potomac on this occasion was a disobedience of that plain rule. She had ample time and clearing ability to fulfil it by stopping her movement until the danger would cease or be safely avoided; and because the steamer did not faithfully execute that duty directly charged upon her, the interdicted offence has been perpetrated, and she must pay the penalty pronounced by the law, without regard to the mistakes or ignorance under which her officers or crew may have acted.

Decree for libelant.

[NOTE. This decision was reversed on appeal by an unreported decree of the circuit court, and the decree of the circuit court was affirmed by the supreme court in The Potomac, 8 Wall. (75 U. S.) 590. Mr. Justice Davis, in delivering the opinion, said: "The law casting the greater responsibility on the steamer on account of her motive power, and the sailing vessel having an easy duty to perform, it has been generally found, on investigation, that the collision was the result of a relaxation of viligance on the part of the officers of the steamer. It has sometimes happened, however, that the steamer was not to blame, and the present case, in our opinion, is one of that character. It is unnecessary to restate the rules of navigation, obligatory upon vessels in the predicament these were on the night in question. * * * One of these rules requires the steamer to keep out of the way of the sailing vessel; but, to enable her to do this effectively, the law imposes the corresponding obligation on the sailing vessel to keep her course. * * * The accident could have happened in no other way than by a change of the schooner's course, and that this was made is evident, for, when the vessels collided, the schooner had fallen off from about a north course to nearly an east course. Besides, the only man on board the schooner who was examined as a witness says that he put his helm hard up, by the captain's order, about two minutes before the collision. If the schooner had kept her course, instead of porting her helm, and changing it to the eastward, the collision would not have occurred."]

Case No. 1,216.

The BEDFORD.

[5 Blatchf. 200.][1]

Circuit Court, S. D. New York. Dec. Term, 1863.

COLLISION—FERRY BOAT AND VESSEL AT ANCHOR—RULES OF ANCHORAGE IN EAST RIVER.

1. Where a ferry boat, running, in a dense fog, on a ferry across the East river, at New York, collided with a schooner at anchor in the river, and it appeared that the schooner was anchored within a distance of sixty yards from a direct line between the landing places of the ferry: *Held*, that the schooner was in fault.

2. The ordinance of the city of New York, (section 14, art. 2, c. 26, p. 291, Revision 1859,) providing that no vessel shall lie at anchor in the East river within a distance of sixty yards from a direct line between the landing places of either of the public ferries across the river, is binding upon all persons engaged in the navigation of the river.

[Cited in The Baltic, Case No. 822.]

3. In this case, the schooner also was in fault, in that her mate had been warned, by the pilot of the ferry boat, before the collision, to move the schooner from her anchorage, and had refused to do so.

4. But the ferry boat also was in fault, in that her pilot knew the position of the schooner, and that the mate of the schooner had refused to change her location, and in not using greater caution.

[Cited in The Ophelia, 44 Fed. 941.]

5. The district court decreed to the owners of the schooner their damages. This court divided such damages, and allowed no costs to either party in the district court, and gave to the appellants their costs in this court.

[Cited in Brush v. The Plainfield, Case No. 2,058; The Mary Patten, Id. 9,223; Vanderbilt v. Reynolds, Id. 16,839.]

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty. This was a libel in rem, filed in the district court, to recover damages for a collision which occurred between the schooner Mary D. Lane and the steam ferry boat Bedford, in the East river, on the morning of the 17th of December, 1853. The district court pronounced for the libellants, [Lane v. The Bedford, Case No. 8,046,] and the claimants appealed to this court.

Erastus C. Benedict, for libellants.

Benjamin D. Silliman, for claimants.

NELSON, Circuit Justice. The schooner lay at anchor about the middle of the river, near the track of the ferry boats of the Wall street ferry, which ran between the foot of Wall street on the New York side and the foot of Montague street on the Brooklyn side. The collision took place about eight o'clock in the morning. There was a dense fog, the tide was flood, and the wind was southeast. The schooner was struck on her port side, near mid-ships, while the ferry boat was on her passage from Brooklyn to New York. The damage was not very serious. The schooner had cast anchor at about twelve o'clock the day preceding, at the place of collision, and was in charge of the mate, the captain and pilot being absent. The mate had been warned by the pilot of the Bedford, that morning, that his vessel was in the track of the ferry boats, and that, as a dense fog was coming on, he ought to trip his anchor and pass up, on the tide, out of the way. The mate refused, insisting that he had as good right to lie there as the ferry boats had to run. On the next trip of the ferry boat, the collision took place.

The proofs are very full and clear, that the schooner was in or near the track of the ferry boats. Indeed, the mate himself states, that, while lying at anchor from the preceding day, the ferry boats passed him on his bow at ebb tide, and on his stern at flood tide, the tide tailing his vessel up or down the river as it was ebb or flood. One of the city ordinances (section 14, art. 2, c. 26, p. 291, Revision 1859) provides, that no ship or vessel shall lie at anchor in the East river, within a distance of sixty yards from a direct line between the landing places of either of the public ferries across the river, and imposes a fine for the offence. This ordinance is made in pursuance of a power conferred upon the city by the legislature of the state. It is a very proper local regulation, and is binding upon all persons engaged in the navigation of the river. The place of the anchoring of vessels in the harbor of New York is under the authority of the city, and its exercise is indispensable, with a view to the convenience and good order of vessels resorting thither. It was a fault on the part of the schooner, to cast anchor within the forbidden limit, and a still greater one not to remove when the attention of the mate was called to the fact and he was warned of the danger.

I think that the ferry boat, also, was in fault, in not avoiding the schooner, as the pilot knew her position, and that the mate had refused to change his location. I cannot but think that, if greater precaution had been used, the collision need not have occurred, notwithstanding the density of the fog.

As both vessels were in fault, the damages sustained by the libellants, which were decreed by the court below at $1,000, must be divided. No costs are allowed either party in the court below. The appellants are allowed their costs in this court.

BEDFORD, The, (LANE v.) See Case No. 8,046.

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

Case No. 1,217.

BEDFORD v. HUNT et al.

[1 Mason, 302;[1] 1 Robb, Pat. Cas. 148.]

Circuit Court, D. Massachusetts. Oct. Term, 1817.

PATENTS FOR INVENTIONS—NOVELTY AND USEFULNESS—EVIDENCE—PRIOR LIMITED USE.

1. By useful invention in the patent act of the United States [of 1793, (1 Stat. 318, c. 11)] is meant, an invention, which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the moral health or good order of society.

2. It is of no consequence, whether its utility be general or limited to a few cases; and it is not necessary to establish, that the invention is of such general utility, as to supersede all other inventions now in practice to accomplish the same purpose.

[Cited in Blake v. Smith, Case No. 1,502; Seymour v. Osborne, 11 Wall. (78 U. S.) 549.]

3. The first inventor, who has put the invention in practice, and he only, is entitled to a patent. Every subsequent patentee, although an original inventor, may be defeated of his patent right, upon proof of such prior invention put in actual use. The law in such case adopts the rule, "qui prior est in tempore, potior est in jure." In order to defeat a subsequent patent, it is not necessary to prove, that the invention has been previously in general use, and generally known. It is sufficient, if the same invention has been previously known and put in actual use, however limited the use, or the knowledge of the invention, might have been.

[Distinguished in Watson v. Bladen, Case No. 17,277. Cited in Sturtevant v. Greenough, Id. 13,579; Parkhurst v. Kinsman, Id. 10,757; Rich v. Lippincott, Id. 11,758; Johnson v. Root, Id. 7,409; Coffin v. Ogden, Id. 2,950; Stimpson v. Woodman, 10 Wall. (77 U. S.) 125; Coffin v. Ogden, 18 Wall. (85 U. S.) 125; Sewall v. Jones, 91 U. S. 171; Pickering v. McCullough, Case No. 11,121; Christie v. Seybold, 5 C. C. A. 39, 55 Fed. 75.]

[At law. Action by William Chadwick, assignee of John Bedford, against William Hunt and others, for infringement of letters patent. Verdict for defendants.]

This was an action on the case for the infringement of a patent right. Bedford, [on July 16,] 1806, obtained a patent for a new and useful improvement in the making of boots, bootees, and shoes. He afterwards sold out to different individuals the right to use this patent in particular towns. The real plaintiff in this case was William Chadwick, to whom such a right had been sold by Bedford; and within whose limits the defendant had manufactured boots, &c. after the manner described in the patent, and vended the same, without having purchased, either of the plaintiff or of Chadwick, the right so to do. The general issue was pleaded, and under it the defendant endeavoured to prove, that the improvement, for which the patent was obtained, was not new; and produced evidence to show, that shoes of the same description had been made many years before. It was also contended, that the invention was not useful; but upon experience had been found not to answer the purpose expected, and that this mode of making boots and shoes had been of late much laid aside.

The case was argued by Webster and Thurston, for plaintiff, and by Blake and Orne, for defendants.

In the course of the argument, the following questions of law were made to the court. 1st. What degree of usefulness in an invention or improvement the law required, in order to support a patent? 2dly. Into how general use, a prior inventor must have introduced an invention or improvement, in order to render void the privileges of a subsequent patentee? On these points the jury were instructed, in the charge, as follows.

STORY, Circuit Justice, (after stating the facts.) No person is entitled to a patent under the act of congress unless he has invented some new and useful art, machine, manufacture, or composition of matter, not known or used before. By useful invention, in the statute, is meant such a one as may be applied to some beneficial use in society, in contradistinction to an invention, which is injurious to the morals, the health, or the good order of society. It is not necessary to establish, that the invention is of such general utility, as to supersede all other inventions now in practice to accomplish the same purpose. It is sufficient, that it has no obnoxious or mischievous tendency, that it may be applied to practical uses, and that so far as it is applied, it is salutary. If its practical utility be very limited, it will follow, that it will be of little or no profit to the inventor; and if it be trifling, it will sink into utter neglect. The law, however, does not look to the degree of utility; it simply requires, that it shall be capable of use, and that the use is such as sound morals and policy do not discountenance or prohibit. In the present case there cannot be the slightest doubt, upon the evidence, that the patent is for a useful invention, in a very large sense.

It is not sufficient, however, that the invention is useful; it must also be new. The statute declares it a good defence to an action for the infringement of the patent right, that the thing secured by the patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee. The first inventor, who has put the invention in practice, and he only, is entitled to a patent. Every sub-

[1] [Reported by William P. Mason, Esq.]

sequent patentee, although an original inventor, may be defeated of his patent right upon proof of such prior invention being put into use. The law in such case cannot give the whole patent right to each inventor, even if each be equally entitled to the merit of being an original and independent inventor; and it therefore adopts the maxim, "qui prior est in tempore, potior est in jure." And to the present defendant it is perfectly indifferent, whether the first inventor has taken out a patent, or has dedicated the invention to the public, or not; for he may stand upon the defence, that the plaintiff is not the first inventor, who put the invention in use.

It has been argued by the plaintiff, that the defence set up by the statute does not apply, except in cases, where the invention, or (as the statute expresses it) the thing originally discovered, has been before generally known and in general use, among persons engaged in the art or profession, to which it properly belongs. But I do not so understand the language of the statute. To entitle a person to a patent as a first inventor, it is certainly not necessary for him to establish, that he has put his invention into general use, or that he has made it generally known to artisans engaged in the same business. And yet, upon the argument we are considering, unless it were so generally known and in use, he would be defeated by a patentee, who was a subsequent independent inventor. The intent of the statute was to guard against defeating patents by the setting up of a prior invention, which had never been reduced to practice. If it were the mere speculation of a philosopher or a mechanician, which had never been tried by the test of experience, and never put into actual operation by him, the law would not deprive a subsequent inventor, who had employed his labor and his talents in putting it into practice, of the reward due to his ingenuity and enterprise. But if the first inventor reduced his theory to practice, and put his machine or other invention into use, the law never could intend, that the greater or less use, in which it might be, or the more or less widely the knowledge of its existence might circulate, should constitute the criterion, by which to decide upon the validity of any subsequent patent for the same invention. I hold it, therefore, to be the true interpretation of this part of the statute, that any patent may be defeated by showing, that the thing secured by the patent, had been discovered and put in actual use prior to the discovery of the patentee, however limited the use or the knowledge of the prior discovery might have been. And in the present case, I have little difficulty in holding, that the prior use is sufficiently established, if the testimony is believed; and that the only point of doubt is, as to the identity or diversity of the inventions.

Verdict for the defendants.

Case No. 1,218.

BEDILIAN et al. v. SEATON.

[3 Wall. Jr. 279;[1] 17 Leg. Int. 356.]

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

STATUTE OF FRAUDS — TRUSTS CLEAVING TO THE LAND AS DISTINGUISHED FROM PERSONAL CONTRACTS — STALENESS OF DEMAND — PROMISE OF HEIR PREVENTING THE MAKING OF A WILL.

1. A mere promise, though a solemn promise, by heirs at law—two brothers—to convey property as these heirs had declared to their dying brother that they would convey it—will not be looked on favorably as taking a case out of the statute against frauds, even though the promise was actually coupled with comforting assurances to the dying brother as to his health, and remonstrances by which this wish to make a will may have been controlled or even prevented; there being no proof of fraud in the case.

2. Even if the promise had been fraudulent, it would not present the case of a trust which adheres to land, in the possession of persons having notice; but only that of a contract of which chancery would compel the execution. Hence a bill to obtain the benefits of it would have to join the executors or administrators of the two brothers who made it, and could not be enforced against their heirs alone, though in possession of the land with notice.

3. Ten years from the time an involuntary disability of infancy is removed, "stales" a case not originally the best; and this is not altered by the fact that the cumulative disability of coverture was incurred after the involuntary one of infancy had ended: voluntary disabilities, even when not cumulative, not being received in equity as a defence to the charge of staleness.

[In equity. Bill by Bedilian and wife against Seaton for a discovery, account, etc. Heard on demurrer to the bill. Decree for defendants.]

The wife of complainant was a natural daughter of Thomas Seaton, who died in July, 1831, intestate. A few days before his death, Seaton requested two friends of his, Messrs. Barclay and Jack, to come to his house (some twenty-eight miles distance) in order to draw his will for him; he intending to devise all his property to this daughter, who then resided with her mother in his house. Before they came, Seaton was taken suddenly much worse, and died within two or three days. During this time he appeared very anxious about the arrival of his friends, Barclay and Jack. His brothers, James and John, told him "to make his mind easy, that his illness was not so dangerous, that he was not likely to die before they arrived." On the day preceding his decease, he called his brothers to his bedside, and stated his desire that his daughter should have his estate. The brothers, in presence of numerous witnesses said to him: "Brother Tom, make your mind easy—give yourself no trouble about that, Harriet shall have it all—every cent of it." No will was executed, the friends not having arrived till after his death on the next day. When the funeral was over,

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

the brothers, John and James, after conference with Mr. Barclay, who afterwards became the guardian of the daughter, and others, made a short conveyance of one-third part of all the real and personal property of deceased, which had come to them as heirs at law and next of kin, reciting as consideration for the deed that "it had been the intention of Thomas to leave his estate, or a part thereof, to Harriet, his natural daughter." The promise to give the property to the daughter, "every cent of it," was proved by two female witnesses, of somewhat advanced years, and who gave an account not exactly the same; but whose characters for veracity stood unimpeached. The daughter was born in May, 1823, and in her minority married one Barry. He dying in 1848, she married in November, 1851, the plaintiff, Bedilian. Her disability of infancy had therefore ceased, in May, 1844, which was a little more than ten years before the filing of this bill, and the disability of her coverture contracted during minority had ceased four years later, that is to say, in 1848, about six years before the bill was filed. The bill prayed for discovery and account of the property of which the father died seized; and that the equitable right of her, the daughter, to the same, might be ascertained, and the property or the value thereof be decreed to her. Both the brothers, John and James, had died prior to the bringing of this suit, but neither their executors nor administrators were made parties to the bill. The defendants, however, were their heirs, and in possession of some of the original property of Thomas Seaton, the father of the girl. The case now came up on demurrer to the bill; the grounds of the demurrer being that the statute of frauds was a bar, there having been a mere promise in the case, and this promise resting in parol; that the executors or administrators of the two brothers ought to have been joined, the case being one of personal contract, and not of a trust attaching itself and cleaving to the land; and finally, that twenty-five years having elapsed since the brothers took possession of the property claiming it adversely to the plaintiff's rights, and more than ten years since the daughter had arrived at full age, the title was barred by the statute of limitations, and the claim was stale.

For the complainants it was contended that the brothers were trustees for the girl. They had, in fact, prevented their brother from making a will, not only by their assurances that he was in no immediate danger, and by the promise that if he died "Harriet should have it all, every cent;" but also by arresting his active intentions, in their entreaty that he should give himself no trouble about what he had been about to do, and had actually begun to do. "Otherwise" —to use the language cited below—he would have given himself the trouble. They stopped him.

In considering what amounts to preventing a man doing an act, an immense distinction must be made between the case of a man in active health and one who is sick and dying. In the case of a person wholly helpless every way; a person who, in the stages of expiring nature, looks imploringly and confidingly on those around him for everything he wants—where death "absorbs him quite, drowns his senses, blinds his sight" —a word, a look, is as potent as, in another cause, superior physical force would be. A sick and dying man can make no actual and personal efforts in anything. He is to be likened in this respect to a child or to a person of feeble understanding. This man, it is plain, was greatly concerned; he had sent for certain friends at a distance, supposing when he sent that he would live to receive them. He now perceived that he was failing fast. He is impressed with a sense of his own dying condition. He wants to make a will at once and before they come. He calls his brothers to his bedside—he is about to "give himself trouble." He does in fact give himself trouble. His brothers stop it. They tell him that he will not die; that if he does die it will make no difference —for that his daughter "shall have all of it —every cent." They will not let him go on with giving himself the trouble which by calling them to his bedside he had begun to take. They arrest—stop—prevent all his efforts. There were numerous persons present; some one of whom could probably have drawn such a will as the case required, and could certainly have found a person who could have done it. But all is prevented by the brothers. We need not go on the promise at all. We go on the case of a weak, dying, helpless man, arrested in what he knew were the last hours of his life, and arrested of necessity, in what he was in the very act of setting into operation. The case is stronger than Oldham v. Litchfield, 2 Vern. 506. In that case Litchfield had devised land to his brother; this brother having promised the testator that he would pay an annuity to a nephew: "Otherwise"—the case says—"the testator would have charged his real estate with the payment of it." On bill filed, the brother was made to pay the annuity, notwithstanding the statute. In the present case there can be no reasonable doubt but that "otherwise"—that is to say —but for the assurances, and the remonstrances and promises of the brothers, a will would have been made. The case in fact resembles Thynn v. Thynn, 1 Vern. 296, where Mr. Thynn had made a will, and in it had made his wife executrix. The son hearing of the will, came to his mother in the lifetime of his father, and persuaded her that there being many debts, the executorship would be troublesome to her, and desired that he might be executor. He induced his mother to ask the father to appoint him, declaring that he would only be an executor in trust for her. The father thus made the will

anew; and on a bill filed, "the lord keeper, notwithstanding the statute of frauds and perjuries, and though no trust was declared in writing, decreed it for the plaintiff."

2. As respects the non-joinder of parol representatives, we are not bringing suit for a breach of contract, but for enforcing a trust against parties not purchasers, and now in possession of the land. There were promises made to the dying man no doubt; and these come in to aid us, not as promises, but along with remonstrances and assurances—as acts which prevented a dying man from going on with what he had begun. At all events, we can amend the pleading by adding the personal representatives.

3. If the trust is plainly proved, the objection of staleness is not sufficient. The child was eight years old, when this fraud was accomplished. Her innocence and infancy are plain, and the disability is not a legal position, but an actual truth. Then before the disability of infancy had ceased, the disability of her marriage in minority with her first husband, Barry, supervened. This disability ceased only in 1848, six years before this bill was filed. There are no laches here considerable enough to be a bar.

GRIER, Circuit Justice. If the property had been devised to John and James under a parol agreement by them, that they would hold it in trust for Harriet, the case would be like that of Hoge v. Hoge, 1 Watts, 163, and numerous others, in which equity treats the fraudulent procurer of the legal title as a trustee ex maleficio.

But in this case the title of the brothers did not arise by deed from Thomas. Their title was by descent; cast upon them by the law of the land, because of the intestacy of their brother. The intention of Thomas to make a devise of his property to his natural daughter having never been legally executed, gave her neither a legal nor equitable title to it. John and James are not the fraudulent grantees of the land, and have not received or accepted a legal title in trust from Thomas. They have made a solemn promise to their brother on his death-bed; and assuming the conspiracy charged in the bill (though not substantiated in the evidence), that in consequence of that promise a will was not made, was this anything more than a parol contract of which chancery is asked to enforce the specific execution? The bill sets forth no acts or declarations from which a fraudulent intention would necessarily be inferred. The exhortation to the brother to make his mind easy, that he was not in danger of immediate dissolution, may have been made in perfect good faith and kindness. Nor does the fact that the decease took place before the arrival of the scrivener, leave any necessary inference that a will would have been made if the promise had not been made. As a naked promise, without consideration, it would not be enforced by equity in the face of the statute. As a trust it could not be, where the alleged trustee did not receive the property by some gift or devise to which a trust was annexed. Nor was the trust left out of a will or conveyance on account of any promise of the devisee or executor, as in the case of Oldham v. Litchfield, cited from 2 Vern. 505, where lands were charged with an annuity on proof that the testator was prevented from charging them in his will, by a promise of payment by the devisee; nor is the case like the other case cited from 1 Vern. 296, (Thynn v. Thynn,) where a son induced his mother, by promising to be a trustee for her, to prevail on her husband to make a new will and appoint him executor in her stead. In these cases from Vernon, the conduct of the devisee was a fraud practiced not only on the party intended to be benefited, but on the testator from whom he received the legacy or devise. A mere promise is not enough to take the case out of the statute, else the statute which requires a will to be in writing would be inoperative. The foundation of the decree is the fraud of the person who has obtained the legal estate, or other benefit under the will, by means of a promise which he never intended to perform.

II. But assuming the charges of the bill to be true and well pleaded, and that the heirs expectant, when they made this promise, fraudulently prevented the intestate from making a will in favor of his daughter; (as on a demurrer we are bound to assume) still the bill does not present a case of a trust which adheres to the title in the hands of the promisees, and their heirs or others having notice: it is but a parol promise or contract which, on account of the fraud practised on the intestate and his intended devisee, chancery will compel the heir to specifically execute, either by transfer of the property or its value to the intended devisee. But as a parol contract, and not a trust descending with the land, or a covenant binding it in the possession of the heirs, how can a bill to enforce a mere personal contract be maintained against the heirs alone? Admit that a chancellor would have compelled the brothers on a bill filed in their lifetime, to make good this promise made to Thomas in favor of his daughter, either by actual transfer of the property itself, or payment of its value. Still the remedy in equity, as at law, would be against the personal representatives, the executors or administrators of the promisors. The estates of the decedents, whether they came by inheritance from the intestate brothers or otherwise, might have been taken in execution to satisfy the judgment or decree. In this way the property inherited by the present defendants might all have been made liable as assets.

III. But assuming that the bill might be so amended by making the executors parties, if any there be, and that the claim of complainants might be relieved from this difficulty by

leave of the court, still it is met by the defence of staleness. Except in cases of direct trusts not denied, the statute of limitations is as applicable to bills in equity as to suits at law. It would be superfluous to repeat the well established doctrines of courts of equity on this subject, further than referring to Wagner v. Baird, 7 How. [48 U. S.] 234.

IV. Infancy is an involuntary disability, and would justly be considered in a case of this sort, but as in courts of law cumulated disabilities will not be permitted to hinder the running of the statute of limitations, so in courts of equity voluntary disabilities, such as coverture or absence from the state, even where not cumulative, will not be received as a defence against the charge of staleness. At all times this jurisdiction of enforcing parol trusts or parol promises to convey property, is one to be cautiously exercised. Courts of chancery proceed in these cases against the letter of the statute, on the ground of preventing frauds from being successful, by pleading the statute against frauds. But the spirit as well as the letter of these statutes would be wholly annulled, if legacies or devises not written in a will, or contracts for the sale of realty were enforced, by the vague, uncertain, and too often imaginary recollections of old women or old men after a great number of years. Those who swear to conversations are never accurate; the omission of a part of a conversation, the leaving out of a single adverb, pronoun or preposition, may unintentionally convert a partial truth into a great lie.

V. After forty years' experience at the bar and on the bench, I must say, that I think courts had better never have relaxed the stringent rule of these statutes. Courts, as well as juries, are too apt to be led away by the cry of "Fraud!" We all hate fraud, and are too willing to assume the functions of an overruling Providence, and punish it by arbitrary power. This feeling of virtuous self-complacency too often leads to hasty decisions and dangerous precedents. I have known a valuable property converted into a trust, by the testimony of an old woman who recollected and construed a nod, after some twenty-two years, into the acknowledgment of a trust. See Jones v. McKee, 3 Barr, [3 Pa. St.] 496.

The promise which this bill calls upon us to enforce against the heirs of the promisors (on the recollection of one or two old women, who do not agree with one another, nor with that laid in the bill) purports to have been made some twenty-five years ago. The disability of infancy was over more than ten years before the filing of this bill. There is no allegation of any fraudulent concealment of her rights from the complainant; no reason why she might not as well have brought her suit during the life of her first husband, as in that of her second.

However romantic the story may be, that seeks to divest men of property held in descent by the second generation, on a cry of fraud set up after all the alleged parties to it are long dead and their executors after them, I am happy to say, that the rules which govern a court of chancery in cases of this kind fully justify me in dismissing this bill as stale, and that the lapse of time appearing from the face of the bill itself is a complete bar to the relief sought.

Decree for defendants.

BEDOWIN, The, (AMERICAN DREDGING CO. v.) See Case No. 299.

Case No. 1,219.

The BEE.

[1 Ware, (332,) 336.] [1]

District Court, D. Maine. May 13, 1836.

ADMIRALTY JURISDICTION — SUITS BETWEEN FOREIGNERS—CONSENT OF CONSUL—SUITS IN REM—LOCUS REI SITAE—SALVAGE — DERELICT—ABANDONMENT—AMOUNT.

1. When a party objects to the jurisdiction, if the objection is founded on a personal privilege of declining the forum, it must be made before entering a general appearance and answering to the merits.

[Cited in Manchester v. Hotchkiss, Case No. 9,004.]

2. A court of admiralty has jurisdiction over controversies of a maritime nature, between foreigners who are transiently within the jurisdiction of the court.

[Cited in The Ada, Case No. 38.]

[See, also, Moran v. Baudin, Id. 9,785; Ellison v. The Bellona, Id. 4,407; The Jerusalem, Id. 7,293; Davis v. Leslie, Id. 3,639; The Havana, Id. 6,226; Thomassen v. Whitwell, Id. 13,928.]

[3. Cited in Ex parte Newman, 14 Wall. (81 U. S.) 169, to the point that in a suit between foreigners, transiently within the jurisdiction of the court, the consent of the representative of the foreign government is merely a material fact to aid the court in the exercise of its discretion on the question whether to assume jurisdiction or not.]

4. But the court is not bound to take jurisdiction of a case in which all the parties are foreigners.

[Cited in The Ada, Case No. 38.]

[See Moran v. Baudin, Id. 9,785; Ellison v. The Bellona, Id. 4,407; The Jerusalem, Id. 7,293; Davis v. Leslie, Id. 3,639; The Havana, Id. 6,226; Thomassen v. Whitwell, Id. 13,928.]

5. Suits in rem are local, and the court within whose jurisdiction the thing is situated is the proper forum, though all the parties in interest are foreigners. There is an exception to the general rule, when the thing has been brought within the jurisdiction of the court by a violation of the sovereign rights of another nation.

6. Property is derelict in the sense of the admiralty, when the owner has abandoned it without the intention of returning and resuming the possession. The owner's right of property

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[1] [Reported by Hon. Ashur Ware, District Judge.]

is not lost by the abandonment, but the possession is left vacant.

[Cited in The Hyderabad, 11 Fed. 754; The Ann L. Lockwood, 37 Fed. 237.]

[See Moran v. Baudin, Case No. 9,785; Ellison v. The Bellona, Id. 4,407; Tyson v. Prior, Id. 14,319; The Jerusalem, Id. 7,293; The Emulous, Id. 4,480; Bean v. The Grace Brown, Id. 1,171; Davis v. Leslie, Id. 3,639; The Havana, Id. 6,226; Thomassen v. Whitwell, Id. 13,928.]

7. The finder, who takes possession of the goods with the intention of saving them, gains a right of possession which he may maintain against the true owner, and a lien upon them for salvage.

[Cited in The John Wurts, Case No. 7,434; Cromwell v. The Island City, Id. 3,410; The Mayflower v. The Sabine, 101 U. S. 386; The Ann L. Lockwood, 37 Fed. 237.]

8. But the owner's exclusive right of possession is not lost by temporarily leaving the goods for the purpose of obtaining aid, and with the intention of returning to save them.

[Cited in The Cleone, 6 Fed. 525; The B. C. Terry, 9 Fed. 922.]

[9. Cited in Patch v. Marshall, Case No. 10,793, to the point that the master's act in procuring the intervention of a foreign consul to the injury of an American citizen by imprisonment in a foreign jail is cognizable in admiralty.]

[10. Cited in The Choteau, 9 Fed. 211, to the point that the sailors have no right to act against the will of the master.]

[11. Salvage amounting to one-sixth of the value of the property saved was allowed where the service required but four days, and, though laborious, was not attended with any extraordinary peril.]

[Cited in The W. D. B., Case No. 17,306.]

[Libel for salvage against The Bee, Woodworth, master.]

This was a case of salvage. The libellants allege in the libel that on the 13th of November, being informed by the master that the vessel had been thrown down in a gale of wind, and was then lying on the western side of Grand Manan, and was abandoned by him and his crew, they proceeded across the island with the intention of saving her; that they found her and took possession of her, there being then a strong wind from the north-west, blowing directly on shore, that she was in a state of imminent peril, laying on her larboard side, her ballast shifted, the larboard sails and her bulwarks cut away, one anchor down, but the chain not secured and paying out, with only about a fathom and a half remaining in, which they succeeded in securing about the stump of a mast, the masts with her spars having all gone by the board. They let go another anchor, when she dragged and parted her small chain. After much toil and great exposure, they succeeded in righting her; that they then attempted to obtain help to carry her into port, but did not succeed until the 15th, when having procured two small sails, a studding-sail and part of a trysail, they rigged jurymasts, and the wind having changed and the weather become more favorable, they succeeded in getting her into Lubec on the 17th of the month.

The libel was filed at the last December term of the court, when a claim and answer was put in on behalf of the owner by the British consul, stating the situation of the vessel, and denying that she was abandoned by the master and crew, but alleging that they only left her temporarily, the master to make his protest, and the crew to obtain assistance; that they offered the libellants $150 as a remuneration of their services, which was refused, and praying that the vessel may be restored "without salvage, or on paying the libellants such remuneration as the court may adjudge proper and reasonable." At the same time, a claim was filed by the Protection Insurance Company, of Hartford, in Connecticut, alleging the same facts and concluding with the same prayer. And on this day, the owner, Mr. Caltin, filed a claim and answer. The counsel for the claimants then moved that the libel be dismissed, on the ground that the court had no jurisdiction over the cause. The motion was argued by Mr. Hobbs, for the libellants, and Mr. Deblois, for the respondents.

WARE, District Judge. The counsel for the respondents has supported the motion to dismiss the libel, on two grounds; first, because the parties in the cause, both the libellants and respondents, are foreigners, and subjects of the king of Great Britain; secondly, because the vessel is not only a British vessel, but was taken by the salvors, after the disaster had happened, from British waters, and brought within the jurisdiction of the court.

Waiving the question, for the present, whether the court can, under any circumstances, exercise jurisdiction over the cause, I may remark that if the motion had been seasonably made, though it should regularly have been presented in the form of a plea, I should have felt inclined to have yielded to the argument of the counsel, and remitted the parties to their domestic and natural forum. The courts of the United States are not bound to take cognizance of the controversies of strangers having their domicil in a foreign country, as they are of suits which are brought before them by our own citizens; nor are they eager to exercise a voluntary jurisdiction when there is the least disinclination to submit to it. But in this stage of the cause, when it has proceeded thus far without objection, it would be a serious hardship on the libellants to dismiss the libel unconditionally. A proposition was therefore made by the court to dismiss the libel on the parties agreeing that the testimony, which has been taken at considerable expense, should be used without objection in the proper court of their own country. To this proposition the respondents' counsel objects, and insists on an unconditional dismissal of the suit. They insist on their extreme rights, and though I have no desire to

sit and decide controversies between foreigners, justice to the libellants requires, under the circumstances of the case, if the court may rightfully exercise jurisdiction, that the cause should proceed to a final decision in this court. The motion, not being addressed to the discretion of the court, but proceeding on the supposed legal rights of the parties, may be considered in two aspects; first, as being founded on a personal privilege of the party of declining the jurisdiction and having the cause transferred to another forum; and secondly, as standing on an entire want of legal capacity in this court to take cognizance of the cause.

If considered in the first point of view, it comes too late. The libel was filed at the last December term, and a warrant of attachment and monition issued, returnable on the first Tuesday of January. The claimants appeared by their proctors before the return day, and filed interrogatories for the taking of depositions on the 20th of December. On the return day the proctors for the claimants entered into a written agreement with the proctor of the libellant, which is filed in the case, that the hearing should be at Portland, in May. In the mean time the testimony in the case has been taken and returned. A claim and answer has been put in for the foreign owners by his Britannic majesty's consul, and another by the Protection Insurance Company, of Hartford, who are not foreigners but citizens of the United States, praying that the vessel may be delivered to them, "without salvage, or on the payment of such reasonable salvage as the court shall adjudge just and proper." The insurance company not having accepted the abandonment which has been made by the owners, cannot be, it is true, received as claimants. The Henry Ewbank, [Case No. 6,376.] If they were legally parties, it would be an answer to one of the objections to the jurisdiction. But the foreign claimants, as far as acts can go, have waived any personal privilege, if they had any, of declining the jurisdiction. This objection, to be available, should have been taken before a general appearance, and an answer to the merits.

The next question which presents itself, and which has been argued at the bar, is whether the court is wholly incompetent to exercise jurisdiction over the cause, so that its decree on the merits may, according to the established principles of the jus gentium, be held by a court having jurisdiction over the parties, as a mere nullity. It may, I think, be assumed, as a point settled both on principle and authority, that the court is not rendered incompetent on the mere ground of the alienage of the parties on the record. Story, Confl. Laws; 2 Browne, Civ. & Adm. Law, 119; Abb. Shipp. 447. It is believed that in most civilized nations, foreigners transiently among them are allowed to apply to the tribunals of the country to obtain a decision of controversies which may arise between them. In Rome a particular magistrate was appointed to take jurisdiction of such causes, called the Praetor Peregrinus. Just. Dig. 1, 2, § 28; Poth. Pandect. 1, 2, 20. The courts of this country are not bound to take jurisdiction of controversies between foreigners having no domicil in this country, as they are when parties are citizens or resident among us, and are thus entitled to claim of right the benefit of our laws. It is a question of discretion to the court, whether it will take cognizance of the case, or not, and it cannot be charged with a denial of justice if it remits the parties, with their rights entire, to their domestic forum. Gardner v. Thomas, 14 Johns. 134; Glen v. Hodges, 9 Johns. 67. The question is, therefore, not one affecting the competency of the court, but it turns upon the expediency of taking jurisdiction in the particular case. Courts of admiralty have always been in the habit of entertaining suits between foreigners in cases of salvage, on bottomry bonds, and for seamen's wages, when a refusal to interpose might occasion a failure of justice. In salvage cases this jurisdiction has been less doubted than in others, because salvage is a question arising under the jus gentium, and does not ordinarily depend on the municipal laws of particular countries. The Two Friends, 1 C. Rob. Adm. 271; The Madonna D'Idra, 1 Dod. 37; The Wilhelm Frederick, 1 Hagg. Adm. 138; The Maria Theresa, 1 Dod. 303; The Forsoket, [Case No. 17,682;] The Jerusalem, [Id. 7,293;] The St. Oloff, [Id. 17,357;] 2 Pet. Adm. 415, [Moran v. Baudin, Case No. 9,785;] Bee, Adm. 106, 112, [Ellison v. The Bellona, Cases Nos. 4,406, 4,407;] The Blaireau, 2 Cranch, [6 U. S.] 240. Indeed, the court of admiralty, according to Cleirac, was, in its original constitution in all the maritime nations of western Europe, the appropriate tribunal to take cognizance of suits when the parties were foreigners. Jurisdiction de la Marine, art. 1, notes 1, 2; Id. art. 2. If the jurisdiction of the court is not ousted by the national character of the parties, then, the property being within the jurisdiction, this, upon common principles, is the proper court to take cognizance of the cause. In proceedings in rem, the forum rei sitae is the natural and proper forum, for it is the only one which can make its jurisdiction effectual by operating directly on the thing. Story, Confl. Laws, 462; The Two Friends, 1 C. Rob. Adm. 277; The Invincible, [Case No. 7,054;] The Jerusalem, [Id. 7,293.] A court sitting in another jurisdiction can only reach the thing through the person of the owner. There may be an exception to the universality of this rule, when the thing is seized within the territorial limits of another sovereignty in violation of its sovereign rights, and brought within the jurisdiction of the court. The Apollon, 9 Wheat. [22 U. S.] 362. But when the thing is found within the jurisdiction of the court, the right to adjudicate upon it follows ordinarily as a matter of course, and it belongs to the party who denies the jurisdic-

tion to bring his case within some exception to the general rule. In the present case it appears by the statement of the libel, which in this stage of the case must be taken to be true, that the libellants found the vessel abandoned, at least temporarily, lying in British waters in a state of extreme peril. They took possession of her, as well they might, and carried her to a place of safety. In this there was no violation of the territorial rights of Great Britain. The salvors had a right, and it was their duty, to carry her to a place of safety, and it does not at present appear that this was not the only port of safety which she could reach in her exposed and destitute condition. My opinion is, that the court has jurisdiction, and the motion must be overruled.

On a subsequent day, the testimony having all come in, the case was again argued on the merits. The depositions were very voluminous, but the material parts are stated in the opinion of the court.

WARE, District Judge. The question of jurisdiction having been settled, the case is now to be disposed of on its merits. Whatever difficulty there may be in reconciling parts of the testimony, there are some facts which are either admitted, or are proved by evidence of such a character that they do not admit of a reasonable doubt. The Bee sailed from Boston on the 8th of November, on a voyage to Windsor, in Nova Scotia; on the 11th, she met a heavy gale from the south-east, was thrown down on her beam ends, and lost both her masts, besides suffering some other injuries. The wind then changed, and blew strong from the north-west, and she drifted before the gale into Bradford's cove, on the north side of Grand Manan, where she came to anchor on the morning of the 12th, and lay twenty-four hours. The captain and all hands, Friday morning, the 13th, at 8 o'clock, left her riding with one anchor down, and went ashore to get assistance and refreshments. The wind was then blowing strong from the north, and directly on shore, where the Bee lay exposed to its full force. The master and crew went into the wood, for there was no settlement at the cove, and soon fell in with a party of men, among whom was one Robison, whose house was about two miles from the cove, where they went with the party for refreshments. They related the disaster they had met with, and stated where the vessel lay, and the condition in which they had left her. The libellants, after hearing the story of the master and crew, left the house and went to the cove, and taking the boat which had been left on the shore, went on board and took possession of the vessel. Some time after, the master and crew, having stopped at the house as they say about an hour, returned to the cove and found the libellants in possession of the vessel. They arrived there about one o'clock, having been absent, according to their statement, five hours. Thus far the facts are not controverted, and here the discrepancy in the testimony commences.

It is contended by the counsel for the claimants that the libellants took possession of the vessel wrongfully, and excluded the master and crew by violence, and therefore, that having originally gained the possession by a trespass and continued it by force, although they may by their exertions have saved the wreck, they can make no claim to a reward for acts which were commenced and continued in wrong. If the evidence fully sustained the position of the claimant's counsel, I should readily agree to the conclusion.

When a vessel is found at sea, deserted, and has been abandoned by the master and crew without the intention of returning and resuming the possession, she is, in the sense of the law, derelict, and the finder who takes the possession with the intention of saving her, gains a right of possession, which he can maintain against the true owner. The owner does not, indeed, renounce his right of property. This is not presumed to be his intention, nor does the finder acquire any such right. But the owner does abandon temporarily his right of possession, which is transferred to the finder, who becomes bound to preserve the property with good faith, and bring it to a place of safety for the owner's use; and he acquires a right to be paid for his services a reasonable and proper compensation, out of the property itself. He is not bound to part with the possession until this is paid, or it is taken into the custody of the law, preparatory to the amount of salvage being legally ascertained. Should the salvors meet with the owner after an abandonment, and he should tender his assistance in saving and securing the property, surely this ought not, without good reasons, to be refused, as this would be no bar to the right of salvage, and should it be unreasonably rejected it might affect the judgment of a court materially, as to the amount proper to be allowed. Still, as I understand the law, the right of possession is in the salvor. But when the owner, or the master and crew who represent him, leave a vessel temporarily, without any intention of a final abandonment, but with the intent to return and resume the possession, she is not considered as a legal derelict, nor is the right of possession lost by such temporary absence for the purpose of obtaining assistance, although no individual may be remaining on board for the purpose of retaining the possession. Property is not, in the sense of the law, derelict and the possession left vacant for the finder, until the spes recuperandi is gone, and the animus revertendi is finally given up. The Aquila, 1 C. Rob. Adm. 41. But when a man finds property thus temporarily left to the mercy of the elements, whether from necessity or any other cause, though

not finally abandoned and legally derelict, and he takes possession of it with the bona fide intention of saving it for the owner, he will not be treated as a trespasser. On the contrary, if by his exertions he contributes materially to the preservation of the property, he will entitle himself to a remuneration according to the merits of his service as a salvor.

Applying these principles to the evidence in this case, it is impossible for me to say that this was a case of legal derelict. The master had indeed, with his whole crew, left the vessel, and though there is evidence of some declarations made by him, which, if unexplained, might have led the libellants to suppose that he had abandoned her, the whole evidence taken together conclusively proves that it was his intention to return. But though the intention to return is admitted as the fair result of the whole testimony, it is also true that the whole evidence taken together does not present the conduct of the master in so favorable a light as could be wished. He left the vessel, and took with him the whole crew, without any apparent and overruling necessity, in a situation of extreme peril; he does not appear to have taken all the precautions which were practicable for her safety during his temporary absence; he left her with one anchor only out, when he had another on board, in a heavy gale, driving directly on the rocks of a lee shore. The reason which he gives for this, in his deposition, is, that "if the chain fouled and the vessel swung round, she would be better with one." The reason given by the mate and the seamen is, that the chain was too short, and that one anchor was enough. But when the libellants got on board, the first thing they did was to put out the second anchor, and it does not appear that they found any difficulty in the length of the chain. The master and crew say that the chain of the best anchor, which was down, was made fast. The libellants say that they found it with two or three turns around the windlass, and slipping with every swell of the sea, and with but about a fathom and a half remaining in. The master stated, when at Robison's house, that he left the vessel in a state of extreme peril; that it was doubtful whether she would not be ashore before he got back, and that it would be very difficult, if not impossible to save her. It is further in proof that he stated that "if the vessel went ashore it would be the making of the owners; that one of them was in pretty good circumstances, and that the other was not; that if she came ashore and went to pieces, and they gained the insurance, it would set them up again; that if she was saved it would be the ruin of them." This is sworn to by a disinterested witness, and is in substance confirmed by the unsuspicious testimony of the mate. With these facts in the knowledge of the libellants when they went forward to save the vessel, it is impossible to say that they had not some reason to suspect that the master was not very anxious for her safety; and there is no doubt that they went with the bona fide intention of saving her and entitling themselves to salvage.

But it is said that the libellants having got possession of the vessel, held it, and excluded the master and crew by violence. They returned to the cove some time after the libellants took possession, and, as the master says, hailed them from the shore, but that the distance was such that the answer could not be heard; and having fitted up a camp in the woods, they remained till the next morning, expecting some of the libellants would come on shore during the night, and that then they could regain the possession of the vessel. This not being the case, they hailed again in the morning, and no one coming ashore, the master left the cove and went to Franklands, about twelve miles distant, to note his protest and get assistance; although there were vessels lying at Seal cove, about six miles distant, which might equally well have been obtained, if his principal object had been to obtain the aid of one to tow the schooner. He was absent two days, noted his protest in which he says nothing of being dispossessed of the vessel, attempted without success to get assistance, and on his return found that his own vessel was on her way to Lubec. The mate and crew remained at the cove Saturday and Sunday, and there were several other persons there during that time. The libellants also came ashore two or three times, delivered to the mate the captain's watch, which was left on board, and brought ashore provisions for the men. The mate demanded the boat, which was refused, but the libellants offered to take him on board and set him ashore again. There was no violence offered on one side or the other. The libellants appear to have acted under an impression that, having taken possession of the vessel, when she was left without a keeper, they had a right to hold the possession and entitle themselves, by saving the property, to salvage. They may have supposed that the master was not very anxious for the safety of the vessel. And although there is an unusual asperity in the language of the claimants' witnesses, charging the libellants, among other things, with going on board for the purpose of plundering, there is nothing in the testimony beyond this harsh language which in the slightest degree implicates the honesty of the salvors; and these hard imputations, being unsupported by facts, do not add to the credibility of the witnesses who make them. I may add, for it is on this ground that my judgment in part proceeds, that I am not sure that the vessel and the interests of the underwriters were not quite as safe in the hands of the libellants as they would have been if the vessel had been surrendered to the master.

I decree salvage; but it is not a case which demands a high rate of salvage. The salvors were employed in the service from Friday to

Monday, four days. Though the service was undoubtedly laborious, it was not attended with any extraordinary peril, as the vessel was during no part of the time in so much danger as when they took possession of her. The value of the vessel in the state in which she was saved, was about $2,000. I allow $350 salvage, which is about at the rate of one sixth, and charge the expenses on the residue.

BEE v. The MINNIE. See Case No. 9,117.

BEEBE, (RUSSELL v.) See Case No. 12,153.

Case No. 1,220.

Ex parte BEEBEES.

[2 Wall. Jr. 127.] [1]

Circuit Court, D. Pennsylvania. Nov. 3, 1851.

WRITS—PRACTICE — SUBPOENA RUNNING BEYOND THE DISTRICT — DISOBEDIENCE — ATTACHMENT DISCRETIONARY.

Although there is an act of congress [Act March 2, 1793; 1 Stat. 333, c. 22] which allows subpoenas ad testificandum to run from the circuit courts into districts not their own, yet where the witness who has been thus subpoenaed, shows no disposition to treat the process of the court with contempt, the issuing of an attachment is always matter of discretion with the court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the court will not compel his attendance; but will either postpone the cause or have his deposition taken.

[Rule upon the Beebees to show cause why the Beebees should not be attached for contempt. Rule discharged.]

By an act of congress, [Act March 2, 1793; 1 Stat. 333, c. 22,] changing the rule of common practice, subpoenas for witnesses may run into districts, other than the one where the court is sitting, provided the witness does not live at a greater distance than 100 miles from the place of holding the court. And under this act the Beebees, residing at Ravenswood in New York, and out of this district, had been served in an equity suit pending at Philadelphia, in it, with a subpoena to appear before the master there and testify. The subpoena which was a duces tecum, required them to produce before the master, in Philadelphia, their letter-books, original letters, books, papers and vouchers, containing entries concerning gold dust, gold or other securities transmitted by the defendant, at San Francisco, since the 1st of January, 1851. Not appearing according to the requisition of the subpoena, Mr. C. Ingersoll now moved for an attachment to compel their attendance; but Mr. H. J. Williams, appearing as their counsel, and denying all contempt of the process of the court, the court refused the attachment, and ordered a rule on them to show cause why one should not issue. On the return of this rule, Mr. Williams read their affidavit as follows: That they "reside in Ravenswood, more than 100 miles from Philadelphia; are partners in the banking, bullion and exchange business; transacting a business averaging from eight to ten millions a month, and having in their employ thirteen clerks: that the nature of their business absolutely requires their personal attendance, and the presence of their books, and that the absence of either, for any length of time, might and probably would not only cause great injury and loss to themselves, but greatly jeopard the interests of their correspondents and the persons with whom they deal." With regard to the exact distance of Ravenswood, their residence, from Philadelphia, which they swore was "more than 100 miles," it appeared that the place is seven miles from the city of New York, and that the distance of New York from Philadelphia, though commonly spoken of as being 100 miles, and assumed by the post-office contracts as 95 miles, does, in fact, not exceed, by one of the two roads usually travelled, 87 miles, and by the other 90 miles from the courthouse in Philadelphia.

GRIER, Circuit Justice. The court must, of course, have regard to the actual distance by the usual routes, and not the imaginary rules assumed for the benefit of mail contractors. The residence of the witnesses is accordingly within and not over one hundred miles from the court-house in Philadelphia. We might, therefore, compel the attendance of the witnesses, if a sufficient cause were shown for the exercise of such a power.

We do not think it is the absolute right of the party to compel the personal attendance of witnesses in every civil case, and much less so in cases pending on the equity side of this court, where their testimony may be taken before a commissioner. Where the witness, who has been subpoenaed, shows no disposition to treat the process of the court with contempt, the issuing of an attachment is always a matter of discretion with the court. Where the witness is sick; where a member of his family is dangerously ill; where age or infirmity or any other reason which would render his compulsory absence from home dangerous to his health, or oppressive, the court will not compel his attendance, but will either postpone the cause, or order the deposition of the witness to be taken.

In the present case there is no physical disability alleged to excuse the attendance of the witness; but under the circumstances in evidence, we think it would be a great hardship, and would probably cause derangement and injury to the business of the witnesses. There is no reason why their testimony could not be as well taken in New York as in Philadelphia; before a commissioner there, as before a master here. In fact, it is but a question of convenience and

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

expense. Must the witness be dragged from his counting-house to the great injury of his business, and compelled to transport himself and a cart load of books of accounts to Philadelphia for the mileage and daily pay allowed by law? Shall he shut up his bank, suspend his business, merely to save a little expense to the party who wants his evidence? If there was an absolute necessity for such a sacrifice on the part of the witness; if there would be a failure of justice, unless his attendance at this place were enforced, the court would be bound to issue this compulsory process. But where, as in the present case, it is but a question of convenience and expense between the party and the witness, we think that the witness may justly demur to an application, which is to transfer the burthen to his shoulders.

If it should turn out (which we have no right to anticipate) that the witnesses should refuse to make a full, fair and candid disclosure of all facts within their knowledge, and of which the master may judge proper to inquire, the court can and will, on proper proof thereof, compel the attendance of the witnesses, and enforce obedience to their orders. But at present we do not see a necessity for enforcing the attendance of the witnesses at this place, at so great a sacrifice of their private interests. Rule discharged.

Case No. 1,220a.

BEECHER et al. v. BECHTEL et al.

[19 Betts, D. C. Ms. 63.]

District Court, S. D. New York.[1]

SHIPPING—CHARTER PARTY—BREACH—BURDEN OF PROOF—TIMBERS TOO LARGE FOR PORT-HOLES.

[1. Libellants suing for breach of a charter party are bound to show that there was no default on their part.]

[2. A vessel chartered to take a cargo of lumber is not justified in refusing certain pieces of timber merely because they are too large for her port-holes; the charter party being silent as to the size of the timbers to be laden, and the sticks in question being merchantable, and of a size customarily laden at that port.]

[Reversed in Beecher v. Bechtel, Case No. 1,221.]

[In admiralty. Libel by William K. Beecher and others against George J. Bechtel and John H. Dreyer, Jr., for breach of a charter party. Libel dismissed. This was reversed by the circuit court in Case No. 1,221.]

Before BETTS, District Judge.

[Libellants were owners of the brig Buenovento, which was chartered by respondents at New York, October 2, 1849, to carry a cargo of lumber from Charleston, S. C., to Barcelona, in Spain. The owners engaged that the whole of the vessel, except the part necessary for the accommodation of the officers and crew, and the stowage of cables and provisions, should be at the disposal of the charterers, who, on their part, agreed to furnish a full cargo of lumber for the voyage. After a part of the cargo had been received on board, the shippers' agent delivered for lading two timbers too large and long to be received through the vessel's port, which was 24 inches square. The agent insisted that the port hole should be enlarged. The master, after waiting a considerable time for timber suitable to the vessel's size and capacity, sailed in ballast for another port.]

It is considered BY THE COURT:—

(1) That the libellants are bound to prove a fulfillment of the charter party entered into by them. They engaged the ship to perform the voyage, and must show there was no default on her part.

(2) The contract is to carry a cargo of lumber and timber in the vessel named, from Charleston, S. C., to Barcelona, Spain, for the defendant.

(3) The defendants having tendered a cargo of lumber and timber at Charleston to the vessel, she declined receiving it on board, because some of the timber was of a size too large for her port-holes. The defendants must be held to have complied with their contract, unless guilty of some fraud or deception in relation to the size of the timber.

(4) It is incumbent on the owner of the vessel to limit in the charter party her obligation to take particular descriptions or sizes of timber, if he did not intend to leave it to the discretion of the defendants to load such as they desired to send, and such as should be merchantable.

(5) Upon the proofs the cargo offered was merchantable, and of a customary kind at Charleston, as to size, &c., and the shipper on an open charter party had a right to require the ship owner to have his vessel fitted to receive and transport it.

(6) The preponderance of evidence is that the vessel might have been fitted to take in the lumber offered with but small expense; but if that point be doubtful, the risk is upon her owner, and he cannot maintain an action as for the performance of his contract, or merely sending his vessel to Charleston, and offering to receive such lumber and timber as her fitment and arrangements then enabled her to load on board.

(7) The contract is not to be considered as if made by the defendant with reference to the then state of the vessel, and her capacity at the time to pass through her timber ports the description of timber which might be offered, but must be understood to relate to the vessel at Charleston when the cargo should be brought to her; and the plain obligation of the libellants is, to have her ready to ship the lumber and timber offered by the defendants.

In my opinion the breach of the contract is on the part of the libellants and not on the part of the defendants, and the libel must accordingly be dismissed with costs.

[1] [Reversed by circuit court in Case No. 1,221.]

Case No. 1,221.

BEECHER et al. v. BECHTEL et al.

[3 Blatchf. 40;[1] 30 Hunt, Mer. Mag. 196.]

Circuit Court, S. D. New York. Sept. 23, 1853.[2]

SHIPPING — CHARTER-PARTY — AGREEMENT FOR FULL CARGO OF LUMBER — PIECES TOO LARGE FOR PORT-HOLE—DUTY TO WIDEN.

The charter-party of a vessel provided that the whole of it, except the part necessary for the officers and crew, and for stowing sails, cables, and provisions, should be at the disposal of the charterer, for a specific voyage. The charterer agreed to furnish a full cargo of lumber and timber for the voyage, at a specified price per thousand feet. After the vessel had received part of her cargo, the charterer desired to put on board two pieces of timber that were too large to be received through the port-hole of the vessel, and insisted that the port-hole should be enlarged to receive them, and refused to furnish any more cargo till that was done. Thereupon, the master landed the cargo that had been taken on board, and left for another port, in ballast: *Held*, in an action by the owner against the charterer, to recover compensation for the loss sustained by the failure to furnish the cargo, that the undertaking of the charterer was to furnish a cargo of such timber as was suitable to the capacity and condition of the vessel, and that the owner did not undertake to convey a given quantity of lumber and timber generally, and was not bound to alter the port-hole of the vessel.

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libel by William K. Beecher and others against George J. Bechtel and John H. Dryer, Jr., for breach of a charter-party.] This was a libel in personam, filed in the district court, to recover compensation for the loss and damage sustained by the libellants, as owners of the brig Buenovento, by reason of the non-fulfilment, by the respondents, of a charter-party. The libel was dismissed by the district court, [Case No. 1,220a,] and the libellants appealed to this court. [Reversed.]

N. Dane Ellingwood, for libellants.
George F. Betts, for respondents.

NELSON, Circuit Justice. The brig Buenovento, of two hundred and fifty tons burthen, was chartered from the libellants by the respondents, at the city of New York, on the 2d of October, 1849, to carry a cargo of lumber and timber from Charleston, in South Carolina, to Barcelona, in Spain. The owners engaged that the whole of the vessel, except the part necessary for the accommodation of the officers and crew, and the stowage of sails, cables, and provisions, should be at the disposal of the charterers, who agreed to furnish a full and complete cargo of lumber and timber for the voyage, and to pay, as freight, eleven dollars per thousand superficial feet, with five per cent. primage. The cargo was to be delivered and received alongside of the vessel, within reach of her tackles. The charter was to commence when the vessel should be ready to receive the cargo at her place of loading, and notice thereof should be given to the charterers.

The vessel, in pursuance of the charter-party, arrived at the port of Charleston on the 14th of the month, ready to receive her cargo. After she had received on board a considerable portion of it, the agent of the shippers delivered, for the purpose of being shipped on board, two large masts or spars —the one twenty-seven inches in diameter, and the other twenty-eight inches—round timbers, and sixty feet in length. The lumber was received through a square port-hole in the forward part of the vessel, called the bow port, and which could not receive timber of the length and dimensions of these spars, the port being only twenty-four inches square, which would not receive timber of the length of the spars exceeding twenty-two inches in diameter. The port-hole was of the usual size for vessels of the burthen of the Buenovento. The master, having waited some sixty-three days in all for lumber and timber suitable to the size and capacity of the vessel, and the agent of the shippers refusing to furnish other lumber till the spars were taken on board, and insisting that the port-hole should be enlarged so as to receive them on board, landed the portion of the cargo that had been taken on board, in pursuance of orders from the owners in New York, and left for another port, in ballast, after full notice to the agent of his intention so to do, unless the cargo of the vessel was completed.

A good deal of evidence has been taken on both sides upon the point as to whether or not the port-hole could have been enlarged without injuring the strength and affecting the seaworthiness of the vessel. It is exceedingly doubtful, upon the evidence, whether or not the necessary alteration could have been made without permanently disabling her and rendering her unseaworthy; and the estimate of the expense varies from fifteen dollars to three hundred dollars, according to the various witnesses. I shall not undertake to weigh this evidence, as it respects the question either of the practicability of the alteration or of its cost; for, in my judgment, the owners, upon any just and proper construction of the charter-party, were not bound to make or submit to the required change.

The charter was entered into in the city of New York, and the vessel lay in that port at the time. An opportunity was thus afforded to the charterers to make any examination of her they might desire. Her tonnage is specified in the charter-party, and the only covenants entered into by her owners, in respect to her character and condition, are, that she shall be seaworthy; that, during the voyage, she shall be kept tight, staunch, well fitted and tackled, and provid-

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

[2] [Reversing Case No. 1,220a.]

ed with every requisite, and with men and provisions necessary for the voyage; and that she shall receive on board all such lawful goods and merchandise as the charterers may see proper to ship, the same to be properly stowed by the ship's crew, or by such other suitable persons as the captain may employ, at the vessel's expense; the charterers agreeing to furnish a full and complete cargo of lumber and timber.

I agree that, if the owners had undertaken to convey from Charleston to Barcelona a given quantity of lumber and timber generally, for a specified price, they would have been bound to furnish a vessel that could have received and shipped any description of the article mentioned, which, according to the usage and custom of the trade, was ordinarily shipped at the former port. Such would have been the fair and reasonable import of the contract. But here, no such contract has been entered into. The owners have simply chartered their vessel, and have stipulated that the whole of it, with the exceptions stated, shall be at the sole use and disposal of the charterers during the voyage; and that no goods or merchandise whatever shall be laden on board, otherwise than by them or their agents, without their consent. It is an engagement, therefore, on the part of the owners, not that they will convey between the ports mentioned a given amount of lumber and timber for the price mentioned, but that the vessel named shall be employed, for the particular voyage, in the conveyance of those articles. It seems to me clear, therefore, that the undertaking of the charterers is to furnish a cargo, at the port designated, of such lumber as is suitable to the capacity and condition of the vessel; and that it would be carrying the contract beyond the intent and scope of it, to consider the same as an engagement to convey a given quantity of the article generally, without regard to the means of conveyance.

Some evidence has been given tending to show that it is not unusual to enlarge the port-holes of vessels employed in the conveyance of lumber, to enable them to receive on board spars of the size of those delivered in this case. But the evidence is slight, and does not approach to the establishment of a usage or custom in the trade, especially in the case of a charter-party like the one in question. It may well be that an owner who enters into an engagement generally, to convey a given quantity of lumber and timber, might find it necessary to alter materially the construction of his vessel, to enable him to comply with the terms and conditions of his obligation, as, under such a charter, he would be bound to carry any description of the article within the usage and custom of the trade. Under such a contract, there would be no reference to any particular vessel or mode of conveyance. But where, as in the present case, a particular vessel has been chartered for the conveyance of a cargo of lumber, the obligation is different, and the charterers are, in respect to the cargo to be furnished, bound to regard the capacity and condition of the vessel. I agree, that changes of a temporary character, as it respects the interior of the vessel, such as may be usual and customary in the trade, for the accommodation of the cargo, may be proper and within the duty of the owners. But changes affecting her safety and sea-worthiness, and thereby permanently lessening her value, cannot, it seems to me, be regarded as falling within the contract; and this, even assuming that it may be matter of doubt whether the damage to the vessel will or will not be serious and permanent. The contract, in my judgment, does not impose upon the owners the hazard of the contingency supposed.

Upon the view, therefore, which I am obliged to take of the case, I think that the decree below is erroneous, and should be reversed. There must be a reference to the clerk to ascertain the loss and damage sustained by the libellants.

Case No. 1,222.

BEECHER v. BININGER et al.

[7 Blatchf. 170.][1]

Circuit Court, S. D. New York. Feb. 11, 1870.

BANKRUPTCY — EQUITY SUIT — ACT OF 1867 — GROUNDS FOR INJUNCTION AND RECEIVERSHIP.

1. Where an assignee in bankruptcy brings a suit in equity in this court, under the second section of the bankruptcy act of March 2d, 1867, (14 Stat. 518,) against a person claiming adversely a title to property in the possession of such person, to have the question of such title, as between such assignee and such person determined, he must, in order to entitle himself to an injunction pendente lite, restraining such person from intermeddling with such property, and to a receivership thereof, show some emergency, some peril of loss which the court will be unable completely to redress; and the danger must be clear, and the right, in general, free from reasonable doubt.

[Cited in Norton v. Barker, Case No. 10,349.]

[2. Cited in Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 196, note, to the point that the appointment of a receiver is discretionary with the court.]

[In equity. Bill by John S. Beecher against Abraham Bininger and others.] This was a motion for a provisional injunction, and a receiver. [Motion denied.]

Francis N. Bangs, for plaintiff.

Roger A. Pryor, for defendants.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge. The bill of complaint herein alleges, that, by the decree of the district court, the defendants Bininger and Clark, co-partners in business, have been

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

adjudged bankrupts; that the plaintiff has, in pursuance of the provisions of the bankrupt act, been appointed assignee, and the property and estate of the bankrupts have been assigned to him, as is directed by section fourteen of the act; that the bankrupts heretofore composed the co-partnership firm of Abraham Bininger & Co.; that, prior to the institution of the proceedings in the district court, wherein they were declared bankrupts, one of the partners, Clark, had filed his complaint, in equity, in the superior court of the city of New York, for the determination of their interests in the co-partnership property, and the defendants Hanrahan and Barr had been appointed receivers of the property of the said firm, and were in the actual possession of the property; that said receivers exclude the plaintiff from any possession or control of the property, so that he cannot make an inventory thereof; that Clark will not make such inventory, and the plaintiff cannot particularly specify the same, but he gives a general description thereof, and avers that, if properly administered, it is sufficient for the payment of all the debts of the bankrupts; that nearly all of the creditors have proved their debts in the proceedings in bankruptcy; that the receivers have set themselves to defeat those proceedings, resist the attempts of the marshal to possess himself of the property under the warrants of the district court, have converted a portion of the property into money, and refuse to deliver possession to the plaintiff, or to render him an account, and claim an excessive amount as fees or commissions as receivers; and that, by these means, the plaintiff is prevented from administering his trust as assignee, and the effect and operation of the act of congress are impeded, hindered, and delayed. Upon the principal facts thus alleged, with some other details, the plaintiff seeks, by way of relief, a decree that the title of Bininger and Clark to the property is divested, except such as they may claim under and through him as assignee; that the receivers' title is divested, except so far as they have a lien for their just fees or commissions as receivers; and that they deliver the property to the plaintiff, as such assignee, to be by him administered. As auxiliary to such relief, the plaintiff prays for an injunction restraining the defendants from intermeddling with the property, restraining Clark from prosecuting his said action in the superior court of the city of New York, and restraining the defendants from preventing the marshal from taking possession of the property. He also prays that a receiver of the property may be appointed by this court.

Upon this bill the plaintiff moves for an injunction and a receiver according to the prayer. The defendant Clark and the receivers resist the motion on various grounds, and, among others, that Bininger and Clark had committed no act of bankruptcy; that the state court had acquired jurisdiction of the property, in the action brought by Clark for the settlement of the affairs of the co-partnership, before any proceedings in bankruptcy were instituted; that, by the appointment of the receivers, the title of the bankrupts was divested, and became vested in such receivers; that neither the jurisdiction of the state court, nor the title of the receivers, was divested by the decree in bankruptcy, or the appointment of the assignee; that the state court has jurisdiction to proceed with the settlement of the co-partnership affairs, the payment of the creditors of the firm, and the distribution of the property; that the receivers are warranted in acting, and are bound by law, and by their bonds as receivers, to hold and administer the property under the direction of the state court; that such property is to be deemed in legal custody, from which it ought not to be, and cannot legally be, taken by the federal courts; and that there is no ground for impeaching the administration to which the property is subject in the state court, which proceeds in such cases according to the rules of equity alike recognized by the federal and state courts, and will apply the property to the payment of the debts of the firm on equitable principles, and with the equality of distribution which governs the administration of the estate of a bankrupt in the federal court.

It is quite certain that this court cannot listen to any argument which proceeds upon the allegation that the decree by which Bininger and Clark were adjudged bankrupts was erroneous in fact or in law. The pendency of proceedings in this court for the review of that adjudication may furnish a reason why, if there is no danger of injury to the property or serious loss to the bankrupts or their creditors, this court should not summarily interfere with the temporary custody of the property; but this court will not, on a mere motion of this description, suffer a collateral attack upon that decree, and proceed upon any assumption that such decree is erroneous, but will presume the contrary to be true. On the other hand, a plaintiff coming by motion to this court, and asking its summary interposition by an injunction and a receivership pendente lite, must show other grounds than a mere conflict of claim to the title and possession of the property which is the subject of litigation.

It is quite true that proceedings in bankruptcy are summary in their nature, and that the purpose and design of the bankrupt act is to make them summary and speedy in effecting the purposes of its enactment. To this end a very extensive summary jurisdiction is given to the district court, as a court of bankruptcy, by the first section of the act. This extends to the collection of all the assets of the bankrupt, the ascertainment and liquidation of the liens and other specific claims thereon, the adjustment of the

priorities and conflicting interests of all parties, the marshalling and disposition of the funds and assets, and all matters and things to be done under and in virtue of the bankruptcy, with full authority to compel obedience to all orders and decrees in bankruptcy, to the same extent as this court has authority in any suit in equity. If, however, the case arises in which that summary jurisdiction, comprehensive as it is, seems inadequate, concurrent jurisdiction is, by the second section, given to this court, to entertain an action at law or a suit in equity by the assignee against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt, transferable to or vested in such assignee. The assignee must, in such cases, proceed at law or in equity, according to the nature of the case; and, where he proceeds by bill in equity, his suit is subject to the ordinary rules governing this court, and regulating its discretion as a court of equity, in other cases. Therefore, on an application for an injunction and a receivership, in the first instance, where the plaintiff insists that it be granted before the merits of the controversy shall be examined and considered on the proofs of both parties, on all the questions of law and fact, he must not only show a case of adverse and conflicting claims, and that the case is one of equitable cognizance, but he must show some emergency, some peril of loss which the court will be unable completely to redress; and the danger must be clear, and the right, in general, free from reasonable doubt.

The present suit is, undoubtedly, brought in reliance upon the provision of the second section of the act, for the purpose of determining the adverse claims of the receivers appointed by the state court, to hold and administer the property of the copartnership lately composed of the bankrupt defendants. So far as it seeks affirmative relief, by way of injunction or otherwise, against the bankrupts themselves, I perceive no ground for coming to this court by bill in equity. The summary jurisdiction of the district court embraces ample power to compel obedience by them to all orders and decrees necessary to enforce the surrender and appropriation of their property; and, if they are proper parties in a case like the present, in which their claims and interests may be affected, no order for an injunction against them is called for.

As it respects the other defendants, assuming, for the purposes of this motion, that the plaintiff is right in bringing his suit to determine the effect of the proceedings in bankruptcy upon the action pending in the state court, and upon the title of those defendants as receivers, what facts are shown which constitute proper grounds for invoking the immediate interference of this court, by its injunction and receivership, pending the litigation? Certainly, it is no just reason for such interference, that the defendants assert a prior jurisdiction acquired by the state court over the property, and claim thereupon the power of that court to administer it; or, that they claim that they acquired title to the property by the appointment made in the state court, before any decree in bankruptcy, and that neither the jurisdiction of the state court nor their title is defeated by that decree; or, in short, that they make any of the claims which are put forward by their counsel on this motion. Such claims are not shown to be made in bad faith, with no belief in their correctness, for the purpose of accomplishing what we are at liberty to say is unjust or inequitable, or intended to impede the administration of the property according to law. They raise questions of law and present a conflict between the parties as to what is the law in the circumstances stated. The plaintiff proposes to settle those questions, we assume, in this litigation. If the inquiry is to be entertained, it is not shown that the property is in peril of waste or loss in the custody of the state court, or that the receivers are violating their supposed duty in the temporary care of the property, or that they are irresponsible, or that they threaten or are about to remove the property from the jurisdiction of the court, or that any future determination of the questions which have arisen between the parties will be defeated, unless this motion should be granted. Nor does the circumstance that the decree itself, which lies at the foundation of the plaintiff's title, is not acquiesced in, but is sought to be reviewed, strengthen the case of the plaintiff. Provision is made in the act itself for such review, and, if the defendants deem the decree erroneous, no inference of bad faith or violation of equity arises from their seeking such review, while at the same time the legal operation and effect of the decree is denied by them to be such as is insisted by the plaintiff. These considerations lead to the conclusion that the case as now presented does not call for a preliminary injunction or a receivership. The motion must, therefore, be denied.

BEECHER v. BININGER. See Cases Nos. 1,417–1,421.

Case No. 1,223.

BEECHER v. CLARK et al.

[12 Blatchf. 256;[1] 10 N. B. R. 385.]

Circuit Court, S. D. New York. July Term, 1874.[2]

FRAUDULENT CONVEYANCES — FROM HUSBAND TO WIFE—FAILURE TO RECORD DEEDS —INTENTION —KNOWLEDGE OF WIFE—BANKRUPTCY—RECOVERY BY ASSIGNEE — PROPERTY NOT SUBJECT TO CREDITOR'S LIEN.

1. A voluntary conveyance of real estate by the owner to his wife, by means of a deed from him to a third person, and of a deed from the latter to the wife, held void, as having been made in fraud of the creditors of the husband.

[See note at end of case.]

2. The circumstance, that the deeds were not recorded until more than 18 months after they were made, and were then recorded the day before the failure in business of the firm of which the husband was a member, having been for sometime previously in his possession, commented on, as a badge of fraud.

[Cited in Clark v. Hezekiah, 24 Fed. 666.]

3. It is not necessary that the wife should have known of the fraudulent intent of the husband, to make void a voluntary conveyance to her, fraudulent on the part of the husband, as to creditors.

[See note at end of case.]

4. The husband [was] shown to have conveyed, by voluntary conveyances, to his children, for their benefit, and to his agent, for the grantor's benefit, during a period commencing soon after the deed to the wife was made, and ending immediately before the failure of the firm, real estate worth $60,000, as part of a scheme to set apart property for himself and his family, in fraud of his creditors. The real estate conveyed to the wife was of the value, at the time, of $132,000, and the husband retained in his hands, (excluding the $60,000 of real estate conveyed to his children and his agent,) property of the net value of only $25,000. He was engaged in a business which he knew to be in an embarrassed condition, when the deed to the wife was made, he lived in the city of New York, he was not in harmony with his partner, and the real estate conveyed to his wife was his most valuable property, and was all he had that was immediately available and unencumbered.

[5. Cited in Re Duncan, Case No. 4,131, to the point that the assignee in bankruptcy can recover property conveyed by the bankrupt in fraud of his creditors, even if there was no lien on such property in favor of a creditor when the petition was filed.]

[See note at end of case.]

[In equity. Bill by John S. Beecher, assignee in bankruptcy of Abraham B. Clark, against Isabella Clark and others, to set aside certain conveyances made by the bankrupt in fraud of his creditors. Decree for complainant.

[The respondent subsequently appealed, and the supreme court remanded the cause, with instructions to modify the decree. Clark v. Beecher, 24 U. S. Sup. Ct. Rep. (Lawy. Ed.) 705.]

Francis N. Bangs, for plaintiff.

Luther R. Marsh, for Mrs. Clark.

HUNT, Circuit Justice. The plaintiff is the assignee in bankruptcy of the defendant Abraham B. Clark, who, jointly with Abraham Bininger, his partner in the firm of A. Bininger & Co., was adjudged bankrupt in 1869. The object of the suit, as stated in the prayer of the bill, is to obtain a decree declaring certain conveyances, one made by the bankrupt to Thomas D. James, and the other (of the same property) by Thomas D. James and wife to the defendant Isabella Clark, void, and that the property conveyed thereby vested in the plaintiff, because conveyed in fraud of creditors. The bill of complaint alleges, as ground of impeaching these conveyances, that the conveyance to James was voluntary and without any actual consideration, and made in fraud of Clark's creditors, with intent to hinder, delay and defraud such creditors, and that that conveyance was kept secret; that the conveyance from James to Mrs. Clark, although executed and acknowledged by James on April 20th, 1868, was not actually delivered to Isabella Clark, and that that conveyance was kept secret, and was made in pursuance of the same secret trust, for the benefit of Clark, upon which said first mentioned conveyance was made by Clark to James; and, also, that the conveyance to Mrs. Clark was made in pursuance of said secret trust, and with intent to hinder, delay and defraud the creditors of Clark, and in fraud of all such creditors. A large amount of testimony has been taken, and the case now comes up on a final hearing.

The property in question consists of four lots of land on Park avenue in the city of New York, which, with the buildings upon them, were, in April, 1868, of the value of $132,000. On the 20th of April, 1868, the bankrupt, Clark, conveyed these premises to Thomas D. James, who, on the same day, with his wife, conveyed the same to the defendant Isabella Clark, wife of the bankrupt. These conveyances were dated and acknowledged on the day mentioned, but were not recorded until November 3d, 1869. The evidence of Clark is to the effect, that the deeds were actually delivered to Mrs. Clark, retained in her possession for several months, then by her delivered to him to be placed for safe keeping in the safe at the store of the firm, and, on the 3d of November, the day before the suspension of the firm, delivered by him to the proper officer to be recorded. Mr. Clark testifies, that he was advised by Mr. James, his friend and counsel, that the purpose of a record was only to secure the grantee against another conveyance by the grantor; that the conveyance was equally valid, whether recorded or unrecorded; and that he communicated to his wife this information from Mr. James, when he delivered the deeds to her. No value was paid by Mr. James or by Mr. Clark, at the time of delivering the deeds.

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

[2] [Decree modified in Clark v. Beecher, 24 U. S. Sup. Ct. Rep. (Lawy. Ed.) 705.]

The plaintiff alleges, that this transaction was fraudulent in law and in fact; that it was made with intent to defraud creditors; that such was its natural and necessary operation; that the evidence shows an intent on the part of the bankrupt to provide for his future maintenance out of property which belongs to his creditors; and that, the conveyance being "in fraud of creditors," the title of the property is "vested" in the assignee, under the bankrupt act. In Sedgwick v. Place, [Case No. 12,621,] recently decided in this district, I had occasion to examine the law on this subject, and I shall not repeat what was there said.

Two further suggestions as to the law seem to be appropriate—1st. It is held by the New York court of appeals, in the recent case of Fox v. Moyer, 54 N. Y. 125, 131, that it is only when one makes a voluntary conveyance in good faith, with no intent to defraud creditors, that it will be upheld by proof that, when he made it, he retained an ample estate to pay all his debts. 2d. I cannot assent to the proposition, that it is necessary that the grantee should have known that the intent of the grantor was fraudulent, and that she should have been an intentional party to the fraud. I do not speak of the case of a bona fide purchaser for value. I mean to say, that, if Clark knew that he was insolvent, that he was giving to his wife that which he knew was needed for the payment of his debts, that he intended thereby to secure to himself a future provision and support from property which justly belonged to his creditors, the fact that his wife received a voluntary conveyance of the same, in ignorance of these facts, will not make the conveyance a valid one.

The fact that the deed was unrecorded for more than a year and a half, is important only as an evidence of fraud. If Clark and his wife supposed that the only value of a record was to prevent the effect of another deed by him, and the wife had confidence that he would make no other conveyance, the omission to record has no significance. If the intent was to allow Clark to play fast or loose, as he might find it to his interest, to own and transfer the property, if that was to his advantage, or, in the event of misfortune, to have it protected by a concealed conveyance to his wife, the occurrence is much against the honesty of the transaction. A former unrecorded deed is referred to by both sides. In that case, Clark had made a deed to his wife of the Eighth street property, which was never recorded. He treated the property as his own, and at length sold it for the nominal sum of $20,000, taking in payment an interest in a gold mine in Virginia. Was it his purpose to treat the Park avenue property in the same manner? A jury might so infer and might deem it an evidence of fraud, to be considered with the other circumstances of the case. If the transaction were kept a secret, it would add to the gravity of the suspicion, while, if well known, the effect would be lessened by such knowledge and publicity.

I consider the conveyance of the Park avenue property to Mrs. Clark as a voluntary conveyance. The title or claim of Mrs. Clark to the Eighth street property was of a doubtful character, and the property had been sold by her permission. Any equitable claim of Mrs. Clark for its value, was or is upon the property received in exchange for it, and not in the nature of a claim on the Park avenue estate. The building of the Park avenue house was begun in 1855, and the house was completed and occupied in 1858. Everything remained in statu quo for ten years after its completion and occupation, and it was not until the occurrence of some disagreeable transactions between Mr. Bininger and Mrs. Fisher, related to Mrs. Clark by Mrs. Fisher, that she called upon her husband to fulfil his promise to convey the property to her. She did not require a conveyance in satisfaction of a debt due to her from her husband, or as an equivalent for the Eighth street property, or as a legal right, but to avoid, in the event of his death, the disagreeable circumstances that had happened to Mrs. Fisher upon the death of her husband. This is so stated by Mr. Clark himself. If Mr. Clark was indebted to his wife for money received belonging to her, the debt remained, after this conveyance, as it was before. General declarations by Mr. or Mrs. Clark of what was intended or expected to be done are of little value. Her title rests upon the deeds of April, 1868, and I think they were purely voluntary.

The pecuniary condition of Mr. Clark on the 20th of April, 1868, when the deeds were executed, is the first point to be considered. The plaintiff insists that his individual condition on that day was as follows—that he owed (1) on his Canal street property, $4,000; (2) that he was under a liability to or for the Texas and Wisconsin Improvement Company, to $30,000; (3) that he had received under the will of Agnes Clark, and which belonged to Mary Avery, up to August 11th, 1869, and which was unpaid, $13,000; (4) that, under the same will, and to the same date, he owed to Richard Clark, or his children, $14,326 69; (5) a judgment in favor of Mrs. Avery, on which was due $688 75; (6) a judgment in favor of Barnum, due, $283; (7) debt to Mrs. Mapes, $200; (8) the Damon note, $2,800; (9) that he had received, as rent, from the Chatham street property, No. 194, more than he had paid, $22,000, and No. 196, $15,000, of which two-thirds belonged to parties other than himself; (10) that, in 1861, he mortgaged his interest in the firm of Bininger & Co. to A. Bininger, for $45,000, that such amount had not been reduced by profits, and that he remained liable therefor, as a debt.

I am not certain that the last item, of $45,000, is insisted by the plaintiff to be a debt

owing by Mr. Clark. An examination of the papers on which the point arises, satisfies me that the result of that transaction was simply this: Clark had used the notes of the firm, to $45,000, for his private purposes, which the firm then, or at maturity, paid. To right the wrong, as far as it would go, Clark sold and transferred to Bininger all his interest in certain real estate on Liberty and Thames streets, as well as in the firm business, substantially went out of the firm, and became a clerk, at $6,000 a year, the firm ostensibly remaining without change. This arrangement was to continue for five years. At the end of each year the net profits were to be ascertained, and, after allowing Mr. Bininger $7,000 a year, for interest on his capital, the residue was to be equally divided between Bininger and Clark. By a separate paper, Bininger bound himself, upon payment of the sum of $45,000, to retransfer to Clark his interest in the firm. The numerous provisions by which Clark's position was reduced to that of a clerkship, it is not necessary to detail. Mr. Bininger testifies, that, under this contract, no profits ever became due to Mr. Clark. This transaction does not create a debt. It is rather a payment or compromise of an existing debt, by the sale of all his interest in four pieces of real estate in the city of New York, on Liberty and Thames streets, and in the capital stock of the firm, by one partner to his associate. If Clark owed the firm $45,000 for the cause mentioned, he did not owe that sum to Bininger. He was himself an equal partner, and one-half of the debt was due to himself, as such partner. If, again, he was bound to pay Bininger $45,000, and re-enter the firm, while he would be charged with the sum paid, he would be entitled to a credit for the value of the firm interest, to be returned to him. What this value between 1861 and 1867 [1870] [3] would be, does not appear. This item of $45,000 cannot, I think, be properly set down in the account as a debt owing by Clark in April, 1868.

The accounts against Avery, Addoms [Adams] [3] and Clark result in this, that Clark was indebted, in April, 1868, to Mrs. Avery in about $13,000, subsequently reduced to $10,261, and to the Addoms family in $4,364 22, the share of Mortimer having been paid in the summer of 1869, and to Richard M. Clark, or his family, in the sum of $14,266 74.

The Wisconsin Improvement debts, of $30,000, for which Clark had been responsible, had been paid before April, 1868, by the sureties for the company, Clark among them. All that remained of this transaction, at the date mentioned, was in the form of a note to Samuel Marsh, dated February, 1861, amounting, in April, 1868, to the sum of $1,584 28. There is a good deal of doubt about Clark's liability for this sum. There was also due on Mrs. Avery's judgment, $688 75, and on Barnum's judgment, $283.

The 9th item, of rents received from 194 and 196 Chatham street, is not correct, if intended to establish a separate debt. These items are properly to be considered as a part of the current accounts, at the date mentioned, and it may be said that the accounts show the result claimed. They are, however, but a part of the accounts between Mr. Clark and the representatives of his brother Richard and Mrs. Avery. Upon a settlement of all the accounts of Mr. Clark, including the rents of Chatham street, referred to, the balance against Mr. Clark, in favor of each of these parties, is as given under the heads 3, 4, and 5, above set forth. Charging Mr. Clark with the amount of those several items, as must be done, no other or further claim arising out of the estate of his mother can properly be made. The items above mentioned, of 3, 4, 5, 6, 7, and 8, were lawful debts due by Mr. Clark at the time of making the deed to his wife. His debts, at that time, amounted to $31,298 44. The Canal street mortgage I shall deduct from the assets, when examining the value of his property.

The next inquiry is—what individual property did Clark possess at that date, viz., April 20th, 1868? The defendant insists that he was at that time abundantly solvent, with ample property (independent of that conveyed to his wife) to pay all his debts and leave a large surplus.

1. The first item of the property is that of eight thousand acres of land in Wisconsin. The cash value of these lands, if required to be turned at once into money, it would be difficult to fix. So far as it appears, the titles were perfect, the taxes were paid, and they were free from incumbrance. The fair value of these lands, as they are ordinarily sold, and as established by the witnesses for the plaintiff, together with about $3,500 in contracts for lands already sold, stated by Mr. Clark at $11,900, may be taken at $60,000.

2. The house and lot, 130 Canal street. The value of this is proved by Mr. Clark and Mr. Gardner to have been $20,000. It was subject to the incumbrance hereinbefore mentioned, of $4,000, and is to be carried out at $16,000.

3. The one-third interest in Nos. 194 and 196 Chatham street, which, according to Mr. Clark's evidence, rented for $10,000 per annum and repairs, and was worth $100,000. There is no other evidence on the subject. Mr. Clark's one-third interest was of the value of $33,333. This property is subject to a mortgage of $13,000, of which one-third is to be deducted from Mr. Clark's interest, viz., $4,333 33, leaving a value of $29,000, subject to the dower interest of his wife. I have no means of ascertaining the value of the dower, but take it, by conjecture, at one-sixth of the value, $4,866 66, leaving Clark's

[3] [From 10 N. B. R. 390.]

interest in the property to be the sum of $24,133 34.

4. Mr. Clark also testifies, that there were debts due to him individually, amounting to $5,000, and that he had $1,000 cash in hand, making, for this item, $6,000.

5. A stipulation in the case shows, that Mr. Clark owned Velvet Company stock, of the value nominally of $5,000, but sold for $725, and that he was entitled to a legacy, under the will of his uncle, Thomas L. Clark, of $3,200, making an aggregate of $3,925.

6. There appears, by the report of the referee, made in the suit of Sarah E. Clark against Abraham B. Clark, to have been an overpayment to her of $1,660 73, "irrespective of any claim he might have upon her for the sum of $1,327 16, advanced for education and clothing of the children of Richard Clark." I do not see why this does not establish a claim for $1,660 73.

7. His Park avenue property was, at that time, worth the sum of $132,000.

The value of the property of Mr. Clark, owned by him individually, may be put at the sum of $248,585 73, the aggregate of the details last above set forth. Assuming the value of Mr. Clark's lands in Wisconsin to have been, as I have stated it above, a further question is made in relation to them. The evidence shows, that, by five deeds, the first one of which is dated September 24th, 1868, and the last November 1st, 1869, Mr. Clark conveyed these lands to his children and to his agent; that he owed his children but a few hundred dollars, and his agent but a small amount; and that he intended to give his children the value of the lands in excess of the debts, and intended that his agent, after indemnifying himself against certain liabilities, should hold the lands conveyed to him for the benefit of Mr. Clark. The first of these conveyances was made within five months after the conveyance to his wife, and nearly a year before that conveyance was recorded, the last one at about the time of the failure of the firm. Were these conveyances to his wife and to his children and agent a part of the same scheme? When he conveyed to his wife, did he intend to make the other conveyances which he afterwards did make? If so, the lands are not only not to be counted among his assets, but the fact tends to characterize the whole transaction as fraudulent. As I make it, Mr. Clark individually was indebted, at the time in question, in the sum of $31,298 44, and had property of the value of $248,585 73, leaving a balance in his favor of $217,287 29. If we hold the Wisconsin lands as not to be credited as a part of his estate, deducting their value, as estimated, $60,000, it leaves his estate $157,287 29. Of this he gave to his wife the Park avenue property, of the value of $132,000, retaining in value, for himself $25,287 29.

We come, next, to an examination into the affairs of the firm of A. Bininger & Co., of which Mr. Clark was a member. What was its condition on the 20th of April, 1868? The actual capital of the firm was never large. Bininger, Clark & Fisher succeeded Jacob Bininger in 1837, but it does not appear that either of them put any money into the business, or that they had any money. The business seems to have been reasonably profitable up to 1861. The events of the rebellion are said to have added to the value of their goods on hand. At that period, viz., 1861, the firm became embarrassed, and a suspension was threatened. Mr. Clark had used $45,000 of the notes of the firm for his private purposes, and then made the transfer of his interest to Mr. Bininger, of which notice has already been taken. The coal lands and gold mines, in which the firm property had been invested, were not productive, but made large drafts upon the profits made by the legitimate business of the firm. Mr. Bininger, when in Europe for a year and a half, had drawn upon the firm to the extent of $40,000, for private purposes. In November, 1869, the difficulties culminated in an open failure.

There is but little direct evidence of the condition of the firm in April, 1868. Its condition at the failure (November 4th, 1869) was fully proven, and we must reach a knowledge of its condition in April, 1868, by a comparison of the condition at that time and as it stood in November, 1869. The assets may be thus stated: (1) At the time of the suspension there was cash actually on hand, $4,735.38. (2) The stock of wines and liquors on hand is put by Clark and by Bininger at the value of $120,000. (3) In the same manner, the debts due to the firm are put at $35,000 to $40,000, say $35,000. (4) Andrew Bininger owed the firm, for money borrowed, the sum of $50,000. I should doubt whether this debt was of any real value. (5) The real estate in which the firm carried on its business, 92 and 94 Liberty street. I take Mr. Bininger's estimate of this value, and the circumstance that the property rents for $11,300. He puts it at $80,000 to $100,000, say $90,000, subject to a mortgage of $24,000. This gives a net value of $66,000, of which the firm owned two-thirds, $44,000. (6) Nos. 18 and 20 Thames street. This property was sold at auction for $14,050, which was less than its value. I should judge it to be worth about $20,000, from which is to be deducted a mortgage of $4,000, being $16,000 in value. Of this, two-thirds was owned by the firm, making $10,666. (7) The Briarport estate, in West Virginia, of 5,000 acres of coal and timber lands, estimated by defendants' counsel at $40,170. This property cost the firm from $65,000 to $70,000. Without going into an examination of the evidence, I content myself with saying, that I have read it all, and that I think $25,000 is a full allowance for the value of this item of property. (8) The Vaucluse mines, in Virginia, with the lands, farms, buildings and machinery connected therewith, put down by

the defendants' counsel at the sum of $25,000. I think the full value of this property, $12,900, was obtained upon the sale in 1871. That sale was to the owner of adjoining property, and was extensively advertised.

Upon this statement, the assets of the firm, in November, 1869, stood thus: Cash, $4,735 38; stock on hand, $120,000; debts due the firm, $35,000; Liberty street property, $44,000; Thames street property, $10,666; Briarport property, $25,000; Vaucluse property, $12,900—being a total of $252,301 38. The assets of the firm were reduced by the payment of $25,000 on account of Wagstaff, in August, 1869. The firm was better off by that amount in April, 1868, than it was in November, 1869. To the above amount of assets, should, therefore, be added $25,000, to ascertain the condition of the firm assets in April, 1868, making a result of $277,301 38. The actual results, in turning these assets into the means of paying the debts of the firm, by no means came up to this estimate.

As to the debts and liabilities of the firm of Bininger & Co. in November, 1869, the plaintiff's counsel, in his brief, states them at $220,000. The defendants' counsel states them at $216,510 67. The difference is not material for the purposes of the present suit. This indebtedness consisted of notes of the firm, issued between May 4th, 1869, and October 26th of the same year, and maturing in November of that year. To meet it, the firm had practically assets to the amount of $159,735 only, viz., cash, $4,735; stock on hand, $120,000; and debts due to the firm, $35,000, assuming such debts to be not only good, but immediately available. The other property consisted of real estate, of which the Liberty street portion was necessary for the transaction of its business, was already subject to a mortgage of $24,000, and was in the form of an undivided interest. The Virginia coal and gold lands were not in a condition to afford any considerable relief to the immediate necessities of the firm. The Thames street property was also mortgaged and consisted of an undivided interest. Nominally, the firm had a surplus of $66,125; practically, it was deficient to the extent of $56,775. The struggle for existence was continued during the year 1868 and the most of the year 1869, but was abandoned on the 4th of November of that year, at which time the failure of the firm was announced.

In ascertaining Mr. Clark's condition, as one of this firm, and whether made rich or poor by his connection with it, I am disposed to consider it an evenly balanced affair. No injustice is done if we say that the firm was able to take care of itself, and there leave it. The subsequent failure and unfortunate winding up of the firm will hardly warrant this conclusion, but I am inclined here to hold, that Mr. Clark stood as if not connected with the firm, that is, neither benefited nor injured in his pecuniary position, by being one of the firm of A. Bininger & Co.

Upon mature reflection, I am not able to satisfy myself that the motive of Mr. Clark, in not recording the deeds of April, 1868, to and from James, was an honest one. The idea of actual dishonesty was, perhaps, not present to his mind. He intended to stand before the world, before his partner, his sister, the children of his brother and his creditors generally, as the owner of this valuable estate. At the same time he intended to have it in a shape in which it would enure to the benefit of himself and his family, should that resort become necessary. His family would have called upon him to secure their debts, his general creditors would have become clamorous for payment, had they known the fact that he had conveyed his Park avenue property to his wife. Not being aware of it, they remained at ease, in reliance upon his ownership.

Neither am I able to satisfy myself as to the honesty of the conveyances of the Wisconsin lands to his children. These conveyances were substantially voluntary, they began within a few months of the voluntary deed to his wife, and they ended immediately before his open failure. The lands had been held by him for many years, and now, soon after the deed to his wife, and when the day of failure was rapidly approaching, he voluntarily conveys them to his children, for their benefit, and to his agent, for his, Clark's, benefit. Like the others, these deeds are left unrecorded. The deeds to his wife and to his children seem to me parts of a scheme to secure and set apart property for the benefit of himself, which justly belonged to his creditors, and which was necessary for the payment of their debts. Regarding them in this view, no part of the plan can be upheld. The Park avenue property forms a part of the scheme, and it must be deemed to have been fraudulently conveyed.

I have assumed, upon the evidence, that the affairs of the firm would take care of themselves, and that Clark individually had a surplus of property beyond his debts. That his firm and himself have gone into bankruptcy shows that this assumption was, probably, erroneous. The endeavor to protect his family by the means adopted, is very strong evidence that Clark did not believe this to be true, and that he wished to shield those he loved from results which he clearly foresaw. Living in the city of New York, subject to the great expenses necessarily there incurred, engaged in a business which he knew to be in an embarrassed condition, although nominally possessing property sufficient to pay its debts, not in harmony with his partner, he strips himself of his most valuable property, of all that is immediately available and unencumbered, by transferring it to his wife by a concealed conveyance. He follows this by conveyances to his sons and agent, of his remaining unencumbered property, by conveyances also concealed. These deeds are all voluntary. They were brought forth for rec-

ord only the day before the failure of the firm. The result is, if his views are carried out, that Clark's wife holds an estate in the city of New York worth $132,000, for which she paid nothing, and his sons hold the Wisconsin property, which he declares to be worth $70,000, and which I estimate at $60,000, for which but a few hundred dollars are paid, while his creditors are unprovided for.

It is with reluctance that I have reached the conclusion, that the conveyances to Mr. James and Mrs. Clark, of April 20th, 1868, are fraudulent, but such is my opinion, and I cannot do otherwise than to hold accordingly. [The conveyance was fraudulent as to the creditors. Mr. Clark did not leave himself an amount of property as large as he should have retained. On both of these grounds the prayer of this bill must be granted.] [4]

[NOTE. This case was appealed to the supreme court, which remanded the cause, with instruction to modify the decree. Clark v. Beecher, 24 U. S. Sup. Ct. Rep. (Lawy. Ed.) 705. Mr. Justice Swayne, in delivering the opinion, said: "We therefore deem it sufficient to say that we are satisfied with the judgment of the circuit court upon the main point brought before it for consideration. We think the conveyance complained of was properly condemned as fraudulent, and therefore held to be void. But it is equally clear that the personal decree against the appellant for the rents, issues, and profits, and the use and occupation of the premises, was erroneous."]

Case No. 1,224.

BEECHER v. GILLESPIE.

[6 Ben. 356.] [1]

District Court, S. D. New York. Feb. Term, 1873.

WILL—VESTED REMAINDER—NOTICE OF BANKRUPTCY PROCEEDINGS.

1. In 1853 the will of T. L. C. was admitted to probate. It made G. executor, and by it all the property of T. L. C. was given to his executor, to be sold and converted into money, and the proceeds invested. The executor was to apply the income to the use of the wife of T. L. C. during her life. On her death, the executor was to stand possessed of $10,000 of the principal, in trust for a niece. and the rest he was to pay over and divide among several persons named (one of whom was A. B. C.), "their heirs, executors, administrators, and assigns forever, in equal shares, as tenants in common, per capita, the issue of any such person named who may be then dead, to take his or her deceased parent's share." On December 22d, 1869, A. B. C. was adjudged a bankrupt, and on January 22d, 1870, an assignment in bankruptcy was executed to B. The widow of T. L. C. died in April, 1872, and G. then proceeded to close up his trust, and the share to go to A. B. C., who had survived the widow, was $3,249 27. G. drew his check for that amount, dated May 11th, 1872, in favor of A. B. C., and gave it to his counsel, C., to give to A. B. C. C. had had actual knowledge of the fact that A. B. C. had been adjudged a bankrupt, and that B. was his assignee. He delivered the check to A. B. C., and took from him a release of the executor. On the 17th of May the check was deposited in a savings bank to the credit of the wife of A. B. C., with other moneys. On the 16th of June, the savings bank was notified by B. that he claimed the money, as assignee of A. B. C., and, on the 20th of June, B. filed this bill in equity against all the parties, to recover the money: *Held*, that, under the will, A. B. C. had a vested interest in the money at the time of the adjudication in bankruptcy, which was part of his estate, and passed to his assignee, and it made no difference whether G. had any actual notice of the bankruptcy proceedings or not. That G. was chargeable with notice of the bankruptcy proceedings, by reason of the actual knowledge of them by his counsel, C., even though such knowledge did not recur to the mind of C. at the time of the delivery of the check.

2. That no title to the money had passed to the wife of A. B. C., or to the savings bank.

3. That the bank was entitled to deduct its costs from the fund, and must pay over the remainder, and that B. was entitled to a decree against G. and A. B. C. for the amount of the check, less the amount so paid over by the savings bank.

[In bankruptcy. Bill by John S. Beecher, assignee of Abraham B. Clark, against George D. H. Gillespie, executor, etc., of Thomas L. Clark, Abraham B. Clark, Isabella Clark, and the Citizens' Savings Bank. Decree for complainant.]

F. N. Bangs, for plaintiff.
J. P. Crosby, for Gillespie.
Marsh & Wallis, for Clark and wife.
J. E. Wheeler, for the bank.

BLATCHFORD, District Judge. On the 31st of March, 1848, Thomas L. Clark executed his last will and testament. It was duly proved as a will of real and personal estate, before the surrogate of the county of New York, on the 5th of October, 1853, and on the same day letters testamentary thereon were granted to the defendant George D. H. Gillespie, one of the executors named therein. The will, after giving two legacies of money, proceeds: "I give, devise, and bequeath to the executors and trustees in this my last will and testament named, and the survivor of them, or unto such one or more of them as may take upon themselves or himself the burden of the execution of this my last will and testament, his or their heirs, executors, administrators and assigns forever, upon trust, for the purposes of this my will, all my real estate, lands, tenements and hereditaments, whether in possession, reversion, remainder or expectancy, and all my personal estate of what nature or kind soever, not before disposed of, upon trust, to receive the rents and profits of the same hereditaments, and to recover and receive such personal estate as soon as conveniently may be, and to sell and dispose of and convey all and singular my said real estate, by public auction or private contract, unto any person or persons who shall become and be the purchaser or purchasers thereof, for the most money that can reasonably be had for the same, and to receive the moneys for which the same shall be sold; * * * and I will and direct my said trustees and ex-

[4] [From 10 N. B. R. 398.]

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

ecutors to invest the proceeds of my personal estate, and the moneys arising from the sale of my real estate, after payment of all my just debts, and of the aforesaid legacies, in government or real securities, or in bank or other stock, with power, from time to time, to alter and transpose such securities or stocks, at their discretion; and, as to the dividends, interest and income to arise from the said stocks, funds and securities, and the rents and profits of my said real estate, to be received by my said executors, I direct that my said trustees and executors do and shall apply the same to the use of my said wife, to and for her own sole benefit, for and during her natural life; * * * and, from and immediately after the decease of my said wife, I will and direct that, as to ten thousand dollars of the principal moneys to be invested as aforesaid, my said executors and trustees shall stand possessed of the same, in trust, to apply the interest thereof to the use of my niece, Mary Ann, the wife of my executor George D. H. Gillespie, for and during her natural life; * * * and, as to all the rest and residue of the said principal moneys to be invested as aforesaid, I will and direct, that, from and immediately after the decease of my said wife, my said executors and trustees shall pay over and divide the same unto and among my nephews and nieces William N. Clark, Catharine Ann Wolfe, Edwin Clark, Daniel S. Clark, and Richard Smith Clark, the children of my brother John Clark, and Abraham B. Clark, Richard M. Clark, and Mary Addoms, the children of my brother Richard S. Clark, their respective heirs, executors, administrators and assigns, forever, in equal shares, as tenants in common, per capita, the issue of any such child or either of my said brothers who may be then dead, to take his or her deceased parent's share."

On the 22d of December, 1869, the defendant Abraham B. Clark, named in the will as a child of Richard S. Clark, was adjudged a bankrupt by this court. The plaintiff was appointed his assignee, and, on the 22d of January, 1870, an assignment under the bankruptcy act, in the usual form, was executed to the plaintiff.

The widow of Thomas L. Clark, the testator, died in April, 1872, and the defendant Gillespie then proceeded to close his trust. After providing for the $10,000 set apart for the use of his wife, he ascertained the balance left for distribution to be $25,994 14. Of this sum, one-eighth, or $3,249 27, was to go to the defendant Abraham B. Clark, who survived the widow. The entire fund was on deposit in a bank to the credit of the defendant Gillespie, as executor. A check on such bank for $3,249 27, drawn by the defendant Gillespie, as executor, payable to the defendant Abraham B. Clark, or order, and dated May 11th, 1872, was, by the direction of the defendant Gillespie given to the defendant Abraham B. Clark. He signed a release to the executor, on receiving the check, on the 16th of May, 1872. He also indorsed his name on the check. The check, so indorsed, was, on the 17th of May, 1872, deposited in the bank of the defendants the Citizens' Savings Bank, to the credit of the defendant Isabella Clark, the wife of the defendant Abraham B. Clark, and formed part of a sum of $3,250 credited by said bank to her account that day, as deposited to her credit that day. The check for $3,249 27 was collected by the Citizens' Savings Bank. On the 6th of June, 1872, Isabella Clark had on deposit to her credit in the said savings bank $4,290. On that day she withdrew from it $76, leaving $4,214. On the 16th of June, 1872, the said savings bank was notified, in writing, by the plaintiff's attorneys that the check referred to was obtained by the fraud of Abraham B. Clark, that said Clark was adjudged a bankrupt on the 22d of December, 1869, and that they were requested to retain the proceeds of the check to abide such formal claim as might be made upon them. The bill in this suit was filed on the 20th of June, 1872. The savings bank has allowed interest to Isabella Clark, on her deposits, at the rate of six per cent. per annum. On the 1st of July, 1872, the bank credited her account with $32 25 interest, and, on the 31st of August, 1872, she withdrew from the bank $996, leaving to her credit there $3,250 25. All the other legacies provided for by the will have been paid, and all the other legatees have given releases to the defendant Gillespie.

The bill alleges that the defendant Gillespie, although knowing of the insolvency of Abraham B. Clark, and having notice of the appointment of the plaintiff as his assignee, and of the title of the plaintiff to the legacy, placed the amount of the legacy in the hands of Abraham B. Clark; and that Abraham B. Clark, with intent to defraud the plaintiff, and to prevent the said sum from coming to the plaintiff's possession, fraudulently placed it in the hands of the Citizens' Savings Bank, and caused the bank to enter it on its books as a sum deposited with the bank by his wife, the defendant Isabella Clark.

The bill prays for a decree that the plaintiff is entitled to the amount of the legacy, and the interest thereon, and that the defendants may be decreed to account for and pay the same to the plaintiff; that Abraham B. Clark and his wife may be enjoined from collecting the amount of the legacy, or the proceeds thereof, from the savings bank and from Gillespie; and that the bank and Gillespie may be enjoined from paying the amount of the legacy, or the proceeds thereof, to any other person than the plaintiff.

The answer of Gillespie avers, that, not knowing that Abraham B. Clark was insolvent, or that the plaintiff was his assignee in bankruptcy, and having had no notice thereof, he, in good faith, gave the check to Abraham B. Clark. It denies the right and

title of the plaintiff to the money, and avers, that, if the fund belongs to the plaintiff, the savings bank should be decreed to pay the amount deposited with them, with interest thereon, to the plaintiff, they holding the same in trust for the account of Abraham B. Clark.

The answer of Abraham B. Clark and his wife avers that the legacy was rightfully paid to Abraham B. Clark; that, under the will, he was the only person entitled to it; that the plaintiff never had any right, title, or interest in it, and it never vested in him; that it did not vest in Abraham B. Clark until after the appointment of the plaintiff as assignee, and until the death of the widow; and that Abraham B. Clark, being indebted to his wife in a large amount of money, paid to her, on account of such indebtedness, the sum which he received as the legacy, and she deposited it, as her own money, with the savings bank, and it was mingled with other moneys deposited there by her.

The answer of the savings bank admits that Isabella Clark has on deposit with the bank a larger sum of money than that paid to Abraham B. Clark by Gillespie, and leaves the plaintiff to prove his case.

It is urged, for the defendants, that, under the will, the legacy did not vest in Abraham B. Clark until the death of the widow of the testator, in April, 1872; that, under the will, the whole property was converted into personal estate, for all purposes; that no specific legacy was absolutely given to Abraham B. Clark with merely a postponement of the time of payment, till the death of the widow, so as to vest the legacy in him on the death of the testator; that, as the proceeds in the hands of Gillespie were not to be divided until the death of the widow, the share of Abraham B. Clark did not vest in him until the death of the widow; that no portion of the estate was set apart for Abraham B. Clark, payable in the future; that, until the death of the widow, it could not be determined who were entitled to the legacies; and that Abraham B. Clark could not have assigned or disposed of the legacy before the death of the widow, so as, as against his issue, to have vested a title to the legacy in the transferee, if he himself should not survive the widow.

It is impossible to distinguish this case from that of Lawrence v. Bayard, 7 Paige, 70. There, on the death of Margaret Leake, one-fourth of the proceeds of some bank stock was to be paid to the then surviving oldest son of William Bayard, the elder. He had two sons, William and Robert, of whom William was the elder, and both of whom survived Margaret Leake. Before the death of Margaret Leake, William, in 1832, sold and assigned to one Hall his contingent interest in the proceeds of the bank stock to which he would be entitled as the eldest son, if he should survive Margaret Leake. Hall claimed, under the assignment, as against creditors of William, who, after the death of Margaret Leake, took proceedings to reach the interest of William in the property. It was contended, for the creditors, that the interest of William was a naked possibility, which could not pass by assignment. The chancellor says: "There is no foundation for the objection that the interest of W. Bayard was of such a nature that it could not pass by sale or assignment before the death of Mrs. Leake. It was not a mere naked possibility coupled with an interest; but it was a vested remainder in one-fourth of the six hundred shares of the bank stock, according to the statutory definition of vested remainders, for W. Bayard was the person in being and ascertained, who would, at the time of the assignment, in 1832, have had an immediate right to the possession of such bank stock, if the life estate of Mrs. Leake therein had then ceased. See 1 Rev. St. p. 723, § 13. He was the oldest son, to whom this remainder in fee was limited, subject only to be divested by his death during the continuance of the particular estate or interest of Mrs. Leake, and in the lifetime of his brother Robert. The limitation of the remainder in fee to W. Bayard was, therefore, vested in interest. But I admit the substituted remainder to Robert necessarily remained contingent so long as his elder brother was living. Nothing could defeat W. Bayard's right to the bank stock or its proceeds, as an interest in possession, if he continued to live until the life interest of Mrs. Leake terminated. And it is the present capacity of the individual to take the remainder in possession, if the particular estate should immediately determine, which vests his remainder in interest; and not the absolute certainty that such remainder will ever in fact become vested in possession in him. Per Nelson, C. J., 16 Wend. 137; Watk. Conv. (8th London Ed.) 123; 5 Paige, 466. And nobody ever doubted that a remainder which was vested in interest could be transferred, both at law and in equity. Again, the Revised Statutes, which were in operation when this sale was made, have declared, in express terms, that expectant estates are devisable, descendible and alienable, in the same manner as estates in possession. 1 Rev. St. p. 725, § 35. And, by an examination of the several provisions of the Revised Statutes, it will be seen, that, by the term 'expectant estates,' the legislature intended to include every present right or interest, either vested or contingent, which may, by possibility, vest in possession at a future day. The mooted question, whether a mere possibility coupled with an interest is capable of being conveyed or assigned at law, is, therefore, forever put at rest in this state." In the present case, Abraham B. Clark was the person in being, and ascertained, who would, at the time of the commencement of the proceedings in bankruptcy, to which time the

plaintiff's title, by assignment, relates back, have had an immediate right to the possession of the legacy, if the life estate of the widow had then ceased. The remainder in fee was limited to him, subject only to be divested by his death during the life of the widow. The limitation of the remainder in fee to him was, therefore, vested in interest. Nothing could defeat his right to the legacy, as an interest in possession, if he continued to live until the life interest of the widow terminated. He had, at the commencement of the proceedings in bankruptcy, a then present capacity to take the remainder in possession, if the particular estate should immediately determine. It is of no moment that he might have died before the widow died. If he had so died, the remainder in fee would have been divested. But it was vested in interest in him at the commencement of the proceedings in bankruptcy, and it was then transferable by assignment. Moreover, his interest, under the will, to the legacy, was an expectant estate, because it was a present right or interest, either vested or contingent, which might, by possibility, vest in possession at a future day.

That the right to the legacy passed to the plaintiff, as assignee in bankruptcy of Abraham B. Clark, under section 14 of the act, there can be no doubt. It was a part of the property and estate of the bankrupt. Moreover, it was, at least, a right in equity.

The title of the plaintiff to the legacy vested at the commencement of the proceedings in bankruptcy, and certainly was vested by the making of the assignment on the 22d of January, 1870. The question is one of title; and it makes no difference whether Gillespie had or had not notice of the bankruptcy of Abraham B. Clark, and of the assignment to the plaintiff, when he gave the check to Abraham B. Clark. The money which Gillespie caused to be paid on the order of Abraham B. Clark, indorsed on the check, was the money of the plaintiff; and, even if Gillespie dealt with Abraham B. Clark in good faith, and without notice of the bankruptcy proceedings, still he is not protected, as against the plaintiff. Mays v. The Manufacturers' Nat. Bank, [64 Pa. St. 74;] Miller v. O'Brien, [Case No. 9,586.]

But, the evidence in the case is sufficient to charge Gillespie with notice of the plaintiff's title. Gillespie testifies that he delivered the check to his counsel, Mr. Crosby, with the instruction to him to notify Abraham B. Clark to call on him and obtain the check. Mr. Crosby's clerk testifies that Abraham B. Clark came to Mr. Crosby's office, in the absence of Mr. Crosby, and that he, the clerk, under Mr. Crosby's instructions, gave the check to Abraham B. Clark. Mr. Crosby is shown to have known, in June, 1871, of the bankruptcy of Abraham B. Clark, and of the fact that the plaintiff was his assignee in bankruptcy, and to have been, at that time, a creditor of Abraham B. Clark, and of his former partner, Bininger, and to have at that time made claim, to the plaintiff's attorney, to a lien for his debt on property which the plaintiff, as assignee, was about to sell at auction, and to have attended, early in the summer of 1871, at the sale (at which the plaintiff, as assignee in bankruptcy of Clark and Bininger, was announced as the seller), and there given notice publicly of his claim, and to have been examined, before May, 1872, and after such sale, as a witness on the part of the plaintiff, in a suit brought by the plaintiff, as assignee in bankruptcy of Clark and Bininger. There is no evidence to show that Mr. Crosby did not, at the time the check was delivered to Abraham B. Clark, have knowledge of the fact that Abraham B. Clark was an adjudged bankrupt, and that the plaintiff was his assignee in bankruptcy; or to show that the knowledge which he had in June, 1871, and afterwards, was not retained by him until and at the times the check was delivered to Abraham B. Clark and the money was drawn on it, and was not then present to his mind in fact, although he did not happen to recur to it. It was knowledge which he was at liberty to communicate to Gillespie. To suppose that he did recur to it, and yet did not communicate it, would imply fraud. No suggestion of that kind can be or is made. Yet the fact, which must be assumed, that he did not recur to the knowledge, is no evidence, in view of the short lapse of time, that the knowledge was not retained by him and was not present to his mind, in the sense of the rule laid down in the Case of The Distilled Spirits, 11 Wall. [78 U. S.] 356. Mr. Crosby gives no testimony on the subject. On the facts of this case, and under the decision in the case cited, I think that Gillespie was bound by the knowledge possessed by Mr. Crosby.

No attempt has been made to prove the indebtedness set up, of Abraham B. Clark to his wife; and, so far as respects the $3,249 27, acknowledged by the Citizens' Bank to have been received by it on the 17th of May, 1872, it must be regarded as the specific money which went out of the funds of Gillespie, as executor, and as standing in the same position as if it were still in the hands of Abraham B. Clark. As against the plaintiff, it was fraudulently obtained by Abraham B. Clark from Gillespie. No title to it has passed to the savings bank or to Isabella Clark. No person has taken it from Abraham B. Clark in the course of business, or allowed an equivalent for it; and the plaintiff has a right to follow it into the hands of Abraham B. Clark and of Isabella Clark, and of the savings bank.

The plaintiff is entitled to a decree against the defendants Gillespie and Clark personally, for the $3,249 27, with interest from the 16th of May, 1872, and to a decree that the savings bank pay to the plaintiff, in exoneration of such liability of Gillespie and Clark, pro tanto, the sum of $3,249 27, with such in-

terest thereon, from May 17th, 1872, as such bank would have allowed on such deposit to Isabella Clark, less the amount of its costs in this suit to be taxed. When this suit was brought, the bank had on deposit to the credit of Isabella Clark, not only the $3,249 27, but $964 77 more. Isabella Clark is liable to the plaintiff for such interest as she was entitled to receive from the bank on the money, and if the bank has paid any of it to her since the suit was brought, it has paid it with notice. The bank is entitled to charge Isabella Clark in account with the amount it shall so pay to the plaintiff, and to be protected against any claim by her hereafter for such amount, by an injunction to that effect.

The plaintiff is entitled to costs against all the defendants but the bank, and the bank must recover its costs, in the manner above mentioned.

Case No. 1,225.

BEECHER et al. v. GILLETT et al.

[1 Dill. 308.] [1]

Circuit Court, D. Nebraska. 1871.

REMOVAL OF CAUSES—PARTIES—SUBSTITUTION OF NON-RESIDENT FOR RESIDENT.

In an action of replevin commenced in the state court by a resident citizen against a sheriff who has seized goods at the instance of non-resident creditors, the latter under a statute of the state by the order of the state court, were substituted as defendants "in lieu" of the sheriff who was discharged from liability: *Held*, that being thus made sole defendants, the non-resident creditors were entitled, on filing the requisite petition, to have the cause removed to the proper federal court.

At law. On motion to remand the cause to the state court. This is an action of replevin, commenced originally in one of the state courts. The plaintiffs in the action are Beecher & Toncray. The defendant in the petition in replevin was one A. J. Arnold, sheriff of Platte county. The goods sought were taken on the writ of replevin by the coroner and delivered to the plaintiffs. The sheriff filed an answer in the state court and claimed therein to hold the property by virtue of a writ of attachment directed to him in a suit in one of the state courts, wherein Gillett & King were plaintiffs, and Dale & Co., were defendants, and that he seized and held the said property as the property of Dale & Co. Under provisions of a statute of the state of Nebraska, the sheriff subsequently filed his affidavit stating, in substance, that he had no interest in the suit except as an officer; that the real parties in interest were Gillett & King, and he asked the court "to substitute them in his stead as parties defendant to the action." The court, after argument, granted the application, and entered an order that the said Gillett & King "be, and they are hereby, made parties defendants in this action in lieu and in the stead of A. J. Arnold, sheriff, &c., and the said Arnold is hereby discharged from all liability to the parties to this action, in respect to the subject matter thereof." When the order of substitution was made, Gillett & King filed their petition in the state court for the removal of the cause into the circuit court of the United States. The petition for removal describes the nature of the replevin action and states that the petitioners are the real defendants; that the amount in controversy exceeds $500; that the petitioners, Gillett & King, are citizens of the state of Illinois; that from prejudice and local influence they will not be able to obtain justice in the state court, and offers the requisite security for entering copies, &c., in the circuit court. The state court ordered the cause to be removed; and in this court the plaintiffs now move that the same be remanded to the state court. [Denied.]

Woolworth & Doane, for the motion.
Redick & Howe, opposed.

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

DILLON, Circuit Judge. The state court construed the statute of the state to authorize the substitution of the creditors as parties in the place of the sheriff, and if that ruling were before us for review, we are not prepared to hold that it was erroneous. St. Neb. 1867, p. 400, §§ 48, 49. The substitution of the parties for whom the sheriff acts "in lieu" of the sheriff, in an action brought against him for the recovery of personal property taken under execution, or for the proceeds of such property, is expressly provided for; and the extension of the right, by construction, to property taken under attachment is not unreasonable, and was regarded by the state court as within the true meaning and purpose of the enactment. Such legislation is not unusual. Revision Iowa, 1860, § 2768; Gunn v. Gudehus, 15 B. Mon. 449.

Gillett & King were made defendants in lieu of the sheriff, who was discharged from all liability to the present plaintiffs. Upon this order being made, Gillett and King, who were citizens of another state, filed their petition in due form for the removal of the cause. They were nonresident creditors of Dale & Co., resident debtors. The latter made a sale of their property to the present plaintiffs, also residents of Nebraska. The validity of this sale Gillett & King attacked by their attachment levy.

The adversary parties to the controversy are Gillett & King, of Illinois, on the one side, and the present plaintiffs, of Nebraska, on the other. By the order of the state court (which we must assume to be correct), Gillett & King were made the sole defendants on the record, and filed their petition for removal in due form, stating the existence of local influence and prejudice. This case is

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

distinguishable from Nye v. Nightingale, (1860,) 6 R. I. 439, decided under section 12 of the judiciary act, [1 Stat. 79,] where the resident officer was held to be not only a party, but a necessary party. In our judgment, the court properly ordered the removal, and the motion to remand is denied.

Motion overruled.

BEECHER, (WILBUR v.) See Case No. 17,634.

Case No. 1,226.

In re BEEDE.

[19 N. B. R. 68;[1] 26 Pittsb. Leg. J. 172.]

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

BANKRUPTCY—RIGHTS OF BANKRUPT—HOMESTEAD ESTATE IN EQUITY OF REDEMPTION.

The bankrupt's estate consisted in part of a farm on which he resided, which was subject to a mortgage. Under the laws of the state, he was entitled to a homestead exemption to the value of five hundred dollars. The farm having been sold free of such homestead right, *held*, that the bankrupt was entitled to a homestead of the full value of five hundred dollars in the equity of redemption, and that such sum should be paid to him out of the avails of the sale.

[In bankruptcy. In the matter of the determination of the homestead interest of Freedom D. Beede, a bankrupt, in the proceeds of a sale by the assignee of land, subject to a mortgage. Decree for bankrupt.]

WHEELER, District Judge. Part of the estate of the bankrupt consisted of a farm, on which he resided, worth four thousand five hundred dollars, subject to a mortgage of one thousand eight hundred dollars, out of which his homestead right, if he has any, and whatever it is, cannot be taken without detriment to the residue. The bankrupt law [of 1867, (14 Stat. 523,)] excepts out of the conveyance to the assignee, and leaves owned by the bankrupt, among other things, such property as is exempted from attachment and levy of execution by the laws of the state where the bankrupt resides to the amount so allowed by the laws existing in the year 1871. The laws of Vermont now, and in 1871 did, exempt the homestead of every housekeeper or head of a family, consisting of a dwelling-house, out buildings, and the land used in connection therewith, to the value of five hundred dollars, from such attachment and levy. The assignee has asked, and, with the consent of the bankrupt, had granted to him, leave to sell the farm free of the homestead right of the bankrupt, and leaving the avails of the farm after the sale subject to it. There is no question but that the bankrupt is a housekeeper or head of a family, nor but that the premises consisted of a dwelling house, etc., so occupied as to come within the exemption. The only question is as to how the homestead right is affected by the mortgage. The laws of the state govern this question, and in such cases, where there is any question as to the construction of those laws, the construction given to them by the highest tribunals of the state is to govern. Their construction is as binding upon this court as the laws themselves are, and when such construction has been given, the sole province of this court, in that respect, is to ascertain what it is, and apply it. The construction given by the supreme court of the state to this homestead law has always and clearly been such as would give this bankrupt a homestead right in this farm to some extent. McClary v. Bixby, 36 Vt. 254; Morgan v. Stearns, 41 Vt. 398; Lamb v. Mason, 50 Vt. 345.

The only question is whether he is entitled to a homestead of the full value of five hundred dollars in the equity of redemption, or only to a homestead to the actual value of five hundred dollars in the buildings and land, subject to its proportionate share of the mortgage. If he is entitled to the former, he is entitled to five hundred dollars of the avails of the sail; if only to the latter, he is only entitled to five hundred dollars after it has borne its share of the mortgage, which is 18-45 of the value of the whole farm, and would absorb 18-45 of the homestead or of the five hundred dollars, its equivalent, and leave 27-45, or three hundred dollars. In McClary v. Bixby, [supra,] the supreme court of the state declared and held that the homestead right was a right to be set out of the estate of the head of a family, and was to be treated as an exemption of so much of his estate. That decision was steadily followed until that of Lamb v. Mason, [supra.] It has been claimed that it was not followed there. The law has not changed since 1871, if the decisions have, but has always been the same, and the latest construction must be taken here on this question to be the true one; so, if there is a change in the decisions, it must be followed. But the court there do not profess to make any change, and it is not to be presumed that they did unless it clearly appears that they did.

The estate of the bankrupt in this farm was his equity of redemption. According to McClary v. Bixby, and the cases which followed it, he was entitled to an exemption of five hundred dollars in value of that. In Lamb v. Mason the homestead had been set out in levying an execution upon the property including it, subject to a mortgage. The question was whether the part set out for a homestead should bear its proportion of the mortgage. The statute provided that, in making levies upon homesteads encumbered by mortgages, they should proceed the same as in the case of mortgages upon distinct parcels of land. It does not appear

[1] [Reprinted from 19 N. B. R. 68, by permission.]

from the report of the case how that requirement was carried out; and the statute, in providing for levies on land, makes no express provision for such a case. If the appraisers considered that, after the homestead should be set out, it would be a distinct parcel of the land, subject to its share of the mortgage, then, to give the debtor five hundred dollars in value of equity of redemption, they would appraise so much as would be worth five hundred dollars after it had sustained its share of the mortgage. That would seem to be a correct mode of procedure if one of two parcels, both subject to a mortgage, was to be set off. In the absence of any proof of how the levy was made, it may have been assumed that this was the way in which it was made. But, however that may have been, there is no question here as to how whatever homestead right this bankrupt had could be set out to him in levying an execution, nor of presumption as to how it may have been set out, as it has never been set out. The only question is as to the extent of his right, in whatever mode it might be maintained, presuming that in some way, whatever his right is, it could be maintained. The decisions were so many in number and so uniform that, in cases where there was no question as to the priority of debts, as there is none here, the homestead man was entitled to five hundred dollars in value of his estate or interest in the premises, that it is not to be presumed the court intended to vary their ruling when they did not say that they did, and it does not appear that they must have intended to do so. The result is that the bankrupt was entitled to five hundred dollars in value of his equity of redemption, and is entitled to five hundred dollars in money out of the avails of it.

Let an order issue to the assignee for the payment of five hundred dollars of the avails of the equity of redemption to the bankrupt for and on account of his homestead right.

Case No. 1,227.

BEEDING v. PIC.

[2 Cranch, C. C. 152.] [1]

Circuit Court, District of Columbia. June Term, 1818.

NEGOTIABLE INSTRUMENTS—DEMAND.

Demand of payment of a promissory note on the day after the last day of grace, is too late.

[Cited in Auld v. Mandeville, Case No. 653; and historically in Union Bank of Georgetown v. Geary, Id. 14,357.]

At law. Assumpsit against an indorser of Robert Bayley's note. H. Whetcroft, the notary-public, demanded payment of Bayley on the day after the third day of grace.

THE COURT (nem. con.) said the payment should have been demanded of Bayley on the third day of grace, and the protest and notice to the indorsers should be on the day after, and referred to the case of Lindenberger v. Beall, [Case No. 8,359,] and 6 Wheat. [19 U. S.] 104.

A juror was withdrawn by consent, and the cause continued.

NOTE, [from original report.] See Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 582, and Mills v. Bank of U. S., 11 Wheat. [24 U. S.] 431, 436, as to the usage of banks in making demand of payment on the 4th day.

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

Case No. 1,228.

BEEDING v. THORNTON.

[3 Cranch, C. C. 698.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.

A note made "negotiable" at the Bank of Washington is not a note "payable" at that bank, and it is not necessary to demand payment there, in order to charge the indorser.

At law.

R. P. Dunlop, for plaintiff.

C. C. Lee, for defendant.

After verdict for the plaintiff, in an action by the indorsee, against the indorser of a promissory note, which in the body of it stated it to be "negotiable" at the Bank of Washington, the defendant's counsel moved in arrest of judgment, and assigned as the ground of the motion, that the note was made upon its face, payable at the Bank of Washington, and that the declaration did not aver a demand of payment at that bank, and contended that the word "negotiable" meant payable, and that when a note is payable at any particular place, a demand of payment at that place, must be averred and proved in order to charge an indorser. Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 175.

But THE COURT, (nem. con.) overruled the motion, being of opinion that "negotiable" did not mean payable.

BEEDLE, (WORMSLEY v.) See Case No. 18,049.

BEEF SLOUGH MANUF'G, Etc., CO., (HEERMAN v.) See Case No. 6,320.

BEEF SLOUGH MANUF'G, Etc., CO., (UNITED STATES v.) See Case No. 14,559.

BEERMAN, (UNITED STATES v.) See Case No. 14,560.

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

Case No. 1,229.

In re BEERS et al.

[5 N. B. R. 211.][1]

District Court, N. D. Ohio. March 23, 1870.

BANKRUPTCY—INDIVIDUAL LIABILITY OF PARTNERS —PROOF OF CLAIM.

Where a party files separate proofs of debt for the same [debt and of the same] amount against the individual members of the firm, the claims must stand as proven, and the motion of the assignee that they be stricken from the list will be overruled.

[Cited in Re Tesson, Case No. 13,844.]

[In bankruptcy. On certification by the register.]

I, Henry C. Hedges, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: On the twenty-fifth day of June, eighteen hundred and seventy, Daniel Struble and N. M. Young made their proof and caused to be filed their claim against William L. Merrin, as an individual, for four thousand three hundred and twenty-six dollars and thirty cents, which proven claim is herewith certified. On the twenty-second day of March, eighteen hundred and seventy-one, said Daniel Struble and N. M. Young made their proof and caused to be filed their claim against John Beers, as an individual, for four thousand three hundred and twenty-six dollars and thirty cents, which proven claim is herewith certified. On the twenty-second day of March, eighteen hundred and seventy-one, the assignee filed his two motions to strike from the list of proven claims, said claims against said Wm. L. Merrin, and against said John Beers, which motions are herewith certified.

Now, Mr. Geo. A. Clugston, attorney for S. S. Tuttle, the assignee, and W. C. Cooper, Esq., who appeared for the creditors, Struble & Young, stated and agreed as follows: "That the original indebtedness now proven was the indebtedness of Daniel Struble, N. M. Young and Wm. L. Merrin as partners under the firm name of "The Bank of Fredericktown." That Wm. L. Merrin and John Beers, on the nineteenth day of April, eighteen hundred and sixty-nine, bought out all the interest of said Struble and said Young in said bank, and agreed to save harmless said Young and Struble against all liabilities of said firm, which agreement was reduced to writing, and a copy thereof is attached and marked A. as an exhibit in each proof; that afterwards Wm. Gilmore and Luther Smith bought into the said bank, and assumed with Beers and Merrin all liabilities; that the indebtedness stated in the proof of said Struble & Young, against William L. Merrin's estate, and against John Beers' estate, was not paid and satisfied by said John Beers or William L. Merrin, nor by the new firm of "The Bank of Fredericktown," composed of William L. Merrin, John Beers, William Gilmore and Luther Smith, but was satisfied by said Struble & Young.

It is claimed by said W. C. Cooper, attorney for said Struble & Young, that the proven claim should stand as a proven claim against Wm. L. Merrin's estate, and that the proven claim should stand as a proven claim against John Beers' estate, and that said Struble & Young are entitled to any dividend that may be made out of the individual assets of Wm. L. Merrin, and also to any dividend that may be made out of the individual assets of John Beers. While it is claimed by Mr. Geo. A. Clugston, attorney for the assignee, that the two several proven claims against the separate estates of Wm. L. Merrin and John Beers each should be stricken from the list of proven claims; that said Struble & Young are not entitled to have a proven claim against the estate of Wm. L. Merrin individually, and the same claim against the estate of John Beers individually; but that in equity said claim should be proven against Wm. L. Merrin and John Beers, (as the old firm), or against Merrin, Beers, Gilmore & Smith as "The Bank of Fredericktown," and that there is no equity in allowing said Struble & Young to prove the same claim against Merrin's and again against Beers' estate.

On consideration whereof, it was by me ordered, that the motions heretofore filed by said assignee be overruled, and said proven claims stand as proven claims against said John Beers' estate. And the said parties request me to certify said matter to his honor, the district judge, for his action, which is done accordingly.

W. C. Cooper, for Struble and Young, assented to the action of the register.

Geo. A. Clugston, for S. S. Tuttle, assignee, dissented to the action and decision of the register.

SHERMAN, District Judge. I approve the decision made above, and order the same to be so certified to the register.

BEERS, (BLANCHARD v.) See Case No. 1,506.

[1] [Reprinted by permission.]

Case No. 1,230.

BEERS et al. v. HAUGHTON.

[1 McLean, 226.] [1]

Circuit Court, D. Ohio. July Term, 1834.[2]

INSOLVENCY — DISCHARGE — OBLIGATION OF CONTRACTS — IMPRISONMENT ON JUDGMENT — BAIL — ACTION ON RECOGNIZANCE — PLEADING — COURT RULES.

1. Where defendants in a judgment can show that they have been released under the insolvent laws of the state, and that the debt or judgment formed a part of their schedule, they cannot, under a rule of the court, be imprisoned on the judgment.

2. The insolvent laws may be adopted by a rule of court, under the process act of 1828, [4 Stat. 278, c. 68.]

[See Dobbin v. Allegheny, Case No. 3,941.]

3. Where the defendants are not liable to be imprisoned on the judgment, the special bail is not bound to surrender them in his discharge.

4. To an action on the recognizance of bail, he may plead the discharge of his principals under the insolvent laws of the state.

[See Byrne v. Carpenter, Case No. 2,271; Richardson v. McIntyre, Id. 11,789.]

5. These laws cannot affect the proceedings in the federal courts, unless they are adopted as rules of proceeding.

[See Gray v. Munroe, Case No. 5,724.]

6. A state has a right, in regulating the remedy, to protect from imprisonment, insolvents. Such laws affect the remedy only, and do not in any respect impair the contract.

[See Gray v. Munroe, Case No. 5,724; Mason v. Haile, 12 Wheat. (25 U. S.) 370; Vial v. Penniman, 103 U. S. 714.]

7. A law which relieves from the contract cannot be enforced against non-residents of the state; or in cases where the contract was prior to the law.

[See note at end of case.]

[At law. Action of debt by Joseph D. Beers, William L. Booth, and Isaac R. St. John against Richard Haughton on the recognizance of special bail. Plaintiffs demur to a plea of defendant. Demurrer overruled. Subsequently affirmed by the supreme court in Beers v. Haughton, 9 Pet. (34 U. S.) 329.]

Chester & Caswell, for plaintiffs.

Mr. Fox, for defendant.

OPINION OF THE COURT. An action was brought by the plaintiffs in 1830, against Joseph Harris and Cornelius V. Harris, and judgment for 2818 dollars and costs, was entered at December term. In this suit the defendant Haughton became special bail, and bound himself that the Harris's, should a judgment be recovered against them, should pay the judgment, or render themselves to the marshal. A capias ad satisfaciendum was issued upon the judgment in October, 1831, to the marshal, which he returned that the defendants were not to be found. At the same term this court adopted a rule "that if a defendant upon a capias, does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under neither mesne nor final process, shall any individual be kept imprisoned, who under the insolvent law of the state, has for such demand been released from imprisonment." In February, 1831, Cornelius V. Harris was discharged from imprisonment for all his debts, under the insolvent law of the state; and in February, 1832, Joseph Harris was also discharged. The plaintiffs in December, 1832, commenced an action of debt on the recognizance of special bail. In the declaration, the proceeding in the suit against the Harris's, and the return of the ca. sa. non est are set out. Among other pleas, the defendant sets up the discharge of the Harris's under the insolvent law of Ohio, and the rule of the court as above stated, in bar of the action. The plaintiffs demurred to this plea, and a joinder being filed to the demurrer, the sufficiency of the plea is presented for the decision of the court.

In the Revised Laws of Ohio, (volume 22, p. 58,) it is enacted, "that after the return of the capias ad respondendum, the defendant may render himself, or be rendered, in discharge of his bail, either before or after judgment; provided such render be made at or before the appearance of the first scire facias against the bail returned scire feci, or of the second scire facias returned nihil, or of the capias ad respondendum, or summons in an action of debt against the bail on his recognizance, returned served; and not after." This act was passed in 1824, and was in force when the act of 1828 [4 Stat. 278, c. 68,] was passed by congress, adopting the "modes of proceedings" in actions at common law, established in the state courts. Under this law and the practice of this court, the special bail had a right to discharge himself by a surrender of the principals any time before the writ, on the recognizance was returned served, or the return of the second scire facias nihil. And this is the rule of the common law. It is said that the bail are fixed on the return of the capias ad satisfaciendum non est; but it will be found that they have, though it is said to be a matter of favor, until the return of the scire facias served, or the alias writ nihil, within which to surrender their principal. So that the bail are not fixed, unconditionally, till the return of the writ as above stated. Mannin v. Partridge, 14 East, 599.

By the insolvent law of Ohio, of 1824, it is provided "that the certificate of the commissioner of insolvents, duly obtained, shall entitle the insolvent, if in custody upon mesne or final process in any civil action, to an immediate discharge therefrom, upon his complying with the requisites of the act;

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

[2] [Affirmed in Beers v. Haughton, 9 Pet. (34 U. S.) 329.]

and that the final certificate of the court of common pleas, duly obtained, shall protect the insolvent for ever after from imprisonment for any suit or cause of action, debt or demand mentioned in the schedule given in under the insolvent proceedings; and a penalty is inflicted on any officer who shall knowingly and wilfully arrest, in any civil proceeding such discharged insolvent." This act is repealed by the insolvent law of 1831, but the same provisions, as above stated, are contained in the repealing law.

In support of the plea, it is contended that the Harris's, having been discharged under the insolvent law, and as the schedule they exhibited contained the debt on which the plaintiffs obtained their judgment, that they are not liable to be imprisoned on said debt or judgment. That had they been in imprisonment on the judgment when the benefit of the act was extended to them, they must have been immediately discharged. That they are protected from arrest, by the laws of the state, under a heavy penalty, for any debt contained on their schedule, and that under such circumstances the bail cannot be required to surrender them in his discharge. That the law requires nothing to be done in vain, and that to surrender the original defendant, would be in vain, as they could not be held in imprisonment, but must be immediately discharged. That to attempt to make the surrender would subject the bail to an action of trespass, as it would any officer who should knowingly arrest them.

On the part of the plaintiffs, it is contended, that it appears from the pleadings that neither of the original defendants were discharged under the insolvent law, until after judgment in the circuit court. That Joseph Harris was not discharged until after the return of the ca. sa. and that the rule of court set out in the plea was not adopted until after the return of that execution. That the plaintiffs' right, therefore, was fixed by the judgment, or by the judgment and the execution, against the bail, and that no mode of discharge subsequent to this can be adopted which shall affect this right. It is insisted that the insolvent laws of the state cannot be enforced by the courts of the United States, and that such laws or a discharge under them cannot affect the proceedings in those courts. That the act of congress of 1828 does not adopt these laws, or authorize the court by rule to adopt them. That the discharge of the defendant from his recognizance under the state law, would be in conflict with the decisions of the supreme court in the case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 369; Shaw v. Robbins, in a note to the case, and Boyle v. Zacharie, 6 Pet. [31 U. S.] 643.

As before remarked, the bail were not fixed, absolutely, until the return of the scire facias served on the second writ nihil. And within this time, the bail, not as a matter of favor, but as a matter of legal right, could surrender their principal and claim a discharge. This is the law of Ohio. And is it adopted by the act of 1828, and the rule of court? The act in terms adopts in the federal courts the same "modes of proceeding" in the federal courts, as in the state courts. Now is not the surrender of the principal by the bail, a mode of proceeding? In the case of Wayman v. Southard, 10 Wheat. [23 U. S.] 1, the supreme court decided that the terms 'process,' and 'modes of proceeding in a suit,' embraced the whole progress of such suit and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied. The words of the act of 1828 are, "the forms of mesne process, and the forms and modes of proceeding," shall be the same as in the state courts. And these words embodied in a different statute having the same object in view, received the above construction by the supreme court. Now there was no right fixed against the bail on the return of the ca. sa. so that the rule of court in no sense affected a vested right, but merely changed or modified the remedy. The power of the court to adopt the rule seems to be clear, under the third section of the above act. It provides "that writs of execution and other final process, issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state; provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change, which may be adopted by the legislatures of the respective states for the state courts." The rule adopted did nothing more than in effect to conform the process against the body, to the mode of proceeding in the state courts, on the same process. It might well be contended that this proceeding may be sustained under the act of 1828, independently of the rule; but the law authorizes the court to make such alterations as shall conform to the state practice.

A state law, as it regards the proceedings of the courts of the United States, can only be in force, by the adoption of congress or under their authority. If then the defendants to the original judgment, having been discharged under the insolvent laws of the state, were not liable to be imprisoned on such judgment; it would be worse than solemn mockery to require them to be surrendered, as the condition on which the special bail shall be discharged. Why require their surrender when they cannot be held in confinement? The law can never require an act to be done, so useless and absurd. Mannin v. Partridge, 14 East, 599; Olcott v. Lilly, 4 Johns. 407; Boggs v. Teackle, 5 Bin. 332; 18 Johns. 335; 9 Serg. & R. 24. But it is said that a discharge of the defendant, will conflict with the decision of the supreme court

in the case of Ogden v. Saunders, [supra.] In this case the court decided that a state bankrupt or insolvent law, which discharges both the person of the debtor, and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law. But that a certificate of discharge under such law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained. It is true that Mr. Justice Johnson, in giving the opinion of the court in this case, calls the law under which the question was raised an insolvent law; but it was a law which not only relieved the party from imprisonment, but also his future acquisitions from liability. This was then substantially a bankrupt law. In the case of Boyle v. Zacharie, 6 Pet. [31 U. S.] 643, Mr. Justice Story, in giving the opinion of the court, says—"the first point presented for argument, and indeed that which was the principal ground of the appeal, is, as to the effect of the discharge under the insolvent act. This question is of course at rest, so far as it is covered by the antecedent decisions made by this court." And he refers to the decision in the case of Ogden v. Saunders, and observes—"so far then as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive."

The insolvent law referred to in this case, like the one involved in the case of Ogden v. Saunders, discharged the party from the contract. That the mere imprisonment of the debtor as a means of enforcing the payment, belongs to the remedy and does not reach the contract, has been often decided, and is so clear a proposition that no one will controvert it. And the supreme court have often decided that a state insolvent law, which exonerates the debtor from imprisonment, does not impair the obligation of the contract, but is within the legislative power of a state, which modifies the remedy at its discretion within its own jurisdiction. The counsel for the plaintiffs suggest, though they do not seem to urge the point with confidence, that the recognizance of bail was a contract with the plaintiffs, who are citizens of New York, and in which the bail agreed that the defendants should surrender themselves or pay the money, and to discharge the bail, without such surrender or payment under the state insolvent law, impairs the obligation of the contract. The undertaking of the bail is a part of the remedy, and rests on the ground that the plaintiff has a right to imprison the defendant, in satisfaction of his judgment. This is shown by the necessity the plaintiff is under to issue an execution against the body of the defendant, before he can proceed against the bail. The defendant, by giving special bail, places himself in the custody of his bail, who is bound to have him to answer the writ of the plaintiff. Or the bail, under the laws of this state, may surrender the defendant, at any time, as a matter of right, before he is fixed by the proceeding against him. Now this undertaking of the bail is a part of the remedy for the enforcement of payment. And if the plaintiff has no right to imprison the defendant, how can he demand him by execution, or make the bail responsible for not surrendering him? It is true the plaintiff may not know that the defendant has taken the benefit of the act, and as the discharge may be taken advantage of by plea or on motion, it may not be improper for the plaintiff to sue out a ca. sa.; but the question is, can he imprison a defendant who has been discharged? Clearly he cannot; and it follows as a necessary consequence if he cannot imprison him, that the bail is not bound to make the surrender. Suppose the judgment against the Harris's had been entered before one of the state courts, does any one doubt that they would have been discharged from imprisonment, by virtue of their proceeding under the insolvent law? And that their bail would have been also discharged on the same ground? This will hardly be controverted. And yet such a proceeding would as much impair the obligation of the contract, as the proceeding in the present case. In fact no contract is impaired; the state law relieves from imprisonment by a modification of the remedy, and this the state has a right to do, as the supreme court have solemnly decided.

The principles decided in the case of Ogden v. Saunders, [supra,] and of Boyle v. Zacharie, [supra,] have no application to the present case. Both of those cases turned upon the ground that the statute relieved from the contract. But in the present case the remedy only is affected. The plaintiffs, under the circumstances of the case, have no right to imprison the defendant as a means of enforcing the payment of the judgment; and consequently they have no right to demand his surrender by the special bail. The plea is sustained and the demurrer overruled—judgment for the defendant.

NOTE, [from original report.] This case was removed by writ of error to the supreme court, where the judgment of the circuit court was affirmed. [Beers v. Haughton,] 9 Pet. [34 U. S.] 329.

[NOTE. In delivering the opinion of the supreme court, Mr. Justice Story said:

["By the rules of the circuit court of Ohio, adopted as early as January term, 1808, the liability of special bail was provided for and limited; and it was declared that special bail may surrender their principal at any time before or after judgment against the principal, provided such surrender shall be before a return of a scire facias executed, or a second scire facias nihil, against the bail. And this in fact constituted a part of the law of Ohio at the time when the present recognizance was given; for in the Revised Laws of 1823-24 (22 Laws Ohio, 58) it is enacted that, subsequent to the return of the capias ad respondendum, the defendant may render himself or be rendered in discharge of his bail, either before or after judgment, provided such render be made at or before the

appearance day of the first scire facias against the bail returned scire feci, or of the second scire facias returned nihil, or of the capias ad respondendum or summons in an action of debt against the bail or his recognizance returned served, and not after. This act was in force at the time of the passage of the act of congress of the 19th of May, 1828, (chapter 68,) and must, therefore, be deemed as a part of the 'modes of proceeding' in suits to have been adopted by it; so that the surrender of the principal by the special bail within the time thus prescribed is not a mere matter of favor of the court, but is strictly a matter of legal right. * * * Where the bail were entitled to be discharged, ex debito justitiae, they may not only apply for an exoneretur by way of summary proceeding, but they may plead the matter as a bar to a suit in their defense. But, where the discharge is matter of indulgence only, the application is to the discretion of the court, and an exoneretur cannot be insisted on except by way of motion. And this leads us to remark that where the party is, by the practice of the court, entitled to an exoneretur without a positive surrender of the principal, according to the terms of the recognizance, he is, a fortiori, entitled to insist on it by way of defense, where he is entitled, ex debito justitiae, to surrender the principal. Now, the doctrine is clearly established that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an exoneretur, without any surrender. * * * And, a fortiori, this doctrine must apply where the law prohibits the party from being imprisoned at all, or where, by the positive operation of law, a surrender is prevented. So that there can be no doubt that the present plea is a good bar to the suit, notwithstanding there has been no surrender, if, by law, the principal could not, upon such surrender, have been imprisoned at all. * * *

["There is no doubt that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and a discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects. * * * State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws directly by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States. * * *

["The present case does not depend upon the provisions of the acts of 1789 or 1792, but it is directly within and governed by the process act of the 19th of May, 1828, (chapter 68). That act, in the first section, declares that the forms and mesne process and the forms and modes of proceeding in suits at common law in the courts of the United States held in states admitted into the Union since 1789 (as the state of Ohio has been) shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction in the same, subject to such alterations and additions as the said courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same. The third section declares that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and 'the proceedings thereupon,' shall be the same in each state, respectively, as are now used in the courts of such state, etc.; provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of the court, so far to alter final process in such courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts. * * * The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and, if it were not, the circuit court had authority, by the very provisions of the act of 1828, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject."]

Case No. 1,231.

BEERS et al. v. The JOHN ADAMS.

[34 Hunt, Mer. Mag. 74.]

District Court, S. D. New York. June 15, 1855.

MARITIME LIENS—CONSTRUCTION OF FOREIGN VESSEL—SALE ON CREDIT.

[1. The builder of a foreign vessel has a lien on such vessel for work done and materials supplied in her construction.]

[See Egleston v. The Agnes, Case No. 4,308; Menzies v. The Agnes, Id. 9,430. Contra, The Count De Lesseps, 17 Fed. 460.]

[2. Sale of a vessel on credit does not destroy a material man's lien.]

[In admiralty. Libel by Joseph Beers and others, as assignees of the firm of Crawford & Terry, against the steamboat John Adams, for work done and materials supplied in the construction of the steamboat, (the People's Ferry Company, claimant.) Decree for libellants.]

On the 28th of January, 1854, a contract was entered into between John Crawford, shipbuilder of Keyport, N. J., and William Small, of New York city, by which it was agreed that Crawford should build for and deliver to Small three ferry boats, of certain dimensions, for certain sums of money, and that the boats and the materials, as fast as they were fitted for use, should be the property of Small, subject only to a lien on the part of Crawford, for such sums of money as might be due under the contract. Crawford was in partnership with B. C. Terry, at Keyport, and the contract was made by him for the benefit of the firm, and was carried out by the firm. Under this contract, the John Adams was built by Crawford & Terry, at Keyport, and subsequently delivered to Small, at New York. They afterwards failed, and made an assignment to the libellants, who now libel the boat, to recover about $7,600, still due to Crawford & Terry, for building her, and to them as assignees of the firm, claiming that Crawford & Terry had a lien upon the boat, either under the general maritime law, which gives a lien for work done and materials supplied to or for a foreign vessel, and that, as Small was a non-resident of New Jersey, the John Adams was a foreign vessel; or under the contract,

which especially gave them a lien upon the boat, which would be enforced by a court of admiralty. The boat was claimed by the People's Ferry Company, a corporation duly incorporated under the laws of Massachusetts, who allege that on January 23, 1854, they made an agreement with Small to build three ferry boats for them; that under this contract, Small procured the John Adams to be built, as one of them; and that, when Crawford made his agreement with Small, he knew of Small's agreement with them; and they denied, therefore, that the libellants of Crawford & Terry had any lien upon the vessel on either ground claimed by them. They also claimed that, if Crawford & Terry had any lien, they were deprived of it by virtue of an attachment issued against them, before the filing of the libel, in favor of one of their creditors. There is no statute law of New Jersey which gives a material man a lien upon a vessel for supplies furnished. And it was admitted by the parties that the boat, while building, was the property of Small, who resided in New York.

Benedict, Scoville & Benedict, for libellants.

O'Connor, Dunning & Marbury, for claimant.

INGERSOLL, District Judge. It is very clear that the admiralty law creates a lien in favor of a party who does work or furnishes supplies to a foreign ship, and that a ship owned in another state is foreign. In determining the question whether such lien is created also in favor of the builder of a ship, as well as of him who furnishes work and supplies to her after she is built, the court is not controlled by the restricted admiralty courts of law of England, as exercised by them under the supervising power of the common law courts. The rules and principles of the admiralty law, as administered by the admiralty courts of this country, are more enlarged, more in conformity to the principles of the civil law, as administered by the maritime nations of continental Europe. According to that law, the interests of shipping and ships, not only in their creation, but in their preservation, are of paramount importance. The importance of this consideration is the reason why the material man who furnishes supplies for the preservation of the ship is entitled to a lien; and there is the like reason for giving a lien to him who has furnished necessaries to bring the ship into being. The English law gives only the common law possessory lien to a material man or to a builder, but the maritime law of continental Europe gives a maritime lien to those who build, supply or repair a ship, at least where she is a foreign ship. This is expressly stated by Boulay Paty, and this principle was acted upon for a long time by the English admiralty, before it was overthrown by the courts of common law. That right of a material man who has furnished necessaries for the preservation of a foreign ship has been repeatedly acknowledged by the admiralty courts of this country. And as the like reason exists why a carpenter should have a lien on that which by his work and materials he creates, as on that which he preserves, after he has created it, and as by the general maritime law a lien exists in the one case, as in the other, the court must hold that Crawford & Terry had a lien upon the boat for the work done and materials furnished in building her. By the contract between Small and the respondents, no property in the boat vested in the respondents, who have not paid for the boat, and the contract between them and Small is not sufficient to defeat the lien of Crawford & Terry. Their lien upon the boat would not be taken away by the attachment against them. To take it from them, something more would have to be done, and nothing more has been shown to have been done. This view of the case renders it unnecessary to consider the other points raised.

Decree for the libellants, with a reference to ascertain the amount.

Case No. 1,232.

BEERS et al. v. KNAPP et al.

[5 Ben. 104.] [1]

District Court, D. Connecticut. April Term, 1871.

MECHANIC'S LIEN—PAYMENT BY NOTE—FIXTURES.

1. K. and F. filed a mechanic's lien under the statute of Connecticut, for work and materials furnished to, and done for, the bankrupts, partly under a special contract and partly under a general agreement. They had agreed to take $3,000 worth of the stock of the company as part payment, but they had paid $1,500 on account of it. They had also received three notes of the bankrupts, two of which they had passed away, and one they had procured to be discounted, but on maturity had taken them all up with their own money. Their certificate of lien placed the lien on the "factory and other buildings, * * * for services rendered and materials furnished in the construction of said buildings, and for repairs done thereon." The assignees filed a bill for the discharge of the lien. *Held*, that liens of this character are to be construed with reasonable strictness; that this lien would not include machinery or fixtures not necessarily connected with and forming part of the buildings themselves, nor fences, nor blocks nor timber for trip-hammers or any other supports for machinery, which could be put in or taken out without disturbing the building.

2. That the promissory notes were not to be treated as taken in payment.

[See Allen v. King, Case No. 226; Peter v. Beverly, 10 Pet. (35 U. S.) 532.]

3. That the amount still due on the stock was a payment.

[In equity. Suit by Lewis F. Beers and Francis H. Nash, as assignees of the Allerton Iron Works Manufacturing Company,

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bankrupts, against Burr Knapp and Henry R. Fitch, to set aside a mechanic's lien.]

Lewis F. Beers, for plaintiffs.
Levi Warner, Jr., for defendants.

SHIPMAN, District Judge. This is a suit in equity brought by the assignees of the Allerton Iron Works Manufacturing Company, a bankrupt corporation, against the defendants, praying that a certain alleged mechanic's lien placed by the defendants upon certain real estate of the bankrupts may be declared void, or that, if the same should not be found wholly void, this court proceed to ascertain the amount of such lien, and direct the assignees as to the redemption of the premises and the discharge of the lien.

Though the pleadings and the evidence present the case in a loose, not to say confused, manner, enough can be gathered to enable the court to dispose of the legal questions involved. It appears by the evidence that on the first of August, 1869, the defendants commenced the erection of certain buildings on the land of the bankrupts, described in the bill, and carried the same substantially to final completion. A portion of the work appears to have been performed under a special verbal contract as to price, and the rest done under a general agreement to charge for labor and materials according to their fair value. No controversy has been suggested as to the prices charged. The whole amount of the defendants' claim, including what was done both under the special and general agreements, was $14,202.35, for which they rendered their bill after the work was finished. On the first of February, 1870, the defendants lodged with the proper officer a certificate of lien, as provided by the statute of Connecticut regulating mechanic's liens, claiming a lien to the amount of $8,450, "as nearly as the same can be ascertained." The statute upon which such proceedings rest, has, among other provisions, the following:

"Section 1. Every dwelling-house, or other building, in the construction, erection, or repairs of which, or of any of its appurtenances, any person shall have a claim for materials furnished, or services rendered, exceeding the sum of twenty-five dollars, shall, with the land on which the same may stand, be subject to the payment of such claim; and the said claim shall be a lien on such land, and building, and appurtenances, and shall take precedence of any other lien or incumbrance, which shall originate subsequent to the commencement of such services, or the furnishing of any such materials; * * * and the said premises shall be liable to be foreclosed by such person, in the same manner as if held by mortgage.

"Sec. 2. The debt for services or materials, as aforesaid, shall not remain a lien on such lands or building, for a longer period than sixty days after the person performing such services or furnishing such materials has ceased so to do, unless he shall lodge with the town clerk of the town in which such building is situated, a certificate in writing describing the premises, the amount claimed as a lien thereon, and the date of the commencement of the claim, the same being first subscribed and sworn to as the amount justly due, as nearly as the same can be ascertained, which certificate shall be recorded by the town clerk with deeds of lands."

The lien filed by the defendants was, by its terms, both "for services rendered and materials furnished." The bill avers that this certificate was not filed within the sixty days prescribed by the statute, and that therefore no lien exists. On this point, however, I am satisfied from the proofs, that the defendants did not cease either to perform labor or to furnish materials even upon the main factory building, until after the third of December, 1869. Their certificate having been filed on the first of February following, the sixty days had not expired, and the lien was preserved.

The next question is, how much that is due from the bankrupt is embraced in and secured by this lien? In the first place, the amount of the defendants' bill, none of the items of which are disputed, is $14,202 35. It is agreed on all hands, that of this they received, during the progress of the work, $6,300 in cash, leaving $7,902 35. From this sum must be deducted $1,500, due from the defendants for the stock of the company. It is conceded that they originally agreed to take $3,000 worth of the stock (120 shares at par value, of twenty-five dollars purchase), as part payment for their work and materials. Of this sum they paid $1,500, and no more, leaving $1,500. Of course this latter sum must be deducted from the amount they claim, as by the contract it was to be taken as payment. Deducting this sum, leaves $6,402 35. But the plaintiffs claim that there should be a further deduction of the amount of certain promissory notes given by the bankrupts to the defendants on account of, and during the progress of the work on the buildings. These notes were as follows: One on the 6th of November, for $1,000, payable in three months; one on the 7th of November, for $2,000, payable in four months; and one on the 9th of November, for $1,000, payable in three months, all payable at the First National Bank of South Norwalk. These notes were received by the defendants, the first two were indorsed by them over to parties with whom they were doing business, and the last they got discounted themselves. They were all duly protested for non-payment, and the defendants took them up with their own funds, and have ever since held them, and now produce them in court to be delivered to the assignees. The ground assumed by the plain-

tiffs is, that these notes were received by the defendants, as payment of the amounts therein stated, and therefore, to that extent, absolutely discharged the bankrupt's indebtedness to the defendants. Of this there is not a particle of evidence, while the proof is clearly the other way. There is no agreement between the parties by which these notes, or either of them, were to be received as payment, nor was there any receipt given from which the court can infer such an agreement. It is true that the defendants, in their running account on their own books, credited the bankrupts with these notes at the time they were given, but I apprehend that this act in no way extinguished their lien. The taking of these notes, unless it was expressly agreed that they should operate as payment, in no way affected the original indebtedness except to suspend a remedy on that indebtedness, while the notes were outstanding. This is the settled law of Connecticut. Dougal v. Cowles, 5 Day, 516; Davidson v. Bridgeport, 8 Conn. 477; Bill v. Porter, 9 Conn. 31. The indebtedness in this case not being extinguished, the lien remained. The remarks of the supreme court of this state in Rose v. Persse & Brooks' Paper Works, 29 Conn. 256, and in Chapin v. Same, 30 Conn. 475, have no application to the facts of the present case.

If the case were to rest here, the extent of the defendants' lien would stand fixed at $6,402.25, with interest. But, on examination of the defendants' certificate of lien in connection with the items of their account, I am satisfied that some further deductions ought to be made. The certificate places the lien on the "factory and other buildings, * * * for services rendered and materials furnished in the construction and erection of said buildings, and for repairs done thereon." "Liens of this character are to be construed with reasonable strictness." Chapin v. Persse & Brooks' Paper Works, 30 Conn. 474. The lien in this case, by its express terms, is confined to the buildings, and is for work and materials bestowed on them. This would not include either machinery or fixtures not necessarily connected with and forming part of the buildings themselves. It would not include fences or blocks, or timber for trip-hammers, or any other frame work or supports for machinery which could be put in or taken out without disturbing the buildings. Now, in examining the bill of the defendants in connection with their testimony, it is evident that there are items which go into their alleged claim, that are not covered by their lien. The number, value, and extent of these are not determinable by the proofs in their present state; consequently, the court cannot fix the exact amount of the lien without further inquiry. Perhaps the parties, in the light of these observations, can agree upon the amount of these further deductions. If not, the case must stand over for further proof on this point. When the amount of further deductions is agreed upon, or the proof is submitted on this point, the court will fix the amount of the lien and direct a final decree.

Case No. 1,233.

BEERS et al. v. PLACE et al.

[4 N. B. R. 459, (Quarto, 150);[1] 36 Conn. 578; 4 Am. Law T. 136; 1 Am. Law T. Rep. Bankr. 262.]

District Court, D. Connecticut. Dec. 19, 1870.

BANKRUPTCY — RIGHTS OF ASSIGNEE — SETTING ASIDE LEVY OF EXECUTION—ATTACHMENTS.

1. The petition of assignees in bankruptcy to have the levy of an execution on personal property of the bankrupts declared void will be granted where it appears that such levy is not in conformity with the laws of the state in which the same is made.

[Cited in Re Klancke, Case No. 7,864; Davis v. Anderson, Id. 3,623; Re Butler, Id. 2,236.]

[2. Where personal property of a bankrupt has been attached, the assignee in bankruptcy can take advantage of any remedy which would have been open to a subsequent attaching creditor, since the assignee represents the creditors of the bankrupt, as well as the bankrupt himself.]

[In equity. Bill by Lewis F. Beers and Francis H. Nash, as assignees of the Allerton Iron Works Manufacturing Company, bankrupt, against George Place and Charles F. Hardwick, to declare void a levy of execution. Decree for complainants.]

Lewis F. Beers and Stephen W. Kellogg, for plaintiffs.

Asa B. Woodward and Henry C. Robinson, for defendants.

SHIPMAN, District Judge. This is a bill in equity praying this court to declare void a levy of an execution upon certain machinery of the bankrupts, and thus remove a cloud on the title of the assignees thereto. The facts which have led to this controversy are as follows: The Allerton Iron Works Manufacturing Company were a corporation located at Norwalk, Connecticut, and engaged in building machinery. They had a machine-shop, and such tools and machinery as are necessary in a business of that character. On the 10th of January, 1870, Reynolds & Co., a corporation located at New Haven, brought a suit against the Allerton Iron Works Manufacturing Company (the bankrupts), and attached the machinery in their shop at Norwalk to the amount of four thousand dollars. The writ upon which this attachment was made, was returnable and returned to the superior court for New Haven county on the first Tuesday of March, 1870; and on the 30th of the same month judgment was rendered in favor of the plaintiffs therein against the bankrupts for one thousand one hundred and fifty-six dollars and nine-

[1] [Reprinted from 4 N. B. R. 459, (Quarto, 150,) by permission.]

ty-one cents. On the 3d of February, 1870, the same property was attached by the New York Steam Engine Company for two thousand two hundred dollars. On the same day the defendants, George Place & Co., attached the same property for two thousand dollars; and on the 22d of April following, judgment was rendered in their favor and against the bankrupts for one thousand five hundred and seven dollars and sixty-eight cents, and execution issued thereon. On the 2d of May, 1870, the officer claimed to levy this execution on the machinery in question, the New York Steam Engine Company waiving any rights under their attachment. But the lien by the prior attachment of Reynolds & Co. was not waived, but was still in force. The officer posted the same for sale under the execution, according to the law of Connecticut. The sale has never in fact taken place, but has been from time to time adjourned by the officer, he having been enjoined from selling by the state court on the application of the assignees, the present plaintiffs, who have now brought this bill. The injunction of the state court is temporary, and the judgment creditors, George Place & Co., insist upon their right to have the property sold on the execution in their favor as soon as the injunction is removed.

On the 3d of May, 1870, the Allerton Iron Works Manufacturing Company filed their petition in this court, praying to be declared bankrupts under the act of congress [of 1867, (14 Stat. 517,)] and on the 9th of the same month were adjudicated bankrupts. The plaintiffs claim this property, over which the levy of the defendants' execution is hanging, and ask leave for a decree of this court declaring it void, in order that they may sell it at its full value, unembarrassed by this alleged lien of the defendants.

It will be noticed that all these attachments, and the execution in question, were levied on the property within four months next preceding the filing of the petition in bankruptcy. The attachments were therefore dissolved by operation of the bankrupt law when the debtors went into bankruptcy, as they were all attachments on mesne process under the statutes of Connecticut. The present defendants claim, however, that, as the bankrupt act only dissolves attachments on mesne process, the levy of their execution is left undisturbed. And it is true that the 14th section of the act dissolves such attachments only, and not levies of execution. The law, therefore, seems to contemplate possible results that are somewhat singular. An attachment on mesne process of any age short of four months, is dissolved absolutely by the adjudication, and the latter relates back to the time of filing the petition. But an execution, actually and legally levied, remains, and the property is held by it, even though the suit upon which it was founded may not have been commenced ten days before the filing of the bankrupt's petition. It may be asked why the older attachment is dissolved while the recent levy of the execution is protected? Why the levy of the execution, except in cases where it is to enforce a lien secured by an attachment more than four months old, should not share the fate of attachments that are less than that age? It is not necessary to answer these questions in the present case. One obvious difficulty in the way of dissolving levies of executions, and thus invalidating proceedings under them, would arise out of unsettling titles to property sold under such process. Bona fide purchasers of personal and real property at judicial sales might find their titles suddenly annihilated by a decree in bankruptcy. Their vendees would be in the same predicament. This mischief would not indeed result from dissolution of proceedings under executions merely levied where the sale under them had not actually taken place. Yet congress has not seen fit to make the adjudication in bankruptcy operate to dissolve them. But, as already intimated, this peculiar feature of the statute need not be vindicated in the present case.

The plaintiffs insist that the levy of the execution in question was void, inasmuch as there was a prior attachment lien in force upon this property, when the attempted levy was made. The solution of this question depends, not upon the bankrupt act, but upon the true construction of the statutes of Connecticut relating to attachments on mesne process and the levy of executions. The practice of attaching property on mesne process and holding it in the custody of the law, subject to execution upon judgment recovered in the same suit, has been sanctioned by the law of this state for more than two hundred years. The process had been regulated by statute for a century. In 1770 the colonial legislature passed the act of which the following was a section: "No estate attached as aforesaid shall be held to respond to the judgment obtained by the plaintiff at whose suit the same is attached, either against the debtor or any other creditor, unless such judgment creditor take out execution on such judgment and have the same levied on the goods or personal estate within sixty days after final judgment, or on real estate, and have the same appraised and recorded within four months after such judgment obtained; or, if such goods or estate are encumbered by any prior attachment, the execution be levied as aforesaid within the respective times aforesaid after such incumbrance is removed." Laws Conn. Oct. Sess. 1770. This section has never been repealed or modified, but has remained in force down to the present time. Rev. St. Conn. 1865, pp. 6, 7. The practice has been uniform under it. The first attaching creditor has sixty days in case of personal property, and four months in case of real estate, after final judgment, within which to levy his execution and thus enforce his attachment lien.

After he has done so, or his time has expired, then the second attaching creditor has the same length of time within which to levy his execution. The third attaching creditor has the same time after the second, that the second does after the first, and so on till the property is exhausted, or the attachments are all satisfied. This is the natural and orderly mode of proceeding, and has been universally followed in this state for more than a century. No case has been cited showing even an attempt to introduce a different practice, and after a thorough search I have been able to find none. If there had been no statute regulating the order in which executions should be levied under successive attachments, this long and uniform practice, so consonant with good sense and the orderly administration of justice, would be strong evidence that such had been the settled policy of the state in the disposition of debtors' property thus taken into the custody of the law and held to respond to the liens of attaching creditors. But a careful examination of the statute in question leaves no room for doubt as to what it prescribes. The language is explicit, that "no estate attached as aforesaid shall be held to respond to the judgment * * * either against the debtor or any other attaching creditors, unless such judgment creditor take out execution and have the same levied"—when?—on personal estate within sixty days, and on real estate within four months, or, in case of incumbrances by prior attachment, "unless the execution shall be levied as aforesaid, within the respective times as aforesaid, after such incumbrance is removed." It would be difficult to use language more explicit. The act plainly says to the first attaching creditor, you shall levy your execution within sixty days on personal property, and within four months on real estate, or it shall not be held to respond to your judgment. To the second attaching creditor it says, with equal explicitness, the property shall not be held to respond to your judgment, unless you levy your execution within sixty days on personal property, and within four months on real estate, after the first lien by attachment is removed. These respective periods within which first and subsequent attaching creditors are to enforce their liens, are thus marked out with precision. One does not begin until the other ends, unless the word "after" is destitute of meaning. All conflict, confusion, embarrassment, or failure of justice is thus avoided. So just is this mode of procedure, that if the language of the act were somewhat doubtful, courts would struggle to maintain the practical construction hitherto given it. But as I have already stated, the language is too plain to admit of question, and, after having received this practical interpretation for a century, it should not be disturbed now by an innovation which would introduce confusion, uncertainty, and injustice.

If this view of the law needed any further support, it would be found in the consequences which would inevitably follow if subsequent attaching creditors were allowed to levy their executions subject to prior attachments. The extent and value of such prior liens can never be determined until judgment in the suits out of which they originated be rendered; and even then it can never be known whether the creditors having such liens would enforce them or not, until after the expiration given them by statute. Take the case of a prior attachment upon a suit for a tort. The property attached is taken into the custody of the law to respond to such judgment as may be recovered. There is an inchoate lien to the extent of the direction in the writ. The extent and value of this lien which may finally be enforced against the property attached, depends upon a great variety of facts and circumstances, including, often, even the motives and intentions of the alleged tort-feasor, which cannot be approximately guessed at, much less estimated or appraised, until the case is heard and judicially determined. To allow property thus situated, and in the custody of the law, to be sold subject to such a lien, could not fail to often work the grossest injustice to the debtor, by sacrificing his property for a nominal sum bid by a speculative purchaser. Indeed, such a disposition of the property would not merit the name of a sale, for a sale implies that it be for such value as the judgment of purchasers in the market may put upon it. But no judgment of its value under such circumstances can be formed. Purchasers can have no information upon which to found such a judgment. In the case supposed, the first attachment lien might be swept off by a judgment in the defendant's favor, or reduced to a nominal sum if the plaintiff should recover at all, and yet he might find his whole property attached had been sold by a second attaching creditor, to satisfy some petty judgment of the latter. The same absurd and oppressive results would often follow in suits on contracts. A law which should thus take the property of the citizen into its custody, and make such an unjust and arbitrary disposition of it, would not long be tolerated in any civilized community. The mischievous consequences of such a proceeding would be endless. Some of them are well stated in Barnard v. Fisher, 7 Mass. 71.

In the case of Pease v. Bancroft, 5 Metc. (Mass.) 90, involving the question whether a sale of an equity of redemption on a second attachment, pending the first, would have been good as against the debtor, the court decline to express an opinion, though they give a good reason why it ought not to be held good. The court, however, held that such a sale, by a second attaching creditor, was void as against all the others, and thereby let in a third attaching creditor to the rights which the second would otherwise

have retained. But I attribute no importance to the doubt implied, from the language of the court in Pease v. Bancroft. In the first place, the language of the statute of Connecticut regulating the levy of executions, expressly provides, that the property shall not be held to respond to the judgment "either against the debtor or any other creditor," unless execution is taken out and levied in the order and within the time provided. In the second place, the present case comes within the principle laid down in Pease v. Bancroft, for the assignees represent the creditors of the bankrupt as well as the bankrupts themselves, and can take advantage of any remedy which would have been open to subsequent attaching creditors. It follows from these views, that the levy of the execution having been made while there was a subsisting prior incumbrance by attachment on the same property, the same is void under the law of Connecticut.

But it is said that the plaintiffs have adequate remedy at law, and are therefore entitled to no relief in equity. There might be force in this objection, but for the peculiar provisions of the statutes of Connecticut relating to attachments and executions levied on machinery used in manufacturing establishments. Attachments of such property are made, where it cannot be removed without manifest injury, by particularly describing the same in the return of the officer, and leaving a copy of the writ with such return thereon in the town clerk's office, in the town where the same is situated. In case of the levy of an execution, notice thereof is posted by the officer on the door of the building in which the same is situated. This course was pursued in making the levy in question. The officer making it has no actual possession, but his official acts, done, as he claims, under color of law and in the execution of legal process, constitute a cloud on the title of the assignees that might well affect the price in the market. Such a cloud it is the peculiar province of a court of equity to remove. But even if the officer had actual possession of this property, holding it under this alleged color of right, on a proper application, this court might feel called upon to exercise the power conferred upon it by the bankrupt act, and compel him to deliver it to the assignees, instead of turning them over to an action of trover. But this question does not arise in the present case.

I am satisfied that the plaintiffs are entitled to have this proceeding of the defendants under their execution declared void, except as to the levy on the upright drill, which was not attached by Reynolds & Co., and a decree will be entered accordingly, with costs to be apportioned.

BEESTON, (PENTLARGE v.) See Cases Nos. 10,963 and 10,964.

BEHLIN, (GALE v.) See Case No. 5,189.

Case No. 1,234.

BEHM v. WESTERN UNION TEL. CO.

[8 Biss. 131;[1] 7 Reporter, 710; 4 Cin. Law Bul. 334; 25 Int. Rev. Rec. 179; 11 Chi. Leg. News, 276.]

Circuit Court, D. Indiana. Jan. Term, 1878.

DUTY OF TELEGRAPH COMPANY—DELAY IN TRANSMISSION OF MESSAGE—MEASURE OF DAMAGES.

1. It cannot be expected that a message left for transmission with a telegraph company at a small station shall be forwarded and delivered at its destination as quickly as though it had originated at a large office.

2. At a small station, it is not the duty of the company to keep more than one operator, and if a message is left with a messenger during the operator's absence, and the message was forwarded on the operator's return, after a reasonable absence, the company is not guilty of negligence.

3. If the usual line of business between the two points is through a repeating office, the company is entitled to a reasonable time for the delay on account of other business at such repeating office.

4. Where the face of the dispatch does not indicate that the sender is liable to sustain loss if the dispatch is not promptly forwarded, and the company is not so informed, it is liable only for nominal damages.

[See Dorgan v. Telegraph Co., Case No. 4,004.]

At law. Action [by Godlove O. Behm against the Western Union Telegraph Company] for alleged damages caused by delay in transmitting a telegram from Monticello to Lafayette, Indiana. The telegram was left by the plaintiff with the messenger, at the telegraph office at 11:55 a. m., April 2, 1877, and forwarded by the operator on his return from dinner, at 12:45, and delivered at the office of A. O. Behm, to whom it was addressed, at 3 p. m., a few minutes too late, as plaintiff claimed, to enable the desired transaction to be closed. [Judgment for defendant.]

John R. Coffroth and S. A. Huff, for plaintiff.

McDonald & Butler and John A. Stein, for defendant.

GRESHAM, District Judge, (charging the jury.) It was the duty of the telegraph company to send the message with reasonable dispatch. What was a reasonable time for sending a dispatch, you will determine from all the facts and circumstances. It is in evidence and not disputed that Monticello is a small town, where little business was done by the telegraph company; that the usual line for business between Monticello and Lafayette was through Logansport, where there was a repeating office; that on the other line there was only a single wire, used exclusively for railroad business, with no repeating office at Reynolds. Under the circumstances of this case, one competent operator and a mes-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

sage boy at Monticello was force enough for that office, and it was not negligence in the telegraph company for the operator to leave the office in charge of the messenger while he was absent a reasonable time at dinner; but whether the absence on this occasion was or was not reasonable, is a question for the jury. It was not the duty of the telegraph company, when the message was left at its office, to forward it to Lafayette as quickly as electricity would carry it. In determining what was a reasonable time, you will take into consideration what has been already said about the necessary force at Monticello, the absence of the operator at dinner, and the further fact that the message had to go through the office at Logansport, and the delays it was liable to encounter there on account of other business.

If, under the instructions already given, you find that the plaintiff has a cause of action, you will next determine the measure of damages. The dispatch, which was not written upon one of the printed forms of the telegraph company, reads thus: "Take separate deed to Marks for White Fountaine, Tippecanoe and Iowa, 4, and meet me at office at 9 to-night. (Signed) G. O. Behm." It is not insisted that when the dispatch was left with the operator at Monticello, he was informed of the nature of the business to which it related. You will remember that the plaintiff sent the dispatch to the office from the hotel, by the boy or young man named Crooks. Was the company informed by the mere reading of the dispatch, of the nature of the contract between the plaintiff and Reynolds, and that the plaintiff was liable to sustain loss if the dispatch was not promptly forwarded and delivered at Lafayette? If not, plaintiff is entitled to no more than nominal damages. It would be unjust to the telegraph company to hold it responsible for damages without limit, when it is not informed by the dispatch itself, or otherwise, that the sender might sustain heavy loss unless the message be transmitted and delivered immediately, or without delay.

If you find that the face of the dispatch informed the telegraph company of the character of the contract between the plaintiff and Reynolds,—if, in fact, there was a contract, and that the same was not fraudulent and void; that there was negligence in forwarding the dispatch to Lafayette; that Reynolds would have complied with the contract on the 2d of April, but for the company's negligence, then the plaintiff is entitled to a verdict for the difference between $300, the contract price, and the fair value of the land bargained for. But if you find there was nothing on the face of the dispatch to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and yet you find that the company was negligent, then you will find against the defendant for nominal damages only. And, if you find there was no negligence in receiving and transmitting the dispatch, you will find for the defendant.

Verdict for defendant, and judgment accordingly.

Case No. 1,235.

In re BEISENTHAL et al.

[10 Ben. 42;[1] 18 N. B. R. 120.]

District Court, N. D. New York. June Term, 1878.

VOLUNTARY ASSIGNMENT — EXECUTION — LIEN — FORMER JUDGMENT — TITLE OF ASSIGNEE IN BANKRUPTCY.

B. made a voluntary assignment to C., for the benefit of his creditors. After that an execution was levied on the property assigned. Subsequently a petition in bankruptcy was filed against B. Thereafter C. sued the sheriff in trespass, because of the levy. B. was afterwards adjudged a bankrupt. The goods were then sold, and the assignee in bankruptcy held the proceeds subject to the lien of the execution if any. The suit of C. against the sheriff was then tried, and in it the sheriff set up that the assignment from B. to C. was fraudulent and void as to creditors, and had a verdict and a judgment in his favor. The assignee in bankruptcy had, in a suit against C., set aside the assignment from B. to C., as being in violation of the bankrupt law. The sheriff then applied to the bankruptcy court to pay him, on the execution, the proceeds of the sale: *Held*, that the assignee in bankruptcy derived his title through C., and was estopped by the judgment; that the lien of the execution was valid, and that the sheriff was entitled to be paid the proceeds of the sale to the extent of the lien.

[Cited in Linder v. Lewis, 4 Fed. 323, (see, also, Case No. 8,362,) and in Re Beisenthal, Id. 1,236.]

In bankruptcy. Solomon Beisenthal and Henry Henschel made a voluntary assignment for the benefit of their creditors, July 19th, 1876, to Herman Cohen. The sheriff of Erie county, under an execution against Beisenthal and Henschel, in favor of Adam, Meddrum and Anderson, levied on the assigned property, September 6th, 1876. September 14th, 1876, a petition was filed by creditors, asking that the assignors be declared bankrupts. September 22nd, 1876, Cohen commenced an action of trespass against the sheriff, to recover for damages sustained by reason of the levy. September 26th, 1876, an adjudication of bankruptcy against Beisenthal and Henschel was made, and, soon after, upon an application to this court, the sheriff was permitted to sell the goods levied on, and directed to pay the proceeds to the assignee in bankruptcy, to be held subject to the lien of the execution, if any. [For opinion of the circuit court, affirming the unreported decree directing the sheriff to pay the proceeds to the assignee in bankruptcy, see In re Beisenthal, Case No. 1,236.] The action brought by the voluntary assignee against the sheriff was tried in February, 1878. The sheriff defended on the ground that the voluntary assignment from Beisen-

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

thal and Henschel to Cohen was fraudulent and void as to creditors and a verdict was found for the defendant. The sheriff now applies, upon petition, asking, by reason of the foregoing facts, that he be adjudged entitled to the proceeds of the sale, under his execution. [Application granted.]

S. S. Rogers, for sheriff.
N. Morey, for assignee.

WALLACE, District Judge. If the voluntary assignment from Beisenthal and Henschel to Cohen was fraudulent as to the creditors of the former, inasmuch as the sheriff's levy was made prior to the filing of the petition in bankruptcy, the levy conferred a valid lien, viz., the right to seize and sell the property under the execution, both as to Cohen, the voluntary assignee, and as against the assignee in bankruptcy. If the assignment was not fraudulent, the title of the property covered by it had passed to Cohen prior to the levy, and the levy did not confer a lien. The assignment was void as to the assignee in bankruptcy, and has been so determined, not because it was fraudulent as to creditors, but because it was made with intent to prevent the property coming to the possession of the assignee in bankruptcy and from being distributed under the bankrupt act [of 1867, (14 Stat. 517.)] If the sheriff had no lien at the time the petition in bankruptcy was filed, he did not acquire one when the assignment was set aside, at the suit of the assignee in bankruptcy. The reasons which lead to these conclusions are more fully set forth in Johnson v. Roger, [Case No. 7,408,] and In re Beisenthal, [Id. 1,236.]

The only question, therefore, to be decided now, is, whether or not the judgment in favor of the sheriff, in the action brought by Cohen, the voluntary assignee, whereby it was determined that the assignment was fraudulent, is conclusive upon the assignee in bankruptcy, as an estoppel. Certainly, the assignee in bankruptcy, upon setting aside the voluntary assignment to Cohen, gets no better title to the property than Cohen had. He gets what Cohen got and nothing more. Now, it has been determined by a court of competent jurisdiction that Cohen did not have title to the property levied on by the sheriff, and that the sheriff acquired a valid lien upon it by his execution. Upon the rule that such a judgment is binding upon privies as well as upon the immediate parties to the action, the assignee in bankruptcy, whose title is derived through Cohen, is estopped by the judgment.

It is argued, however, that the assignee in bankruptcy does not claim under Cohen, but by a paramount title and in hostility to him. In a general sense, this theory is correct, but it is not true as to this particular transaction. If it were not for the title of Cohen, the sheriff would have acquired a valid lien by his levy, and been entitled to hold the property as against the assignee in bankruptcy; because he had taken it under execution against the owners prior to the institution of proceedings in bankruptcy. The assignee in bankruptcy, therefore, has no title except that which enures to him through the title of Cohen. Cohen was in a position to insist that an assignment to him, valid as against the execution of the sheriff, stood between the title of the judgment debtors and the sheriff; and the assignee must affirm this position before he can assert any claim against the sheriff. As to the sheriff and the property levied on by him, the assignee in bankruptcy, therefore, claims under Cohen, and is in privity with him.

A decree is ordered, adjudging the sheriff's lien valid, and directing the assignee to pay over to the sheriff the proceeds of the sale, to the extent of the lien.

Case No. 1,236.

In re BEISENTHAL et al.

[14 Blatchf. 146;[1] 15 N. B. R 228.]

Circuit Court, N. D. New York. Feb. 24, 1877.

BANKRUPTCY—PROHIBITED TRANSFERS—VOLUNTARY ASSIGNMENT—RIGHTS OF ASSIGNEE IN BANKRUPTCY—EXECUTION CREDITOR—LIEN—FORMER JUDGMENT.

1. On the 19th of July, 1876, B. made, in New York, a valid voluntary assignment of all his property for the benefit of all his creditors, without preferences. The assignee accepted the trust and qualified. Afterwards a creditor recovered a judgment against B. in an adverse suit, on a debt existing before the assignment, and, under an execution thereon, the property covered by the assignment was levied on and taken possession of by the sheriff. Afterwards, and on the 11th of September, 1876, a petition in involuntary bankruptcy was filed against B. by creditors, other than the judgment creditor, and he was adjudged a bankrupt, and an assignee in bankruptcy was appointed. By agreement, the property was sold by the sheriff, and he held the proceeds subject to the order of the district court in bankruptcy. That court decided that the assignee in bankruptcy was entitled to such proceeds, to the exclusion of the execution creditor: *Held*, on review, that such decision was correct.

[Cited in Linder v. Lewis, 4 Fed. 319; Claridge v. Kulmer, 1 Fed. 402.]

2. The assignment was void, under the bankruptcy statute, as against the assignee in bankruptcy.

[Cited in Re Frisbee, Case No. 5,129; Re Beisenthal, Id. 1,235; Linder v. Lewis, 4 Fed. 319; Wehl v. Wald, 3 Fed. 93; Adams v. Hyams, 8 Fed. 419; Re Pitts, 9 Fed. 544; Wald v. Wehl, 6 Fed. 169.]

3. Where an assignment is void as to creditors, by reason of its being made to hinder, delay or defraud them, it does not in law oppose an obstacle to the enforcement of their legal rights.

[Cited in Re Croughwell, Case No. 3,440. See, also, In re Beisenthal, Id. 1,235.]

4. But, where such an assignment is valid as to the debtor and as to creditors, and is avoided by the assignee in bankruptcy, only as having been made in contravention of the bankruptcy statute, no right of any judgment and execution

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

creditor, intervening between the time of such assignment and the time of the filing of the petition in bankruptcy, can prevail over the superior right of the assignee in bankruptcy to the proceeds of the assigned property.

[Cited in Re Hull, Case No. 6,857; Re Steele, Id. 13,345; Linder v. Lewis, Id. 8,362; Reed v. McIntyre, 98 U. S. 513; Re Walker, Case No. 17,063; Waring v. Buchanan, Id. 17,176; Hunker v. Bing, 9 Fed. 280.]

[On appeal from the district court of the United States for the northern district of New York.

[In bankruptcy. Application by the judgment creditors of Solomon Beisenthal and Henry Henschel, bankrupts, for the review of an order (unreported) directing the sheriff to pay the proceeds of an execution sale to the assignee in bankruptcy. Order affirmed. For subsequent opinion directing the return of the proceeds to the sheriff, see In re Beisenthal, Case No. 1,235.]

Norris Morey, for assignee in bankruptcy.

Sherman S. Rogers and E. Carlton Sprague, for judgment creditors.

JOHNSON, Circuit Judge. This is an application to review the decision of the district court in bankruptcy. The material facts are, that, on the 19th of July, 1876, the now bankrupts made a voluntary assignment of all their property for the benefit of all their creditors, without preferences, and complied in respect to it, with all the provisions of the statutes of New York regulating such assignments. The assignee accepted the trust and qualified as assignee. Afterwards, creditors recovered judgments against the assignors in adverse suits, upon debts existing before the assignments, and executions were issued thereon to the sheriff of the proper county, who levied upon all the goods and merchandise covered by the assignment, and took the same into his actual possession. Afterwards, and on the 11th of September, 1876, creditors of the assignors, other than the judgment creditors, filed their petition praying that the assignors might be adjudged bankrupts. On the 26th of September, 1876, an adjudication of bankruptcy was duly had, a warrant issued, and an assignee was afterwards duly appointed and qualified. Afterwards, upon the stipulation of the parties in interest, the property levied upon was sold by the sheriff, the proceeds to be held subject to the order of the district court in bankruptcy. The questions involved were brought before the court upon motion, and, after hearing the parties interested, it was decided that the assignment, not having been made with intent to hinder, delay or defraud creditors, contrary to the laws of New York, was valid as against the execution creditors, and that they took nothing by the levy made under the executions; but that the assignment, having been made within three months before the filing of the petition against the bankrupts, was void as against the assignee in bankruptcy, and that he, therefore, was entitled to the proceeds of the property, to the exclusion of the execution creditors' claim of priority, and it was ordered accordingly.

That such an assignment is void against the assignee in bankruptcy has been long held in the courts of the United States, in most of the circuits. It has been recently elaborately re-examined by Judge Emmons, in the sixth circuit, and his opinion is so full and able that it scarcely leaves any thing material to be added. Globe Ins. Co. v. Cleveland Ins. Co., [Case No. 5,486.] All the judges in this circuit have repeatedly so held. [See Allison v. Loveridge, recently decided by Judge Shipman, MS. Feb. 1877.] [2] This view receives a strong affirmative support from the provisions of the act of July 26, 1876, (19 Stat. 102,) amending section 12 of the act of June 22, 1874, (18 Stat. 178) in amendment of the bankrupt law. That amendment provides, that no voluntary assignment by a debtor of all his property, made in good faith, for the benefit of all his creditors, ratably and without creating any preference, and valid according to the law of the state where made, shall, of itself, in the event of his being subsequently adjudicated bankrupt in involuntary bankruptcy, be a bar to the discharge of such debtor. When it is considered that the making of such assignment had been frequently held to be of itself an act of bankruptcy and to bar a discharge, the implication is irresistible, from the very narrow limitation put by this amendment upon the law as understood and administered, that, in the judgment of congress, the general interpretation of the law was correct. This amendment alters the law only in involuntary cases, and in them only in the single particular, that such an assignment, of itself, is no longer a bar to a discharge. In voluntary cases it is a bar, and in all cases it is an act of bankruptcy, and is void as against the assignee, according to the intent of congress as plainly implied from this enactment.

The general intent of the bankrupt law was not only to administer assets on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be entrusted with their administration, and to add the sanctions of the criminal laws of the United States to secure the results aimed at. To permit the administration of the assets of an insolvent and bankrupt debtor to be committed to a trustee of his choice, and thus to reduce the bankrupt law to a mere process for discharging a debtor from his debts, is quite inconsistent with any fair view of the purpose of this legislation.

Thus far the courts of the United States

[2] [From 15 N. B. R. 228. The case of Allison v. Loveridge is nowhere reported; opinion not now accessible.]

are in substantial agreement. Nor, so far as I am informed, is there any disagreement in regard to the next proposition. Where an assignment is void as to creditors, by reason of its being made to hinder, delay or defraud them, it does not in law oppose an obstacle to the enforcement of their legal rights. A creditor who has obtained an execution may treat such an assignment as void, and levy upon the property transferred by it. The bankrupt law does not interfere with this right, if exercised prior to the application in bankruptcy for an adjudication, and if the judgment and execution were obtained without collusion on the part of the debtor, in violation of sections 5021 and 5128 of the Revised Statutes. In the case supposed, the assignment, being fraudulent as against creditors and void, does not so transfer the property to the assignee as to obstruct their rights, although good as against the debtor himself. Their judgments are liens upon the assigned real estate, and their executions bind the personal property just as if no assignment had been made. These rights of creditors do not grow out of the bankrupt law, and in no sense depend upon it for their origin or support. The bankrupt law, under certain circumstances, defeats these rights, but never confers them.

We now come to a different case, in respect to which differences of opinion exist among the judges of the district courts, and upon the decision of which this cause depends. Here, the assignment was not made to hinder, delay or defraud creditors, and all the requirements of the laws and statutes of the state of New York had been complied with in respect to it. The title to the assigned property passed, by the assignment, to the assignee. No creditor, as such, could successfully assail it. No judgment or execution, obtained against the debtor after the assignment, could bind the property, for the plain reason that the title of the debtor was gone from him by a transfer valid against him and valid against creditors. But, under the provisions of the bankrupt acts, (Rev. St. § 5129, and Act June 22, 1874, [18 Stat. 180,] § 10,) a right was conferred upon an assignee in bankruptcy of such an assignor, to avoid such an assignment, provided it was made within six months before the filing of the petition for an adjudication of bankruptcy in a voluntary case, or within three months in an involuntary case, and provided, also, that the other requisites pointed out by the statute existed. The right thus given was to recover the property, or the value of it, as assets of the bankrupt. The title of the assignee in general relates back only to the commencement of the proceedings in bankruptcy, but, in the particular cases of transfers made void as to him, his title relates back to the time of such transfers. The substantial question is, whether, under these provisions of the law, creditors by judgment and execution obtained after the assignment, having, by reason of it, no lien upon or right in the assigned property, are to be let in to intercept, and take precedence of, the right of an assignee in bankruptcy to the property or its value, when he exercises his right to avoid the assignment and to recover the property. Upon this question the opinion and decision of Judge Wallace against the claim of the judgment creditor is given in Johnson v. Rogers, [Case No. 7,408.] In Macdonald v. Moore, [Id. 8,763,] Judge Blatchford reaches a different conclusion, and each of these learned judges has stated the arguments and considerations which led him to his conclusion. Between these conflicting views the controlling and decisive consideration seems to me to be that which Mr. Justice Story puts forward as the ground of his judgment upon a similar question under the bankrupt act of 1841, [5 Stat. 440,] in the case of Everett v. Stone, [Case No. 4,577.] He says, in substance, that the judgment creditors cannot avail themselves of a fraud under the bankrupt act, to defeat the very policy of the act itself. That policy is, equal distribution among creditors, through the agencies of the bankrupt law. To avoid the assignment as in conflict with that policy, and, as a consequence, to allow particular creditors to intercept the fruits of avoiding it, and thus prevent equal distribution, would be contradictory, and would subvert the whole laudable purpose of the bankrupt act, so far as creditors are concerned. These considerations were overlooked in McLean v. Meline, [Case No. 8,890,] where it was assumed, rather than adjudged, that, if an assignment could be avoided under the bankrupt act, the necessary consequence was that judgment creditors would be let in to claim according to their priorities, in preference over the assignee in bankruptcy.

The acts of the assignee in bankruptcy do not enure to increase the rights of the judgment and execution creditors. Dodge v. Sheldon, 6 Hill, 9; Seaman v. Stoughton, 3 Barb. Ch. 344. When the assignee recovers the property, he takes it as the debtor had it at the time of the act which the assignee avoids, so far as creditors of the debtor are concerned. Avoiding the transfer in favor of the assignee in bankruptcy does not revest the property in the debtor, but vests it directly in the assignee, who takes it by virtue of the statute. The transfer by the debtor, good against him, and good against his creditors, prevents any lien by subsequent judgment or execution. Upon the property so situated the statutory transfer to the assignee in bankruptcy operates directly, and cannot be subjected to the liens of intervening judgments and executions without overthrowing both the language and the policy of the bankrupt act in its most vital provisions. I am, therefore, of opinion that the order of the district court under review was correct, and should be affirmed.

BEJANDIO, (UNITED STATES v.) See Case No. 14,561.

Case No. 1,237.

In re BELCHER.

[2 Ben. 468; 1 N. B. R. 666, (Quarto, 202.)] [1]

District Court, S. D. New York. June 22, 1868.

BANKRUPTCY—ORIGINAL JURISDICTION—PLACE OF FILING PETITION.

Where a merchant, who has resided in New York city for more than twenty years, failed in business, sold his residence in that city, and removed his family to New Jersey, and they thereafter resided there upon some property belonging to his wife, while he engaged as a clerk with his successors in business, and continued so till the filing of his petition in bankruptcy, two years after: *Held*, that his petition was properly filed in the southern district of New York.

[See In re Little, Case No. 8,391; In re Watson, Id. 17,272.]

In bankruptcy.

[Platt, Gerrard & Buckley, for bankrupt.

William K. Belcher filed his petition and schedules in bankruptcy, on the 19th day of February, 1868, and was duly adjudged a bankrupt. His petition set forth that he had done business and had a place of business in the southern district of New York, for more than six months next immediately preceding the filing of the petition, but set forth no place of residence. The petitioner had carried on business and resided in the city of New York for more than twenty years prior to June, 1866. In the month of June in that year, he failed in business, and made a general assignment for the benefit of his creditors. He sold out his residence in the city of New York, and retired with his family to New Jersey, where they now reside upon some property which belonged to the separate estate of his wife. Immediately after his assignment he engaged as a clerk, upon a yearly stated salary, with his successors in business, and has ever since continued with them as such clerk upon such salary. All the partners of petitioner, except one, were, and now are, residents of the city of New York, and have obtained a discharge in bankruptcy in the southern district. The petitioner's creditors are 212 in number, of whom 170 are merchants carrying on business in the city of New York. Under these circumstances, it is submitted that the petition is properly filed in the southern district of New York.] [2]

[By I. T. Williams, Register: Entertaining no doubt that the petition is well filed in this district, I am reluctant to submit the question to the court, as it seems to me that any decision of it would be extrajudicial. But as my Brother Ketchum has submitted a similar point (perhaps it arose in a different manner), I do not feel at liberty to decline to do so, as the party is urgent to have it done. I feel wholly incapable of adding anything to what must have already been urged or suggested itself to the court upon the subject in the former cases that have been submitted.] [3]

[BLATCHFORD, District Judge. The petition was properly filed in this court. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.] [3]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. The opinion and statement are reprinted from 1 N. B. R. 666, (Quarto, 202,) by permission; the report in 2 Ben. 468, being more condensed in form.]

[2] [From 1 N. B. R. 666, (Quarto, 202.)]

[3] [From 1 N. B. R. 666, (Quarto, 202.)]

BELCHER SILVER MIN. CO., (KIELLEY v.) See Cases Nos. 7,760, 7,761.

BELCHER SILVER MIN. CO., (KNARESBOROUGH v.) See Case No. 7,874.

Case No. 1,238.

In re BELDEN et al.

[4 Ben. 225.] [1]

District Court, S. D. New York. June Term, 1870.

EXTENDING TIME TO OPPOSE DISCHARGE — EXAMINATION OF BANKRUPT—STANDING IN COURT.

Creditors of a bankrupt, against whose claim a protest had been filed by the bankrupt, applied to the register, on a petition making allegations of fraud in the bankrupt's proceedings, for an order directing the examination of the bankrupt, and of witnesses, and extending the time to show cause against the discharge till after such examination. The register declined to grant the order, because the creditors had no standing in court: *Held*, that the register, under section 26, [14 Stat. 529,] should have made the order prayed for, and that the time to show cause against the discharge ought to be extended till the examination was concluded.

[Cited in Re Jacobs, Case No. 7,160. See, also, In re Ray, Case No. 11,589; In re Thompson, Id. 13,935.]

In bankruptcy. A petition was presented to the register, in this case, by Harris C. Fahnestock, a member of the firm of Jay Cooke & Co., creditors of [William Belden and George W. Hooker,] bankrupts, setting forth that the bankrupts, by collusion with some of their creditors, and by wrongfully protesting against the claims of others, including that of the petitioner's firm, had procured the election of an assignee who, also, was in collusion with them; that the schedules attached to the petition were false; that fraudulent preferences had been made by the bankrupts; and that the proceedings throughout had been fraudulently conducted, with intent to prevent honest creditors from investigating the affairs of the bankrupts, and preparing to oppose their discharge. The petition prayed for an order of examination of the bankrupts, the assignee, certain of the creditors, and some other persons, as witnesses, and, also, for an order extending the

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

time to oppose the discharge of the bankrupts until such examination could be made.

The register declined to grant the order, but certified the question to the court, stating that he should grant the order of examination at once, were it not for decisions of the court, to the effect, that, where the claim of a creditor has been protested against, such creditor has no standing in court until the claim has been adjudicated on, citing Adams' Case, [Case No. 39;] 6 Int. Rev. Rec. 28, 127, 223; [In re Baum, Case No. 1,116; In re Patterson, Id. 10,814; In re Metcalf, Id. 9,494;] 2 N. B. R. 76, 109, [In re Brandt, Cases Nos. 1,812 and 1,813;] following which, as he said, he held that the petitioner was not entitled to the order asked for, but would be the moment his claim was substantiated as a claim; and that the prayer of the petition for an extension of the time to show cause why the bankrupts should not be discharged, could only be heard on the return day of the order to show cause before the register.

[For opinions rendered at subsequent hearings, see Cases Nos. 1,241 and 1,239.]

Charles D. Burrill, for petitioner.

BLATCHFORD, District Judge. On the petition, it is proper that the register, acting as the court, should, under section 26, [Act 1867, (14 Stat. 529,)] make the order prayed for, there being power to make such order at all times, "without any application;" and the time for showing cause against the discharge ought to be extended from time to time by the register, until the examinations of the bankrupts and the other witnesses are concluded, the whole matter being subject to regulation by the register and the court, as to the use of reasonable diligence.

Case No. 1,239.

In re BELDEN.

[5 Ben. 476;[1] 6 N. B. R. 443.]

District Court, S. D. New York. Jan. 27, 1872.

STAY OF PROCEEDINGS AGAINST BANKRUPT — UNREASONABLE DELAY—PETITION OF REVIEW.

A bankrupt filed his petition in bankruptcy October 30th, 1869. In June, 1871, M. & Co., creditors, commenced a suit against him in a state court, to recover for goods sold to him in September, 1869. In October, 1871, on the bankrupt's petition, an order was made that M. & Co. might take judgment in their suit, and that further proceedings therein be stayed, to await the determination of the question of his discharge in bankruptcy. The judgment was entered on October 20th, 1871. After the lapse of three months, M. & Co. applied to have the stay set aside, on the ground that there had been unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge. It appeared that, prior to the commencement of the creditors' suit, the bankrupt has made application for his discharge; that controversies had arisen in the proceedings, and, among others, as to whether certain other creditors had so proved their debts as to authorize them to contest the application for discharge, which questions, having been certified by the court, were decided by the court in October, 1870, and that, on November 17th, 1870, the bankrupt presented a petition of review to the circuit judge, praying a review and reversal of that decision, and obtained an order to show cause why the prayer of the petition should not be granted, returnable on November 19th, 1870, with a stay of all proceedings under the order sought to be reviewed. The petition of review had not, by January, 1872, been brought to a hearing. *Held*, that the order of the circuit judge stayed the granting of a discharge; that, as the bankrupt showed no reason for the delay in bringing the petition of review to a hearing, there had been unreasonable delay on his part in obtaining his discharge, within the meaning of the 21st section of the bankruptcy act [of 1867, (14 Stat. 526,)] and that the stay of M. & Co.'s proceeding on their judgment must be vacated.

[In bankruptcy. Application of L. Marcotte & Co., creditors of William Belden and George W. Hooker, bankrupts, to discharge an order of stay for unreasonable delay by the bankrupts in endeavoring to obtain a discharge. Granted.]

Hugh Porter, for L. Marcotte & Co.
H. E. & C. B. Stoughton, for bankrupt.

BLATCHFORD, District Judge. The petition for adjudication in this case, a voluntary one, was filed on the 30th of October, 1869. The adjudication was made on the 1st of November, 1869. On the 12th of May, 1870, the bankrupt filed his application for a discharge. Between the 1st and the 8th of September, 1869, the firm of L. Marcotte & Co. delivered to the bankrupt furniture and merchandise to the amount of $2,435. On the 15th of June, 1871, they commenced an action against him in a state court, to recover the said sum. He appeared in the suit, and served a verified answer, denying that he had ever bought or received the property, or was indebted to the plaintiffs in the suit in any sum. Thereupon, they obtained an order to examine him, as a party, before trial, which order was served on him. He then served an offer in writing to allow judgment to be entered against him for the $2,435, with interest and costs, and the offer was accepted. On the 17th of October, 1871, he presented to this court a petition verified by him on the 16th, setting forth that the indebtedness to L. Marcotte & Co. arose prior to the presentation of the petition in bankruptcy, and was a provable debt, and praying that they might take judgment for the amount claimed, with costs, and that all further proceedings in the action might be stayed to await the determination of this court on the question of his discharge from his debts. An order to that effect was made by the court on the 17th of October, 1871. The judgment was entered in the state court on the 20th of October, 1871. The debt has never been proved in bankruptcy. L. Marcotte & Co. now apply to this court to discharge the order of stay, on the ground that there has been unreasona-

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

ble delay on the part of the bankrupt in endeavoring to obtain his discharge.

On the filing of the application for a discharge, an order of hearing was made, returnable June 9th, 1870. Prior to that day, and in May, 1870, orders had been made referring to the register, for investigation, on the application of the assignee, certain claims of S. R. Jacobs, William Reed, Charles T. Yerks, Junior, and Jay Cooke & Co., as creditors, proofs of which claims had been postponed by the register, prior to the meeting for the election of an assignee. On the 8th of June, 1870, Jay Cooke & Co. applied to the register for an order to examine the bankrupt and the assignee and others, to enable Jay Cooke & Co. to file specifications against the discharge. On the 9th of June, 1870, Reed and Yerks filed specifications against the discharge. On that day the bankrupt objected, before the register, to the application of Jay Cooke & Co. and to the specifications of Reed and Yerks, on the ground that they had not proved their debts, and had no standing in court, and could not be permitted to show cause against a discharge. A motion before the register, on that day, by Jay Cooke & Co., to adjourn the hearing on the application for a discharge, was opposed by the bankrupt on the same grounds, and on the further ground, that no such examination as Jay Cooke & Co. had applied for could be allowed, to enable a party to make and file specifications. The motion was denied by the register, on the ground that Jay Cooke & Co. had not proved their debt, but their claim had been referred to him for investigation, and no proceedings had been had on such reference. This decision of the register was, at the request of Jay Cooke & Co., certified to this court. This court held [2] that the register had power to adjourn the hearing until after the investigation into the disputed claims should be had. Thereupon, the hearing on the discharge was adjourned to the 23d of June, 1870.

On the 16th of June, 1870, Jay Cooke & Co. had subpoenaed the assignee to appear before the register, claiming the right to examine him in relation to the validity of a claim of his which had been proved. To this the bankrupt and the assignee objected, before the register, on the ground that Jay Cooke & Co. had not proved their debt and had no standing in court. Jay Cooke & Co. alleged, in reply, that they had filed with the register, on the 23d of May, 1870, a deposition in proof of their debt, which had been certified by the register in the usual form. This was denied, and it was alleged that protests and affidavits against the claim of Jay Cooke & Co., made by creditors who had proved their debts, had been filed with the register on the 11th of May, 1870. The register sustained the objections made by the bankrupt and the assignee, and, at the request of Jay Cooke & Co., the decision was certified to this court.

On the 9th of June, 1870, Jay Cooke & Co., Ralli & Fachiri, and G. H. & H. Redmond filed with the register their protests against the claims of thirty-three creditors who had proved their debts before the first meeting of creditors. These protests were objected to by the bankrupt and the assignee, on the ground that the protestants had not proved their debts and had no standing in court.

On the 23d of June, 1870, the day of the adjourned hearing on the discharge, the said protestants moved for an adjournment till June 30th, 1870. This motion was opposed by the bankrupt, on the ground that the claims of the said protestants had not been proved, and that Jay Cooke & Co. had taken no steps to prove their claims under the order of reference to the register, but had refused, on a requirement to that effect made by the register, to do so, and that all the creditors who had proved their debts, being a majority in number and value of all the creditors, including those in controversy, had signed a written consent to the discharge, and that the bankrupt had, in all other respects, complied with the law, to entitle himself to a discharge. The register decided that he would not adjourn the hearing. Thereupon, at the request of the said protestants, the decision was certified to this court, and the papers touching the subject, including the specifications filed by Reed and Yerks, were transmitted to this court.

On the 3d of July, 1870, Jay Cooke & Co. and Jacobs filed specifications against a discharge, which were transmitted to this court.

The decision of the register as to the right of Jay Cooke & Co. to examine the assignee as to his debt, and the decision of the register refusing further to adjourn the hearing on the discharge were reviewed by this court,[3] on a hearing, in October, 1870. It held that the claims of Jay Cooke & Co. were duly proved on the 23d of May, 1870; that the claim of Ralli & Fachiri ought to have appended to it the certificate of the commissioner before whom it was taken, that it was satisfactory to him, and, if such certificate was procured, the claim would be filed nunc pro tunc as of the 1st of June, 1870, and would be regarded as having been duly proved at that time; that Jay Cooke & Co. were entitled to an order of examination, under section 26th of the act, according to form No. 45; that the assignee was bound to answer the questions put to him, so far as they related to any matter of examination specified in section 26th; that the case would stand for hearing, as to the question of discharge, on the specifications of Jacobs, Jay Cooke & Co., Reed and Yerks; and that any party might take testimony thereon before the register.

On the 17th of November, 1870, the bank-

[2] [See Case No. 1,238.]

[3] [See Case No. 1,241.]

rupt presented to the circuit judge a petition setting forth the foregoing proceedings, and that he was aggrieved by the decisions of the court, and praying the circuit judge to review and reverse such decisions. The circuit judge granted leave to file the petition, and made an order requiring Jacobs, Jay Cooke & Co., Yerks, Reed, and Ralli & Fachiri to show cause before him on the 19th of November, 1870, why the prayer of the petition should not be granted, and directing that, in the mean time, and until the hearing and determination of the motion on the order, all proceedings under the orders of this court herein should be suspended.

This order stays all proceedings towards a hearing on the specifications against a discharge, and stays such hearing, and, consequently, stays the granting of a discharge, so long as a decision is not made by the circuit judge on a review of the decisions of this court a review of which is asked. But, the 21st section of the act provides, that proceedings to collect a provable debt shall, on the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge. L. Marcotte & Co. are not parties to the petition of review pending before the circuit judge. They can do nothing to further a decision on such petition, except to make this application to discharge the order of stay granted against them. It is not shown by the bankrupt why the petition of review has not been decided, or whether it has ever been brought to a hearing, and, if it has not, that the failure has been through no fault of his, or what efforts he has made to have a hearing. It is stated in the petition of L. Marcotte & Co., that the bankrupt is amply able to pay their claim in full. This is not denied by the bankrupt. Of course, he can pay it only out of means acquired since the petition in bankruptcy was filed. I think the unexplained delay since November, 1870, on the part of the bankrupt, in procuring a decision on his petition of review, is an unreasonable delay on his part in endeavoring to obtain his discharge, within the intent and meaning of the 21st section. The 2d section provides that the jurisdiction by petition of review may be exercised by the circuit court, or by any justice thereof, in term time or vacation. It would be great injustice to permit an order of the circuit judge, which shows on its face that he contemplated a stay of only two days till the hearing of the petition of review, and which has now been allowed by the bankrupt to remain as an obstruction for fourteen months, and has operated against L. Marcotte & Co. for three months, to remain any longer as an obstacle to their proceeding to endeavor to collect their claim out of any property which the bankrupt has acquired since his petition in bankruptcy was filed.

So much of the order of October 17th, 1871, as operates as a stay of the proceedings of L. Marcotte & Co. on their judgment, is vacated.

Case No. 1,240.

In re BELDEN.

[2 N. B. R. (1874,) 42, (Quarto, 14;)[1] 2 Am. Law Rev. 771; 15 Pittsb. Leg. J. 547.]

District Court, D. California.

BANKRUPTCY—PREFERENCES—INTENT.

The property of a debtor being attached by a hostile creditor, without his knowledge, and he [having] omitted to have himself adjudged a voluntary bankrupt: *Held*, that the omission had no retrospective intent on the previous taking of the property, and could not "supply the intent to give a preference."

[Cited in Beattie v. Gardner, Case No. 1,195.]

[In bankruptcy. Application by Francis C. Belden, a bankrupt, for a discharge. Creditors object. Objection overruled.]

In this case the bankrupt having applied for a discharge, the creditors' counsel objected on the ground that Belden had brought himself within the meaning of the twenty-ninth section of the bankrupt act of 1867, [14 Stat. 531,] which forbids the discharge to be granted in cases where the bankrupt has, within four months before the commencement of proceedings, procured his property to be attached, &c. It appeared that the attachment had been made without his knowledge or consent, by a hostile creditor. But it was contended, on the part of the creditors, that Belden came within the meaning of the clause, by having subsequently omitted "to procure himself to be adjudged a voluntary bankrupt." But THE COURT (HOFFMAN, District Judge) decided that this omission "could have no retrospective intent on the previous taking of the property," and could not "supply the intent to give a preference, which is an essential ingredient in the act of bankruptcy, and which, when the property was taken, had no existence."

Case No. 1,241.

In re BELDEN et al.

[4 N. B. R. 194, (Quarto, 57.)][2]

District Court, S. D. New York. Oct. 19, 1870.

BANKRUPTCY—RIGHTS OF CREDITORS—ORDER FOR EXAMINATION.

Where creditor's claims have been protested against, if duly proved, the creditors representing those claims will be entitled to an order according to form No. 45, under section 26, [Act 1867, (14 Stat. 529.)]

In bankruptcy.

I, John Fitch, one of the registers of this court, before whom the proceedings in the matter [of William Belden and George W.

[1] [Reprinted from 2 N. B. R. 42, (Quarto, 14,) by permission.]

[2] [Reprinted by permission.]

Hooker, bankrupts] are now pending, do hereby certify that on the 16th day of June, 1870, at 12 o'clock m., personally appeared at my office, No. 44 Wall street, in the city of New York, Josiah H. Burton, assignee and creditor of the estate of said bankrupts, pursuant to an order and summons issued by me on the 10th day of June, 1870, upon the application of J. E. Burrill, attorney for Jay Cooke & Co., creditors, whose claim has been protested against. L. B. Clark appeared as counsel for the bankrupts; C. B. Stoughton as counsel for the assignee and various creditors who have duly proved their debts; J. E. Burrill as counsel for Jay Cooke & Co., and Gutman & Thomson for G. H. H. Redmond, and Rulli and Fachiri, creditors, whose claims have been protested against. That the proceedings which took place before me on the said 16th day of June, 1870, fully appear by the stenographer's minutes which are hereto prefixed; that copies of the respective papers requested by counsel to be certified to this court, and the statement of facts and the points presented to me by C. B. Stoughton, of counsel for assignee, and J. E. Burrill, of counsel for Jay Cooke & Co., are also hereto prefixed.

The question raised by the counsel for the creditors and assignee, C. B. Stoughton, and by the counsel for the bankrupts, L. B. Clark, is simply this: Have Jay Cooke & Co. and the other creditors whose claims have been protested against, any standing in court, their claims not having been proved in accordance with the rules and practice of this court? I hold, as a matter of law: First. That they have not duly proved their claims. Second. That they are not entitled to an order, according to form No. 45, under section 26. Third. That the witness is not bound to answer the questions put to him until Jay Cooke & Co., etc., etc., shall have duly proved their claim, and when such claims shall have been duly proven according to law, and when so proven, filed, and become a record of the court, then, and not till then, the question must be answered.

The proceedings of Jay Cooke & Co., etc., etc., are premature, irregular, and void. The bankrupts or any creditor may object to them. The authorities applicable to this question are enumerated in my certificate, attached to the certificate of the proceedings which took place before me on the return day of the order, to show the cause why the said bankrupts should not be discharged, and the adjourned return day of said order, filed in the office of the clerk of this court on the 28th day of June, 1870.

[For opinion at a prior hearing, see Case No. 1,238; and, for history of case and opinion at subsequent hearing, see Id. 1,239.]

BLATCHFORD, District Judge. The claim of Jay Cooke & Co. was duly proved, and the proof of it must be filed nunc pro tunc as of the 23d of May, 1870.

The proof of the claim of Rulli and Fachiri ought to have had appended to it the certificate of the commissioner before whom it was taken, that it was satisfactory to him. If such certificate is procured, the proof must be filed nunc pro tunc as of the 1st of June, 1870, and the claim will be regarded as having been duly proved at that time.

Jay Cooke & Co. are entitled to an order according to form No. 45, under section 26, [Act 1867, (14 Stat. 529.)] The witness was bound to answer the questions put to him, so far as they related to any matter of examination specified in section 26. The clerk will certify this decision to the register, John Fitch, Esq.

Case No. 1,242.

BELDEN et al. v. SMITH et al.

[16 N. B. R. (1878,) 302.][1]

District Court, N. D. New York.

BANKRUPTCY—VOLUNTARY ASSIGNMENT—TITLE OF ASSIGNEE IN BANKRUPTCY — LIEN OF FORMER JUDGMENT—CLOUD ON TITLE.

1. A judgment recovered after the making of a general assignment for the benefit of creditors, without preferences, and valid by the laws of the state where it is made, creates no cloud upon the title to property transferred by the assignment, although such assignment be subsequently set aside upon the application of an assignee in bankruptcy.

[Cited in Wehl v. Wald, 3 Fed. 93. See, also, In re Beisenthal, Case No. 1,236.]

2. Until a general assignment for the benefit of creditors has been set aside, the title to property embraced in it remains in the assignee; it does not vest in the assignee in bankruptcy by the mere force of an adjudication and his appointment as assignee.

[In equity. Bill by James J. Belden, as assignee in bankruptcy of Munroe, against Moses Smith and others, to remove a cloud on title. Defendants demur. Demurrer sustained.]

George Doheny, for complainant.

Warren F. Miller, for defendant Smith.

WALLACE, District Judge. The main question raised by the demurrer to the bill is whether the judgment of the defendant Smith is a cloud on the title to real estate. The bill alleged that after Munroe had executed a general assignment of all his property in trust for the benefit of his creditors, without preferences and pursuant to the laws of New York, to the complainant, after complainant had acquired the trust, the defendant Smith recovered a judgment against Munroe, and docketed it in the county where certain real estate was situated, which had been owned by Munroe, and conveyed by him under the assignment to complainant. The bill then proceeds to allege that after this judgment was docketed, proceedings in bankruptcy were instituted under which Munroe was adjudged a bankrupt, and the complainant was

[1] [Reprinted by permission.]

selected and qualified as assignee in bankruptcy of Munroe, and that thereafter the complainant as assignee in bankruptcy conveyed said real estate, and agreed with the purchaser to remove the apparent lien of Smith's judgment. Then follow general allegations to the effect that the general assignment to complainant is contrary to the spirit and provisions of the "act of congress to establish a uniform system of bankruptcy, etc.," [March 2, 1867, (14 Stat. 517,)] that the complainant is embarrassed by the judgment of Smith, and that Smith refuses to remove the cloud from complainant's title.

Without discussing the question whether complainant, after having conveyed the real estate, has such an interest as will enable him to maintain an action to remove a cloud upon the title, it is clear the complainant cannot maintain this bill. It is well settled that a general assignment in trust for creditors, without preferences, and valid by the laws of the state where it is made, though it may be set aside in favor of an assignee in bankruptcy, as contrary to the provisions of the bankrupt act, is effectual and valid until so set aside; and the grantee in trust takes good title to the property conveyed as against every one but an assignee in bankruptcy. And it is the settled law in this court that a person recovering a judgment after such an assignment has been made and accepted, acquires no lien upon the property transferred by the assignment, although the assignment be subsequently set aside upon the application of an assignee in bankruptcy.

The complainant's case then stands precisely as though he were seeking to remove as a cloud on his title a judgment recovered against a former owner of real estate, after such owner had parted with his title by a valid conveyance. No authority can be found sanctioning such an action. The judgment is not in any legal sense a cloud upon the title. If the bill had alleged that the assignment in trust was void for any reason as against the judgment, a different question would be presented. The only purpose which such an action as this could subserve would be to correct an apparent defect in an abstract of title, and that end could be much more easily accomplished by means of a conveyance by complainant as assignee under the general assignment to the purchaser. In fact, it is difficult to see how the purchaser can acquire any title to the land except by such a conveyance. The title did not vest in the complainant as assignee in bankruptcy by the mere force of an adjudication of bankruptcy and the appointment of complainant as assignee. Until the general assignment shall have been set aside as void as against complainant as assignee in bankruptcy, the title remains in complainant as assignee under the general assignment. Whether an action would lie by a complainant as assignee in bankruptcy against himself as a defendant as assignee under a voluntary assignment, upon the theory that the voluntary assignment was void as contrary to the terms of the bankrupt act, it is not necessary to discuss. The difficulties in the way of such an action are sufficient to attest to the great impropriety of selecting as an assignee in bankruptcy one who may be called upon to bring an action against himself to invalidate a conveyance to which he has been a party.

Case No. 1,243.

BELDING et al. v. TURNER.

[8 Blatchf. 321; 4 Fish. Pat. Cas. 446.][1]

Circuit Court, D. Connecticut. April 20, 1871.

PATENTS FOR INVENTIONS—LICENSE TO PARTNERSHIP—INJUNCTION FOR INFRINGEMENT.

A. licensed the firm of H. & Co., of New Jersey, for the sum of one thousand dollars, to use a patented invention "for the purpose of manufacturing a quantity of silk, not exceeding one hundred pounds per week," during the term of the letters patent. The firm of H. & Co., which consisted of two members, H. & L., was subsequently dissolved, L. assigning all her interest to H. H. subsequently transported the machine to the works of the defendant, in Connecticut, where he used it, under an agreement with him, in the manufacture of the quantity of silk named in the license. The owners of the patent having moved to enjoin the use of the machine, under these circumstances, an injunction was refused.

[Cited in Montross v. Mabie, 30 Fed. 238.]

[See note at end of case.]

[In equity. Motion by Milo M. Belding and others for a provisional injunction to restrain Phineas W. Turner from infringing letters patent No. 42,153, granted April 5, 1864, to Goodrich Holland and J. E. Atwood, for an "improvement in the manufacture of sewing silk." Denied.]

Charles E. Perkins, for plaintiffs.

Alvin P. Hyde, for defendant.

SHIPMAN, District Judge. This is a motion for a preliminary injunction, founded upon an ordinary bill in equity, seeking to restrain an alleged infringement of the plaintiffs' patent, and to obtain an account, together with accompanying affidavits. That the device covered by the plaintiffs' patent is in use in the defendant's manufacturing establishment, with his consent, is not denied. He seeks to justify that use by the following facts:

On the 3d of February, 1866, the then owners of the patent in question executed a written instrument under seal, which, after reciting the issue of the patent to the inventors thereof, and that "Messrs. Howarth & Co., of Hoboken, state of New Jersey, are desirous of acquiring a license to use said invention to a limited extent," proceeds as follows: "Now this indenture witnesseth, that, for and in consideration of the sum of one thousand dollars to us in hand paid, the receipt of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus taken from Fish. Pat. Cas., and opinion from Blatchf.]

which is hereby acknowledged, we hereby grant unto the said Howarth & Co. the right to use the aforesaid invention for the purpose of manufacturing a quantity of silk, not exceeding one hundred (100) pounds per week, during the term for which said letters patent are granted." At the time this instrument was executed, the firm of Howarth & Co. consisted of Horatio Howarth and Ann E. Leigh. On the 3d of September, 1867, the firm of Howarth & Co. was dissolved by mutual consent, Leigh assigning all her interest in the assets of the firm, of every kind, to Howarth, and the latter paying a consideration therefor, and also assuming all the debts and liabilities of the firm. On the 27th of March, 1869, Howarth entered into an arrangement with the defendant, by which the former agreed to transport the machine used for the manufacture of silk under the license, to the manufacturing establishment of the defendant, in Hebron, Connecticut, where it was to be run by Howarth, in the manufacture of the quantity of silk named in the license, the defendant to furnish water-power, pay certain expenses, and a prescribed tariff, and comply with certain other conditions not necessary to mention. The question now is, whether the use of the machine under these circumstances should be arrested on this motion.

The plaintiffs contend, that, as the license is not in terms assignable, it conferred a personal privilege only, and that upon Howarth & Co. They insist, that the dissolution of the firm and the withdrawal of Leigh extinguished the license. A court of equity would give such an interpretation to this instrument only when compelled to do so by the unbending and imperative rules of construction. In the first place, it is entirely obvious, that it was of no importance to the licensers whether the privilege granted by them should enure to the benefit of a firm consisting of two or more persons, or should be enjoyed by one only. The privilege granted was specific—to use the invention to the extent of manufacturing one hundred pounds of silk per week during the life of the patent. For this the licensers received a given sum in advance, covering the whole period of time. The license contains no limitation of time or place, but only of quantity.

But it is said that there is an implied limitation to persons—that the privilege can only be enjoyed by Howarth & Co., as the grant was to them only. This is a very narrow interpretation, by which the construction of the instrument is made to hinge on a name. By such a construction, the privilege would not have been defeated had new partners been admitted to the firm, provided the name had remained unchanged. Nor would the withdrawal of one of the two partners composing the firm at the time the license was granted, have had such an effect, provided the remaining member had chosen to carry on the business under the old name of Howarth & Co. For, it will be noticed, that the instrument does not prescribe or limit the number of partners which shall compose the firm of Howarth & Co., by setting out their individual names. The instrument, therefore, furnishes no evidence that the grantors intended that the privilege conferred by the license should be enjoyed by the exact number and identical persons of which the firm of Howarth & Co. was then composed. There was nothing in the nature of the privilege to lead the owners of the patent to call for, or contemplate, such a precise and rigid limitation of the grant. They knew perfectly well, in view of the instability of human affairs, that this firm might be changed or dissolved in a short time, and yet they took a consideration coextensive with the whole life of the patent, which they still retain; and one of them is a party plaintiff to this bill. He, at least, is seeking to deprive a party of a privilege for which he undoubtedly paid a full consideration.

There is no pretence that Howarth is using the invention in any manner not warranted by the license, except what grows out of the fact that his co-partner has withdrawn from the firm and relinquished to him all her rights therein. As at present advised, I do not think that this fact operates to deprive him of all rights under this license. At all events, I entertain sufficient doubts of the validity of the plaintiffs' claim to lead me to deny this motion for a preliminary injunction.

[NOTE. The rule respecting licenses generally, that they are founded in personal confidence, and are not assignable, (3 Kent, Comm. 452,) is closely analogous to the doctrine of the nonassignability of a license to use a patented invention, and, perhaps, has been an influence of more or less potency in shaping the lines of its development. It is worthy of note, however, that the principles enunciated in some of the decisions seem to have more particular relation to the legal character of the original patent grant by the crown.

[The exclusive right to an invention can only have existence by virtue of some positive law, and in England this right has been regarded a personal privilege, inalienable unless power to that effect is given by the crown. This privilege, as such, is a mere naked right, inseparable from the person of the grantee; but in practice it is made assignable by the grant, and is then defined as an incorporeal chattel, which the patent impresses with all the characteristics of personal estate, by limiting it to the grantee, his executors, administrators, and assigns. Duvergier v. Fellows, 10 Barn. & C. 829; Power v. Walker, 3 Maule & S. 9. This same purpose found expression in the first patent act passed by the congress of the United States in 1790, (Act April 10, 1790; 1 Stat. 110, § 1,) the subsequent acts, and also in the Revised Statutes, (section 4884,) which made the grant to the patentee his "heirs or assigns." Statutory provision has been made for the recording of assignments of patents, (Rev. St. § 4898,) but no reference is made in the acts to the assignment of licenses.

[The rule was early established that a mere license to a party, without mentioning his assigns, is a grant of power, or a dispensation with a right or a remedy, and confers a personal

right upon the licensee, which is not transmissible to another person. Brooks v. Byam, Case No. 1,948; Troy Iron & Nail Factory v. Corning, 14 How. (55 U. S.) 193; Curt. Pat. § 213. Further justification is found for the rule in the fact that licenses are usually granted to such individuals as the grantor may select because of their personal ability or qualifications to carry out the purpose of the license; and such a license is not assignable, although granted for a term of years. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61. See, also, Thomson v. Citizens' Nat. Bank, 3 C. C. A. 518, 53 Fed. 250; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. Rep. 544; Holmes Burglar Alarm Tel. Co. v. Domestic Tel. & Tel. Co., 42 Fed. 220; Walk. Pat. § 310; Searls v. Bouton, 12 Fed. 140; Baldwin v. Sibley, Case No. 805. A license does not authorize the granting of sublicenses. Putnam v. Hollender, 6 Fed. 882.

[The rule has been enforced with some strictness; e. g. a license held by a corporation is determined upon the dissolution of the corporation, and cannot pass to another corporation formed by the same parties under the laws of another state. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193. A license will not pass to a receiver appointed by the court, (Curran v. Craig, 22 Fed. 101; Waterman v. Shipman, 5 C. C. A. 371, 55 Fed. 982;) but, where goods manufactured under a license are on hand at the time of the appointment of the receiver, the license will be construed so as to authorize the sale of such goods, (Montross v. Mabie, 30 Fed. 234.)

[A license to a partnership confers no right upon a corporation subsequently organized by the partners, who became its sole shareholders, except 30 shares reserved for sale to employes. Locke v. Lane & Bodley Co., 35 Fed. 289. But it seems that licenses to two corporations will pass to another corporation formed by their consolidation. Lightner v. Boston & A. R. Co., Case No. 8,343. This case was decided in 1869, and rests upon the theory that the gist of the license contract, which was for the use of an axle box on railway cars, was an unlimited use on the two roads between given points, (a purpose best subserved by the continued use by the consolidated corporation,) and the fact that the two old corporations were not dissolved, but were continued for certain purposes. No authorities were cited.

[The principal case, holding that a surviving partner is entitled to a license granted to the old firm, is in a measure based upon the fact that the consideration for the license was the lump sum of $1,000, which should inure to the benefit of the surviving partner, as one of the parties to the original contract.

[Concerning licenses generally, see Ricker v. Kelly, 10 Am. Dec. 40, note; Cowles v. Kidder, 24 N. H. 364; Mumford v. Whitney, 15 Wend. 380.]

BELDING, (UNITED STATES v.) See Case No. 14,562.

BELEW, (UNITED STATES v.) See Case No. 14,563.

Case No. 1,244.

The BELKNAP.

[2 Lowell, 281.][1]

District Court, D. Massachusetts. Oct. Term, 1873.

COLLISION—TUG AND TOW.

1. A ship, manned with landsmen only, was to be moved to another part of the harbor, and, when coming out of her dock in tow of a steam-tug, collided with a lighter which was made fast to another ship in the same dock. *Held*, the tug was prima facie liable.

[Cited in The Frank Moffat, Case No. 5,060.]

2. Some cases concerning the respective liabilities of tow and tug considered.

[Cited in The Doris Eckhoff, 32 Fed. 559.]

3. Whether the tug would be liable if the fault were shown to be with the master of the ship, quaere?

[In admiralty. Libel by the owner of a ballast lighter against the steam-tug Belknap for collision. Decree for libellant.]

The libellant was owner of a small ballast lighter, which was made fast alongside the ship Archer in the dock of a wharf in Boston, on the 23d February, 1873, when the steam-tug Belknap came into the dock to tow the ship Nonantum, which was lying on the opposite side from the Archer and a little higher up the dock, round to a dry dock for repairs. There was not room to pass if the tug should be lashed alongside the Nonantum, and she gave a line to the latter; and the libellant's evidence tended to show that she began to tow, and was hailed not to come into the lighter, and that her master, or some one on board of her, answered that there was room enough. The Nonantum soon after struck the lighter, and damaged her to some slight extent. The respondent denied that the tug was towing the Nonantum. Her master testified that he had not begun to haul taut. His opinion of the cause of the accident was, that the lines of the Nonantum were let go, and she fell over on the lighter, or that she drifted with the wind, which was blowing down the dock.

C. G. Thomas, for libellant.

J. B. Richardson, for claimant.

LOWELL, District Judge. I wish to repeat that these cases should be brought on as speedily as possible, while the witnesses are at hand, and the matter is fresh in their minds. The court will always, as heretofore, make every effort to find time for speedy trials of admiralty causes. In this case we have lost the testimony of the master of the Nonantum, which would have been of most material assistance in settling the difficult question of fact involved in the issue. There is no doubt that either the ship Nonantum or the tug, or both, are responsible for this damage; for the lighter was lawfully in the dock, and was made fast there. If, indeed, it had been proved, as was alleged, that the libellant had failed to give place after due and ample notice, the case might be different. The only point argued was, whether the fault was with the ship or the tug. The master of the Nonantum was on board his ship; but there is no evidence that he was in command of her navigation, unless that is to be presumed. There was also a Mr. Murphy, and five or six men who had been engaged the day before to move or as-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

sist in moving the ship, which had no crew on board. Murphy and his assistants are landsmen, and call themselves ship-movers, or ship-haulers; but whether Murphy, or the master of the tug, or the master of the ship, had the command and charge of the whole business of moving the ship, is what the parties do not agree upon, and what is somewhat difficult to ascertain upon the evidence.

It was argued that the law has been laid down too broadly against tugs in this district, in The R. B. Forbes, [Case No. 11,598,] and The Rescue, [Id. 11,708.] In the latter case, it was held that an action in rem would lie against the steamer which furnished the motive power, although the tow had on board a pilot, who directed the motion of both ship and steamboat. This certainly seems an extreme application of the doctrine that the thing which does the damage is always responsible. It is the law in admiralty, generally speaking, that recovery may be had in rem against a vessel that is improperly navigated and thereby injures another vessel, without regard to the ownership, or possessory or any other title, of the wrong-doing vessel, or any inquiry as to what persons would be responsible in a personal action. A lien is fastened on the thing; and its owner and charterer, master and pilot, and all others interested, must settle their responsibilities between themselves. When two ships, independently owned, but connected in a joint enterprise as tug and tow, have injured a third ship, the question of responsibility may be more difficult, and the authorities seem to be somewhat contradictory. I believe it is true, as argued, that no other case has gone so far as The Rescue, [supra;] but whether that case was well decided or not I shall not need to consider.

In England, the rule is, that the ship is liable for all faults in her own equipment and management, or in those of the tug, on the simple principle of "respondeat superior;" because the ship hires the tug: The Kingston-by-Sea, 3 W. Rob. Adm. 152; The Cleadon, 14 Moore, P. C. 92. If the tug has committed any fault, her owners are to answer over to the ship-owners, (The Nightwatch, Lush. 542;) but the latter assume full responsibility towards third persons, as they do for the conduct of their own officers and crew. Besides this, it is taken to be the fact in most of the English cases, that the navigation is under the charge of the ship's pilot. "To say," said Dr. Lushington, in a case of this character, "that the steamer had the whole charge of the Ticonderoga, is contrary to all common sense." The Ticonderoga, Swab. 215, 217. If the ship have a licensed pilot, whose orders are obeyed by the tug, the fact, according to an exceptional law in England, exonerates both ship and tug: The Duke of Sussex, 1 W. Rob. Adm. 270. But if the pilot be not in command, or his commands are disobeyed, the ship is liable, for the reason already given: The Borussia, Swab. 94. See The Chieftain, 2 W. Rob. Adm. 450; The Gypsey King, Id. 537. As the ship is responsible in every case in which the plaintiff can recover at all, and as there might be doubt about holding the tug under some circumstances, very few cases are brought against tugs.

The simple rule of the English law is not capable of application in this country. In the first place, the usual course of business here is for the tug-boat to take the actual charge of the navigation, and whatever faults are committed are usually by her officers or crew. Besides this, a very considerable part of the towing is done on the great rivers, such as the Hudson and the Mississippi, where the tow often consists of many vessels belonging to different owners. In some of the reported cases there have been thirty or more barges or canal-boats in tow of a single steamer, and, of course, it cannot be that they are all principals. This difference of trade has brought about a different mode of regarding the responsibility of the parties.

In an early case the supreme court of Massachusetts held that the owners of the tow did not stand in the relation of principals to the master and crew of the tug: Sproul v. Hemmingway, 14 Pick 1. It is not easy to see how this conclusion can be avoided at common law, under the rule, now fully established, that the person who merely bargains for certain work to be done for him by a person who supplies the men and materials, and has the whole charge of the operation, is not responsible for the acts or neglects of the contractor or his servants. I do not need to decide whether this rule would hold good in the admiralty, or whether the English rule might not be sound in a case like those in which it has been adopted.

It has come to be the general practice in this country to consider the tug responsible, unless it can be proved that the actual fault was in the navigation of the tow. It is to be regretted, perhaps, that there should not be, if there is not, one simple rule holding one or the other in all cases. It appears to be the opinion of Judge Sprague that the law is so; and I do not now decide that question. The general course, however, having been to endeavor to prove which of the parties engaged in the joint enterprise is, as between themselves, in fault, the decisions in this country have not been entirely uniform, and the practice has grown up in some districts of suing both tug and tow, so as to risk nothing but costs, if only one of them should prove to be responsible. The cases cited below will show that in the third circuit they still adhere to the English doctrine, that the ship is the principal; while in the others and in the supreme court the tug is presumed to be the principal, and is to be held responsible for a fault on that side of the case, in the absence of evidence that the tow caused the damage: The Creole, [Case No. 13,033;] The Sampson, [Id.

12,280;] Sproul v. Hemmingway, 14 Pick. 1; The New York v. Rea, 18 How. [59 U. S.] 223; The Express, [Case No. 4,596;] The John Fraser, 21 How. [62 U. S.] 184; The Hector, [Case No. 6,317,] sub nom. Sturgis v. Boyer, 24 How. [65 U. S.] 110; The R. B. Forbes, [Cases Nos. 11,598, and 11,275;] The Clover, [Id. 2,908.] The law of this country is summed up by Clifford, J., in The Mabey and Cooper, 14 Wall. [81 U. S.] 204.

In only one of these cases was it decided that the ship would not be liable as well as the tug; and it may not yet, perhaps, be too late to establish a general rule, if it should be found the most just and reasonable. In the mean time, it must be admitted to be the law of the United States, founded on what I suppose to be a true assumption of fact, that when a vessel is in tow of a tug and runs into another vessel which is in no fault, prima facie the tug is responsible, whether the tow be so or not. I am prepared to admit, for the purposes of this case, that the tug would be exonerated, if it were shown that the master of the ship or her crew were alone in fault. I do not decide so, but take it for granted in this case. Now, what is the evidence here? The plaintiff's testimony puts it, by three witnesses, that the tug was seen apparently towing the ship towards the lighter, and was hailed, and some one replied that there was room enough. Here is, certainly, a prima facie case. On the other hand, the master of the tug denies the hail, and the reply, and the towing. He puts forward the very improbable theory that the vessel was to be allowed to drift down past the other ships in the dock; improbable, because no means were taken to warp her. This evidence leaves no one in command. It is not likely that the riggers and other landsmen were to do any thing more than tend the lines, and do work of that sort for a vessel moved from one part of the harbor to another. In the case above cited from 24 How. (65 U. S.) the circumstances were very similar, and there not only was the tug held, but the ship was acquitted. Upon the whole evidence, I do not think the claimants have overcome the plaintiff's case, and disproved the apparent responsible agency of the tug in this business. Decree for the libellant.

BELKNAP MILLS, (CROMPTON v.) See Case No. 3,406.

Case No. 1,245.

BELL et al. v. The ANN.

[2 Pet. Adm. 278.][1]

District Court, D. Pennsylvania. 1807.

SALVAGE—DERELICT—AMOUNT OF AWARD.

1. The ship Belvidere fell in with the Ann at sea, deserted, abandoned, and in danger of sinking. The Ann was brought into the port of Philadelphia, by a part of the crew of the Belvidere, and libelled for salvage. The court allowed one half of the net amount of the sales, as salvage.

See 1 Pet. Adm. 31, 48, 70, 87, [Warder v. La Belle Creole, Case No. 17,165; Taylor v. Cato, Id. 13,786; Clayton v. The Harmony, Id. 2,871; Brevoor v. The Fair American, Id. 1,847.]

2. The seamen put on board the Ann, allowed a greater proportion of salvage.

[Cited in The Aroma Mills, Case No. 2,041.]

[In admiralty. Libel by Bell and others against the sloop Ann for salvage. Decree for libellants.]

PETERS, District Judge. The libel, and the depositions and exhibits, in support of it, state, that on the 8th day of October, 1806, the ship Belvidere, Michael, master, owned by Bell, and others in the libel mentioned, in north lat. 38 deg. 42 min. and 60 deg. W. fell in with the sloop or cutter Ann. Her name blacked over, so as scarcely to be discernible. She had been loaded with fish; part whereof had been thrown overboard. Her situation was critical, having been stripped and deserted by her officers and crew. On taking possession of her, about forty barrels of fish were thrown overboard to lighten her. She was taken in tow by the ship, and brought to Philadelphia the 29th of the same month, with great labour and difficulty. She arrived within the capes of Delaware, on the 21st. A gale of wind blew hard for near three days in the bay, and put the ship into difficulties for want of hands, and required great labour and exertion of those on board the sloop, to prevent her loss. The sloop was full of water when boarded, and had neither sails or rigging; but these were supplied from the ship, which towed the sloop upwards of a thousand miles. The chief mate of the ship, with Frederick Collins, John Holme, and the boy Jacob, were put on board the sloop when taken possession of, and so continued until her arrival at Philadelphia. Their duty was to attend to the sails, steer after the ship, keep her free, and other necessary business, both before and after her separation from the ship. The value of the vessel and freight, as it is stated in the policy and freight list, amounted to more than $12,000.

I see nothing in the principles of this case, to distinguish it from cases of salvage, frequently occurring here. In the facts, there is much merit and some singularity. I think it is among the few cases of vessels entirely deserted, and left without any part of the crew, to their fate. This may cause an appearance of hopeless dereliction; but it is no more so than that of goods thrown overboard, or found flotsam, or ligan. The value of the ship and freight has its usual influence. It operates, on a comparison with the amount of property saved, to increase the proportion of salvage, from that allowed where the reward is greater, when the fund

[1] [Reported by Hon. Richard Peters, District Judge.]

out of which it is granted is more ample. I increase or diminish this proportion, according to the amount of the articles saved. Proportions of the amount of sales either in gross or nett, or in the total value of the articles, where their value is found by appraisement, are not so much rules with me, nor should they be, as the sum actually received by the salvors. If the property saved is considerable, the proportion is less; if small, the ratio is greater; so as to produce a sum, in my mind sufficient, to reward the salvors, and encourage others. This must be regulated by circumstances, and an attention to the interests of the owners, as well as the claims of the salvors. If the amount is small, it is a casualty of which they must take the hazard. They can only have a reasonable reward, in a fit proportion of the property saved, whatever may be the property risked. I have never heard of any losses accruing to ships, while saving lives or property at sea. In the instances, and they are not few, I have generally had before me, no more profitable employment could be found for the ships, or their crews, engaged in the risks and dangers so much relied on, for swelling rewards as cases of salvage; be this as it may, the due weight of such circumstances has never been overlooked. As to labour and difficulty, one cannot nicely balance and weigh them; they being generally produced by circumstances incapable of estimation. Some advantages accrue to ships taking on board the crews of perishing vessels; they always assist in the navigation, and often in the salvage. In the present instance the Belvidere had no such advantages; and being obliged to divide her crew, her risk was increased, and they experienced more difficulties: but I know not how to make this a matter of pecuniary calculation. The officers and crew always participate in the amount allowed to the ship; their proportions are greater or less, as the total of salvage is great or small. I gave my opinion, and mentioned my practice on this head, in the Case of The Cato, [Taylor v. Cato, Case No. 13,786,] in these words: "I cannot depreciate the services performed by the officers and crew of a vessel of small value, by making that the rule for reward, either as it respects the owners of the vessel saving, or of the property saved. Nor can I inflate a case of little merit, by augmenting the salvage, in any thing like the proportion of value of a vessel and cargo of great amount." If the whole amount of salvage be but an inadequate reward, the men who stake their lives and apply their labour, must be considered in remuneration, equally with the owners of the ship and cargo, alleged to be put to hazard. It is an extra duty and voluntary service, to which mariners cannot be legally compelled, and must be invited.

As to any argument founded on the total dereliction by the officers and crew of the deserted vessel, I see not its force. The owner of the derelict, as it is called, may sometimes be benefitted by signals and exertions, made by any or all of the crew remaining in his vessel; but I do not see that because his case, though wanting such benefits, is the more hopeless, the conduct of the salvor becomes more meritorious. I have always considered the saving the lives of the officers and crew of a perishing vessel, the most valuable and laudable part of the transaction. I have never esteemed the amount of the property recovered, worthy of comparison with it; much less does it deserve to be elevated in the scale of merit entitling to greater pecuniary reward, than that allotted to those who saved lives, as well as property. I confess, that if my obligations in the station I fill, justified me in yielding to my sensibilities, I should reward those who saved life, in a far greater degree than the salvors of property. I think the policy of encouraging risks to save lives in jeopardy, should warrant a preference in reward of the former, much beyond that allowed to the latter. At any rate, it would be highly discouraging, imprudent and unjust, to increase the compensation and premium, because no lives were saved, when the property was rescued from destruction.

Considering this case under every aspect in which I have viewed it, and it being one wherein the property recovered is not very considerable, and, of course the property saved is in less proportion to that risked, and the labour and difficulty of securing it have been great, I allow for salvage, one-half the net amount of sales, to be divided as directed in the case of The Cato, [Case No. 13,786;] save that the first mate, and hands put on board the sloop Ann, are to receive half a share more than those on board the Belvidere, on account of greater peril and additional exertion, after parting with the ship during the storm in the bay of Delaware. I very cheerfully follow the precedent prescribed to me in the Case of the Blaireau, 2 Cranch, [6 U. S.] 240, and give the boy Jacob an entire share, to be received by himself, and for his own use, for this extra duty. It is true that the officers and hands on board the Belvidere, had their portion both of labour and difficulty; but I think those in the deserted vessel, with less means and worse accommodations, were more perilously situated, especially after parting with the ship: a hazard they encountered, during the whole of the passage, in a vessel not thought safe or seaworthy, by its own officers and crew. Additional encouragement should be given to such adventurous salvors, from motives both of policy and justice.

BELL, (BULLARD v.) See Case No. 2,121.
BELL, (COLLINS v.) See Case No. 3,010.

Case No. 1,246.

BELL et al. v. CUNNINGHAM et al.

[1 Sumn. 89.][1]

Circuit Court, D. Massachusetts. May Term, 1831.

INJUNCTION—ENJOINING JUDGMENT AGAINST FOREIGNERS — SURPRISE — WANT OF NOTICE OF ISSUES.

1. A court of equity will grant an injunction pro tanto to so much of a judgment as has been recovered by surprise of the defendant at a trial, when he had a good defence to it, but had no notice of the claim, even though the plaintiffs in the suit were in no default, and acted bona fide.

[See Roach v. Hulings, Case No. 11,874.]

2. Where foreigners are concerned, and have a good defence at law, unknown to their counsel, and the declaration is so amended at the trial as to let in a new claim, a court of equity will on due proof give them the benefit of such defence and grant an injunction pro tanto to the judgment at law.

In equity. This was a bill [by James C. Bell and others against John A. Cunningham and William J. Loring] for an injunction to a judgment at law in this court between the same parties, and for other relief. [Granted.] The case is reported in 5 Mason, 161, [Case No. 3,479;] and, having been carried by writ of error to the supreme court of the United States, will be found still more fully reported in [Bell v. Cunningham,] 3 Pet. [28 U. S.] 69.

The facts now necessary to be stated to explain the grounds upon which this bill was brought, and upon which the judgment of the court in the present case was founded, were as follows:—The defendants were owners of the brig Halcyon, and contemplating a voyage from Boston to Havana, and from thence to Leghorn, wrote a letter to the plaintiffs, the material parts of which are as follows:—"Boston, September 15, 1824. Messrs. Bell, De Youngh & Co. Gentlemen, This will be handed to you by Captain J. Skinner, master of the brig Halcyon, belonging to us. We have contracted with Messrs. Atkinson & Rollins of this place to furnish 600 boxes (of sugar) from Havana to Leghorn, on freight of £4. 10s. and five per cent. primage payable in a bill on London, &c., and 600 boxes on half profits, for freight, 1000 pezzos to be paid in Leghorn, on account of said profits. As the goods are to be consigned to you, we mention the terms of contract to avoid misunderstanding. The whole amount of freight receivable in Leghorn will be about 4600 pezzos. Please invest 2200 pezzos in marble tiles of 12, 14, and 16 oz., &c. The balance, after paying disbursements, please invest in wrapping-paper, to cost from 35 to 50 pezzos per 100 reams," &c. To this letter, which went by the Halcyon, there was a postscript added. "P. S. We have further engaged whatever may be necessary to fill the brig on half profits, on account of which 700 pezzos are to be paid in Leghorn. After purchasing the tiles, and paying the disbursements, you will invest the balance in paper, as before mentioned," &c.—The Halcyon sailed for Havana on the 16th of September. A duplicate of the above letter, without the postscript, was transmitted by the defendants to the plaintiffs, with a memorandum thereon of the 20th of September; and was received by them on the 30th of November, and answered on the 9th of December, agreeing to conform to the orders of the defendants. The postscript does not appear to have been known to the plaintiffs until the arrival of the Halcyon at Leghorn, on the 13th of January, 1825, with 1330 boxes of sugar. The 700 pezzos alluded to in the postscript were to be advanced on a shipment made by one Charles Torrey. On the 17th of September, 1824, at Boston, he addressed a letter to the plaintiffs, in which he states, "Duplicate. I have also directed them (Messrs. Murdock, Storey, & Co.) to ship per brig Halcyon, Captain Skinner, on my account, 150 boxes brown sugar on freight, and moreover 150 boxes assorted sugars on half profits, or more if required to fill up, and not to exceed 200 boxes. These two adventures you will please keep distinct with a view to determine the profits on the assorted sugars, &c. You will please credit Messrs. Loring, Cunningham, & Co. (the defendants) 1700 pezzos, provided it shall appear to you probable, that one half of the net profits on the assorted sugars will amount to that sum. Should it appear likely, however, that the half profits will fall short of this amount, you will place to their credit that amount, which, in your opinion, will be equal to one half the net profits on the assorted sugars, &c. The Halcyon sailed yesterday for Havana, &c." This letter was received by the plaintiffs on the 17th of November, and subsequently answered. The above letter of Charles Torrey was not introduced at the former trial.

William Sullivan, for plaintiffs, claimed relief under the present bill on the following grounds:—1. That he was surprised at the former trial by the claim upon the plaintiffs for the non-investment of the 700 pezzos, and was not therefore prepared to meet it. 2. That he was at that time entirely ignorant of the existence of any such orders as were contained in Torrey's letter; had he been acquainted with which, and introduced the letter at the former trial, it would have defeated the defendants' claim for damages for the non-investment of the 700 pezzos. The grounds taken by the plaintiffs' counsel being fully canvassed and confirmed by the opinion of the court, his argument is omitted.

[1] [Reported by Charles Sumner, Esq.]

Charles G. Loring, for defendants.

The first point taken by the plaintiffs is, that they were surprised by the claim upon them for the non-investment of the 700 pezzos, at the trial, and were not therefore prepared to meet it. This cannot be truly said. The original count was for the non-investment of 2200 pezzos in tiles; and, although the other parts of the contract were not set forth, they were known to the plaintiffs as well as to the defendants. The plaintiffs evidently had notice that the defendants claimed damages to that extent, and of course had notice to produce all the evidence in their power to show that they were unable to invest the 2200 pezzos, or were justified in omitting to do so. And it was under this count that all the evidence in the case was taken. The plaintiffs, then, knowing that the defendants claimed damages for the non-investment of the 2200 pezzos, must have known that these 700 pezzos were included in the estimate; for in the duplicate letter first received by them, which had not the postscript, they were informed that they would receive 4600 pezzos; and when the original letter with the postscript arrived, they received also the freight list, and at once saw that the 700 were necessary to make up the 4600. When, therefore, they were sued for the non-investment of 2200 pezzos for the whole amount originally ordered to be invested, they must have known that the defendants intended to claim damages for the non-investment of the 700 pezzos, thus expressly directed by them, when the orders were given, to constitute a portion of the 4600, out of which these 2200 were to be taken. But this notice is put beyond all question by the letter of the defendants, under date of the 18th of April, 1825, in which they expressly allege the non-investment of these 700 pezzos, as one ground of complaint. It is clear, therefore, that here was no such surprise as would have entitled the plaintiffs to a new trial on motion; they had full knowledge of the claim and personal possession of the evidence. If they could have claimed any right, it could have been only that of a continuance on the ground of surprise:—they went on in the trial, and this is an afterthought of which they would now avail themselves. A court of equity will not relieve where a defence might have been made at law, unless the party was prevented from making it by fraud, or pure accident unmixed with any fault or negligence of himself or his agents. Marine Ins. Co. v. Hodgson, 7 Cranch, [11 U. S.] 336; Ware v. Horwood, 14 Ves. 30; Bateman v. Willoe, 1 Sch. & L. 201; 6 Johns. Ch. 235; Eden. Inj. 10; Grant, N. Trials, 113, and onward. There can be no pretence of fraud on the part of the defendants; none is alleged. Nor can there be any of concealment; for it is proved by the plaintiffs' own witnesses, that the defendants inquired for and sought to obtain the letters and bills of lading before they did. If there was any concealment, it was on the part of the plaintiffs, who had possession of the letter all the time. There being then no surprise, no fraud, and no concealment, on what ground can relief be granted? Nor can this be called newly discovered evidence, for it was in the plaintiffs' own knowledge and possession.

The second ground upon which relief is claimed is, that the facts now proved, if proved at the trial, would have defeated the defendants' claim for damages for the non-investment of the 700 pezzos. We contend, on the contrary, that the facts now proved, so far from invalidating the verdict in this particular, prove conclusively its justness. The inquiry is not, what effect the production of Torrey's letter might have had upon the jury, the defendants having then no means of refuting it, but whether, upon the case now made out to the court, the plaintiffs are entitled to relief. Now, upon the evidence, it is clear that the contract between Torrey and the defendants was, that the 700 pezzos should be advanced in Leghorn. The bill charges the contrary, but the answer meets and denies the charge in unqualified terms. The only witness in support of the bill is Torrey; but he testifies with caution as to what was his understanding of the contract. The defendants swear absolutely and unequivocally. Torrey's testimony is corroborated by his letter; but the defendants' answer is equally so by their letter to the plaintiffs and their instructions to the master, which are full and explicit to this point. All the collateral circumstances tend to show the truth of the answer, and that Torrey is in error;—the object of the voyage, predicated wholly on the freight to be received at Leghorn; the investment in tiles ordered to be made before the ship's arrival, to be paid for out of her freight; the ordering by the defendants of an investment of 4600 pezzos before the contract was made with Torrey about these 700, which were necessary to make up their funds. The contract was reasonable on the part of Torrey, as he would not have made a shipment unless confident that his sugars would at least yield a common freight, and necessary on the part of the defendants to enable them to fulfil their engagements with the plaintiffs.

It is clear that the contract made between Torrey's agents at Havana, the place of shipment, and the master of the defendants' vessel, was the same. The shipment was actually made on these terms. The bill of lading refers to an agreement; that agreement was specifically set forth in the captain's orders, and must have been that referred to in the bill of lading; there is no pretence that any other was known or thought of by Torrey's agents or the master. The freight list confirms this view. Whatever, then, might have

been the contract here, the shipment was made on these terms; and we contend strenuously, that the actual terms of the shipment must determine the rights of the parties. And from these positions the duty of the plaintiffs is plainly inferrible. They were the consignees of the defendants' ship, and of Torrey's sugars; and had different instructions from each party plainly inconsistent. And if they could not conform to either, without risk of responsibility to the other, they could have avoided it effectually by refusing the consignment of the one and conforming to the orders of the other; and, whichever they thus accepted, the rights of the defendants would have been preserved. Thus, if they had refused the consignment of the sugars, as consignees of the vessel, they would have retained through the master their lien on them until the 700 pezzos should be advanced by any other consignee whom the master should have appointed; and if they had refused the consignment of the vessel, the master and the other consignee of her would not have delivered the sugars until such payment.

If, on the other hand, they chose to take upon themselves the responsibility of deciding, they did so at their peril, and must take the consequences; and, as it now appears that they decided against the lawful right, they must indemnify the party injured. This view, which presupposes an equality in the contracts made between the plaintiffs and Torrey, and the defendants, is the strongest that can be taken for the plaintiffs; but they do not stand on so strong ground; the contract between them and the defendants was prior in time, and therefore of superior obligation, and they could not voluntarily enter into one with Torrey inconsistent with it; they had formerly agreed to accept the consignment of the vessel, with orders to receive the 700 pezzos out of their sugars, and could not be relieved from it by him. If, then, the contract between Torrey and the defendants was as we allege, it is clear that the plaintiffs were justly liable to them according to the verdict. But, if it were now doubtful what that contract was, the result would have been the same; for the bill of lading determined it as to the plaintiffs, and they were bound to conform to it; it referred to the agreement between Torrey and the defendants, and that agreement was set forth in the master's instructions, which they doubtless saw, or at least were bound to see, if they had any doubts, as they must have had when receiving different directions from Torrey and the defendants. This was the legal documentary evidence of the terms upon which the shipment was actually made; and could for ever protect the plaintiffs from all liability to Torrey, had they conformed to them. If the bill of lading had expressed that the sugars were deliverable on payment of 700 pezzos, could the plaintiffs have justified themselves in not requiring payment because the letter of instructions from Torrey contained different orders? Surely not. And the bill of lading referring to the agreement is equally conclusive and obligatory.

Again. Admitting for the sake of the argument, that no binding contract was actually made, here or at Havana, between Torrey and the defendants, still the plaintiffs were bound to obey the orders of the defendants, and not of Torrey, and for this obvious reason. The defendants, as owners of the ship, had the power of enforcing the contract according to their construction of it, by retaining the sugars until the 700 pezzos were paid; nor would it have been possible for Torrey, or his agents, to have obtained them otherwise; and the plaintiffs had no right to waive that advantage. They ought to have refused the consignment of the ship, or of the sugars, and thus have left the parties to their legal remedies. They had no right, by accepting both, to change the respective situations of their constituents, and to take from the defendants this power of enforcing the contract according to their construction, and transfer this power to Torrey to enforce it according to his. And, if they accepted both consignments, they were bound to do so without thus changing the remedial relations of the parties. In such cases, if the true contract be not clearly ascertainable, "potior est conditio possidentis;" and any agent, who should destroy that condition, and yield the advantage, should be made answerable to his employer. The hardship of a contrary construction in this case is most manifest, as the defendants will thereby not only lose their remedy against the plaintiffs, but can have none against Torrey, as they can have no evidence by which to prove the contract as stated by them; the means of proving it in this case not being available to them in a suit upon it against him; so that, by the misconduct of the plaintiffs, the defendants sustain a great loss without any remedy.

STORY, Circuit Justice. The case in equity is substantially narrowed down to the consideration, whether the former judgment, so far as regards the non-investment of the 700 pezzos stated in the case, is correct upon the new facts now alleged; and, if not, whether the defendants are entitled, upon the principles of a court of equity, to any relief. If either ground is against the plaintiffs, their bill fails; they can succeed only by establishing both grounds in their favor. There does not appear to have been a written agreement between Mr. Torrey and Messrs. Cunningham, Loring & Co., in respect to this shipment. Nor does it appear, that the plaintiffs had any other means of knowledge what it was, except from the

language of this letter, and from the postscript to the letter of the plaintiffs of the 1st of September. That the parties should in a matter resting wholly in parol, differ in respect to what were the terms of the shipment, the shipper supposing, that the advance of the 700 pezzos was to be conditional, and the owners of the Halcyon, that it was to be absolute, and at all events, is not surprising; for differences of this sort are of daily occurrence. But that in so important a contract no written paper should have been executed, and no joint instructions sent to the consignees, is truly matter of surprise, since it was the only effectual means of obviating possible difficulties. Indeed, there is no evidence, that Mr. Torrey ever saw the postscript to the letter of the defendants to the plaintiffs, and the defendants positively deny that they ever saw the letter of Torrey to the plaintiffs. If I were called upon to decide upon the whole transactions, whether the views taken of the contract of shipment by the defendants, or by Torrey, was a correct exposition of it, I confess, that the strong inclination of my mind would be, that the defendants truly expounded it. Still it is quite possible, that there might have been a very honest misconception of it by both parties, from the imperfect explanations given, and from the strong belief, in the then state of the market, on the part of the defendants, that the half profits must in every event exceed the 700 pezzos. Now the recovery against the plaintiffs having been for damages for the non-investment of the 700 pezzos, as well as the other funds, contrary to orders, it becomes important to consider, whether if these facts and the others now in the case had been before the court at the trial, the court would have authorized by its opinion the recovery of such damages. It is agreed on all sides, that there were no profits on the sugars, which would have justified the advance of the 700 pezzos. And the question turns upon this, whether the plaintiffs were, under the circumstances, bound to make it, and to invest the same accordingly.

It is very certain that the plaintiffs have not disobeyed the instructions given them by Mr. Torrey. They have acted in exact conformity to them. If the present judgment stands good against the plaintiffs, they have no remedy over for the same against Torrey. In what manner could they shape a claim against Torrey. They did not make any advance on his account. He did not authorize them to make any, except conditionally. And, whether in respect to Messrs. Cunningham, Loring, & Co. his orders conformed or not with his contract, was nothing to the plaintiffs. They had no right to bind him to a fulfilment of it. And if a recovery is now justifiable against the plaintiffs, it is because they have entered into a contract with the defendants to make an advance and investment under circumstances not authorized by Torrey's orders. Now this is very material to be considered; for the loss, whatever it is, must be borne exclusively by the plaintiffs. On the other hand, if the defendants are not entitled to retain the damages for the 700 pezzos, against the plaintiffs, still, if Torrey has broken his contract with the defendants, by not permitting the advance to be made, they have a perfect remedy over against him.

First, it is said, that the bill of lading accompanying the consignment of Torrey's shipment states, that freight is to be paid "as per agreement." But what agreement? The defendants say, that the agreement must be that, which they state in the postscript of their letter of the 15th of September, and in the master's instructions for the voyage. But there is no proof, that these instructions were ever seen by the plaintiffs. The postscript was seen by them. But as there is no reference to any particular agreement, and no written agreement was produced under the hands of the parties, there is no ground to say, that the agreement, under which the plaintiffs were to act, was any more that stated in the postscript, than that stated in their own orders from Torrey. Nor are the terms of the agreement so differently set forth by the postscript and the orders as to be wholly irreconcilable with each other. The 700 pezzos were to be advanced at Leghorn. But the advance, though stated in general terms in the postscript, might still be fairly understood by the plaintiffs as conditional and discretionary, as stated in the orders. And it was their duty to act in a manner, if possible, reconcilable with both. If the parties have, by their neglect to sign joint orders, placed the plaintiffs in a situation to act, and yet they may mistake what is their duty, ought a court of equity to hold them responsible, as if they had been themselves guilty of gross laches and wilful disobedience of orders?

But it is next said, that, if the orders were incompatible, the plaintiffs should have rejected all the consignments both of ship and cargo, and thus have protected themselves from responsibility. I exceedingly doubt, whether, under the circumstances, they would have been justified in so doing; and if the defendants had sustained any injury from their refusal, it would have been difficult to have exonerated themselves from the payment of damages. Because they could not carry into effect all the contracts of all the parties, they were not bound to reject all. And if they were at liberty to accept the consignments of Messrs. Atkinson & Rollins, and others, there is no ground to say, that they were bound to reject the consignment of Torrey. The argument for rejection goes, as it seems to me, to the whole consignments, if to any. But if they might have rejected all, or a part, still the inquiry is, whether they were bound so to do? I think they were not. They had a right to receive the other consignments, and also that of the vessel,

in order to reimburse themselves, for their purchases already made, and to be made, of tiles and paper. And if they had refused the consignments, there is no pretence to say, that they were bound to supply the tiles and paper. The rejection would have been owing to a neglect on the part of the defendants, or of the shippers, and not of the plaintiffs. But I do not accede to the doctrine advanced at the bar, that, where there is a consignment of ship and cargo, belonging to different persons, and the ship-owner construes his contract one way, and the shippers another way, the consignees are bound at their own peril to settle on the spot the rights of the parties. My opinion is, that the consignees are bound to obey the orders of the consignor, and not of the ship-owner, if there be any discrepancy between them. It is true, that the ship-owners are not bound to deliver the goods unless the consignees agree to pay freight, &c., according to the contract between them and the shippers. And they may insist upon an absolute agreement to this effect on the part of the consignees, before the delivery, if there be any dispute as to what the contract is; and the consignees will be then bound by their own agreement. But where no such dispute is known or understood at the time of the delivery, and it passes sub silentio, then the consignees cannot protect themselves in disobeying the orders of the consignors. They are bound to pursue them; and if any injury arises to the other side, the remedy lies against the consignors, and not against the consignees. In the present case there is no evidence to show, that the master of the Halcyon demanded back Torrey's sugars, or that he expressed dissatisfaction with the conduct of the consignees under the circumstances. It is true, that the defendants, in their letter of the 18th of April, 1825, do complain to the plaintiffs of their breach of orders in not investing the 700 pezzos, as well as the other funds. But the plaintiffs, in a reply of the 27th of June, 1825, state the reason. "The sum of 700 pezzos, which were to be advanced here, on account of half profits of the Halcyon cargo of sugar, not having been due from a default of profits, we considered ourselves authorized to act with a discretionary power, otherwise be assured, that we never deviate from orders." No reply was ever made by the defendants to this letter. And this, to some extent at least, furnishes a presumption in favor of their acquiescence in the fairness of the plaintiffs' conduct, though its legal correctness may not have been admitted.

There is another consideration not wholly immaterial. As the postscript was not communicated to the plaintiffs until the arrival of the brig, they had no means of knowing, or even of conjecturing, that there would be any discrepancy between the contract, as understood by Torrey and by the defendants. It was too late then to consult either party; for the delay would have been equivalent to a loss of the voyage. The plaintiffs, then, were compellable to act in a new emergency; and their conduct, if bona fide, is certainly entitled to great indulgence. It does not appear that Messrs. Murdock, Storey, & Co., the shipper's agents at Havana, made any communication to the plaintiffs on the subject; so that they were left wholly to thread their way by the light of the orders of Torrey and the postscript. The ground of recovery for the non-investment of the 700 pezzos certainly was, that there was no proof, that the advance was not absolutely ordered by the consignor of the shipment. If it had appeared otherwise, I am free to say, that I should have given a different direction to the jury on this point. It seems to me, that where an agent receives orders from the consignor giving one interpretation to the contract, and from the ship-owner giving a different interpretation, he is not required to reject the consignment; but he may receive it and act for the benefit of both parties, and remit the question, for them to decide it for themselves. I do not think he is bound to involve himself in a law-suit by a breach of the orders of the consignee. In the present case, if it stood before the jury, as it now does, I should be of opinion, that, however equitable might be the claim for damages by the defendants against Torrey, that claim ought not to be sustained against agents, who have acted bona fide, and without any wilful act done in breach of their duty.

The remaining question is, whether, the recovery having been had perfectly justifiably by the defendants upon their own view of the case, the plaintiffs have now any right to relief against the full effect of that judgment. I agree entirely to the doctrine, that, if the defendants have had full knowledge and means of making a complete defence, and have omitted so to do, that furnishes no ground for a new trial at law or in equity. This, however, is not the case of an application for a new trial, either at law or in equity. It is an application for an injunction pro tanto to the judgment for what is not conscientiously due from the plaintiffs, however conscientiously the defendants might deem themselves entitled to retain it. The language of the court in the case of Marine Ins. Co. v. Hodgson, 7 Cranch, [11 U. S.] 332, 2 Pet. Cond. Rep. 516, seems to me to contain so cogent and clear an exposition of the true principles, which ought to govern a court of equity on this subject, that it is useless to go farther into the authorities upon the general doctrine. The ground of the present bill is, that the plaintiffs were taken by surprise at the trial, and had no opportunity to avail themselves of the defence, which they now set up; that they have been guilty of no negligence; and that they have lost their cause from sheer mistake and ignorance of the nature and extent of the claim against them.

The first question is, whether the plaintiffs had any notice of the claim on account of the non-investment of the 700 pezzos. No notice in pais, that it was contemplated in the suit, is established. But the defendants insist, that they always did contemplate it as a part of their demand, and that it is covered by the counts in their declaration, and therefore constructively brought home to the knowledge of the plaintiffs. The suit was originally brought in the state court in 1827, and was removed into the circuit court, and came on for trial at October term, 1828. The original declaration contained, besides the money counts, only one special count, and that was in the most general form, alleging that Bell, De Youngh & Co. had undertaken, out of certain funds of Messrs. Cunningham, Loring & Co., to purchase for them at Leghorn upon commission, 2200 pezzos in value of marble tiles of certain specified dimensions, and had broken their contract. Upon the trial, it appearing to the court, that the special agreement produced in evidence was not sufficiently set forth, the then plaintiffs obtained leave to amend, and filed three new counts, upon which a trial was had at the same term. The first new count is in substance founded on the original letter of the 15th of September, 1824, and recites it, without any allusion whatever to the postscript, and avers the freight-money recovered to have been, (under a videlicet,) 3449 pezzos, and a neglect to make the investment. The second new count states the voyage to Havana, the leaving of goods there to be carried from thence to Leghorn, on freight for certain moneys to be paid by the owners thereof to the then plaintiffs, and their intention to invest at Leghorn 2200 pezzos of such moneys, so to be received, in marble tiles, &c., the residue of such moneys, after deducting disbursements, in wrapping-paper, and a promise of the then defendants out of such moneys to make the purchases accordingly. It then avers, that a large sum became due, payable at Leghorn to the then plaintiffs, for the freight of the said goods, to wit, 3439 pezzos, which was received by the then defendants, and alleges a breach in the non-investment. The third new count alleges the contract to be, that heretofore, to wit, on the 9th of December, 1824, the then defendants had in their hands a large sum of money, to wit $5000, the property of the then plaintiffs; and the then defendants undertook to purchase for the then plaintiffs 2200 pezzos in value of marble tiles &c., and to invest the residue thereof, after deducting disbursements, in wrapping-paper, &c., &c.; and then proceeds to state a breach by non-investment, by which the then plaintiffs had sustained damages to the amount of $7000.

The original declaration certainly contained no count adapted to make out a case under the postscript. And it does not appear to me, that the first or second new counts, in the manner in which they are actually framed, can cover any claim for the non-investment of the 700 pezzos. They seem to me exclusively adapted to meet the case of the non-investment of the funds under the original letter, independent of the postscript. The only count, which seems entitled to cover the 700 pezzos, is the third new count; and unless my recollection misleads me, this was the count, on which the right to recover was, at the trial, mainly, if not exclusively rested. Now, it cannot escape observation, that this count is very general in form, and conveys not the slightest information as to any particulars of the funds. The gravamen, which it principally purports to insist upon, is the non-investment of the 2200 pezzos in marble tiles, and the statement of the funds is under a videlicet, and merely introductory. Had, then, the plaintiffs any reason to suppose, that they constituted a part of the claim of Messrs. Cunningham, Loring & Co. against them? I do not ask, whether the latter contemplated it as a part of their claim; for that may be admitted, and yet the posture of the case be not changed. I am of opinion, that there is no evidence in the case, that could reasonably lead the plaintiffs to such a conclusion. It is true, that Messrs. Cunningham, Loring & Co. did, in their letter of the 18th of April, 1825, complain to the plaintiffs of the non-investment of the 700 pezzos, as a grievance. But the plaintiffs in their reply of the 27th of June, 1825, already alluded to, stated, that the advance of the 700 pezzos was to be conditional and discretionary, in case there were half profits. The omission on the part of Messrs. Cunningham, Loring & Co. to reply to that statement, would naturally lead the plaintiffs to presume, that so far at least they acquiesced in the justification set up by them. And the original declaration gave no notice of any different intention. And there is no pretence to say, that, by any other matters in pais, the plaintiffs had any special notice of this claim being insisted on.

Now even supposing the new counts gave the most perfect notice of the claim at the trial, it is most manifest, that the plaintiffs could not be apprized of it; for they were in a foreign country, and utterly without any conusance of the proceedings at the trial. The new counts were filed after the trial commenced, and a delay of a short period only was allowed before the trial was again resumed. I have no right to refer to my own recollection of the occurrences at the trial. But it has been stated at the bar, and admitted to be correct, that although Messrs. Cunningham, Loring, & Co. insisted, that they had always intended to make this claim, the counsel for Messrs. Bell, De Youngh, & Co. expressed an utter surprise at the information, and asserted his prior ignorance of any such claim. And it is not now denied, that such was the fact on his part. And it is

not controverted, that, at that time, he had not the slightest knowledge of the orders of Mr. Torrey, so as to enable him to avail himself of that defence.

What, then, is the case before the court? Foreigners are sued in an action, which gives them no notice of the particular claim. Their counsel, the foreigners being resident abroad, go to trial upon the declaration, as it stands, and that declaration is not supportable. New counts are filed, by leave of the court, which cover a claim not before embraced in the actual frame of the declaration. The foreigners have no notice of it, and of course no means of instructing their counsel on any point of defence. The trial immediately proceeds, and a verdict is obtained, which upon facts, which could have been supplied upon due notice by the foreigners, would not have been recovered according to the principles of law. Upon such a case, where the recovery must be, if maintained, a final loss to the parties; where they can receive no ulterior remedy; where they acted merely as agents, bona fide, and according to the orders of their principal; can there be a doubt, that a court of equity ought to furnish redress? It is a case of substantive, unqualified surprise. Even courts of law do not hesitate to grant new trials in cases of surprise. It is a case of persons abroad, who are necessarily compelled to rely on counsel at a distance, and without the means of immediate communication with them. And in such cases, courts of law look with more indulgence in granting new trials, even where the attorney may not be presumed to be wholly without negligence, and more diligence might have brought the proper defence to his knowledge, the papers being in his possession. Broadhead v. Marshall, 2 W. Bl. 955; Grant, N. Trials, 132, 115.

Looking, then, to the case, as it is now presented to the court, I feel, that I am doing no more than what every court of equity would, under like circumstances, feel itself bound to do; to grant relief, and a perpetual injunction as to so much of the judgment, as is covered by the damages given on account of the non-investment of the 700 pezzos. This is readily ascertained by mere computation, and applying the rule of proportion. I make this decree without the slightest intention of suggesting, that the defendants have insisted upon a hard and unconscionable verdict, or have been wanting in all due equity. They have sustained great losses by the misconduct of the plaintiffs in not complying with their orders; and might fairly enough claim to retain any sum, which was not beyond those losses. And, inasmuch as they have been in no default, I do not see that they ought to be deprived of their costs in this suit.

BELL, (CUNNINGHAM v.) See Case No. 3,479.

Case No. 1,247.

BELL v. DANIELS et al.

[1 Bond, 212; 1 Fish. Pat. Cas. 372; Merw. Pat. Inv. 616.][1]

Circuit Court, S. D. Ohio. Nov., 1858.

PATENTS FOR INVENTIONS — CONSTRUCTION — UTILITY — SUGGESTIONS — ABANDONMENT — EFFECT OF CAVEAT — INFRINGEMENT OF COMBINATION — MEASURE OF DAMAGES.

1. A patentee is not controlled by the title of his patent, but the patent, the specification, and the drawings are all to be examined, and are all to have a fair and liberal construction in determining the nature and extent of the invention.

[Cited in Geier v. Goetinger, Case No. 5,299. See, also, Parker v. Stiles, Id. 10,749; Ex parte Littlefield, Id. 8,398; Ex parte Mackay, Id. 8,838; Ex parte Gay, Id. 5,279; Page v. Ferry, Id. 10,662.]

2. A patent can not be valid for a principle merely, but must be for the application of the principle to some practical and useful purpose.

[See O'Reilly v. Morse, 15 How. (56 U. S.) 62; Mitchell v. Tilghman, 19 Wall. (86 U. S.) 287; McComb v. Brodie, Case No. 8,708; Andrews v. Carman, Id. 371; In re Smith, 16 Fed. 465.]

3. The patent raises the presumption of utility, and the jury are not to conclude that there is no utility in an improvement because of its apparent simplicity, nor from the fact that it may not be the best mode of effecting the result. This last consideration would affect the value of the patent, but not its validity.

[Cited in Gibbs v. Hoefner, 19 Fed. 324. See, also, Lee v. Blandy, Case No. 8,182; Tilghman v. Werk, Id. 14,046.]

4. Others may have made suggestions to the patentee as to the possibility of making the improvement subsequently patented; they may have thought upon the subject and made experiments with reference to it, but unless their experiments resulted in discovery, such approaches to invention would be no bar to the granting of a patent to one who succeeded in making the discovery and perfecting it.

[See Pennock v. Dialogue, Case No. 10,941; Judson v. Moore, Id. 7,569; Roberts v. Dickey, Id. 11,899; Whittlesey v. Ames, 13 Fed. 893.]

5. An abandonment or dedication to the public of an invention may be made as well after patent granted as before; but when the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment.

[See Hovey v. Henry, Case No. 6,742.]

6. The effect of a caveat is to protect the claim of an inventor from all interfering applications made within one year after its filing, by requiring the office to notify him of such applications, that he may resist the interference if he chooses. But if, during the time which elapses between the filing of his caveat and his application, he allows his invention to go into public use, his caveat will not protect him.

[See American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co., Case No. 302.]

7. B. made application for a patent in January, 1838. Some objections were made by the office, and, finally, an amended specification was filed in March, 1840, upon which the patent issued. There was no evidence that the patentee

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[1] [Reported by Samuel S. Fisher, Esq.; reprinted by Lewis H. Bond, Esq.; and here republished by permission. Merw. Pat. Inv. 616, contains only a partial report.]

withdrew or abandoned his application of 1838: *Held*, that the two years during which the invention might be used before the application without working abandonment, must be dated back from January, 1838.

[Cited in Blandy v. Griffith, Case No. 1,529; Goodyear Dental Vulcanite Co. v. Willis, Id. 5,603; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 501; Colgate v. W. U. Tel. Co., Case No. 2,995. See, also, Henry v. Francestown Soap-Stone Stove Co., Id. 6,382.]

8. There is no infringement of a patent for a combination, unless all the essential parts of the combination are substantially imitated.

[Cited in Crompton v. Belknap Mills, Case No. 3,406. See, also, Brooks v. Jenkins, Id. 1,953; Brooks v. Bicknell, Id. 1,945; Fisher v. Craig, Id. 4,817; Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819.]

9. There is no unbending or unyielding rule of damages, but the rule generally recognized as the true one is to give, as damages, the amount of profits saved to the defendants by the unlawful use of the plaintiff's invention.

[Cited in Magic Ruffle Co. v. Elm City Co., Case No. 8,950. See, also, Wayne v. Holmes, Id. 17,303.]

At law. This was an action on the case, [by Martin Bell against Hiram G. Daniels and Cyrus Newkirk,] tried by the court and a jury, to recover damages for the alleged infringement of letters patent [No. 1,630] for an "improvement in the mode of applying the waste heat of blast furnaces to steam boilers," granted to plaintiff, June 10, 1840. In the apparatus described in the specification the boilers stood on the stack by the side of the tunnel head, with which they were connected by a short flue. The heat and gas passed by this flue to the end of the boiler nearest the tunnel-head, thence to the end of the boiler, thence back under the other boiler (the boilers being separated by a brick partition wall dividing the fire-bed longitudinally), and so out through a chimney.

The claim of the patentee was as follows: "The arrangement of flues and their necessary appendages by which the flame and gas escaping from the tunnel-head are applied to the boilers for the creation of steam."

In the defendants' apparatus, the two boilers, having one common flue or fire-bed without partition, were placed directly over the tunnel-head, the gas striking them at one end, passing under both together to the opposite end, and thence out through a chimney. This apparatus was used for four hundred and thirty-nine working days before the expiration of plaintiff's patent.

In relation to the history of the invention, it appeared in evidence that the boilers had been put up in various places during the years 1836 and 1837. That the plaintiff commenced experimenting as early as 1834, and continued to experiment until January, 1837, when he filed a caveat. In January, 1838, he filed his specifications, and made his application for a patent, but, having claimed the "application of the waste heat to boilers in any manner," instead of the mode which he had invented and described, his patent was rejected. He filed another specification (without withdrawing the first application), in which the same machine was described, but with a different claim. This was filed in March, 1840, and on June 10, 1840, the patent issued.

G. M. Lee and S. S. Fisher, for plaintiff.

C. Fox and H. H. Hunter, for defendants.

LEAVITT, District Judge. The claim in this case is for the infringement of a patent right. The defendants have plead the general issue, and filed a notice setting up the various defenses upon which they rely. The first of these denies the validity of the patent on its face, and is a question for the consideration of the court. The patent is for "a new and useful improvement in the mode of applying the waste heat of blast furnaces to steam boilers." The plaintiff is not controlled by his title, but the patent, specification, and drawings are all to be examined, and are all to have a fair and liberal construction, in determining the nature and extent of the invention. The statute requires that the patentee shall describe his invention in such clear, full, and exact terms as shall enable any person skilled in the art to which it relates to construct or apply the invention. The defendants insist that these specifications are defective for uncertainty and ambiguity, because they do not state what are the "necessary appendages" to the flues, and, because the claim is for the application of heat to boilers to produce steam, or merely a claim for a principle. The plaintiff, in his specification, describes his improvement as "consisting in the manner of applying the waste heat of furnaces to the generation of steam in steam boilers," and alleges that the object of his specification is to afford practical directions for the use of his improvement.

In his summing up, or conclusion, to which we must look, in order to determine precisely what the patentee claims as his invention, we find that his claim is for "the arrangement of flues and their necessary appendages, by which the flame and gas escaping from the tunnel-head are applied to the boilers for the creation of steam." The court has had occasion to construe this specification and claim in a former trial. In the case referred to, a motion for a new trial was fully argued, Judge McLean being present. Both judges held that the words, "arrangement of flues and their necessary appendages," as used by the patentee, were equivalent to a combination of mechanical structures producing the result stated. It is true that a patent cannot be valid for a principle merely, but must be for the application of a principle to some practical and useful purposes; but in this case, it is not claimed as a discovery that heated air applied to a boiler will make steam, but that the mode of applying the heated air of a furnace in a way to save fuel and labor has been dis-

covered, the invention patented consisting in the contrivances by which the hot air is applied. These contrivances, as described in the specification, are called flues and their appendages, and consist of: 1. The mode by which the heated air passes from the top of the stack into the flues. 2. The mode of bringing the heated air in contact with the boilers, which is by means of a flue passing under one boiler and then under the other, and escaping through an outlet at the end of the boilers at which it entered; and 3. The position or arrangement of the boilers. Neither the boilers, the flues, nor any of the appendages are new, but the claim is that the combination of the whole is new and useful. And there would seem to be no doubt that this is a patentable combination, including the application of principles, not separately claimed to be new, to the production of a new and useful result.

Upon the question of utility, it may be remarked as a familiar principle that the patent raises the presumption of utility, yet the defendants may show, in order to defeat the patent, that the invention is worthless, though, if it appears that it is in any degree useful, the patent will be sustained. The plaintiff has offered proof by Dr. Fisher and Mr. Foster of the utility of this mode of heating boilers, and it will be for the jury to say, from this and all the testimony, whether his invention is, in fact, of any value. In doing this, they are not to conclude that there is no utility in the improvement from its apparent simplicity, nor from the fact that it may not be the best mode of effecting the result. This last consideration would affect the value of the patent, but not its validity. As to the novelty and originality of the improvement patented, the court will again remark that the patent itself raises a presumption in favor of both. The statute, however, requires that the invention shall be new, and if the defendants can show that it was known or in use prior to the patentee's application for a patent, the plaintiff can not recover. This defense is set up in the present case. It is not claimed, indeed, that the combination as such is not new; that is, that it was ever before applied to produce the result claimed for it; but it is insisted by the defendants, that the invention is not new and original, because heated air has been before applied to other purposes. The test of novelty, as applied to a combination, seems to be, whether the application of heated air, by such means and appliances as the plaintiff claims to have invented, has been before known as an agent for raising steam in boilers, for, as already stated, this is a principle of the plaintiff's invention, and the fact that heated air had been before used in a different way and for a different purpose, would not be within this principle and would not defeat the patent for want of novelty. In this connection, I remark that it is no evidence of such a prior knowledge of the invention as will defeat the patent, that other persons have made suggestions to the patentee as to the possibility of making the improvement subsequently patented. Others may have thought upon the subject, and made experiments with reference to it; but unless they accomplished the object, unless their experiments resulted in discovery, such approaches to it would be no bar to the granting of a patent to one who was successful in making the discovery and perfecting it.

But it is claimed that if the plaintiff was the inventor of a patentable subject, there is evidence of a prior public use of his invention which invalidates his patent, and that such prior use was under the authority, and by the concurrence of the plaintiff. The statute provides that if the patented structure or improvement has been in public use, or on sale, for two years prior to the application for a patent, with the consent and allowance of the patentee, the patent shall be void, and whether there was or was not such prior use, will be a question of fact for the jury. In the present case, the witness, Spear, says that in 1837, he put up boilers for his father-in-law, on the plan of Bell's patent, in Huntington county, Pennsylvania, with the knowledge of Bell, and with his consent. E. Soden states that, in 1836 or 1837, his brother, by the consent of plaintiff, put up boilers in Tennessee. James Bell states that the boilers put up by Spear were put up under the supervision of the patentee, and for the purpose of further experiments. It will not be necessary to decide whether this was a public use of the invention, within the meaning of the statute, if the jury are satisfied that such use was not more than two years before the date of Bell's application for a patent. It appears that in January, 1837, the plaintiff filed a caveat in the patent office; and on January 26, 1838, he filed his application. Upon this application, the patent office refused to issue a patent. It was amended in March, 1840, and on June 10, 1840, the patent issued.

The effect of the caveat is to protect the claim of an inventor from all interfering applications made within one year after its filing, by requiring the office to notify him of such applications, that he may resist the interference if he chooses. But if, during the time which elapses between the filing of his caveat, and his application, he allows his invention to go into public use, his caveat will not protect him. The only question upon this point, therefore, for the jury, will be whether the boilers put up by Spear and Soden were put up less than two years before the date of Bell's application. If so, they are within the exception of the statute, and the defense that the invention had been in public use two years prior to the application fails. It is, however, insisted by the defense that the application made by the plaintiff, in January, 1838, can not protect him from the legal effect of allowing his improvement to go into

public use, for the reason that the patent office rejected that application; that, therefore, it must be regarded as a nullity, and that the application for the patent must be dated from March, 1840, and not from January, 1838. This question is decided by section 7 of the act of 1836. That section provides that when a patent is refused, the application shall still be in force, unless the applicant, in a manner pointed out, elects to withdraw it. In this case, Bell made no such election; but he filed an amended specification in 1840, under which the patent issued. This amendment of the original specification, having been provided for by the section above referred to, the court has no difficulty in holding that the application of the plaintiff must date from January, 1838.

The question of abandonment has been raised in this case, and it will be the duty of the jury to pass upon it. If an inventor, by his actions and consent, shows that he has made a dedication of his invention to the public, he can not afterward disavow such a dedication, and obtain a patent; and, therefore, if the jury are satisfied, from the evidence, that this patentee has permitted his invention to go into public use, without objection, and without taking any steps to vindicate his rights, he will be viewed as having given his improvement to the public, and will not be permitted afterward to resume it. This abandonment, or dedication to the public, may be made as well after patent granted as before; but, where the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment.

The doctrine of the law upon this and the preceding points may be briefly stated thus: that if the jury find that the invention was used by others, or even by one person, with the consent or allowance of the inventor, publicly, and for more than two years before the application for a patent; or if they find that it was publicly used for a long period by the inventor himself, not in the way of experiment, but for gain, in either case the patent is void.

If the jury shall be satisfied that this is a patentable invention, that it is new and useful, and has not been abandoned, or permitted to go into public use for more than two years before the application, they will then inquire whether the defendants have infringed the plaintiff's patent. This is a question of fact for the jury. It must be proved by the plaintiff, for the burden of proof is upon him, and to sustain his case he must prove that the defendants have either used his invention, or something substantially like it. To this end, he has introduced two witnesses —Dr. Fisher and Mr. Foster—both of whom testify that the two structures are substantially the same. The jury will, however, be guided by all the evidence in the case, as well the examination of the models and drawings, and of the patent itself, as by the testimony of the experts whose opinions have been laid before them. The court has already stated that it regards the claim of the plaintiff, as set forth in his specification, as being, substantially, a claim for a combination of known mechanical structures to produce a new and useful result. The defendants contend that they have not used all of the parts of this combination, and therefore insist that they are not liable for an infringement. It is undoubtedly true that the use of one or more parts of a combination is not an infringement, and if the defendants have not used all the flues or appendages claimed by the patentee they have not infringed. If the specification requires a flue for conducting the heat from the tunnel-head to the boilers, and the jury find that the defendants have not used such a lateral flue, or anything equivalent to it, then there is no infringement, for the patentee can not abandon any part of his improvement which he claims in his specification as material.

If he has claimed the lateral flues as a material part of his invention, he is not now at liberty to say that it is no part of his patent. In this specification, the plaintiff describes also the flues under the boilers, formed by a division wall; the defendants use no such division wall, but the heat passes under both boilers at the same time. The defendants, therefore, insist that they do not use the plaintiff's arrangement of flues, and that there are in fact no flues in their structure. It will be for the jury to say whether this constitutes a substantial difference in the two machines; if so, the defendants have not infringed. As has been before remarked, they must use substantially all the parts of the plaintiff's combination, in order to be guilty of an infringement of his patent. If they do this: if they include in their contrivance, substantially, all the principles of the plaintiff's combination, it will be no defense that the structure used by them is better in its effects than that patented by the plaintiff. If the jury believe that none of the foregoing defenses are sustained, and that the defendants have infringed, they will then inquire what damages the plaintiff shall receive. This is wholly within the discretion of the jury, though no claim is made in the present case for any thing beyond compensatory damages. There is no unbending or unyielding rule of damages, though that usually recognized as the true rule has been to give to the plaintiff, as damages, the amount of profits which the defendants have derived from the use of the plaintiff's improvement, not the amount which they might have realized, or which they made from the use of improvements other than those of the patentee, but what they actually did make by the use of the machine as patented. In this case, it is claimed by the plaintiff that the jury have the data for ascertaining the defendant's profits, in the value of the coal saved by

the use of the plaintiff's invention. This would seem to be a satisfactory basis. The furnace was run four hundred and thirty-nine days. The witnesses differ greatly as to the quantity of coal that would be required to make the necessary steam by the old method, but it will be for the jury to say what the quantity should be. As before remarked, the whole subject of damages is with them, and they will give such an amount as in their judgment seems proper, under the evidence. There are no doubt cases in which the license price may be a criterion, but there are few instances in my judgment, in which, where his invention is pirated, the patentee ought to be concluded by a former offer to sell.

[NOTE. For other cases involving this patent, see Bell v. McCullough, Case No. 1,256; Bell v. Phillips, Id. 1,262.]

Case No. 1,248.

BELL et al. v. DAVIDSON.

[3 Wash. C. C. 328.][1]

Circuit Court, D. Pennsylvania. April Term, 1818.

COURTS—FEDERAL PRACTICE — STATE LAWS—EVIDENCE — ACCOUNTS — INTERROGATORIES—NEGOTIABLE INSTRUMENTS—LIABILITY OF DRAWER.

1. The laws of the several states, as to the practice and proceedings in their courts, are not obligatory on the courts of the United States; and therefore, the act of the assembly of Pennsylvania, of 2d January, 1815, [Laws Pa. p. 3, c. 4,] as to copies certified by a notary public, is not applicable in this court.

[See Craig v. Brown, Case No. 3,330.]

2. All proper interrogatories must be answered on both sides, or the deposition cannot be read. If the interrogatories are hypothetical, and in a certain event only are required to be answered, which event does not happen; or if they refer to records, which must speak for themselves; they need not be answered.

[See Dodge v. Israel, Case No. 3,952; Winthrop v. Union Ins. Co., Id. 17,901.]

3. If the defendant relies upon one side of the plaintiffs' account, to establish his claim, he admits, prima facie, the debit side of the account; provided it be composed of items, which, by the form of the action, may be recovered. If the form of action is not such, he may use the credits to defeat or diminish the credits claimed by the defendant, when one can legally be opposed to the other.

[See Morris v. Hurst, Case No. 9,832; Griffin v. Jeffers, Id. 5,817. Distinguished in U. S. v. Jones, 8 Pet. (33 U. S.) 383.]

4. If a bill of exchange be drawn by A, with directions to charge the amount thereof to B, and it is accepted generally, and paid, the drawer is not liable to the drawee; unless it appear that B was the agent of A, and the direction to charge the bill to him, was only to point out the fund from which the bill was to be paid.

At law. Action [by John Bell and others against Nathan Davidson] on fourteen bills of exchange, amounting to £9918. 16s. 10d. sterling, drawn on the plaintiffs by the defendant, in favour of different persons, and paid by the plaintiffs for account of the defendant, in 1809. [Verdict for plaintiffs.]

The plaintiffs, established merchants in London, and as the agents and correspondents of the defendant, had large transactions with him, before the circumstances which gave rise to the present suit took place. In 1808, the defendant sent a vessel to Gibraltar, and other ports in Europe, under the care of Lewis R. Brown, with directions to remit the proceeds of the cargo to the plaintiffs. Two of the bills of exchange, each for one thousand pounds sterling, were drawn about the period this vessel sailed; and the plaintiffs were directed "to place them to the account of Lewis R. Brown." These bills were accepted generally, and when paid, were charged to the defendant, and to Lewis R. Brown. Lewis R. Brown remitted the proceeds of his cargo to the plaintiffs, and went to London; where he became intimate with the plaintiffs, had transactions with them, on his own account, and the plaintiffs opened an account in the name of Lewis R. Brown, and Nathan Davidson, in which charges were made, for moneys paid for the separate use of Brown and of Davidson; and moneys were credited, which were received from remittances made by Brown, for account of Davidson, as well as moneys paid by Brown from his own resources. Although an account, opened with Brown, stated a balance to be due to him from the plaintiffs, yet, it appeared, that this balance arose, from giving him credit for a note drawn by him in favour of the plaintiffs; which note was never negotiated by them, remained unpaid, and Brown was, therefore, and is still, a debtor to a large amount to the plaintiffs, on the close of accounts between him and them.

The defendant claimed a credit, for all sums which were received by the plaintiffs from Lewis R. Brown, and remittances made by him; these sums appearing to have been received, by accounts produced under notice to the plaintiffs, and which were returned with a commission issued to London. The right of the plaintiffs to charge him with the sums shown to have been paid by the same accounts, was denied; as it was stated, the defendant had not come prepared to examine these charges, the action being instituted on the bills of exchange only, and not on an account for money laid out and expended. Taking credit for those sums so shown to have been received, and deducting the two bills, for one thousand pounds each, which, having been drawn, as stated in them, "for account of Lewis R. Brown," were therefore alleged to have been paid for the account of Lewis R. Brown only; and excluding the sums charged in the same accounts, as paid by the plaintiffs; a balance would be due to the defendant. The accounts were intricate and involved; and sums which were char-

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

ged in some instances to Brown and Davidson, were afterwards charged to the separate accounts of both or one of them. It appeared, however, that advances had been made by the plaintiffs for insurances, and that the defendant and Lewis R. Brown were debtors to a considerable amount, before remittances were received from Lewis R. Brown or the defendant; and that the two bills, each of one thousand pounds, had been accepted by the plaintiffs before they received the remittances.

The defendant contended, that the two bills, each for £1000, having been drawn for account of Lewis R. Brown, and paid by the plaintiffs, were not to be charged to him; and cited Kyd, Bills, 97, and 5 Com. Dig. tit. "Merchant," F, 5. A bill drawn on account of a third person, and accepted for his account, if such third person fail in providing funds, the drawee who pays it has no claim on the drawer. If the drawee does not choose to accept a bill so drawn, he may protest it; and if he afterwards pay it for the honour of the drawer, he may thus make the drawer liable. It was also claimed for the defendant, that the plaintiffs had no right to connect the defendant and Lewis R. Brown together in an account; and that the charges made in the accounts thus stated, were not evidence against the defendant, but the defendant might make use of the items credited in the accounts as evidence in his favour.

On the part of the plaintiffs, it was admitted, that if the two bills, each for £1000, had been accepted and paid for account of Lewis R. Brown, they could not be afterwards charged to the defendant; but that these bills were in fact drawn for the account of the plaintiffs, and that the direction to pay them for the account of Lewis R. Brown, was only given to designate the funds from which they were to be paid, which were the remittances to be made by Lewis R. Brown out of the defendant's property under his charge. The plaintiffs' counsel, to show that the direction to place a bill to the account of any one was of no consequence, and that the real state of the transactions would not be altered by such direction, cited Chitty on Bills, 55. The defendant, it was said, could not make use of the accounts produced by the plaintiffs, without admitting these accounts as prima facie evidence of the charges made against him in these accounts, he being at liberty to disprove these charges by evidence; and having offered no such evidence to the jury, these charges were to be considered as proved. It was also contended, that the plaintiffs had a right, when they received remittances and payments from Lewis R. Brown, to appropriate the amounts to the payment of advances made by them, on the principle of law which authorizes the payment of either of two accounts or debts due by the payer to the receiver, as the receiver may think proper to apply the same, unless particular directions to the contrary are given at the time of payment. The defendant had received the amount of the bills; and if they were drawn for the separate account of Lewis R. Brown, he might show the fact by his correspondence.

In the course of the trial, a copy of an account current, certified by a notary public "to be a true copy of an original account produced before him," was offered in evidence by the defendant, the plaintiff having failed to produce the original after notice, and his counsel declaring he had not the same. The act of the assembly of Pennsylvania, making the certificates of notaries evidence, was cited, in support of the claim to the admission of the paper. The court rejected the evidence, and adopted both the objections made by the plaintiffs' counsel.—First, that the court are not bound by any acts of the assembly of the state, regulating the mode of proof, but only by general laws. Second, that a copy of an original may be produced; but it must be sworn to be a copy, and not so certified. An objection was made to reading the examinations of witnesses taken under a commission to London; on the ground that all the interrogatories which accompanied the commission had not been put to the witnesses. The court stated, that it had been decided that each question must be put to every witness. The questions which accompany the commission are important to both parties, and other questions are frequently put, on the supposition that all will be answered. It appearing to the court that an answer by the witness to one of the interrogatories, which had not been put by the commissioners, would not have been legal evidence, the court allowed the examination of the witness who had answered the remaining interrogatories to be read.

J. R. Ingersoll, for plaintiffs.
Rawle & Tod, for defendant.

WASHINGTON, Circuit Justice, (charging jury.) This is a question of account, and the jury will not expect assistance from the court; they will examine the accounts, and form an opinion from them.

There are two or three questions on which the opinion of the court is required. First, as to credits claimed by the defendant, taken from the accounts of the plaintiffs, and the debits in those accounts. The principle of law is, that if the defendant is not prepared to prove credits, but relies for their proof on the plaintiff's account, the plaintiff can call on him to admit, prima facie, the debits; but it is competent to the defendant to show, by evidence, that the debits were not properly made. This applies in every case, in which a defendant makes use of credits in the plaintiff's account. The plaintiffs in this

case might have inserted money counts in their declaration; and if the defendant had availed himself of the account of the plaintiffs, the plaintiffs could say, you have admitted the debits, prima facie, and you must disprove them. This action is brought on bills of exchange, and the plaintiffs cannot recover on the debits in their account, and must recover on the bills. But if the defendant avail himself of the credits, the plaintiffs may bring in the debits of the account, the defendant having used the account to show debits.

Another question is, admitting that the debits are made out, can the defendant avail himself of them against the bills of exchange? It is a principle of law, that payments may be applied to any account, unless special directions are given for their application when they are made; and if, when the credits were given, there was an account between the parties other than the bills, they may be applied to that account. With respect to the £2000 and the £790, the jury must determine from the accounts. With respect to the two bills, for £1000 each, there is much difficulty as to facts, but none as to the principle of law; that if a bill is directed to be charged to a particular account, other than that of the drawer, and is paid, it is not to be charged to the drawer. But the jury have not all the evidence which might have been given, to show the actual state of the transaction, such, particularly, as the letters of the defendant to the plaintiffs. No evidence has been given, to show that the defendant was the agent of Lewis R. Brown to draw bills for him, and Brown may have been a principal in the transaction. The court will say, that if the bills were drawn, and Brown's name used only as the agent of the defendant, the general principle of law will not apply.

Verdict for $1,615.83.

Case No. 1,249.

BELL v. DAVIS et al.

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

Circuit Court, District of Columbia. Dec. Term, 1826.

PLEADING—AMENDMENT—EVIDENCE—ADMISSIONS IN PLEADING—ACCOUNT.

1. When some of the defendants have been taken, and others not arrested, the plaintiff may amend his declaration at the trial term, in that respect, as a matter of right, and such amendments will not authorize the defendants to plead the statute of limitations.

[See Brooklyn White-Lead Co. v. Pierce, Case No. 1,940; Tobey v. Claflin, Id. 14,066.]

2. If the defendant reads the credit side of the account, filed by the plaintiff as part of his declaration, he thereby makes the whole account evidence for the plaintiff.

[Cited in Griffin v. Jeffers, Case No. 5,817. See, also, Bell v. Davidson, Id. 1,248.]

[At law. Action by Charles Bell against Davis, Cokenderfer and others for services rendered.]

This was an action for services rendered by the plaintiff to the defendant, in transporting the United States mail between Washington and Georgetown. Some of the defendants, at the trial term, had not been arrested, and Mr. Wallach, for the plaintiff, amended his declaration according to the common practice, by stating that fact; whereupon Mr. Key, for the defendants, offered to plead the statute of limitations, upon the ground of such amendment. But THE COURT (THRUSTON, Circuit Judge, absent) refused the plea, saying that it was a matter of right to amend the declaration in that respect.

It appeared in evidence that Mr. Burgess, one of the defendants, came into the concern in January, 1822, but the plaintiff's account included services rendered before that date, and for which that defendant was not liable, whereupon Mr. Key, for the defendants, prayed the court to instruct the jury that the plaintiff could not recover any part of his account prior to that date; and that all payments made since that date are to be applied to the discharge of what became due after that date. THE COURT, however, refused to give that instruction, but instructed them, that as the only evidence of the said payments was the plaintiff's account filed with and as part of his declaration, the whole account is to be received and read in evidence to the jury, as well in regard to what makes for the plaintiff, as to what makes for the defendant, but that the plaintiff cannot, in this action, recover for his services prior to the time when the defendant Burgess became a copartner with the other defendants; and that the jury are to decide, from the whole evidence before them, whether the payments credited in the said account were made on account of services rendered by the plaintiff or after the defendant Burgess became a copartner in the concern.

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

Case No. 1,250.

BELL v. ENGLISH.

[4 Cranch, C. C. 332.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

APPRENTICE—POWER OF ORPHANS' COURT.

The orphans' court of Alexandria county has authority and jurisdiction to bind out orphan children without indentures.

[At law. Application for a writ of habeas corpus to compel James English to bring up Andrew Bell. Writ dismissed.]

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

The return of a writ of habeas corpus, to bring up a colored boy, was, that he was bound as apprentice to Mr. English, by the orphans' court of Alexandria county, to learn the business of a house-servant. The evidence of this binding was a copy of the record of the orphans' court, in these words:—"Orphans' Court, Alexandria County, October Term, 1832. Andrew Bell, a free orphan boy of color, who will be thirteen years old on the 25th of November next, is, by the court, bound an apprentice to James English until he is twenty-one years of age, to learn the business of a house-servant; which said business, in open court, the said James English agrees to teach the said apprentice, to furnish good board, clothing, washing, and lodging, and pay him $20 freedom dues. Witness: Chr. Neale, Esq., Judge of the Said Court, this 1st day of October, 1832. Test: A. Moore, Register of Wills."

Mr. Hewitt, for the petitioner, contended that the orphans' court cannot bind unless to some trade; and that house-servant is no trade; and objected that no indentures were executed.

Mr. Hodgson, contra. The Virginia law says, "art, trade, or business." The binding was in open court, and in form always used in that court.

THE COURT (nem. con.) refused to discharge the boy, being of opinion that the orphans' court had jurisdiction to bind out orphan children; and that the binding was in the usual form in which that court exercised its jurisdiction. See Hines v. Hewitt, [Case No. 6,520.]

BELL, (FOSSITT v.) See Case No. 4,958.

BELL, (GAUTHIER v.) See Case No. 5,277.

Case No. 1,251.

BELL et al. v. GREENFIELD.

[5 Cranch, C. C. 669.] [1]

Circuit Court, District of Columbia. March Term, 1840.

EVIDENCE—UNPROBATED WILL—PETITION FOR FREEDOM—MANUMISSION.

1. A will, not admitted to probate, is not admissible evidence in favor of the petitioners for freedom.

[2. Nor is it admissible as an instrument of manumission, under Act Md. c. 67, § 29.]

The petitioners [Ann Bell, a negro slave, and her children] claimed their freedom [from Gerard T. Greenfield] under a paper purporting to be the last will and testament of Gabriel P. T. Greenfield, of Maryland. The will, upon caveat, had been admitted to probate, by the orphans' court; but the sentence of that court had been reversed in the court of appeals. It was agreed by the parties in this court, that the petitioners might read in evidence from the record of the court of appeals of Maryland the paper purporting to be the will of Gabriel P. T. Greenfield, and the depositions taken in support of it; and that the defendant might read the depositions in the same record taken on the part of the caveator, in the same manner, and to have the same effect, (and no other,) as if the original paper purporting to be a will was now produced, and the witnesses for and against it were now examined viva voce. Under that agreement the petitioner's counsel offered the paper in evidence, together with the depositions, to the admissibility of which the counsel of the defendant objected, that it was not a valid will until probate; and that the probate had been conclusively refused by the highest court in Maryland.

Mr. Marbury and Mr. R. S. Coxe, for defendant, cited The King v. Inhabitants of Netherseal, 4 Term R. 259, 260, in which Lord Kenyon, C. J., said: "Nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will, in all questions respecting personalty."

Mr. Bradley and Mr. W. L. Brent, contra, contended that the rule did not apply to questions of freedom which were not questions respecting personalty. The judgment of the court of appeals could not affect the petitioners who were not parties to that controversy, and could not appear to sustain their rights. The only right which they have is to appear in this court and petition for their freedom. The reversal was upon grounds not affecting the manumission. The parties might have colluded in the orphans' court to deprive those petitioners of their rights. It was not a judgment in rem. If it were, it is only conclusive against those who could contest it.

Mr. R. S. Coxe, in reply. The sentence of the orphans' court is annulled by that of the court of appeals. It is no will of personal property until proved in the orphans' court. In the case of Armstrong v. Lear, 12 Wheat. [25 U. S.] 175, 176, the supreme court say: "By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical courts and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those courts." "This principle of common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper orphans' court here exercising ecclesiastical jurisdiction. If this be so, and nothing has been shown which leads us to a different conclusion, then it is indispensable to the plaintiff's title to procure, in the first instance, a regular probate of this testamentary paper in the

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

orphans' court of this district, and to set forth that fact in this bill. The treaty stipulations, the act of congress, and the principles of the law of France which have been cited at the argument, attributing to them the full force, which that argument supposes, to establish the validity of the instrument, do not change the forum which is entitled, by the local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing to possess proofs which may be sufficient to establish that a testamentary instrument had been executed in a foreign country under circumstances which ought to give it legal effect here; and quite a different thing to ascertain what is the proper tribunal here, by which those proofs may be examined, for the purpose of pronouncing a judicial sentence thereon." There must be the same evidence of a will, in a case of freedom as in other cases respecting personal rights. Queen v. Hepburn, 7 Cranch, [11 U. S.] 290. The decree was in rem; upon the will itself; and binds all the world. If the petitioners are not bound by the decree rejecting the will, they could not claim under the will if proved. The rule works both ways.

THE COURT (THRUSTON, Circuit Judge, contra) refused to permit the paper to be read in evidence to the jury as a will or testamentary paper.

Mr. W. L. Brent then offered to read the paper to the jury as an instrument of manumission, under the 29th section of the Maryland act of 1796, c. 67, and contended that it is not necessary that the instrument of manumission should be signed or acknowledged by the party. That clause of the section which requires acknowledgment and recording applies only to manumissions intended to take effect in future; not to present manumissions.

But THE COURT (THRUSTON, Circuit Judge, contra) refused this also.

BELL, (HAYS v.) See Case No. 6,270.

Case No. 1,252.

BELL v. HILL.

[1 McA. Pat. Cas. 351.]

Circuit Court, District of Columbia. Oct. Term, 1854.

PATENTS FOR INVENTIONS—INTERFERENCE—PRACTICABILITY—EVIDENCE—TESTS IN COURT.

[Where, in an interference on application for a patent, evidence is given pro and con as to whether or not an alleged improvement for filling lamps is practicable, actual tests made, showing the operation of the improvement as claimed, will be considered by the court in support of the testimony given for the same purpose.]

[Appeal from the commissioner of patents.

[Application by William Bell for an improvement in lamp caps. James Seneca Hill interferes, and claims prior invention. From a decision of the commissioner in favor of Hill, the applicant appeals. Reversed.]

A. B. Stoughton, for appellant.

R. H. Eddy, for appellee.

MORSELL, Circuit Judge. On the 25th of May, 1853, William Bell filed his petition in the patent office for a patent for his invention for "an improvement in lamp caps." The commissioner being of opinion that the patent thus applied for would interfere with an application made by James Seneca Hill on the 27th of January, 1853, and afterwards amended, gave notice thereof to the parties, who were allowed to produce their testimony; and upon due hearing and trial of said issue before him on the 16th day of March, 1854, he decided that the said Hill was the original and first inventor of the said improvement, and refused letters-patent to the said Bell. From this decision Mr. Bell has appealed, and the question is now submitted to me upon written argument.

The commissioner has furnished a certificate in writing of the reasons of his opinion and decision, and Mr. Bell hath filed his reasons of appeal. They are five in number, but it is thought the first two cover the whole ground of the controversy. The first is, "that the commissioner erred in deciding priority of invention in Hill, who could only at farthest prove his invention to some time in September, 1852, when Bell clearly proved the invention back to May, 1852, and actually had models showing the features in controversy in the patent office on the 9th of August, 1852." Second. Because the commissioner alleges that Bell's invention was valueless, for the reason that no provision is made for the escape of the air from the chamber while it is being filled, when it can, and we are prepared to show that it can, be filled without the air chamber, notwithstanding the expert testimony adduced by Hill, which must yield to occular demonstration; and because one of Bell's models, received and acknowledged by the patent office on the 9th of August, 1852, shows that he had air-slots or holes in it, which were afterwards soldered up because they were too large. The reasons for the commissioner's opinion, as stated by himself, are that the evidence shows that the safety-chamber, in one shape, was first invented by Bell. Had he claimed the form described by his witness, the priority would have been awarded to him; but that form seems valueless, for the reason that no provision is made for the escape of the air from the chamber while it is being filled, and there is nothing to show that he ever conceived the idea of remedying this difficulty until long after Hill had made the discovery; that contrivance seems the most material portion of the invention.

It is true that Bell only claimed to be experimenting; and having been the first to communicate it, if he had without negligence or delay prosecuted those experiments till

the discovery was consummated, he might have claimed priority, notwithstanding Hill, who commenced subsequently, might have completed his invention first. But such a position is untenable in the present instance, from the fact that the testimony shows pretty clearly that Bell borrowed the idea from Hill. He inquired of one of the witnesses the purpose of the small side-chamber which he now claims and which Hill had long before invented. He also stated at another time that the two inventions did not interfere. The commissioner says in conclusion: "I am of opinion that on the interfering claims as they are now presented Hill was the first inventor."

In his specification, Bell states: "I do not claim the use of wire-gauze or perforated tin for the purpose of preventing the explosion of spirit-lamps; but what I do claim as new, and desire to secure by letters-patent, is the perforation in the lamp-cap, in combination with the short chamber, of perforated tin, wire-gauze, or other analogous contrivance, by which means the lamp may be filled without removing the cap, and the spirit within the lamp may be protected from igniting when the lamp is filled without the use of the double cylinder of wire-gauze of perforated sheet-metal as heretofore employed. Second. I claim constructing the lamp-tubes with a band either above or below the lamp-cap in the manner and for the purpose substantially as set forth. Third. I claim the rings C, in combination with the stops D, for the purpose of securing the extinguishers F to the tubes without the necessity of employing chains for the purpose, of such a length as to become entangled with each, or to swing about when the lamp is in the hand."

Hill, in his specification, says: "I would remark that I herein lay no claim to the invention of the application to a lamp of a wire-gauze or perforated safety-chamber, such as will permit the introduction of liquid through it and into a lamp, and prevent the passage of flame into such liquid, such chamber being made to extend into the lamp. Nor do I claim the arrangement of such chamber entirely aside and independent from, and not made to surround, the wick-tubes, as such arrangement appears in what is termed Bell's safety-lamp. Nor do I claim any arrangement of the safety-chamber and wick-tubes in which, in order to fill or supply the lamp with the combustible fluid, they must first be wholly or partially removed from it. But what I do claim as my invention is my improvement above specified, the same consisting in arranging the wick-tube or holder within the safety-chamber, and attaching or immovably fixing such wick-tube or holder directly to the sides of the safety-chamber, and attaching or immovably fixing such wick-tube or holder directly to the sides of the safety-chamber, by arms or other equivalent devices, in combination with making the screw-cover g of the safety-chamber independent of, and to freely rotate concentrically around, the said wick-tube or holder, whereby I am enabled to secure to the lamp important advantages as specified; that is to say, to render it capable of being filled through its safety-chamber without in any way disturbing or first removing the wick or any portion thereof, as described. And in combination with the wick-tube f, arranged and applied to the safety-chamber as above set forth, I claim the secondary tube i and two or more branch tubes kk, or their equivalents, extended from it, the same being to enable a person to make use of two or more wicks, as stated."

It appears to me from the aforegoing statement that so far as the decision of the controversy brought up by this appeal is concerned, the question may be narrowed down to a single point. Bell's invention, as alluded to by the commissioner, when he says "the safety-chamber in one shape was first invented by Bell," according to Bell's statement of it, is so constructed that the lamp may be filled without disturbing the wick. The question, then, is, whether this lamp can be filled through the safety-chamber without the air-tube or a provision being made for the escape of the air from the chamber while the lamp is so being filled. It is believed that if the commissioner could have been satisfied from the evidence affirmatively, his decision would have been otherwise. On the part of the appellee, it is contended that it could not, and hence his device for that purpose. The inference from his evidence, as stated by the commissioner, is that Bell thought it necessary, and borrowed the idea from Hill; that he inquired of one of the witnesses the purpose of the small side-chamber which Bell now claims. This inference the appellant repels by showing that one of the models deposited by Bell in the patent office on the 9th of August, 1852, several weeks before the date of Hill's invention, shows that the air-vents were known to Bell, for that he had them on one of his lamp-caps, and afterwards soldered them up as being of no importance.

A witness on the part of the appellee says that without the cuts or slits in the sides of the tube at its top, to allow the escape of air from the lamp, the reservoir of the lamp could not be filled, or any considerable part of the reservoir be filled, while the wicks were in the wick-tubes. He says that he has tried the experiment, and finds the air chokes and causes the fluid to run over unless the air is allowed to escape through some holes.

Mr. Skinner, a witness on the part of the appellant, says he saw a lamp-top, of which Bell claimed to be the inventor, in the month of May, 1852. He describes the lamp, and identifies the one shown him on this examination to be the one. He says he sees two points of difference in the lamp-top—one is the absence of the two tubes through which the wick goes; and the other is that the wire-

gauze has been removed from the tube through which the lamp is filled. He cannot say as to the perforation in the stopper. To the second cross-interrogatory, he answers that he did not see the lamp filled through the tube having a gauze soldered to its bottom, the tubes at the same time being supplied with wicks. He is asked by the same party whether he supposes a lamp thus constructed as described would be capable of being supplied with fluid. He answers: "Yes, I know it could be." In answer to the next cross-interrogatory, "How could the air within the reservoir of the lamp escape when the gauze bottom of the tube was covered with the fluid, in the act of attempting to fill such reservoir," he answers, "I do not know anything about it; I simply know that the lamp I have, which is constructed essentially on the same principles, fills that way." There was no slit near the top of the tube, to his knowledge. Another witness, William G. Cambridge, says he saw the lamp-top of which Bell claimed to be the inventor in the spring of 1852, and gives a description; that he filled through the top by means of a tube which extended about three-quarters of an inch or an inch into the lamp. The bottom of the tube was covered with gauze-wire. The stopper or cap of the tube went on with a screw. He identifies the cap as the one exhibited in 1852. He also answers to a cross-interrogatory that he did not see that lamp filled, but that he does not doubt that it could be so filled. He is asked, under such circumstances how could the air escape; and answers, that he does not understand the philosophy of the thing, but is satisfied that if the nozzle of the lamp-filler did not entirely fill the tube, that the air would pass out. He is further asked, though the nozzle did not do so, whether the fluid filling it would not have the same effect. Answer: "From experiments which I have made in filling the shot-lamp, I should think not, if the fluid were turned in slowly to commence with." He is further asked if it would be possible to fill a lamp through such a tube without a slit or some other passage of air from the lamp. He answers: "As the nozzle frequently extends below the slit while filling, I should think it might."

As the decision of this issue depends so much upon the testimony, I have stated it more at large than I otherwise should have done. That there is a conflict between that which is stated by one of the witnesses on the part of the appellee and those on the part of the appellant is certain; and it becomes proper, therefore, to weigh and see to which side the preponderancy should be given. As to character, the witnesses are respectable and, I believe, intelligent; nor do I see anything to cause me to doubt as to their fairness; the two witnesses especially on the part of the appellant, being clergymen, should claim confidence.

The witness on the part of Hill gives his opinion that the tube or vent for the escape of the air was essentially necessary—such as that in the invention of Hill, I presume he means—and that the lamp with the wicks could not be filled without. The reasons he gives for his opinion were that he had tried the experiment, and found the air to choke up and cause the fluid to run over, unless the air was allowed to escape through some holes. More weight would have been due to this testimony if the witness had been more particular in describing the special circumstances relating to the experiment as to the particular cause of the obstruction, whether the failure was for the want of an air-tube. The same with respect to the "running over" and to the mode in which he attempted to pour the liquid in, especially as to the manner in which the nozzle of the can was held in its application to the mouth of the tube. It might then have been seen whether the experiment could be any test as applied to the lamp in this case.

On the part of the appellant, the witnesses satisfactorily identify the improved lamp claimed as invented by Bell in May, 1852; and they state that without the particular provision alluded to for the escape of the air, they had no doubt it could be filled. And the appellee, by his own cross-examination, brings out from them the evidence of their opportunities of knowing the fact that they had used similarly-constructed lamps, which in constant use they never had any difficulty in filling, and that they had no doubt, though they had never filled it or seen it filled, that the specimen lamp shown them could be so filled. Here, then, are two respectable witnesses, who had ample means of knowing from experience in the often-repeated use of the same kind of lamp as respects this point, declaring that the thing was practicable and could be done. In addition to which the examiner, in the explanations which he gave before me on the occasion of this trial, says (the models being first identified, and the same having been sent up from the office with the original papers and evidence in this cause) that the specimen lamp shown to him was a proper exhibit of the principle, and that it could be filled without any air-vent other than the wire-gauze over the bottom of the tube.

I must state, also, that for my fuller satisfaction I had the experiment made on the occasion alluded to, and saw the said lamp actually filled, and of course am convinced that it could be done as contended for by the appellant; and so believing, I am of opinion, and do decide, that priority of invention ought to be awarded to the said appellant, and that letters-patent ought to issue to him therefor as prayed.

[NOTE. The patent applied for was granted to William Bell November 14, 1854, and is numbered 11,928.]

Case No. 1,253.

BELL v. HOGAN.

[2 Cranch, C. C. 21.][1]

Circuit Court, District of Columbia. June Term, 1811.

SLAVERY—PRESUMPTION AS TO FREEDOM.

1. If a colored man was born a slave, his being permitted to go at large without restraint, and to act as a free man, is no evidence of his being free.

2. If the plaintiff's freedom was not so notorious that the defendant might be presumed to know it, the defendant is not liable to damages for taking up the plaintiff as a runaway, he being a colored man and, prima facie, a slave.

At law. Trespass [by Hogan against Bell for] assault, battery and false imprisonment.

The case was, that the defendant took up the plaintiff as a runaway, and carried him before a justice of the peace. [The court instructed the jury that the defendant was not liable.]

THE COURT, (CRANCH, Chief Judge, absent,) on the prayer of the defendant, instructed the jury, that if they believed from the evidence that the plaintiff was born a slave, his being permitted to go at large without restraint, and to act as a free man, was no evidence of his being free. And that if the plaintiff had recently come into this county, and was not known to the defendant to be free, and his freedom was not so notorious that the defendant might be presumed to know it, then the defendant is not liable in this action, if he used no unnecessary violence, and took up the plaintiff with a bona fide intention of ascertaining whether he was a slave or not.

FITZHUGH, Circuit Judge, in a note to this case, says: "The ground of those instructions was, that the plaintiff's color was prima facie evidence of his being a slave, and justified his being taken up under a suspicion of his being a runaway. In any question respecting a negro's freedom, it is incumbent upon the negro to show that he is free; and this must be by producing the record of his emancipation. If he had been proved to have been born a slave, he is presumed to be always a slave, and the burden of proving his emancipation devolves on him."

Case No. 1,254.

BELL v. HUNT.

[N. Y. Times, April 24, 1857.]

Circuit Court, S. D. New York. April, 1857.

EVIDENCE—PRESUMPTION—LIABILITY OF CHARTERER OF STRANDED VESSEL.

[The fact that a stranded vessel was chartered raises no inference as to the charterer's liability for services rendered in getting her afloat, where the evidence shows that he was present with the owner when the contract for the services was made, but is insufficient to show that it was made by him.]

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libel by Thomas Bell against Thomas Hunt for services in raising and removing the steamboat Cricket. From an unreported decree for respondent, dismissing the libel, the libellant appeals. Affirmed.]

Owen & Vose, for appellant.

Mr. Stoughton, for appellee.

NELSON, Circuit Justice. This is a libel filed by Bell to recover a balance due for raising and removing the steamboat Cricket off, and from a sand-bar, at the mouth of Shrewsbury inlet, N. J., where she had been stranded. It appears that Hunt owned the steamboat Confidence, which ran between the port of New York and Shrewsbury inlet, and that, her engine having failed, he employed and chartered the Cricket on the 4th of July, 1840, of Peck, the owner, to take her place, and that while thus employed, she was stranded, as above stated. The libellant, Bell, was engaged to get her off the sand-bar for $3,150, of which sum a balance of $350 remains unpaid. The court below decreed for the respondent, and dismissed the libel.

There is no sufficient evidence that the contract was made by Hunt with the libellant for the service in question. On the contrary, the weight of it is that it was made by Peck, the owner. Hunt was present when it was made, but, for aught that appears, took no part in the negotiation. Peck did. Indeed, the libellant was given to understand by Hunt, according to the proof, that Peck was the responsible man at the time the contract was made. It is supposed that Hunt may be made liable as charterer to the libellant. But, aside from the consideration that the contract was made with Peck and not with him, it does not appear upon what terms the Cricket was chartered. She may have been navigated by the master and hands of the owner, and hence the charterer be not at all responsible for the safety of the ship. There is no foundation, therefore, laid for the inference sought to be raised of the liability of the respondent on this ground.

We think the decree below should be affirmed.

Case No. 1,255.

BELL et al. v. McCORMICK.

[5 Cranch, C. C. 398.][1]

Circuit Court, District of Columbia. March Term, 1838.

SLAVERY—PRESUMPTION OF EMANCIPATION BY LEGACY IN WILL.

No implied emancipation arises from a legacy of twenty-five dollars bequeathed to slaves who are ordered by the will to be sold.

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

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

Benjamin Prather, of Prince George's county, in Maryland, by his last will, made in 1836, after devising his real estate to his grandson, B. B. Nichols, and sundry pecuniary and specific legacies to several of his relations and friends, proceeds thus: "My will is, that my two servants, Robert and Sarah, immediately after my decease, be set at liberty, and forever free from slavery, and that my executor pay, out of my estate, to the said Robert, the sum of fifty dollars, and to the said Sarah the sum of twenty-five dollars. Item, I will all the rest of my negroes, namely, Bacchus, Joseph, Bill, Dorsey, Hanson, Ann, John, Martha and Rachel, to be sold under the following provisions: that is, none of the said negroes shall be sold to any person residing out of Prince George's county, without their own consent; and in all cases they shall have the liberty of choosing their masters. All the rest and residue of my estate I will to be sold to the best advantage, and the proceeds of such sales, as well as the proceeds of the sale of the negroes above mentioned, (after paying to the said Bacchus, Joseph, Bill, Dorsey, Hanson and Ann, the sum of twenty-five dollars, which I hereby require and authorize my executor to pay, as well as in all other legacies,) to be equally divided between my two daughters Rachel and Eliza, share and share alike."

The present suit was brought by Bacchus [Bell] and Joseph [Williams,] two of the negroes named in the will [against Alexander McCormick.] It was agreed by the counsel of the parties, that, independent of the specific devises and legacies, the testator left assets sufficient to pay his debts, without resort to a sale of the negroes, and to leave a residuum; and that the petitioners had demanded their legacies of twenty-five dollars each, of the executor, who refused to pay them.

Mr. W. L. Brent and Mr. R. J. Brent, for petitioners, contended that a legacy to a slave is an implied emancipation, because, while a slave, he cannot hold the money a moment. It instantly becomes the money of his master. He can give no receipt, nor release; nor can the executor have credit for it in settlement of his administration account. When a right is given by a master to his slave, he is presumed to give all the means of his enjoyment of it. If the will contain consistent devises, or bequests, the last must prevail. The legacies are not to be paid out of the proceeds of the sales of the negroes only, but out of the general fund to be created by the sale of the negroes and other property, and there was more than enough to pay all the debts and legacies, without resort to the sale of the negroes. 1 Thom. Co. Litt. 430; Oatfield v. Waring, 14 Johns. 192; Hall v. Mullin, 5 Har. & J. 194; Le Grand v. Darnall, 2 Pet. [27 U. S.] 670; Ulrich v. Litchfield, 2 Atk. 374.

Mr. Bradley, contra. There can be no implication against the express language of the will. The testator expressly manumits some of his slaves, but directs these to be sold to such masters as they should choose, and out of the proceeds they were to be paid $25 a piece.

Mr. Mennifee, of Kentucky, on the same side. The donation of $25 a piece to the slave is not, in law, a legacy, but a mere benevolence. This construction reconciles all the clauses of the will. It is manifest that the testator did not intend to manumit these slaves; but to do them a gratuitous kindness. So also the right given them to choose their masters, was not a legal right, but a mere benevolence without a corresponding right, a gratuity, a direction to the executor.

THE COURT (nem. con.) was of opinion that the petitioners were not entitled to freedom under the will. That an implied emancipation cannot be inferred in direct opposition to the express order of the testator to his executor to sell them.

Case No. 1,256.

BELL v. McCULLOUGH et al.

[1 Bond, 194; 1 Fish. Pat. Cas. 380.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1858.

PATENTS FOR INVENTIONS—LICENSE—FORFEITURE — ASSIGNMENT OF PATENT — ACTION FOR INFRINGEMENT—TREBLE DAMAGES.

1. If a party obtains a license from a patentee to use his invention, but neglects to pay the price for a long time, and finally, when prosecuted, abandons his license, or while relying upon it, defends also upon other grounds, the license will be forfeited, and he will be liable as an infringer.

2. A paper purporting to be an assignment of an expired patent is void as an assignment, though it may be enforced as a power of attorney.

[Cited in May v. Saginaw, 32 Fed. 632.]

3. The object of the provision, which permits the court to treble the verdict found by the jury, is to remunerate patentees who are compelled to sustain their patents against wanton and persevering infringers, and was not intended to include mere collection suits brought upon an expired patent.

[See Schwarzel v. Holenshade, Case No. 12,506; Brodie v. Ophir Silver Min. Co., Id. 1,919.]

At law. This was an action on the case, tried by the court and a jury. The suit was brought [by Martin Bell against Addison McCullough, James Lampton, William H. Lampton, and others] to recover damages for the infringement of the patent of Martin Bell, more particularly referred to in the report of the case of Bell v. Daniels, [Case No. 1,247.] The defendants insisted that the plaintiff could not recover: 1. Because the defendants did not infringe the plaintiff's patent. 2. Because some ten years before

[1] [Reported by Samuel S. Fisher, Esq.; reprinted by Lewis H. Bond, Esq.; and here republished by permission.]

the expiration of plaintiff's patent, one Foster, an agent of the patentee, had put up the apparatus for the defendants, for an agreed price, which was to include the license fee, but which fee the defendants had neglected to pay. 3. Because, since the expiration of the patent, the patentee had assigned the same to Christian Shunk, for whose benefit the present suit was brought. [There was a verdict for plaintiff, who thereupon moved for treble damages. Motion denied.]

G. M. Lee and S. S. Fisher, for plaintiff.

Isaac C. Collins and John W. Herron, for defendants.

LEAVITT, District Judge, (charging jury.) 1. As to the alleged verbal license from Foster, the agent of Bell, to the defendants, the court will remark, that the contract of license is like every other contract, and depends upon a fair construction of the acts of the parties, of which acts the jury are to judge; but, if even a party originally obtains a license from a patentee to use his invention, but neglects to pay his license price for a long time, and finally, when prosecuted, abandons his license, or, while relying upon it, defends also upon other grounds, the license will be forfeited, and he will be liable as an infringer.

2. As to the paper produced in evidence and claimed to be an assignment to Christian Shunk, executed and delivered by Bell after the expiration of his patent, the court instructs you that the patent, after it expired, was a mere "chose in action," and all that the patentee sought to convey was his right to collect, by suit, or otherwise, the damages which had accrued during the lifetime of the patent. Such a right was not assignable, and the paper offered in evidence, so far as it purports to be an assignment, is void, although it may be good as a power of attorney authorizing the assignee to collect for infringements.

The jury found a verdict for plaintiff with $200 damages.

The plaintiff's counsel subsequently moved the court to treble the damages under the provisions of section 14 of the act of July 4, 1836, [5 Stat. 123.]

THE COURT. The provision contained in section 14 of the act of 1836, under which this motion is made, is as follows: "That whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, a verdict shall be rendered for the plaintiff in such action, it will be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs," etc. The object of this provision was to remunerate patentees who were compelled to sustain their patents against wanton and persevering infringers. There may be, and doubtless are, cases in which the discretion vested in the court for this purpose should be exercised, but it would hardly seem that the spirit of the act was intended to include suits brought upon an expired patent, which are merely cases of collection, the sole object being the recovery of damages. The motion is therefore overruled.

[NOTE. For other cases involving this patent, see Bell v. Daniels, Case No. 1,247, and Bell v. Phillips, Id. 1,262.]

BELL, (MALONE v.) See Case No. 8,994.

BELL, (MILLEDOLLAR v.) See Case No. 9,549.

Case No. 1,257.

BELL v. NELSON.

NELSON v. BELL.

[8 Leg. Int. 22.]

District Court, S. D. New York. Jan. 30, 1851.

ARREST — SUPREME COURT RULE — DISCHARGE — FOREIGN ATTACHMENT—BOND TO DISCHARGE.

[1. A person arrested subsequent to the supreme court rule abolishing imprisonment for debt, but prior to its publication, is entitled to be discharged from arrest.]

[2. Where a defendant is not found, a foreign attachment remains in full force against all his property found within the district; and, to discharge it, defendant must furnish a bond to satisfy the full decree.]

[In admiralty. Libel in personam by Samuel C. Nelson against Thomas Bell and others. Defendant Bell was arrested.] Motion to discharge the bond executed by defendant [Bell] to the marshal in this case, on an order by the judge to hold to bail in the sum of $2,000. The capias had also a clause of foreign attachment upon which property was arrested. It is now contended that, the rule of the supreme court having abolished imprisonment for debt, the capias was void, and the bond taken under it should be cancelled. [Motion denied.]

[The supplemental rule of the supreme court referred to in the opinion provides as follows: "Imprisonment for debt on process issued out of the admiralty court is abolished in all cases where, by the law of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a state court."]

Before BETTS, District Judge.

THE COURT held that the party is entitled to be relieved from personal arrest, and it makes no difference whether the arrest was before or after the publication of the rule of the supreme court, provided it was

subsequent to the rule. As to the foreign attachment, where a defendant is not found, it remains in full force against all property of the defendant found in the district, and the defendant is bound, in order to discharge it, to come in and furnish a bond guaranteeing to satisfy the full decree. The supreme court rule cautiously forbears acting upon the existing practice beyond the relief of a defendant from the imprisonment of his person.

The defendant is bound by the bond executed, and motion denied, but without costs, as a new question of practice is involved.

[For subsequent proceedings in this matter, see Nelson v. Bell, Case No. 10,101a.]

BELL, (NELSON v.) See Case No. 10,101a.

Case No. 1,258.

BELL v. NIMMO et al.

[5 McLean, 109.] [1]

Circuit Court, D. Indiana. May Term, 1850.

BONDS—CONSIDERATION—FRAUD — DEFENSES—ASSIGNEE.

[1. Action cannot be maintained on a bond obtained by falsely representing to the obligors that the obligee had a requisition to take them to another state, to answer a charge of larceny.]

[2. An obligor may set up any defense to a bond, as against the assignee thereof, which he had against the obligee, although bonds are assignable by the Indiana statute.]

[See Scott v. Schreeve, 12 Wheat. (25 U. S.) 605.]

[At law. Action by the assignee of Bell against Nimmo and others upon a bond given to the assignor. Plaintiff demurred to defendants' plea. Plea sustained.]

Mr. Cooper, for plaintiff.
Mr. Breckenridge, for defendant.

OPINION OF THE COURT. This is an action of debt for eight hundred and forty-three dollars. The defendants pleaded that the obligee represented to them, that he had a requisition on them from the governor of Ohio to the governor of Indiana, to surrender them to answer a charge of larceny in Ohio, which was false, but in consequence of which representation, the bond was given on which this action was brought, to settle the same and for no other consideration. That it was fraudulently obtained, &c. To which plea there was a demurrer.

In Indiana, bonds are made assignable by statute, but the obligor may set up any defense which he had against the obligee. The demurrer admits the fraud alleged in the plea, it is sustained. [Demurrer overruled.]

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

Case No. 1,259.

BELL v. NIMMON.

[4 McLean, 539.] [1]

Circuit Court, D. Indiana. May Term, 1849.

DEPOSITION—NOTICE TO TAKE—SERVICE ON COUNSEL.

1. A notice to take depositions is not good if served on counsel who could not attend to the taking of the deposition without being absent at the commencement of the court.

[Distinguished in Union Pac. Ry. Co. v. Reese, 56 Fed. 289.]

2. During court a service on the counsel is not good, if objected to.

[At law. Motion by plaintiff Bell, to reject depositions taken by defendant Nimmon. Granted.]

Mr. Cooper, for plaintiff.
Mr. Breckenridge, for defendant.

OPINION OF THE COURT. A motion is made by plaintiff's attorney to reject certain depositions taken by defendants. This motion is founded on an affidavit by plaintiff's attorney, which shows that notice was served on the 16th May, inst., at Fort Wayne, to take depositions 30 miles distant on the following Saturday. The notice was sufficient by the act of congress of 1789, which requires a notice to be so given as to allow of a travel of twenty miles per day to the place of taking the deposition. But the plaintiff's counsel states, under oath, that if he had attended the taking of the deposition, he could not have reached the court at its commencement.

The deposition will be rejected. No counsel is obliged to receive a notice of taking a deposition while in attendance at court. And for the same reason a notice, which if attended to would deprive the counsel of being present on the day the court commences, he is not obliged to receive the notice. A notice to take depositions, if it require the counsel to leave court, or if he attends, will necessarily prevent his reaching court at its commencement, ought not be held a legal notice.

Case No. 1,260.

BELL et al. v. OHIO LIFE & TRUST CO. et al.

[1 Biss. 260; [2] 3 Wkly. Leg. Gaz. 17.]

Circuit Court, S. D. Ohio. Dec. Term, 1858.

PRIORITY OF JURISDICTION—DETERMINED BY SERVICE OF PROCESS—NOT BY ISSUING OF PROCESS—JURISDICTION HAVING ATTACHED IS EXCLUSIVE—OTHER COURTS AND OFFICERS NO AUTHORITY.

1. Priority of jurisdiction as between the state and the United States courts is determined by the service of process, and not by the date of the commencement of the suit.

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

[2] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

2. The appearance of counsel for defendants is a waiver of notice of an injunction.

3. The rule that the issuing of a summons is such a commencement of a suit as to raise the statute of limitations does not apply to cases of this character; nor does the Code of the State of Ohio contemplate that the simple issuing of the summons, without service or other appearance, shall give jurisdiction over the subject matter.

4. Where process has been served and an injunction issued in this court, jurisdiction attaches to the exclusion of a state court in which a suit had been previously commenced, but no process served.

[Cited in Wilmer v. Atlanta & R. Air-Line R. Co., Case No. 17,775.]

5. After the issuing of such an injunction a state court has no authority to take action or make orders in regard to the subject matter over which jurisdiction had been exercised by this court; nor have its officers any right to the possession of or control over such subject matter.

6. If they obtain such possession, or exercise such control, they are interfering with the process of this court.

7. This court will, in such case, order the return to its receiver of all property over which its jurisdiction had attached.

[See note at end of case.]

In equity. On the 16th of October, 1858, Bell and Grant filed in the clerk's office of this court, a bill against the Ohio Life and Trust Company, their assignees and others, upon which a subpoena was issued and served the same day upon five of the members of the company. On the 18th, at ten o'clock a. m., upon notice to the defendants, who appeared in person and by their solicitors, the judges of this court made an order appointing a receiver of the trust company, and enjoining the assignees from disposing of the assets and ordering them to hold the assets subject to the further order of the court. [See Bell v. Ohio Life Ins. Co., Case No. 1,261.] These assets, consisting of notes, bonds, stock certificates, &c., were at that time in the actual possession of the assignees of the Ohio Life and Trust Company, and they had deposits with certain bankers in Cincinnati on current account. On the same morning, but subsequent in time, in the presence of the parties, one of the judges of the superior court in Cincinnati made an order in the case then pending in that court, in which Spinning and Brown were plaintiffs, and the assignees of the trust company, defendants, appointing the sheriff of Hamilton county, receiver, and requiring the assignees to deliver the assets to him. This case had been commenced on the 14th of October, by filing a petition, and a summons had been issued on the same day, in accordance with the Code of the state, but had not been served. The sheriff, without giving bond or taking an oath, immediately proceeded as such receiver to demand of the assignees the possession of the assets, and they were delivered to him by one of the assignees who had personal notice of the order made in this court. The receiver appointed by this court made due demand of the sheriff for the delivery to him of the assets of the company, at the same time exhibiting to him his authority as receiver under the order of this court. Delivery was refused by the sheriff, he claiming to hold the assets as receiver under an order of the superior court of Cincinnati. Rule against the sheriff to show cause why he should not be attached for contempt. [Attachment refused, but sheriff ordered to return assets to the United States court.]

Henry Stanberry and N. C. McLean, for plaintiffs.

C. D. Coffin, for defendants.

McLEAN, Circuit Justice. If the priority of jurisdiction depends upon the order just made, there is no question it belongs to the United States court.

But it is claimed on the other side, that the priority of jurisdiction depends upon the commencement of the suit, and that the suit in the superior court was first commenced; and therefore the jurisdiction first attached in that court.

It is not controverted, that service of process was first made in the United States court; and that the first order in relation to the assets was made by that court; but it is alleged that the suit in the superior court was first commenced by the filing of the petition and the issuing of the summons, and that the jurisdiction of that court then attached before any service on the defendants.

1. When was the suit in the superior court commenced?

2. When did the jurisdiction of that court attach?

The ground is assumed by Judge Gholson, that the jurisdiction of the superior court was acquired over the defendants on the 14th of October, by the filing of the petition and causing the summons to issue.

The provision cited to maintain this position is section 55, of the Code, (2 Swan. & C. Rev. St. Ohio, p. 961,) which declares, "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." And the judge very appropriately remarks, "Certainly, nothing less will suffice; and had any thing more been required, it is reasonable to suppose it would have been expressed."

With great respect to the learned judge, we are led, from a somewhat critical examination of the provisions of the Code, to think its language is plain and unmistakable. We think there is nothing new or mysterious in the New York or Ohio Codes, in the mode of bringing an action. We think there is nothing left to conjecture on this subject.

The mistake in giving a construction to the 55th section, seems to us, to consist in supposing the 55th section was intended to cover every necessary requisite to give jurisdiction

over the parties, and the subject matter of the controversy. Now we are aware that the title in the Code declares that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place, there shall be hereafter but one form of action, which shall be called a "civil action."

It was lately said by a distinguished judge, "This attempt to abolish all species, and establish a single genus, is proved to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ."

The 56th section points out the duty of the plaintiff in the commencement of his action. He is required to file with the clerk a praecipe stating the names of the parties to the action, and demanding that a summons issue thereon; and the ensuing section, 57, declares the summons shall be issued by the clerk under the seal of the court, &c. It shall be directed to the sheriff of the county, and command him to notify the defendant named therein, that he shall answer the petition. And in section 60, when a writ is returned, not served, other writs may issue. In section 61, "The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ, the time and manner of service." In section 73, "In all cases the return must state the time and manner of service." And again in 78, it is declared, "when the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title."

We suppose that all the sections of the Code, having a direct relation to the commencement of an action, should be so construed as to carry out the expressed intention of the codifiers. The filing of the praecipe, the direction of the process to the sheriff to notify the defendants that they are required to answer the petition, and that the return of the officer must state the time and manner of the service, are all matters of positive requirement, and are plain and unambiguous.

And in the 20th section,—"An action shall be deemed commenced, within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by service within sixty days."

The first part of this section is significant to show what is deemed the commencement of an action, as to each defendant at the date of the summons which is served on him; and also where service by publication is proper, the action shall be deemed commenced at the date of the first publication; and what shall be deemed equivalent to the commencement thereof. Now all these show that something more is requisite for the commencement of an action beyond that of filing a petition and directing a summons to issue. The other indispensable requisite, the service of the process, and the date of that service, to give jurisdiction of the subject matter of the controversy, seems to be indispensable. And it is not perceived how any other construction is consistent with the language of the Code.

Every one knows that the commencement of an action will raise the statute of limitations. And for this purpose the suit is properly commenced before the process is served. If the bar is not complete before the date or issue of the summons, but becomes complete before service, it has been held that the commencement of the action shall date from the writ.

"When a court has jurisdiction of the subject matter and of the parties, the bringing a suit or action in that court," we are informed, "must be regarded as the beginning of the inquiry into the matter of controversy. From that time the jurisdiction of the court attaches."

Now that "the beginning of the inquiry into the matter in controversy," from which time the jurisdiction of the court attaches, means a hearing on the merits of the case, before process has been served or notice given to the defendants, is sustained by no court. I presume, therefore, that I may have misapprehended the meaning of the learned judge on this point.

A reference is made in the case of Carpenter v. Butterfield, 3 Johns. Cas. 145, in which it was held that the issuing a writ in a cause, is, for every material purpose, the commencement of the suit. But the point in controversy was, whether a debt or demand, to be set off under the statute, must be an existing debt or demand, at the time of the commencement of the plaintiff's action. And the court held the matter of set-off must exist at the time the suit was commenced, overruling former decisions, in which it was held that a matter happening after the beginning of the suit, but before plea pleaded, may be pleaded as a set-off.

In the notes appended to this case, a great number of authorities are cited to show that suing out the writ is the "beginning of the action." This is not doubted as to many purposes; though there are conflicting authorities on the subject. But it has been held that fictions of law should not work a wrong contrary to the truth.

We know that, in the king's bench, the bill of Middlesex is a mere order or command of

the court, and has no testo, and is confined to the county in which the court sits. In every other county a latitat was the first process, grounded on a supposed previous return of a bill of Middlesex; but the modern English authorities consider the declaration as the exhibition of the bill, and the commencement of the suit. But why need we trust to the common law forms in the English courts, which are more curious than useful, to instruct us in the modified forms of pleading, especially when the Code informs us there shall be hereafter but one form of action?

In Johnson v. Comstock, 6 Hill, 10, which arose under the New York statute, authorizing the commencement of suits by declaration, it was held that the filing of a declaration is not the commencement of a suit; but the commencement dates from the actual service upon the defendant.

By the Code of Procedure of the State of New York, (sections 106, 112–114,) civil actions in the courts of record in that state shall be commenced by the service of a summons. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The New York Code seems to contain all the material requisites to constitute a service under the Ohio Code.

We are told, "there is strong negative evidence that the issuing, and not the service, of a summons, was intended by the powers of the Code, to be the commencement of an action under our system." But we have been unable to find any negative evidence to sustain this supposition. Confident we are that all positive evidence is against it. We think the codifiers of Ohio have, with a great care and a wise circumspection, guarded the Code against misconstruction as to the commencement of an action. Taking the sections of 55, 56, 57, 61, 63 and 78, no one, it seems to us, can fail to see and feel the force of the language used. Section 57 was not intended to describe the entire mode of bringing a civil action. That mode consisted of parts which made a whole, and consummated the thing designed.

An action, like every other thing, must have a beginning. The filing a petition is one thing, the praecipe another, and the issuing of the summons another, and the service return another; all these are in the Code. They belong to the same class. In the order of time they succeed each other, and are essential to give jurisdiction over the parties, and the subject matter of the controversy. We contend for nothing more than this; and less than this, gives, as we think, no color of jurisdiction over the defendants.

On the 16th of October, the bill of Bell and Grant was filed in the clerk's office, and a subpoena was issued and served on five of the trust company; and on the succeeding Monday morning, under a notice, a motion was made for a receiver, and an injunction was laid upon the assets of the trust company, "and ordering them to hold the assets subject to the further order of the court."

By the service of the process, no question can arise that the jurisdiction attached; and as little doubt can exist that the order "to hold the assets, subject to the further order of the court," fastened itself upon the assets. Prior to this, no steps had been taken, but to file a petition and issue a summons, which was not served.

Under the eleventh rule of the supreme court of the United States, it is declared, "No process of subpoena shall issue from the clerk's office, in any suit in equity, until the bill is filed."

And by the 7th rule, the process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill, &c.

The 16th rule declares "upon the return of the subpoena, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."

We have then the proceedings in personam against the defendants, and the proceedings in rem against the assets, prior in time to any steps taken by the sheriff. We deem it unnecessary to press the argument, however cogently it might be urged, that the process, having been served, necessarily drew after it the assets. But we have no occasion to resort to this ground. The proceedings in rem hold the property beyond question. The defendants appeared by counsel, and were heard in the case, and the order for the injunction was made, "and the defendants were ordered to hold the assets, subject to the further order of this court."

An appearance of counsel for defendants, has uniformly been held a waiver of notice of the injunction. In the case of Varrards v. Nagee, a defendant was committed for a breach of an injunction, by Lord Eldon, though the only notice which he had of it was from the information of the plaintiff's solicitor.

The orders pronounced by the court in cases of special injunctions, have been various at different times. It appears from the precedents, that the form frequently adopted in special injunctions, enjoined the party "till further order;" in some cases the injunction has been "till appearance and further order;" in others, "till answer and further order." But the form at present used, and which is established by a rule laid down by Lord Eldon, is, "till answer or further order." Eden, Inj. 382. In New York, injunctions are usually granted "until the further order of the court."

In the emphatic language of Chief Justice Marshall, in Smith v. McIver, 9 Wheat. [22 U. S.] 535, it is said: "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it."

In the case of Daniels v. Stevens, 19 Ohio, 238, the court says: "The great question in the case is a question of jurisdiction. A court of chancery, like a court of law, must have jurisdiction of the person as prescribed by law, &c. Before a decree can be operative, the court must have jurisdiction of the person, as well as of the subject matter."

In Miers v. Zanesville & M. Turnpike Co., 11 Ohio, 273, the court says: "This bill was first filed; but the decree rendered, and the receiver first appointed, was in the other case. We think that he whom the law first authorizes to receive the tolls, should be protected in his possession; and we find the statute operates to confer this power by the decree. In the present race between creditors, whose equities are equal, this first authority to receive seems to us to confer the priority to the receiver of Muskingum, and that all questions of appropriation and priority must be settled in the court to which he renders his account."

What became of the action first commenced? The receiver was appointed in the second action. Does the first action still rest on the petition and summons?

The established rule is, that a lis pendens duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the lis pendens begins from the service of the subpoena, after the bill is filed. Murray v. Ballou, 1 Johns. Ch. 576.

A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738.

The service of the writ is the commencement of the suit. Jencks v. Phelps, 4 Conn. 149. It is essential that the party should be duly summoned. State v. Bryce, 7 Ohio, pt. 2, pp. 82, 83. A court of chancery, like a court of law, must have jurisdiction of the subject matter and the person. Daniels v. Stevens, 19 Ohio, 222, 238. Every court, that its proceedings may have any validity, must have jurisdiction over the subject matter. Maxsom v. Sawyer, 12 Ohio, 195, 207.

The power to hear and determine a cause is jurisdiction; it is coram judice whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is a case of undoubted jurisdiction.

If jurisdiction of a court once attach, subsequent irregularities will render the judgment voidable only. Paine v. Mooreland, 15 Ohio, 435; Boswell v. Sharp, Id. 447; Adams v. Jeffries, 12 Ohio, 253, 271. Every intendment will be made to support the power of the court. Yet in proceedings of these courts, if they transcend the limits which the law prescribes, and assume to act where they have no jurisdiction, their acts are utterly void. Adams v. Jeffries, Id. 253, 273. If the court here or elsewhere, has not jurisdiction of the person, nor of the subject matter, its proceedings are wholly void. Such judgments are as waste paper. They are no protection to those who seek to enforce them. Id. 273.

A sale of lands by an administrator, under an order of a court having no jurisdiction to make the order is void. Ludlow v. McBride, 3 Ham. [Ohio,] 240, 255.

Where executions issue from a state court, and from a court of the United States, if there be no lien by judgment, the one under which a seizure is first made must prevail, and hold the property. Brown v. Clarke, 4 How. [45 U. S.] 4; Hagan v. Lucas, 10 Pet. [35 U. S.] 400; Pulliam v. Osborne, 17 How. [58 U. S.] 471.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether it be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law trespassers." Elliott v. Peirsol, 1 Pet. [26 U. S.] 328. In Voorhees v. Jackson, 10 Pet. [35 U. S.] 477: "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question." The same doctrine is stated in Thompson v. Tolmie, 2 Pet. [27 U. S.] 157.

In Williamson v. Berry, 8 How. [49 U. S.] 540, the court says: "We concur that neither orders nor decrees in chancery can be reviewed, as a whole, in a collateral way. But it is an equally well settled principle in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states." Glass v. The Betsey, 3 Dall. [3 U. S.] 6; Rose v. Himely, 4 Cranch, [8 U. S.] 241.

The multiplication of these authorities cannot be necessary and it only remains to apply them to the case before us.

Jurisdiction is claimed under the Code by the superior court, from the fact that the petition was filed and the summons issued. And it is insisted, that this was the beginning of the action. In some sense it may be admitted to have been the beginning of the ac-

tion; but in no sense, until the service of process, was it the exercise of a jurisdiction which affected the rights of the defendants. Whether we look to the forms of the common law, the chancery law, as adopted by congress, or the code, a process or notice must be served on the defendants, before they are made parties.

In the 2d section, of the 3d article of the constitution of the United States, it is declared "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States," &c., and "between citizens of different states, and foreign states, citizens or subjects."

In Boyle v. Zacharie, 6 Pet. [31 U. S.] 658, the court says: "The chancery jurisdiction given by the constitution and laws of the United States, is the same in all the states of the Union; and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice, but the act of congress of 1792 has provided, that the mode of proceeding in equity suits shall be according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity of the parent country, as contradistinguished from that of courts of law, subject of course to the provisions of acts of congress, and to such alterations and rules as in the exercise of the powers delegated by these acts, the courts of the United States may from time to time prescribe."

The provision in the constitution, enabling citizens of other states and foreigners, to sue in the federal courts, has been uniformly considered a wise and necessary provision. It has been repeatedly eulogized by Chief Justice Marshall, and the great men, who with him, so fully illustrated and maintained the great principles of the constitution.

In the organization of a national judiciary it was considered a matter of the highest importance to organize a federal court, within each state, which might be supposed free from local influences and combinations, to which the citizens of other states, and foreigners, might resort for the maintenance of their rights. In carrying out this idea, it will be perceived, that no citizen of any other state, or a foreign citizen or subject, can be required to submit to the jurisdiction of a state court, in a civil case.

If sued in such court, he may remove the suit to the circuit court of the United States. For all the purposes of jurisdiction, the state is limited to its own territory, except it be substantially proceedings in rem, where the property within the state is made responsible, or by the acquiescence of those who live without the state or country.

The view of the learned judge who presided in the superior court, seems to be, that in disregard of the federal powers conferred on the courts of the United States, a state court may draw into its jurisdiction the assets of the trust company, and administer them under the Code; on the ground that a petition has been filed, and a summons issued. There is believed to be no authority for the exercise of such a jurisdiction under our system. And confident we are, that under the constitution of the United States, and the laws of congress, this cannot be done. It, in fact, would be a subversion of the constitution of the United States, and the laws of congress, in regard to federal jurisdiction. If anything is to survive the Code and the judicial power of the Union, it is the right of citizens of other states, and the citizens and subjects of foreign governments, to sue in the federal courts. It is true they may sue in the state courts, but there is no power in a state which can coerce them so to do. And if sued in a state court, the right of appeal is given. This was one of the great objects attained in the establishment of a federal judiciary. In numerous cases the supreme court has said, "in all the states the equity law recognized by the constitution and by acts of congress, and modified by the latter, is administered by the courts of the United States." Neves v. Scott, 13 How. [54 U. S.] 268.

In the case of Shelby v. Bacon, 10 How. [51 U. S.] 71, this court says they have no doubt the complainant may file his bill in the circuit court. And they say, "suppose the assignees had reduced to possession the whole amount of the assets of the Bank of the United States, chartered by Pennsylvania, and held them ready for distribution, could it be doubted that the complainant would have a right to file his bill in the circuit court, not only to establish his claim against them, but also for a proportionate share of the assets."

This shows that the courts of the United States, in the discharge of their duties, are bound to carry out their constitutional powers in regard to the claims of non-resident citizens and foreigners, without the aid of the state courts.

Spinning & Brown, in the superior court, rested alone on their petition and summons. Bell & Grant filed their bill in the clerk's office, and issued their subpoena, and it was served on five of the defendants, before any process was served by Spinning & Brown. That the jurisdiction attached under the process of Bell & Grant is undoubted. And it is equally clear, and indeed is not denied, that the assignees were enjoined by the circuit court, and ordered to hold the assets subject to the further order of this court. This order being prior to the action of the superior court, and being in exact conformity with the special orders in Eden on Injunctions, and with the rule of Lord Eldon, settles this controversy. And there was an ap-

pearance of counsel in behalf of the assignees. The proceedings were in rem. Nothing more was wanting.

We do not doubt that in the hurry and confusion of the hour, the superior court mistook the effect of the order of this court, and that they will direct the receiver to restore the assets to the possession of the receiver of this court.

It is clear, as we think, that the superior court had no power to interfere with these assets, "after the assignees had been directed to hold them, subject to the further order of this court." The receiver of the superior court was undoubtedly a trespasser, in removing the assets, and taking them into his own possession, but believing that he acted in good faith in obeying the order of the superior court, which, as we suppose, was made under an erroneous impression as to the effect of that order, we shall exonerate the receiver from all responsibility, on the return of the assets to the possession of the receiver of this court.

It would be painful for us to take any further step in this cause, but not doubting that the assets of the trust company are vested in this court, by the first service of the process in this court, through which its jurisdiction attached; and by its proceeding in rem, which "enjoined the assignees from disposing of these assets, and ordering them to hold the assets, subject to the further order of the court;" and that in virtue of these proceedings, the superior court could have no rightful jurisdiction, we are constrained by a sense of duty, to require the return of the assets by the receiver of the superior court, to the possession of the receiver of this court.

NOTE, [from original report.] Where different courts have concurrent jurisdiction, the one whose jurisdiction first attaches has paramount authority, and cannot be ousted by subsequent proceedings in other courts. Stearns v. Stearns, 16 Mass. 171; Bemis v. Stearns, Id. 203; Eaton v. Patterson, 2 Stew. & P. 9; Thompson v. Hill, 3 Yerg. 167; Hall v. Dana, 2 Aikens, 381; The Robert Fulton, [Case No. 11,890;] State v. Yarbrough, 1 Hawks, 78; Cleveland, P. & A. R. Co. v. City of Erie, 1 Grant, Cas. 212; Ex parte Bushnell, 8 Ohio St. 599; Merril v. Lake, 16 Ohio, 373; Henry v. Tupper, 27 Vt. 518; Bank of Bellows Falls v. Rutland & B. R. Co., 28 Vt. 470; Conover v. Mayor, etc., of New York, 25 Barb. 513; Keighler v. Ward, 8 Md. 254; Gould v. Hayes, 19 Ala. 438; Ex parte Robinson, [Case No. 11,935;] Clepper v. State, 4 Tex. 242. The United States courts cannot enjoin a sheriff from selling, under process from a state court. Ruggles v. Simonton, [Case No. 12,120,] September term, 1872, western district of Wisconsin, in United States circuit court. A state court will not discharge on a writ of habeas corpus county supervisors who have been arrested by the marshal on attachment from the United States circuit court for refusing to levy a tax ordered by that court, though they had been enjoined by the state court from levying such tax. The United States court having jurisdiction, they should be remanded to the custody of the marshal. Ex parte Holman, 28 Iowa, 88, where numerous authorities are cited. Where a United States officer holding a prisoner by United States authority, is served with a writ of habeas corpus issued by a state court, he should make a return, and show how he holds the prisoner. The state authority should thereupon abstain from longer interference, and any proceedings thereafter are illegal. U. S. v. Doss, [Case No. 14,985.] Where both the state and United States authorities have concurrent jurisdiction, the one which first assumes it will retain it until final judgment. The tribunal which first has jurisdiction will retain it. Hines v. Rawson, 40 Ga. 356; West v. Morris, 2 Disn. 415. A federal court will not enjoin persons from proceeding in a state court, &c. Bryan v. Hickson, 40 Ga. 405.

Case No. 1,261.

BELL et al. v. OHIO LIFE INS. CO. et al.

[2 Wkly. Law Gaz. 321.]

Circuit Court, S. D. Ohio. Oct. 18, 1858.

CIRCUIT COURTS — JURISDICTION — CITIZENSHIP — REAL PARTIES — RECEIVERS — APPOINTMENT — CONFLICT OF JURISDICTION — STATE COURTS.

[1. To authorize the federal court to exercise jurisdiction of a bill in equity charging improper conduct on the part of assignees of an insolvent corporation, seeking to enjoin them, and praying for a receiver, it is sufficient that the complainants are aliens, and some of the defendants residents of the state, and the fact that difficulties may arise as to non-resident defendants, and as to non-residents not made parties, which will prevent a decree as to such non-residents, will not affect the jurisdiction as to the resident defendants.]

[See Towle v. American Bldg. Loan & Inv. Soc., 60 Fed. 131.]

[2. Although the real controversy was between the corporation and its assignees, and it could have brought suit to hold them to accountability, yet the plaintiffs, being bona fide creditors, could properly institute the proceeding.]

[3. It was no objection to the jurisdiction of such a suit that the receiver, if appointed, could not prosecute suits in other states.]

[4. When it appears in such suit that the management of the affairs of the company by the assignees is unsatisfactory to the creditors; that the company has suspended, is insolvent, and the assignee's conduct is improper, and that vast interests are at stake; that the assignees refuse to permit the examination of the books and papers of the company,—an order for the appointment of a receiver should be made.]

[5. A suit for the appointment of a receiver was pending in the state court at the same time a suit was before the federal court for an injunction and the appointment of a receiver. The order of the latter court appointing such receiver was prior by one-half hour to the order of the state court. *Held*, that the federal court was first to obtain jurisdiction.]

[In equity. Bill by Bell and Grant against the Ohio Life Insurance & Trust Company and others for the appointment of a receiver, and for an injunction. An injunction was granted in a former proceeding. Order for the appointment of a receiver.

[For proceedings to punish the sheriff, as receiver of the state court, for contempt, see Bell v. Ohio Life & Trust Co., Case No. 1,260.]

LEAVITT, District Judge. As a first impression it seems to me there is nothing involved in the matter before the court which

gives the importance that counsel attribute to it. No fortune nor the reputation of parties is now to be disposed of; it is simply a motion for an injunction, and for the appointment of a receiver. As to the question whether another court has acquired jurisdiction, or whether the superior court can exercise jurisdiction in the matter, I take this occasion to say, individually and personally, that the superior court is competent and qualified to discharge the duties that may be involved; none entertain a greater respect than myself for that court and the judges.

What are the questions involved? Plaintiffs, on the 16th of this month, filed a bill in chancery in this court, alleging that they had recovered a judgment in this court, upon which an execution was issued, and returned unsatisfied. (Here the court referred to the other allegations of the bill.) The defendants are the Ohio Life Insurance and Trust Company, a corporation of the state of Ohio, and the assignees all residents of Ohio. The bill alleges, generally, that the management of the affairs of the company, by these assignees, is unsatisfactory to the creditors; that the company has suspended, is insolvent; and alleges improper conduct by the assignees, and there is a prayer that the defendants may be held to account, &c., and that the control of the affairs of the company may be withdrawn from them, &c.

The application was made at chambers, before Judge McLEAN and myself, at 9 o'clock on Monday morning, the 18th of October, in pursuance of a notice to that effect. Defendants were represented by regular counsel, who resisted the appointment of a receiver and the granting of an injunction. The injunction was granted by both judges upon, what was deemed, sufficient grounds. It is opposed strenuously by defendants, and much has been said that is not pertinent to the investigation, and a wide range and latitude has been allowed counsel, in the argument of matters not involved. I shall not, therefore, refer to all the points and arguments so ably presented by counsel.

The real question lies within very narrow limits. In the first place, the jurisdiction of the court is denied. It is insisted that there is no grant of power in the constitution to this court to adjudicate in controversies between citizens of this state. If there is no jurisdiction the case must be dismissed. This objection to jurisdiction upon the ground that it is not conferred, I may distinctly admit. This court, as well as all the federal courts, is limited, and cannot exercise powers without they are found in the constitution or the laws of congress. This doctrine has been sanctioned and recognized from the first, and about it there ought to be no question.

It is contended that there are citizens of Ohio, as well as citizens of other states, made parties, and that, unless we have jurisdiction of all, there is no authority to act. There is no prohibition as to bill in chancery against parties resident of other states. It is contemplated that, when a citizen of another state is joined, he may be made a party by process or voluntary appearance; and such is the prayer of this bill. This doctrine is recognized and sanctioned by the 22d rule of the supreme court of the United States. True, if in the process of a case we find that residents of other states are made parties, and the court can not make a decree without these parties, the court would be compelled to dismiss the bill; but this does not prevent jurisdiction of resident defendants. There are causes of difficulty which may arise. As the case against these trustees is not one upon contract, but upon a charge of improper conduct, I think there is no difficulty as to the jurisdiction on this point.

Objection is also made that suits and controversies must arise between parties, citizens of Ohio, who can not be made parties in this court. On the face of this bill, there is clearly a case for this court; the plaintiffs are aliens, and this imports jurisdiction. If there is, then, this jurisdiction, will this court, in anticipation of a difficulty, that may never occur, in anticipation of controversies as to claims of citizens of Ohio, refuse to take jurisdiction of this case? I can see no good grounds for this objection. Suppose there are such claims, does it result, necessarily and unavoidably, that the difficulty will arise? These claims can be presented to a receiver, who can examine and pass upon them. The principles in the Methodist Church Case, [Case No. 1,089,] where there was a trust fund, and claimants who could not become parties, settle this question.

It is also objected to jurisdiction in this court that the real controversy is between the trust company and the trustees, and Bell and Grant are only made parties to give this court jurisdiction. From the showing they are bona fide creditors. True, the corporation could have brought suit against the trustees, but it was declined, and has instituted no proceeding to hold them to accountability. I suppose that, under the authority of the bank cases, in the so-called "Crow Bar Law," there is authority for this court to exercise jurisdiction. Jurisdiction was entertained in these cases without doubt. Injunctions were granted. One case went to the supreme court of the United States, and the question was decided in favor of jurisdiction.

It is also objected that the receiver, if appointed by this court, will not have authority to prosecute suits in other states. It is a possible thing, but does it constitute grounds for this court to refuse to exercise jurisdiction? The same difficulty would arise in the state courts. If this rule is to prevail, no receiver could be appointed at all. These are the main objections as to jurisdiction. It is certainly not necessary to notice the objection that the trust company, being

a corporation, is not a citizen. This doctrine —the right of the federal courts to entertain jurisdiction of corporations—has been established by a number of the most respectable authorities in the supreme court of the United States. These decisions are laws to this court, and, certainly, the policy is good. In this day, when corporations are greatly multiplied, when their influence shows its mark on all the business of the country, it would be strange if suits could not be brought in the United States courts. This doctrine, if established, would deprive our citizens of the constitutional privilege of a choice as to courts. I trust the time is far distant when the corporations of our state can place themselves beyond the power or action of the federal courts.

There are other objections made to the appointment of a receiver in this case: 1st. That the injunction was improvidently issued, without sufficient showing of facts to warrant the order. I remark, first, there is no act of congress, or rule of court, which points out the amount or kind of evidence necessary to warrant an injunction. The order was made after deliberation, by Judge McLEAN and myself. 2d. That the allegations are not sustained by affidavits. The rule, as I understand it, is that the court should have sufficient appear to make the order proper. By the 24th rule, the signature of counsel is required to every bill, which shall be considered as an affirmation on his part that there is good ground for the suit.

It would thus seem that all bills are made on the solemn professional obligation of the counsel that the facts set forth are true. For the purposes of this inquiry, it is not necessary to investigate as to these facts in the bill. The only question for us is, were there facts set forth in the bill sufficient to warrant the order? Besides these, there is the professional statement of the counsel, the affidavits of Hardy, Thompson, Nesmith. In their general aspect, all these present that the trust company is insolvent beyond controversy, and has been so for about a year.

Messrs. Stanberry & McLean say they represent half a million dollars in claims of creditors; also, that a meeting of creditors was held since the filing of the bill in this court, at which it was decided that their interests require the appointment of a receiver. Concerning all the facts necessary to consider, there is no dispute; it is not denied that the company is insolvent, that some of the creditors are dissatisfied with the manner of the assignment to the trustees. It is not necessary to pass on the question of the validity of the assignment at this time. It is also stated, and not denied, that the assignees have refused to let parties examine the books and papers of the company. It is also admitted that the person who is charged with the disastrous consequences to this company has been released.

These then are the granted aspects. In view of all these it does seem that this court was warranted in making the order. The same facts are sworn to in the bill of Spinning and Brown in the superior court. True, the affidavits of the trustees are filed here, denying all malfeasance, &c.; and without saying a word as to these, and admitting them to be true, is there a case presented showing that there is no necessity for the appointment of a receiver. They do not present such a case. The trustees may have acted with the best of motives, and yet the interests of the creditors may require that they no longer manage the affairs of this corporation; and so far as the charges in the bill go to affect the integrity, &c., of the trustees and assignees, they will hereafter have an opportunity to vindicate their actions.

Another objection is, that the superior court had obtained jurisdiction prior to this court, and this court cannot interpose. As I have already had occasion to remark, the tone and temper in which these propositions were presented were not satisfactory to us. The insinuation that this court was grasping for power is unfounded. If the question were left to me, in some cases, I should decline to act, and prefer to devolve jurisdiction upon others; but this is not a matter of personal preference, but of duty. There is nothing better settled than that where there are two courts, having concurrent jurisdiction, that which first gets jurisdiction retains it. Then, as a question of law, which of these courts got jurisdiction? There is clearly a difference as to the jurisdiction of things and persons. One court might get jurisdiction of the things, and both have jurisdiction of the persons.

In this court, service of process gives jurisdiction. I have not inquired as to legislative action in regard to the state courts. If, however, there could be any doubt on this question, it is settled by U. S. Sup. Ct. rule 16, which provides that, "upon the return of the subpoena, as served, and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of entry."

If priority of jurisdiction depended upon service, there would be no doubt, for the process of this court was served on the 16th, and that of the superior court on the 22d of October. But we will not depend on this question. Which court first obtained jurisdiction over the assets? Both cases were pending before the several courts at the same time on the morning of the 18th. The case in the superior court was an application for a receiver; in this court was an application for receiver and provisional injunction. The fact is positively proven that the order of this court was prior, by half an hour, to the order of the superior court. The affidavit of Mr. Anderson leaves no doubt of this. It results, inevitably, that the order of this court

had the priority. It is said, however, that, though this is so, the assignees are not chargeable with notice. Beyond controversy, the appearance of counsel is, for all legal purposes, an appearance of the party. Is there any thing better settled than that the principal is bound by the acts of his attorney? It seems very clear there was, by legal effect, a jurisdiction in this court from the time of the order. The order is to hold the assets until further order of this court. It vested, by necessary operation, the control of the assets. From that moment the assignees could do nothing; the property came into the custody of the law. In addition to the appearance of counsel, we have proof of actual notice to Broadwell and Fosdick, prior to the order in the superior court. It is not necessary to extend my remarks. In my view the proposition is clear that this court obtained the first jurisdiction to control the assets.

The only remaining question to dispose of, is whether the court will exercise its power, or there is necessity for the action of this court. It is a matter addressed to the chancellor. If he believes there is necessity for such an appointment, he may make the order. Where all the stock has been sacrificed, &c., and it is made to appear that creditors desire such action, is it not a proper case for the exercise of his functions? There is force in the proposition, that one person can do better than so many, in the settlement of affairs situated as are the affairs of this company. It seems to me the assignees can not object to a receiver in this court; the record of the superior court says their order, appointing a receiver, was made without objection on their part. There was a tacit acquiescence.

This court will make an order for the appointment of a receiver.

I am permitted to say, that in all these views I have the concurrence of Judge McLEAN.

Case No. 1,262.

BELL v. PHILLIPS.

Circuit Court, S. D. Ohio. 1858.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—MEASURE OF DAMAGES.

Where a patent was for heating boilers with the waste heat of a blast furnace, *held*, in the case of an infringement by the use of a machine which was the same in principle, that the rule of damages was the price of the coal saved by the use of the improvement.

[See Bell v. Daniels, Case No. 1,247.]

Before LEAVITT, District Judge.

[NOTE. Nowhere reported; opinion not now accessible. Statement of the point determined was taken from Law's Pat. Dig. 240. For other cases involving this patent, see Bell v. Daniels, Case No. 1,247, and Bell v. McCollough, Case No. 1,256.]

Case No. 1,263.

BELL et al. v. POMEROY.

[4 McLean, 57.][1]

Circuit Court, D. Michigan. June Term, 1845.

DISCOVERY—SUFFICIENCY OF BILL — PLEA—FACTS WITHIN KNOWLEDGE OF THIRD PERSON.

1. In a bill of discovery, to aid a prosecution at law, the bill should aver the materiality of the facts, and that they can only be proved by the oath of the defendant.

[See Brown v. Swann, 10 Pet. (35 U. S.) 497; Swann v. Brown, Case No. 13,673; Baker v. Biddle, Id. 764.]

2. It is no sufficient answer to such bill to say, that A. B. can prove the facts; where the person so referred to is interested.

3. The complainant cannot be compelled to rely upon the oath of an interested witness. He may require the oath of the defendant as to the facts.

4. There is a distinction between a bill for discovery merely, and one for discovery and relief.

5. The plea presented the issue, who was best acquainted with the facts of the case, the defendant or other persons? Such an issue cannot be tried.

[In equity. Bill of discovery by Bell and others against Pomeroy in aid of a defense at law in an action between the same parties. Defendant pleads that the facts sought to be discovered may be proven by another person. Plea overruled.]

Mr. Romeyn, for complainants.
Joy & Porter, for defendant.

OPINION OF THE COURT. The defendant brought an action for trespass on personal property, against the complainants, on the law side of this court. In aid of the defense at law, the present bill was filed, to procure a discovery from the defendant.

In June, 1843, Bell sued out a writ of attachment from a circuit court of the state, against William Cramer, an absconding debtor, which was laid upon certain goods as being his property. The other complainants aided in the service of the attachment. Pomeroy sued them for trespass, on the ground that he had acquired title to the goods from Cramer. In their defense, the complainants set up that the goods were obtained by a fraudulent conveyance, and that others were interested with him in the goods, who should have been made parties. And the bill avers that the facts charged are material to the defense of the complainants in said suit at law. "That a discovery by the said Pomeroy of the various matters set forth in the interrogatories to this bill is indispensable to enable the complainants to plead to said declaration, and as proof in the trial of the cause, and that they are unable to prove the facts by other testimony."

The defendant pleaded that the facts set forth in the bill of complaint are within the personal knowledge of Obed Smith, and may

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

be proved by him. That said Smith was his agent, and that the defendant has no personal knowledge of his doings.

The materiality of the facts alleged in the bill, as a defense to the action at law, are obvious. The non-joinder of the parties connected in interest, with the plaintiff in the original suit, are important to be known, that a plea in abatement may be pleaded. Should such a plea be filed, on insufficient grounds, the judgment would be peremptory.

In support of the plea it is contended that a discovery is granted in such a case only where there is a failure of other legal testimony in the case. That the plaintiff at law can not be called upon to disclose facts for the defense, unless he alone has knowledge of the facts, and they are such as the defendant is entitled to have before the jury on the trial. [Brown v. Swann,] 10 Pet. [35 U. S.] 497; 2 Paige, 601; 4 Johns. Ch. 409; [Russell v. Clark,] 7 Cranch, [11 U. S.] 89; Mitf. Pl. 245. That the only fact in the bill which has any thing to do with the defense, is that other parties are interested in the goods; and this, if true, may be proved by competent witnesses. That it is a fishing bill, which the law will not tolerate. 2 Caines' Cas. 296; Story, Pl. 263, 264.

This argument is in conflict with the express allegations of the bill. The complainants aver, that the facts are material in their defense, at law, and that they can only be proved by the oath of the plaintiff. The plea is not supported by an answer, and the facts stated in the plea must be considered as true, from the manner it comes before us.

The grounds on which the discovery is asked, that the title of Pomeroy is fraudulent, and that other persons have an interest in the goods, it is contended, do not give to the complainants a right of discovery. Hare on Discovery, 197. That it is not a sufficient ground for a discovery to insist that the evidence sought will prove that Pomeroy has no title, and that the title will, therefore, devolve on the plaintiff. There is a distinction between a bill filed for discovery merely, and a bill filed for discovery and relief. The former is ancillary to a trial at law; the latter, although a bill of discovery, withdraws the cause from a legal forum, and brings it for a decision before a court of equity. The present is merely a bill of discovery. It may be filed as a matter of right, either in aid of proof, or as a substitute for proof adducible in a court of law. Mitf. Pl. 193, 307; Hare, Disc. 1, 110, 116; Leggett v. Postley, 2 Paige, 601. The cases cited in 2 Story, Eq. Jur. § 1495, were cases where relief was prayed. In 1 Story, § 74, the rule is confined to such cases. And this was the character of the cases of Russell v. Clark, 7 Cranch, [11 U. S.] 59; and in Brown v. Swann, 10 Pet. [35 U. S.] 497. Judge Story, in his latest work on this subject, refers to this rule, and this will reconcile the cases. Story, Eq. Pl. pp. 260, 348, note, 319, § 324.

The plea presents as an issue, the question, who is best acquainted with the facts of the case, the defendant, or third persons? Can such an issue be tried? It involves not merely a knowledge of the facts, but the competency and credibility of witnesses. Such an issue, if it could be tried, would lead to great delay and to no practical result. Smith is charged in the bill as having an interest in the goods. Can he be made a witness in his own case? And under such circumstances, is it an answer to the bill that Smith has a knowledge of all the facts? He is incompetent. The complainants are not bound to waive this objection and call Smith as a witness, in their defense. It would be unsafe for them to do this. And no court could require them to do it. Smith is also personally interested in denying the fraud. If he acted fraudulently, he is personally responsible to Pomeroy. The plea does not aver Smith to be a competent witness. Its averments are limited to what he did, and do not cover the allegations as to the title of other parties.

Pomeroy, it is contended, being in lawful possession of the goods, by his agent Smith, may maintain an action of trespass against the complainants. This position is founded on the presumption of a legal possession by Pomeroy, and that the defendants, in the action of trespass, are without title. On this bill we are not to try the title. The complainants say that Pomeroy's title was fraudulently acquired, and that they can only prove it by his oath. We think, under the circumstances, they are entitled to an answer, and the plea is consequently overruled.

Case No. 1,264.

BELL v. RHODES.

[1 Hayw. & H. 103.][1]

Circuit Court, District of Columbia. Aug. 20, 1842.

SLAVERY—DISTRICT OF COLUMBIA — IMPORTATION FROM ONE COUNTY TO ANOTHER FOR SALE.

The District of Columbia being still governed by the laws of Maryland and Virginia, which were in force anterior to the cession, it is not lawful for an inhabitant of Washington county to purchase a slave in Alexandria county, and bring him into Washington county for sale.

[Affirmed by supreme court in Rhodes v. Bell, 2 How. (43 U. S.) 397.]

[At law. Petition for freedom by Moses Bell against James Rhodes. Judgment for petitioner. For the special verdict and opinion of the court, see Rhodes v. Bell, 2 How. (43 U. S.) 397.]

The petitioner claims his freedom, and prays that a subpoena may issue to the defendant.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

R. Wallach, for petitioner.
Brent & Brent, for defendant.

The facts as found will appear in the following special verdict:

"We of the jury find that, previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria county, District of Columbia; that in the year 1837, the said Hoff, then owning and possessing the petitioner as his slave, in the county of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then being a resident of Washington county, in the District aforesaid, and that the delivery of the petitioner was made to the said Little in Alexandria county aforesaid, and the petitioner was immediately removed by said Little to Washington county aforesaid, to reside and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit, about one year or a little more, sold the petitioner to one Keiling, in Washington county, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the county of Washington aforesaid; that at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit, he was 54 or 55 years old, and is now 59 or 60 years old. But if, upon the facts aforesaid, the law is for the petitioner, then we find for the petitioner on the issue joined; and if, upon the facts aforesaid, the law is for the defendant, then we find for the defendant on the issue joined.

"Vincent King, Foreman."

Judgment for the petitioner on the verdict.

The following assignment of error to the above judgment was referred to the supreme court of the United States: First. There is error because the removal of Moses Bell from Alexandria county to Washington county, in the District of Columbia, as stated in the special verdict, did not entitle him to his freedom under any law in force in said District. Second. Moses Bell being over 45 years of age at the time of such removal, was incapable by the laws in force in said Washington county of receiving his freedom by or through any act or acts of his master or owner. Third. That said removal of Moses Bell is not an importation according to the true intent and meaning of the laws in force in Washington county aforesaid. Bank of Alexandria v. Dyer, 14 Pet. [39 U. S.] 142. Fourth. That such removal, even if it would have been illegal previous to the year 1812, was legalized and allowed by act of congress of the 24th of June, 1812. See 14 Pet. [39 U. S.] 142, and Lee v. Lee, 8 Pet. [33 U. S.] 49, which cases show how unsettled the law is on these points, and how desirable a decision is for citizens of the District whose daily transactions may be within the operation of these principles.

The supreme court affirmed the judgment.

NOTE, [from original report.] Mr. Justice McLean, in giving the opinion of the court, (2 How. [43 U. S.] 405,) said: "The counties of Washington and Alexandria are foreign to each other as regards the importation of slaves as are the states of Maryland and Virginia. Such we understand to be the settled doctrine of the circuit court of this District. And this is no unsatisfactory evidence of what the law is. An acquiescence of many years in a course of decision involving private rights should not be changed except upon the clearest ground of error."

BELL, (SMOOT v.) See Case No. 13,132.

BELL v. The TRAVELLER. See Case No. 14,147.

BELL, (TRAVERS v.) See Case No. 14,149.

BELL, (UNITED STATES v.) See Cases Nos. 14,564 and 14,565.

BELL, (YOUNG v.) See Case No. 18,152.

BELL, The HORACE E. See Case No. 6,702.

BELL, The MARY. See Case No. 9,199.

BELLA DONNA, The, (PORTEVANT v.) See Case No. 11,292.

Case No. 1,265.

Ex parte BELLAMY.

[The case reported under above title in 15 Pittsb. Leg. J. 1, is the same as Case No. 1,267.]

Case No. 1,266.

In re BELLAMY.

[1 Ben. 390;[1] Bankr. Reg. Supp. 14; 1 N. B. R. 64; 1 Am. Law T. Rep. Bankr. 22; 6 Int. Rev. Rec. 86; 15 Pittsb. Leg. J. 1.]

District Court, S. D. New York. Sept. 9, 1867.

BANKRUPTCY PRACTICE — POWER OF REGISTER — ACCOUNT — PETITION — FORM NO. 51 — TIME OF PUBLICATION—ORDERS FOR EXAMINATION.

1. Under § 4 of the bankruptcy act [March 2, 1867; 14 Stat. 519] and rule 5 of the general orders in bankruptcy, a register in bankruptcy has power to make an order requiring an assignee in bankruptcy to file the account required by § 28 of the act. If no assets have come to the hands of the assignee, form No. 35 is such account; but if assets have come to his hands, forms Nos. 37 and 38 constitute it.

[Cited in Re Bodenheim, Case No. 1,594.]

2. It is not necessary for the bankrupt, on presenting the petition, form No. 51, to produce the assignee's return, form No. 35, or any evidence other than the statement in the petition that no debts have been proved, or that no assets have come to the assignee's hands.

3. Publication "once a week for three successive weeks," means publication once in every seven days for three successive periods of seven days, so that the interval between any two of the publications shall not be less than seven days, and the interval between the last publica-

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

tion and any proceeding dependent upon the publication shall not be less than seven days.

4. A register has power to make the order to show cause (form No. 51) there being no opposition, if, under § 4 of the act, he is directed to make it by the judge; and the order referring the case to him may be considered as giving such direction.

[Cited in Re Solis, Case No. 13,165.]

5. Orders for the examination of bankrupts, or their wives or other witnesses, are summonses under § 26; and, under rule 2 of the general orders, blanks of form No. 45 not filled up, but signed by the clerk and bearing the seal of the court may be given by the clerk to the registers.

[In bankruptcy. Certificate by Isaiah T. Williams, register in bankruptcy, for a decision on questions arising on the petition of John Bellamy, a bankrupt. Decision certified to register.

[For subsequent proceedings in this matter, see Cases Nos. 1,267 and 1,268.]

BLATCHFORD, District Judge. In this case the register certifies four questions for decision by the court. An assignee was duly elected by the creditors of the bankrupt at the first meeting of the creditors, and appeared in person before the register. The bankrupt applied to the register by petition, duly verified, and drawn strictly in compliance with form No. 51, for the order, to show cause in form No. 51. The petition sets forth that the bankrupt has no property, real or personal, of any kind, and that none has come to the hands of the assignee, and that more than sixty days have elapsed since the adjudication of bankruptcy. The notice required by the act of the appointment of the assignee was published on the 16th, 19th, and 26th of August, 1867, but no return has been made by the assignee as prescribed by form No. 35. On the foregoing facts the four questions are presented.

1. Can the register (assuming that no assets have come to the hands of the assignee), by a common order, require him to make the return under oath prescribed in form No. 35? As to this question, the register says, that it would be no violent presumption to suppose the case of an elected assignee who should be unfriendly to the bankrupt, having found no assets, and refusing to go before the register and make the oath contemplated in form No. 35; that in that case the court must be applied to, in case the register has no power to compel the assignee by order; that in case there be no opposing party, it would not seem to be necessary to trouble the court by applying to it for such an order; and that in all such cases of obvious duty, the register may be presumed to act by direction of the court, as the court.

I am of opinion that the register, under the power given to him by section four of the act, [14 Stat. 519,] and by rule 5 of the "General Orders in Bankruptcy," to audit and pass the accounts of assignees, has power to make an order requiring the assignee to submit to the court, and file, the account required by section twenty-eight of the act. In a case where no assets have come to the hands of the assignee, form No. 35 is such account. In a case where assets have come to the hands of the assignee, forms Nos. 37 and 38 constitute such account.

2. Is a return according to form No. 35 necessary before the granting of the order to show cause, provided for in section twenty-nine of the act, form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt? As to this question, the register says that the form clearly contemplates the practice of basing the sixty days' discharge upon evidence derived from the assignee and not from the bankrupt; that such evidence from the assignee would seem to be the highest evidence of the fact; and that, indeed, it is a fact of which the bankrupt may, in some cases, be ignorant.

I think that form No. 51 does not contemplate the practice of basing such order to show cause upon evidence derived from the assignee and not from the bankrupt. The twenty-ninth section of the act provides that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts." Form No. 51 embraces the petition of the bankrupt for his discharge, and the order to show cause thereon. The petition is one to be made and signed by the bankrupt, and the form contains at its foot this memorandum: "If this petition is filed within less than six months after the filing of the original petition, it should state that no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee." It is sufficient, therefore, when the discharge is applied for after the expiration of sixty days from the adjudication of bankruptcy, and before the expiration of six months from such adjudication, for the bankrupt to state in his petition, form No. 51, that no debts have been proved against him, or that no assets have come to the hands of his assignee. It is not necessary, on presenting such petition, to produce the assignee's return, form No. 35, nor any certificate from the assignee that no assets have come to his hands, nor any evidence other than the mere statement in such petition that no debts have been proved against the bankrupt, or that no assets have come to the hands of his assignee. The return, form No. 35, is a return to be made under section twenty-eight, preparatory to a final dividend and to an application by the assignee for his discharge, and is to be made after the third meeting of creditors. Of course, on the return of the order to show cause, made on the bankrupt's application

for his discharge, if such application is made after the expiration of sixty days from the adjudication of bankruptcy and before the expiration of six months from such adjudication, the court will not grant the discharge without satisfactory evidence that no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee. The highest evidence as to debts is, by section twenty-two of the act, required to be in the hands of the assignee, and the highest evidence as to assets must necessarily be in his hands. The evidence must, therefore, come from the assignee. But a return according to form No. 35 is not necessary, before the granting of the order to show cause provided for in section twenty-nine of the act, form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt.

3. Has the notice of the appointment of the assignee been published in the present case, as required by the act, and, if it has not, is such error fatal to the application for the discharge? The notice was published on the 16th, 19th, and 26th of August, 1867. As to this question, the register says, that the fourteenth section of the act provides that the publication "shall be" once a week for three successive weeks; that the notice in this case was published the first time on Friday of one week, the second time on Monday of the next week, and the third time on Monday of the week after; that this is no doubt one publication in each week of three successive weeks, although a week or seven days did not elapse between the first and second publications; that the letter of the statute does not require that such an interval should elapse, yet it could not be pretended that a publication on a Saturday and another on the succeeding Monday was a publication "once a week for two successive weeks;" that the cases of People v. Gray, 10 Abb. Pr. 468, and Bunce v. Reed, 16 Barb. 350, seem to settle the question, as only ten days intervened between the first and the last publications in the present case; that he thinks it clear, therefore, that the publication was insufficient; and that, if so, a new order of publication must be made.

The fourteenth section of the act requires that "the assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors shall reside." Rule 10 of this court provides, that "notice of the appointment of an assignee shall be given by publication once a week for three successive weeks, in two of the newspapers named in rule 21, at least one of which shall be a newspaper published in the city and county of New York, such newspapers to be selected by the register, with due regard to the requirements of section fourteen of the act." A requirement that a notice shall be published once a week for three successive weeks, is a requirement that it shall be published once in every seven days, for three successive periods of seven days each; that the interval between any two of the publications shall not be less than seven days; that the interval between the last publication and any proceeding dependent on the publication shall not be less than seven days; and that the publications shall be three in number, and no more and no less. In the present case, the notice of the appointment of the assignee was not published as required by the act and by rule 10 of this court; and my opinion is that, under section thirty-two of the act, no discharge can be granted in this case until such notice is duly published.

4. Shall the order to show cause, form No. 51, there being no opposition, be made by the register? As to this question, the register says, that the act provides, section twenty-nine, that "the court" shall make the order; that it seems to be nothing more than an order of course, involving no discretion, nothing but mere obedience; that section four of the act, after prescribing what a register may do in all cases, goes on to prescribe what, in addition to that, he may do in non-contested cases, that the language is, "sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct;" that all the duties of the register may be regarded as being done while he is sitting in chambers; that the language of the act is not confined to a particular case, but extends to a "particular matter" or subject; that it would seem, therefore, that it is somewhat in the discretion of the court to do these acts in person or by its registers; that it is more convenient that this order to show cause be made by the register to whom the case is referred; and that it is true that the word "court" is used in the act, but that if the words "court" and "judge" in all uncontested cases, where there is no opposition or adverse appearance, be not construed to mean "register," whenever the court shall, in its discretion, see fit to devolve a duty upon the registers, the act will, by construction, become not only a medley of confused and inharmonious provisions, but the court will load itself with ministerial duties which will in the end be found to be both laborious to itself and inconvenient to its suitors.

I do not see that, by the act or by the general orders made by the justices of the supreme court, power is specifically given to the register to make this order to show cause. But as the order is one made ex parte, and is, consequently, so far as the making if it is concerned, uncontested, I think that a register may make it, if, under section four of

the act, he is directed by the district judge to make it. It is very proper and convenient that the register charged with the case should make the order. This decision will, therefore, be regarded as a direction that the register to whom a case is referred shall have power to make the order in form No. 51, under section twenty-nine of the act.

The register also states, that the call for orders to examine bankrupts, their wives, and other witnesses before the registers, is becoming so frequent, that it would be exceedingly irksome to be compelled to fill out each order (form No. 45) and dispatch a messenger to the clerk's office to get the signature of the clerk and the seal of the court, and keep the applicant waiting meanwhile; that he, the register, sent a quantity of blank orders, form No. 45, to the clerk's office, to procure the signature of the clerk and the seal of the court to them, but the clerk refused to sign or seal the orders in blank, or unless they were filled up; and that, in view of the provisions of rule 2 of the general orders, he, the register, thinks the clerk is mistaken. The register says that he wishes to submit this question for the decision of the judge. An order, under section twenty-six of the act, requiring the bankrupt to attend and be examined, may properly be regarded as a summons; and so may an order, under the same section, requiring the wife of the bankrupt to attend and be examined as a witness; and so may an order, under the same section, requiring the attendance of any other person as a witness. The service upon the wife, or other person, of the order, is a summoning of him or her under section twenty-six, so that, for a failure to attend under such order, the party may be arrested. The order, form No. 45, is a summons, when served, quite as much as is the summons, form No. 48. Being a summons, it falls within rule 2 of the "General Orders in Bankruptcy;" and, therefore, under that rule, blanks of form No. 45, not filled up, but having the signature of the clerk and the seal of the court, will, upon application, be furnished by the clerk to the registers.

[The clerk will certify this decision to the register, Isaiah T. Williams.] [2]

Case No. 1,267.

In re BELLAMY.

[1 Ben. 426;[1] 1 N. B. R. 96; Bankr. Reg. Supp. 21; 15 Pittsb. Leg. J. 1.]

District Court, S. D. New York. Sept. 25, 1867.

BANKRUPTCY—ORDER TO SHOW CAUSE WHY BANKRUPT SHOULD NOT BE DISCHARGED—REGISTER'S CERTIFICATE OF REGULARITY—REGISTER'S FEES—FILING PAPERS.

1. On a petition, according to form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in that form.

[Cited in Comstock v. Wheeler, Case No. 3,084.]

2. What is to be contained in that order, and the practice under it.

3. Whether there be opposition to the bankrupt's discharge or not, the register must furnish to the court, after the return day of the order to show cause, a certificate that he has examined carefully all the proceedings in the case, and that the bankrupt has in all things conformed to the requirements of the act.

4. The bankrupt is made responsible for the regularity of the proceedings, and is bound to see that all the necessary steps are regularly taken, or he cannot have his discharge.

5. The register is entitled to fees for the above services, under section forty-seven of the act, as for services "while actually employed under a special order of the court."

6. No discharge can be granted until all the papers relating to the case are filed by the register in the clerk's office.

In bankruptcy. In this case application was made to the register, [Isaiah T. Williams, by John Bellamy, a bankrupt,] upon a petition in due form, for an order to show cause why the bankrupt should not be discharged from his debts. The register stated to the court, that he was in doubt as to the form of the order, that is, as to whether it should be made returnable before the register, and, if not, on what day and hour it should be made returnable before the court; that there was no prospect of any opposition to the discharge, and that the bankrupt insisted that the order should be made returnable before the register; that it should give notice of the second and third meetings of the creditors, pursuant to rule 25 of the "General Orders in Bankruptcy;" that, in case no one appeared to oppose on the return day or before, the bankrupt might on that day make and subscribe before the register to the oath required by the twenty-ninth section of the act, [14 Stat. 531;] that, thereupon, it would be the duty of the register, pursuant to the provisions of rule 7 of the "General Orders in Bankruptcy" to file all papers in the case with the clerk, and certify, by the usual daily certificate, the proceedings of such last day before him, and that the court would thereupon, nothing appearing in the record to the contrary, sign the bankrupt's final discharge. The register also stated, that it would seem scarcely worth while, when a case really goes, as it were, by default, when the discharge must inevitably follow upon the proceedings theretofore had, that the court should be troubled to fix a day to do nothing; that, in case there is opposition, and the creditor opposing files the specifications provided for by section thirty-one of the act, the register would then (if there were no assets) in like manner return all the papers into court, as directed by said rule 7, with the usual certificate, from which certificate and papers, composing the record, the court would order a trial, as it might see

[2] [From 1 N. B. R. 64.]

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

fit, pursuant to section thirty-one; that the case would then seem to be closed before the register unless sent back for some purpose; that certainly, there being no assets, there would be nothing more a register could do; and that, if a trial were ordered by the court, and the bankrupt were to be successful, the court would sign his discharge, and, if unsuccessful, the discharge would be denied. [Decision certified to register.]

[For prior proceedings in this matter see Case No. 1,266; for subsequent proceedings, see Case No. 1,268.]

BLATCHFORD, District Judge. I have heretofore held that, upon a petition, according to form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in form No. 51. This order may be made returnable before the court at the office of the register, to be sufficiently designated, on such day and hour as the register appoints, allowing time for the proper publication of notice. The order must name the newspapers in which the notice is to be published. The selection of the newspapers is to be made by the register, with due regard to the requirements of section twenty-nine in reference to such selection, and is to be made from among the newspapers named in rule 21 of the rules of this court in bankruptcy. The publication will be made for three times once a week, in two newspapers, with an interval of seven days between every two publications, and an interval of seven days between the last of the three publications and the return day of the order. The notice, form No. 52, both as published and as served, must specify, as the place of hearing, the office of the register, to be sufficiently designated. If the notices to be served be sent by mail, they must be mailed by the clerk. A fee to the clerk for this service is prescribed by rule 30 of the "General Orders in Bankruptcy," and, by the memorandum appended to form No. 52, the certificate of the clerk as to the mailing of the notices and the placing thereon of the proper postage stamps is made evidence of the fact of notice. The proof of publication in the newspapers may, as in other cases, be by the usual affidavit of the printer.

In a case where no debts have been proved against the bankrupt, or no assets have come to the hands of his assignee, if the second and third meetings of creditors required by the twenty-seventh and twenty-eighth sections of the act have not yet been held, the order to show cause in form No. 51 should contain the direction provided for by rule 25 of the "General Orders in Bankruptcy," in regard to such second and third meetings, and the notice, form No. 52, published and served in pursuance of the order, should have added to it the clause provided for by said rule 25, in regard to such second and third meetings.

This power of the register to act on the return of the order to show cause on the petition of the bankrupt for his discharge, is deducible from the provision of section four of the act, that the register shall have power, and it shall be his duty, "to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose." Form No. 53 contemplates that, if a creditor opposes a discharge, he may address to the register the specification in writing of the grounds of opposition required by section thirty-one of the act. If, under rule 24 of the "General Orders in Bankruptcy," no creditor enters an appearance in opposition to the application for a discharge, by the day when the creditors are required to show cause, the register may require the bankrupt to take and subscribe the oath provided for by section twenty-nine. Whether there be or be not opposition to the discharge, the register must furnish to the court, after the return day of the order to show cause, and before the court will either grant a discharge or try any question raised as to the discharge, a certificate to be made by the register, that he has examined carefully all the proceedings in the case, and that it appears to him, from those proceedings, that the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act. The provisions of section thirty-two of the act as to the prerequisites to a discharge mean, that all the requirements of the act as to what steps are to be taken, from the commencement of the proceedings to the end, must be conformed to, as prerequisites to the granting of a discharge, and not merely that the bankrupt has personally done what he is required to do. Claiming, as the bankrupt, does, the benefit of the act, he is made responsible for the regularity of the proceedings, and he is bound to see, as the case proceeds, that all the necessary steps are taken, and regularly taken, or else he cannot have his discharge. The register will, therefore, with a view to making the certificate in question, examine carefully all the steps in the case, and, if he finds any want of conformity to the requirements of the act, he will specify what it is, so that the defect may be supplied, if it can be. As this is a service involving care and responsibility, the clerk will, in every case where a petition for discharge is filed hereafter, enter a special order referring it to the register in charge of the case, to make an order to show cause thereon, and to sit in chambers on the return thereof, and pass the last examination of the bankrupt, if there be no opposition, and certify to the court whether the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act. In rendering these services, the register will be considered as acting under the special order, so as to entitle him to be compensated for

such services under that clause in section forty-seven of the act which gives to the register, "for every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court."

The regulations announced in this decision will be considered as standing rules of this court in cases in which petitions for discharge shall be hereafter filed. It must also be understood, that no discharge will be granted until, under rule 7 of the "General Orders in Bankruptcy," all the papers relating to the case are filed by the register in the office of the clerk of the district court.

[The clerk will certify this decision to the register, Isaiah T. Williams, Esq., and he will act on the petition for the discharge in this case in accordance with the above regulations, and the clerk will enter a special order in this case to the effect above prescribed.] [2]

Case No. 1,268.

In re BELLAMY.

[1 Ben. 474;[1] 1 N. B. R. 113, (Quarto, 25;) Bankr. Reg. Supp. 25; 6 Int. Rev. Rec. 141; 15 Pittsb. Leg. J. 1.]

District Court, S. D. New York. Oct. 11, 1867.

BANKRUPTCY — ORDER DIRECTING REGISTER TO EXAMINE THE PROCEEDINGS AND CERTIFY—GENERAL AND SPECIAL ORDERS—SERVICE OF NOTICE.

1. Form No. 4 in bankruptcy is not a special order, but a "general order," under rule 5 of the general orders in bankruptcy.

2. The special order, directed by the previous decision in this case to be made in every case in bankruptcy, is necessary.

3. The clerk must mail the notices, form No. 52.

4. The order, form No. 51, though the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court.

5. When a register directs that order to issue, he is at once to transmit to the clerk a list of all the proofs of debt in the case, which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with particularity enough to enable the notices, form No. 52, to be served properly.

[Cited in Re Dean, Case No. 3,699.]

In bankruptcy. After the rendering of the decision in this case, heretofore reported, [In re Bellamy, Case No. 1,266.] the register [Isaiah T. Williams] to whom the case was referred requested the court to reconsider that opinion. He suggested that the order, directed by the previous decision to be made in each case, was unnecessary, because the first order of reference (form No. 4) was not a general order, but a special order, and was by its terms broad enough to cover what was to be done under the order directed by the decision. He further suggested, that the notices, form No. 52, should be served by the register instead of by the clerk, as the clerk would have no knowledge of the facts necessary for such service, and that to have them sent by the clerk would be inconvenient and expensive; that the note at the end of form No. 52 was probably an error; and that, as the court had in this case decided that an order in the midst of the proceedings could not require the seal of the court, and had directed that the order (form No. 51) should be issued by the register, so the certificate of service upon the creditors should be made by the register also. [Decision certified to register.] [For prior proceedings in this matter, see Cases Nos. 1,266 and 1,267.]

BLATCHFORD, District Judge. I regard the special order referred to as necessary, certainly so far as the requirement is concerned that the register shall examine and certify as to the regularity of all the proceedings, which is one of the principal points in the special order. That requirement is not covered by the order of reference, form No. 4. Form No. 4, in referring it to the register "to take such other proceedings therein as are required by the act," means such other proceedings required by the act, as the act requires the register to take. The act does not require the register to examine and certify as to the regularity of the proceedings with a view to the discharge, and it may be doubtful whether it requires the register to make the order to show cause on the petition for a discharge. I therefore regard the special order as necessary.

Form No. 4 is not a special order, but is what rule 5 of the "general orders in bankruptcy" calls a general order made by the district court in the case. That rule speaks of the power of the district court to make a general order "in each case," fixing the time when and the place where the register shall act upon the matters arising under the case. Form No. 4, the order of reference, is such a general order.

If any inconvenience in practice shall result from the making of such special orders, and it shall be brought to the notice of the court, the court will cheerfully consider the subject again. But no such inconvenience is stated as having arisen.

I am satisfied that, under rule 30 of the "general orders in bankruptcy," taken in connection with the note at the end of form No. 52, the clerk must mail the notice, form No. 52, when it is served by mail. Such note is, I think, not an error. Nor is it an error to put the seal of the court and the clerk's name to the order to show cause in form No. 51. I have not decided that an order in the midst of the proceedings cannot, with any propriety, require the seal of the court. The order in form No. 51, although the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court.

It will be regarded as a standing rule, that

[2] [From 1 N. B. R. 96.]

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

every register shall, immediately on directing an order to show cause, form No. 51, to issue, transmit to the clerk a list of all the proofs of debt in the case which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with sufficient particularity to enable the notices, form No. 52, to be served properly.

If this practice is expensive or inconvenient (which has not appeared), or shall hereafter appear to be expensive or inconvenient, the difficulty lies in the law, and in the "general orders" framed by the supreme court, and not in their administration. This court can only apply and carry out the law and the rules as it finds them, according to its best judgment.

BELLAMY, (VARNUM v.) See Case No. 16,886.

Case No. 1,269.

The BELLE.

[1 Ben. 317;[1] 9 Leg. & Ins. Rep. 276.]

District Court, S. D. New York. Aug. Term, 1867.

COLLISION BETWEEN SAILING VESSELS OFF BARNEGAT—CHANGE OF COURSE IN EXTREMIS—LIGHTS—BRITISH STATUTE NOT BINDING UPON A BRITISH VESSEL MEETING A VESSEL OF ANOTHER NATION AT SEA.

1. Where a British schooner bound to New York, close-hauled on the wind, met an American brig bound out, with the wind free, and kept her course till a collision was imminent, when she ported her helm, but did not avoid the collision; the schooner not having the lights required by the British merchants' shipping act, and the collision having taken place before the passage of the act of congress respecting lights on vessels at sea: *Held*, that it was the duty of the brig to keep out of the way, and of the schooner to hold her course.

2. That the court will not stop to inquire whether some other manoeuvre on the part of the schooner than porting might have proved more successful. The error of a vessel, which has been brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages or prevent her recovery.

[See Haney v. The Louisiana, Case No. 6,021, as to mistakes committed in moments of peril and excitement, when produced by mismanagement of those in charge of the other vessel, and made under fear of impending danger caused by the action of the other vessel, which are acts done in extremis, and which will not be accounted faults, nor relieve the vessel whose action causes them. See the Jupiter, Case No. 7,585; The Western Metropolis, Id. 17,440; The Nichols, 7 Wall. (74 U. S.) 656.]

3. That there is no proof that the failure of the schooner to carry the lights required by the British merchants' shipping act misled the brig, or in any way contributed to the disaster.

4. That that act had no application to the equipment or conduct of this British schooner when meeting a foreign ship on the high seas.

[Cited in The Scotia, Case No. 12,513; Leonard v. Whitwell, Id. 8,261; The Belgenland, 114 U. S. 369, 5 Sup. Ct. 860; The Athabasca, 45 Fed. 656. See, also, Thomassen v. Whitwell, Case No. 13,929; Churchill v. The British America, Id. 2,715.]

5. Whether it would have an application to collisions between British and American vessels since the passage of the act of congress in the same subject—Quere?

[In admiralty. Libel by the Pacific Mutual Insurance Company against the brig Belle. Decree for libellants.]

The facts of this case are stated in the opinion of the court.

A. L. Edwards, for libellants.

Beebe, Dean & Donohue, for claimants.

SHIPMAN, District Judge. On the evening of the 22d of November, 1862, a collision occurred between the schooner Tempest and the brig Belle, off the New Jersey shore, between Barnegat and Sandy Hook. The schooner was sunk. She was insured by the Pacific Mutual Insurance Company. They paid the loss under the policy, and as assignees, subrogated to the rights of the owners of the schooner in the premises, they bring this suit to recover the damages resulting from the collision.

The Tempest was bound from Nassau to New York, and took on board Captain Murray, an experienced Sandy Hook pilot, some time before the collision. He immediately took charge of her navigation, and continued in charge until the accident.

He states that the wind was about N. W. by W., and the schooner close-hauled, with a light at the end of her bowsprit; that he kept her close by the wind. About seven o'clock he discovered the light of an approaching vessel, which proved to be the brig Belle, in the neighborhood of a mile off, coming down the coast, and approaching the Tempest nearly head and head; that he kept his vessel close by the wind until the brig had approached so near that a collision was imminent, when he ordered his wheel hard a-port and attempted to slack off the main sheet, in order, if possible to clear her; but that it was impossible to do so, and that though his wheel was put hard up, the Tempest had fallen off but little, when the Belle struck her stem on, near the port cathead, at an angle of about two points, and cut into her fifteen or twenty feet, knocking out her foremast, and sinking her in a few minutes. I find nothing in the other proofs that, in my judgment, materially shakes the statement of the pilot. On the other hand, I think that the testimony of Captain Yates, of the Belle, when carefully considered, tends to show that there was no material change in the course of either vessel until the Tempest's

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

wheel was put hard a-port. The pilot of the Tempest says there was no change of her course till that time, and if there was any change of the course of the Belle, it was so small as to still leave the vessels approaching each other nearly head and head. The Belle having the wind free, and the Tempest being close-hauled, it was the duty of the former to keep out of the way. This is so well settled that a citation of authorities would be superfluous.

It was equally the duty of the Tempest to hold her course, and allow the Belle to choose which side of her she would pass. She did so, as I understand the proofs, until it became evident that a collision must take place unless something was done. She then ported her helm. Whether some other manoeuvre on her part might not have proved more successful, this court will not stop to inquire. The movement was made in a moment of alarm and of imminent and overwhelming peril—peril into which the vessel had been brought by the fault of the Belle and by no fault of the Tempest. The error of a vessel thus brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages nor prevent her recovery. This is a perfectly familiar principle of constant application by courts of admiralty.

The duty of the Belle was obvious and simple. She discovered the light of the Tempest in ample time to have cleared her. To accomplish this she should have taken such early and decided measures as would prevent both the danger and alarm. She failed to do this, and must be pronounced in fault and responsible for the consequences.

The claimants insist that upon the proofs the Tempest must be regarded as a British vessel, and that as she failed to carry the colored lights prescribed by the act of parliament, she can not recover. Assuming that the Tempest was a British vessel, there are two answers to this claim of the defence:

First.—There is no proof whatever that the failure to carry the colored lights prescribed by the British merchants' shipping act misled the Belle, or in any way contributed to produce the disaster.

Second.—The act of parliament in question has no application to the equipment or conduct of a British ship when meeting a foreign ship on the high seas, and can furnish no rule by which the merits of a controversy growing out of a collision with a foreign vessel can be tested. This has been repeatedly decided by the English courts.

In the case of The Saxonia, 1 Lush. 414. this question was considered, and Dr. Lushington remarked: "When a British and foreign ship meet on the high seas, the usual rule is that the statute is not binding; clearly it is not binding on the foreigner; and if it were considered binding on the British vessel, the British vessel would manifestly be under an undue disadvantage. I believe the practice of applying the maritime law to such cases has been followed universally up to the present moment, and I hold such to be the law." This case was affirmed on appeal by the privy council, the master of the rolls delivering the judgment, in the course of which he says: "We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships. This being so, it follows that the merchants' shipping act has no application to this case, as it has been fully determined that where a British and foreign ship meet on the high seas, the statute is not binding upon either. The principle, therefore, by which this case must be decided, must be found in the ordinary rules of the sea." 1 Lush. 421, 422. The same doctrine was laid down by the high court of admiralty in The Dumfries, Swab. 63; and in The Zollverein, Swab. 96. To the same point is the case of The Chancellor, 14 Moore, P. C. 202. The only case I find in the English reports where a contrary doctrine is held, is that of The Cleadon, 1 Lush. 158. In this latter case the point seems to have been passed upon without much attention, and without reference to the fact that it had been decided the other way by the high court of admiralty. The weight of authority is decidedly in favor of the doctrine that the statute has no application to the case of a British ship meeting a foreign ship on the high seas; upon principle, I think this is correct.

Of course this exposition of the law refers to the state of things existing on the date of this collision, 1862. Since then, the United States, as well as other nations, has passed laws similar to those of Great Britain, relating to the lights which sailing vessels are bound to carry.

Let a decree be entered for the libellants with an order of reference to a commissioner to compute the damages.

Case No. 1,270.

The BELLE.

[5 Ben. 57.] [1]

District Court, S. D. New York. March, 1871.

ADMIRALTY—STIPULATION FOR VALUE — INTEREST —RULES OF COURT.

1. A stipulation for value was given, on the discharge of a vessel from custody, fixing her value at $1,750, and containing an agreement that, "in case of default or contumacy on the part of the claimant or his surety, execution for the above amount may issue, &c." The stipulation bore a heading, that it was "entered into pursuant to the rules and practice of the court." A decree being afterwards entered against the vessel for $3,767 29, the libellant claimed to be entitled to recover interest on the $1,750, at the rate of 6 per cent., from the

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date of the stipulation: *Held*, that the terms of the stipulation made the rules of the court a part of the contract; and that, under the provisions of rule 71, interest on its amount from its date must be paid, in addition to the $1,750.

[Cited in The Maggie M., 33 Fed. 591; The Sydney, 47 Fed. 262.]

2. This rule, and the fact that it is made a part of the stipulation, is not noticed in the case of The Ann Caroline, 2 Wall. [69 U. S.] 538, which would seem to hold the contrary view.

In admiralty.

James K. Hill, for libellant.

Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. In this case, a libel in rem was filed against the steam propeller Belle on the 8th of November, 1869. The vessel having been taken into the custody of the marshal under process, and a claim to her having been filed, the claimant and a surety executed, on the 14th of December, 1869, a stipulation, which recites the filing of the libel, and that appraisers had been appointed, and that they had filed their report, fixing the value of the vessel at $1,750, and then proceeds as follows: "And the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of the claimant or his surety, execution for the above amount may issue against their goods, chattels, and lands, now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Beebe, Donohue & Cooke, Esquires, proctors for the claimant of said steam propeller, abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue." This stipulation is headed thus: "Stipulation for value entered into pursuant to the rules and practice of this court." On the execution and filing of this stipulation, and of a stipulation for costs in the sum of $250, the vessel was released from custody. On the 1st of November, 1870, a decree was entered for the libellant, for $3,767 29 damages and $114 30 costs. The libellant insists that she is entitled to recover, on the stipulation for value, interest on the $1,750 at the rate of six per cent. per annum, from the date of the stipulation, December 14th, 1869. This claim is made under rule 71 of this court, which is as follows: "In all cases where a judgment or decree is entered on a bond or stipulation filed with the clerk for the appraised or agreed value of any property libelled in this court, the clerk shall receive, in addition to the amount of the bond, interest at the rate of six per cent. per annum, for the time which shall intervene between the entry of the judgment, or date of the stipulation, and the day when the money shall be paid into court." The claimant contends that the libellant is not entitled to interest at such rate on the $1,750, "except after decree," intending, probably, the date of the decree entered on the stipulation.

Rule 71 contemplates that there shall be a decree on the stipulation. Such decree is provided for by rule 144, under which, if the decree in the cause is not fulfilled or satisfied in ten days after notice to the proctor of the party against whom it is rendered, and the sureties of such party show no cause, after notice, against the performance of the engagement of their stipulation, a summary decree is to be rendered against them on their stipulations, and execution is to issue. In the present case, such summary decree against the stipulators has been entered. The words "entry of the judgment," in rule 71, mean, entry of the judgment or decree on the stipulation, and not the entry of the main decree in the cause. When a judgment or decree is entered on the stipulation, and is so entered after the date of the stipulation, I think that, under rule 71, interest at the rate named in that rule, on the amount of the stipulation, from the date of the stipulation, must be paid, in addition to the amount of the stipulation. The stipulation must be regarded as having been entered into in view of the provisions of rule 71, which was in existence when the stipulation was entered into. This view does not conflict with the principle decided in the case of The Ann Caroline, 2 Wall. [69 U. S.] 538, that, in a suit in rem, the stipulator, being a surety, cannot be made liable beyond the terms of his contract, or beyond the extent of the obligation expressed in his stipulation, according to its plain and obvious meaning. On the contrary, I think the stipulators in this case are liable for the interest, because it is within their contract. It is a part of their stipulation, on its face, that it is entered into "pursuant to the rules" of this court. This makes rule 71 a part of the contract. The fact that such rule was part of the contract in the stipulation in the case of The Ann Caroline [supra] does not seem, from the report of that case, to have been brought to the attention of the supreme court. The decision in that case was put upon the ground that the agreement in the stipulation, that execution might issue for "the above amount," could only mean for an amount no greater than the amount before expressed in the stipulation as the agreed amount of the value of the libelled vessel. The question as to interest, under rule 71, was not raised. In view of that rule, the words "the above amount," in the stipulation in this case, must be held to mean the amount of the appraised value of the vessel $1,750, as a principal sum, subject to the provision of rule 71 as to interest thereon.

Moreover, the literal language of the stipulation would limit the liability to $1,750 in any event, without interest even after a decree, under rule 144, against the stipulators. There is no ground for imposing interest, even after a decree, unless rules 71 and 144 are to be regarded as forming part of the contract of the stipulators.

Case No. 1,271.

The BELLE.

[6 Ben. 287.] [1]

District Court, E. D. New York. Dec. Term, 1872.

ADMIRALTY—PLEADINGS—SEAMAN'S WAGES.

An admission, in the answer to a libel for seaman's wages, that the seaman shipped for the voyage and performed the service described in the libel, though coupled with a denial that any amount is due to him, and an allegation that the seaman was guilty of smuggling, by reason of which the vessel was subject to penalties and the seaman forfeited his wages, is sufficient, in the absence of evidence, to entitle the seaman to a decree for the amount of his wages.

In admiralty. This was a libel by John Armstrong for seaman's wages. The libel alleged that Armstrong shipped as mate on the vessel, and signed articles for a specified voyage at $50 a month, and served on board from January 7th, 1872, to June 3d, 1872, when he was discharged, and there was due him from the vessel $195, payment of which had been demanded and refused. The answer admitted these allegations, except that it denied that anything was due to the libellant. It further alleged that Armstrong, while he was mate, smuggled segars on shore from the vessel, whereby she became subject to penalties, by which conduct he forfeited his wages. The case was submitted on the pleadings. [Decree for libellant.]

Wilcox & Hobbs, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. The admissions in the answer are sufficient to entitle the libellant to recover the amount of his claim for wages as stated in his libel, to wit, $195, for which amount, with costs, let a decree be entered.

Case No. 1,272.

The BELLE.

[Blatchf. Pr. Cas. 294.] [2]

District Court, S. D. New York. Dec. Term, 1862.

PRIZE—EVIDENCE OF VIOLATION OF BLOCKADE.

The vessel on her voyage next preceding the one on which she was captured had violated the blockade. She was laden and virtually owned by parties notoriously actively concerned during the war in carrying on an illicit trade with the blockaded ports of the enemy. Her master and mate were residents of the enemy country, and were employed on the voyage at the instant of its commencement. There is no proof of the bona fide purchase of the vessel by her neutral claimant from her enemy owner. Although her clearance was from Nassau for Philadelphia, there is no written evidence in her papers that she was put upon or attempted to pursue that voyage. Vessel and cargo condemned.

[See The Peterhoff, Case No. 11,024, reversed in part in 5 Wall. (72 U. S.) 28; The Minna, Case No. 9,634.]

[In admiralty. Proceedings to condemn and forfeit the schooner Belle and cargo. Decree of condemnation and forfeiture.]

BETTS, District Judge. The acting British consul for this port intervenes and answers, and claims against the libel filed in this suit against the vessel, and takes issue thereon. When the cause was called for hearing, the counsel for the libellants read the pleadings and proofs brought into court, and the counsel for the claimants entered a formal protest against the jurisdiction of the court and the liability of the vessel and cargo to proceedings in prize, on the ground that they were neutral property, belonging to English subjects. The libel was filed May 17, 1862, and the claim July 17. The trial was had December 2, thereafter. The vessel had on board, when captured, a certificate of registry, dated at Nassau, April 15, 1862, issued to George D. Harris, of Nassau, a merchant, stating that she was foreign built, at Charleston, South Carolina, in 1845; also, a shipping agreement with the master and crew, made at Nassau in April, 1862, "from the port of Nassau to ——, and back to Nassau;" also, a clearance from the port of Nassau to Philadelphia, with a cargo of three hundred and twenty sacks of salt, fifteen bags of pepper, and forty boxes of soap, dated April 16, 1862; bills of lading of the salt and soap shipped by Henry Adderly & Co., of Nassau, to Philadelphia, to order or assign, April 19; and a letter of advice from Adderly & Co., of the same date, addressed to W. S. Stockman, Philadelphia. The bills of lading refer to the charter-party as governing the shipment. That document was not produced from the vessel with the ship's papers, nor was any log-book, invoice, or manifest of the cargo.

The vessel was captured by the United States steamer Uncas, April 26, 1862, at sea, while approaching the coast of South Carolina, off Cape Romaine, in nineteen fathoms of water. The master was an English subject by birth; he and his family had been residents in Charleston for several years. He joined the vessel at Nassau on the 17th of April. The crew consisted of six persons in all, mostly Italians. The mate was an American, and, by the printed constitution of an artillery company at Georgetown, South Carolina, found on board of the prize, marked with pencil as belonging to him, he appears

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

[2] [Reported by Samuel Blatchford, Esq.]

to have been a member of that company, and, as such, necessarily a resident of South Carolina. The master, on his examination, evidently presses his statements strenuously, to maintain that his voyage was one to Philadelphia, and nowhere else; but his representations as to his destination are contradicted by the shipping articles, and his assumed ignorance of the previous employment of the vessel is placed in doubt by his admission that he had heard at Nassau that, on her voyage next preceding the one on which she was captured, she arrived at Nassau from Charleston, with a cargo of cotton. He says that he took charge of her on the 17th of April, and had only known her two or three days previously; and that he understood that Mr. Harris was connected in some way in business with Adderly & Co. No proof is furnished that a bill of sale was given to Harris on the alleged purchase of the vessel, or that any consideration money was actually paid. The existence of the war and of the blockade of the southern coast was notorious at the time, as stated by the witnesses. The vessel was captured west of the Gulf Stream, making towards the South Carolina coast, off Cape Romaine, within sounding, and, as the master supposes, fifty miles from the cape. The circumstances in evidence raise impressions strongly inculpating the motives and movements in the voyage.

1. The vessel had just come into the port of Nassau from an evasion of the blockade of Charleston, bringing with her a guilty cargo.

2. She was laden and virtually owned by parties notoriously actively concerned during the war in carrying on an illicit trade with that port and the southern blockaded ports from and to Nassau.

3. The master and mate were residents of Charleston or its vicinity, and had been taken up and employed on the voyage in question at the instant of its commencement.

4. There is no proof of the lawful transfer of the vessel from an enemy ownership, nor indeed of any actual sale or delivery of her on a bona fide purchase.

5. There was no written evidence in the ship's papers that she was put upon or attempted to pursue a voyage to the port of Philadelphia.

A decree of condemnation and forfeiture of the vessel and cargo is ordered.

Case No. 1,273.

The BELLE.

[Blatchf. Pr. Cas. 353.][1]

District Court, S. D. New York. May Term, 1863.

PRIZE—VIOLATION OF BLOCKADE—CONDEMNATION.

Vessel and cargo condemned for an attempt to violate the blockade.

[In admiralty. Proceeding to condemn and forfeit the proceeds of the schooner Belle and cargo. Decree of condemnation and forfeiture.]

BETTS, District Judge. This vessel and cargo were captured at sea, off the coast of Georgia, by the United States gunboat Potomska, February 23, 1863. The vessel was deemed unseaworthy, and, after a naval survey and appraisal, was delivered over to the use of the government, at Port Royal, South Carolina, at the value of $800. No party intervened to defend or claim the prize, and, on the return of the warrant of arrest in court, her default was duly taken and declared upon the minutes of the court, April 7, 1863, and the proofs in preparatorio were thereupon submitted to the court by the United States attorney, with a motion for the condemnation and forfeiture of the cargo sent to this port for adjudication. There were found on board of the vessel at her capture a certificate of British registry, dated at Nassau, N. P., May 5, 1862, to Horatio Johnson, of that place, mariner, stating that the vessel was foreign built, at Charleston, South Carolina, in the year 1861; also, a shipping agreement between Richard Eccles, master of the vessel, and three men, a mate, a seaman, and a cook, for a voyage in the vessel from Nassau aforesaid to Port Royal, and back to the port of Nassau, signed February 9, 1863; a clearance from the receiver general's office at the port of Nassau, to Port Royal, dated February 11, 1863, with a cargo of coffee, salt, copperas, and gin; an agreement in writing, dated at Nassau, February 6, 1863, and signed by the master, (Eccles,) stating the terms on which he was to navigate the schooner "on the aforesaid voyage, for the purpose of running the said blockade," and the payments to be made to him in specie and in Confederate currency on his arrival at a port in the Confederate States, and the additional amount to be received by him on his safe arrival at Nassau, on his return trip.

The master, on his examination upon the stated interrogatories, admits that he knew of the war and of the blockade, and that the owner of the vessel and the cargo did also, and that it was agreed in writing between them, that the vessel and cargo should run the blockade into any of the Confederate States he could get into. A part owner of the vessel and cargo, who was on the vessel when she was captured, also testifies that he knew that Sapello, on the coast of Georgia, the port which the vessel was attempting to enter when captured, was in a state of blockade. These proofs leave no room for doubt in the case, that the voyage was deliberately put on foot, and attempted to be executed, for the purpose of entering a port of the rebels then under strict blockade. A decree of condemnation and forfeiture of the cargo and of the proceeds of the vessel must accordingly be entered.

[1] [Reported by Samuel Blatchford, Esq.]

BELLE IDA, The, (PATTERSON v.) See Case No. 10,824.

BELLE LEE, The, (JANNEY v.) See Case No. 7,211.

BELLE OF THE SEA, The, (HIGGINS v.) See Case No. 7,372.

BELLE OF THE SEA, The, (JOHNSON v.) See Case No. 7,372.

BELLINGSTEIN, (UNITED STATES v.) See Case No. 14,566.

Case No. 1,274.

In re BELLIS et al.

[3 N. B. R. 199, (Quarto, 49;)[1] 3 Ben. 386; 8 Am. Law Reg. (N. S.) 747; 38 How. Pr. 79; 3 Am. Law T. 170.]

District Court, S. D. New York. Sept. 23, 1869.

WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—TRANSFER OF REAL ESTATE.

A witness, who was a lawyer, being under examination, was questioned touching a certain conveyance made to him by the bankrupt and wife, and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client. *Held*, on the facts stated, the questions were proper and must be answered, and are not within such privilege.

[See Ex parte O'Donohoe, Case No. 10,435; In re Woodward, Id. 17,999; In re Adams, Id. 42; In re Aspinwall, Id. 591.]

In bankruptcy. The attorneys for Edward C. Williams, assignee of the said bankrupts, claim the right to examine a witness in the above-entitled cause, concerning a deed executed by James Milligan, one of said bankrupts, and Elizabeth, his wife, to one John T. Gray, between the 1st days of January and July, 1868; the consideration that passed between the said parties to this deed, and the property conveyed; also concerning a deed executed by —— to Elizabeth R. Milligan, wife of James Milligan, between the 1st days of January and July, 1868, the consideration and the property conveyed. On the 8th day of April, 1868, James Milligan and Elizabeth, his wife, executed a deed conveying certain property, situate in the city of Brooklyn, state of New York, to ——, of New York city. On the 10th day of April, 1868, the said —— conveyed the same property to Elizabeth R. Milligan, wife of said James Milligan.

Q. 1. State whether James Milligan, one of the bankrupts, conveyed to you by deed, on or about the 8th day of April, 1868, certain real estate situated in the city of Brooklyn?

Q. 2. State the consideration, if any, given by you to him therefor?

Q. 3. State whether you simultaneously, on or about the same date, by deed, conveyed to Elizabeth R. Milligan, wife of said James Milligan, the same premises so conveyed to you by James Milligan, on or about the 8th day of April, 1868?

Q. 4. State the consideration, if any, given to you by Elizabeth R. Milligan therefor?

Q. 5. State whether at that time any suit or action at law was pending in relation to the said real estate between the said James Milligan and wife, and any person in which you were attorney or counsel of Mr. and Mrs. Milligan, or whether there has, since that 8th day of April, 1868, been such an action pending in relation to said real estate, in which you were attorney or counsel?

—— is an attorney in all the courts; being called as a witness in the matter of Bellis & Milligan, bankrupts, refuses to testify concerning the above said transfers, on the ground that they were made in the course of his professional business, and are therefore within the privilege of confidential communications between him and his clients.

The examination of ——, as a witness, in this matter, does not involve any statement, confidential or otherwise, made by James Milligan to him, or any advice given by him to his client, the said James Milligan, but merely the part he performed in a business transaction wherein he was grantee in the first place, and grantor in the second, of certain real estate, as hereinbefore mentioned.

In this case the witness claims that the rule which protects professional communications of clients to their attorney, or counsel, extends to all business communications as well as those appertaining to suits in law or equity, or other judicial proceedings. Upon examining the authorities, I find that in the early history of litigation parties prosecuted or defended their suits in person. In the progress of time, as litigation increased, and judicial proceedings became settled and established, men skilled and learned in the law and practice of the courts, were employed to conduct the prosecution and defense of causes. Parties were not then compelled to testify, and hesitated to communicate the facts in relation to their causes to others; to obviate that difficulty, the courts adopted the rule in relation to professional communications of clients to their attorneys, exempting the same from disclosure, etc. Among the early cases upon this subject is that of Annesley's Lessee v. Earl of Anglesea, before the barons of the Irish exchequer. 17 Howell, St. Tr. 1139. The case was most extensively and ably argued, and very elaborately considered by the court, and the conclusion arrived at as to the true origin of the rule in question, may be best stated in the language of Mr. Baron Montenay, who says, at page 1240, "Mr. Recorder has very properly mentioned the foundation upon which it hath been held, and it is certainly undoubted law, that attorneys ought to keep inviolably the secrets of their clients, viz.: That an increase of legal business and the inability of parties to transact that business themselves, made it necessary for them to employ other

[1] [Reprinted from 3 N. B. R. 199, (Quarto, 49.) by permission. 3 Ben. 386, contains only a partial report.]

persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of those causes which they found themselves under the necessity of intrusting to their care." In the case of Dixon v. Parmelee, 2 Vt. 185, Paddock, Justice, says: "It also became necessary for courts to adopt a rule by way of pledge to suitors, that their secret and confidential communications to their attorneys should not be drawn from them with or without the consent of such attorney." Among the earliest cases to be found on this subject, are Berd v. Lovelace, Cary, 88; Austen v. Vesey, Id. 89; Kelway v. Kelway, Id. 126; Dennis v. Codrington, Id. 143. Solicitors and counsel were excused from testifying on the ground that they were solicitors or counsel in the cause. In Waldron v. Ward, Styles, 449, a witness was offered in evidence to be examined as to some matter "whereof he had been made privy as of counsel in the cause." The courts would not permit the examination. In Sparke v. Middleton, Redley, [1 Keb.] 505, counsel for the defendant was excused from testifying on the ground "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons." In Cuts v. Pickering, 1 Vent. 197, a witness was called to testify concerning an erasure in a will, supposed to have been made by Pickering. The witness, after the erasure, was retained as his solicitor in the cause. In Vaillant v. Dodemead, 2 Atk. 524, witness was called to prove certain interrogatories. Objections, that his knowledge of the matters was obtained as a clerk in court. Evidence received. Lord Hardwicke says: "That the matters inquired after by the plaintiff's interrogatories, were antecedent transactions to the commencement of the suit." In the then last cited cases, the communications to the respective parties were during the pendency of an action in which they were either attorney, solicitor, or counsel. The same rule is held by the courts in this state, and seems to decide the question in this case. In 17 Johns. 335, the court says: "The privilege, in its most comprehensive sense, is not broad enough to cover collateral facts, the answer to which does not betray any confidential communication between attorney and client."

An attorney or counsel may be called on to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client. Johnson v. Daverne, 19 Johns. 134, 4th Term, 431. Communications made to an attorney at law with a view to obtain his assistance in the commission of a felony, are not privileged. 3 Barb. 598. In the case of the Rochester City Bank v. Suydam, 5 How. Pr. 254, held: To be brought within its protection, if they do not appertain to any suit or legal proceeding commenced or contemplated, they should be made under cover of an employment strictly professional, and should be such as the business to be done requires to be made. They should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct reference to the professional business upon which they may be supposed to bear. 17 Howell, St. Tr. 1139; 1 Greenl. Ev. 244; 1 Phil. Ev. 145; 1 Starkie.

In section 26 of the bankrupt act, [March 2,] 1867, [14 Stat. 529,] it is provided that the court may, at all times, require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property; the bankrupt is, therefore, liable to be called (and in this case has been called), and examined upon these very transactions. He cannot extend an immunity to his attorney which he does not possess himself. The privilege is for the benefit of the client, not the attorney. The authorities upon this point, which I have cited, show that originally no communications were protected as confidential professional communications, except that which related to the management of some suit or judicial proceeding actually pending, or about to be commenced, in some court. Few cases have gone beyond that. Even in the case of Wilson v. Troup, 7 Johns. Ch. 25, 2 Cow. 195, where Haight, an attorney, was retained to conduct the foreclosure of a mortgage by advertisement, under the act concerning the foreclosure of mortgages by advertisement, and it was claimed that Troup employed Haight because Haight was a lawyer, the court of errors evidently considered the relation of the parties in the statutory foreclosure case as that of attorney and client, and therefore the evidence of Haight was not admissible as against Troup, his client. This decision is unquestionably correct, and founded upon the principle, that a statutory foreclosure of a mortgage by advertisement is in the nature of a judicial proceeding. And in Jackson v. Dominick, 14 Johns. 443, the court says, "that a foreclosure under the statute is substantially equivalent to a foreclosure in equity, same in effect." 5 How. Pr. 261.

In this case there was no action pending. The witness drew a deed, conveying certain real estate from James Milligan to himself. He then conveyed the said real estate to Mrs. Milligan, the wife of said James Milligan. There was no action then pending in regard to said real estate, and the question before the court in relation to said real estate now is, whether the legal title of the real estate so conveyed vests in Mrs. Milligan as against the assignee in bankruptcy. Now, the witness is simply called upon to state the

fact of the receiving and the conveying of the real estate, the consideration, if any, he gave or received therefor, and what was said and done on the occasion. His testimony, if given, cannot do injustice to any one. The same facts have been proven by James Milligan in these proceedings. The deeds can be given in evidence, and although Mrs. Milligan cannot be compelled to testify to these facts in bankruptcy, still she can be made to do so by a bill in equity, on the part of the assignee against herself, her husband, and the witness, to set aside said conveyance as fraudulent etc., etc., as against the assignee in bankruptcy. 30 Barb. 506. The court of appeals, in 30 N. Y. 330, Sheldon, Justice, holds, that the rule which protects professional communications of clients to their attorneys or counsel from disclosure, should only extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated. The testimony in this case is claimed only for the bankrupt, which brings it within the cases of Griffith v. Davies, 5 Barn. & Adol. 502; Shore v. Bedford, 5 Man. & G. 271; Weeks v. Argent, 16 Mees. & W. 816. In 30 N. Y. 342, Ingram, J., says, "If he was only the counsel of Barney, then the decisions settle, that the disclosures being made in the presence of a third party, they are not privileged." I think that for the purposes of this case Mrs. Milligan, the wife of the petitioner, who received the conveyance from the witness as property to her sole and separate use, must be considered as a third person. I have given the authorities as they were previous to the legislative enactments in this state, in relation to the examination of parties as witnesses, which enactments are as follows: "Any party in any civil suit or proceeding, either in law or equity, had before any court or officers, may require any adverse party, whether complainant, plaintiff, petitioner, or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceedings, though not nominally as parties, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein; and such party may be subpoenaed, and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness. The court or officer before whom such suit or proceeding may be had, shall have power to dismiss the bill, petition, or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out, or disregard any defense, or any part thereof, of any party who shall refuse to testify. Any party in any suit or proceeding as aforesaid, shall be required, to entitle him to examine the adverse party as a witness in any suit or proceeding, to give testimony therein, in the same manner as the attendance of witnesses in ordinary cases." The act of congress, July 16th, 1862, [12 Stat. 588, c. 189,] provides: "That the laws of the state in which the court shall be held, shall be the rules * * * as to the competency of witnesses in the court of the United States."

In this case the rights and privileges of the attorney, and his duty to his clients, are entirely separate, and distinguished from his rights and duties as purchaser and vendor. The transaction in relation to the purchase and sale of the real estate was not a part and parcel of, or in and about any lawsuit in which he was counsel, for either the petitioner or his wife. It therefore stands as a transaction of purchase and sale of real estate, the witness purchasing the real estate of Mr. Milligan, and selling the same to Mrs. Milligan, his wife, two days thereafter. It is claimed by the assignee in bankruptcy, that this was a mere fraud and cover, and intended to evade the act of the legislature of 1849, p. 528, c. 375, viz.: "Any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey, and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof in the same manner, and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband or be liable for his debts."

The assignee also claims that the conveyance from the witness to Mrs. Milligan is void; that it was a mere formal transfer of the real estate from the husband to the wife, using the name of the witness as a mere go-between, so that the conveyance might technically conform to the letter of the statute, and at the same time defeat the spirit and intent of the law; that the wife acquired no legal or vested rights therein by said conveyance other than her contingent right of dower to which she was previously entitled. The courts ever have, and now do hold, that the character of their attorneys should be above reproach and beyond suspicion; that they should never be a party to the perpetration of any fraud, or any act of doubtful integrity, or in the remotest manner violating any of our country's laws. The reasons for this are obvious. They in most instances draft, if they do not make, the laws, and most certainly, "the law makers should not be law breakers." In all well-regulated communities the lawyers are looked up to and respected. It is just and right they should be. They are the best educated men, better versed in the whole policy of our country, are more intelligent, and have broader, and more enlarged views of all the relations of life than any other class of men; therefore it is that the community requires of them, in all

their relations in life, to be entirely free from any wrong or any act of doubtful propriety. All must see the impropriety of lawyers being connected with any conveyance of real estate, the purpose or effect of which would be to evade the provisions of any law. I find that previous to the act of 1847, [Laws N. Y. 1847, c. 280,] and the acts amendatory thereof, an attorney occupied the same relative position as his client in relation to giving testimony, and was privileged only as to matters which his client could not be compelled to disclose. But now, whenever and wherever the client can be compelled as a witness to testify to any fact, then the attorney must also testify; the statutes of this state having abrogated the former common-law rule to that effect. That the witness in this case is not privileged—as the mere act of receiving and conveying the title to real estate about which there has not been any action pending, does not bring him within the former common-law rule as to privileged communications to attorneys and counsel—and since the act of 1847, no such privilege exists which can be claimed for the witness in this case. That the questions are pertinent to the issue, and proper, and the witness must answer.

John Fitch, Register.

BLATCHFORD, District Judge. On the facts stated by the register the five questions set forth were proper, and must be answered by the witness, and are not within the privilege of confidential communications between attorney and client.

[NOTE. For subsequent proceedings in this matter, see Cases Nos. 1,275 and 1,276.]

Case No. 1,275.

In re BELLIS et al.

[4 Ben. 53;[1] 3 N. B. R. 496, (Quarto, 124.)]

District Court, S. D. New York. Feb. 2, 1870.

BANKRUPTCY—BOOKS OF ACCOUNT—SPECIFICATION OF OPPOSITION TO DISCHARGE.

1. Where it appeared that the bankrupts, being merchants, had not for ten months kept a cash-book, and that it was impossible to tell from their books what was their financial condition when they suspended business, *held*, that a discharge must be refused.

2. A specification of opposition to a bankrupt's discharge, averring that the bankrupt had not kept proper books of account in his business, in that such books do not show what moneys were received, or what disposition was made of them, is sufficiently specific to admit evidence that no cash-book whatever was kept for a time.

[3. Cited in Re Archenbrown, Case No. 505, to the point that the test as to whether books are proper books of account is whether a competent accountant could from the books themselves ascertain the debtor's financial condition.]

[4. Cited in Re Jacobs, Case No. 7,160, as to the power of the court to grant leave to amend defective specifications.]

[See In re Smith, 16 Fed. 465.]

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

[In bankruptcy. Petition for discharge by Garret S. Bellis and James Milligan, bankrupts. Discharge refused.

[For prior proceedings in this matter, see Cases Nos. 1,274 and 1,276.]

J. N. Piper, for creditors.

Abbett & Fuller, for bankrupts.

BLATCHFORD, District Judge. The discharge of the bankrupts is opposed on the ground, as stated in one of the specifications, that, since the passing of the bankruptcy act, the bankrupts, being merchants or tradesmen, have not kept proper books of account in their business, as required by the said act, in that the true or real condition of their affairs and business cannot be ascertained therefrom; and in that such books do not show what moneys, merchandise and property they purchased or received, or what disposition was made of the same; and in that transactions both of moneys received and property sold, amounting to many thousand dollars, are not entered therein; and in that, in other respects, the books are not proper books of account, considering the business and condition of the debtors, or such as would enable a competent person to determine therefrom the real condition of their affairs.

The bankrupts were merchants engaged in business as copartners, from some time in 1866 until June, 1868. The evidence is clear that they kept no cash-book, or account answering the place of a cash-book, between the 2d of March, 1867, and the 2d of January, 1868, and that it is impossible for a competent book-keeper or accountant to ascertain from the books which they kept what was their financial condition when they suspended business, on the 15th of June, 1868. The keeping of a cash-book by merchants such as the bankrupts were, is indispensable. In re Solomon, [Case No. 13,167;] In re Gay, [Id. 5,279;] In re Littlefield, [Id. 8,398.]

The specification, averring as it does, that the bankrupts have not kept proper books of account in their business, in that such books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time. In re Littlefield, [Id. 8,398.] Besides, if necessary, an amendment of the specification would, under the circumstances, be allowed. A discharge is refused.

Case No. 1,276.

In re BELLIS et al.

[3 N. B. R. 270,[1] (Quarto, 65;) 1 Am. Law T. Rep. Bankr. 178; 38 How. Pr. 88.]

District Court, S. D. New York. October, 1869.

BANKRUPTCY — EXAMINATION BEFORE REGISTER—COMPELLING BANKRUPT'S WIFE TO TESTIFY—ATTACHMENT.

The usual order and subpoena were issued for the wife of bankrupt to attend before the reg-

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ister and be sworn and testify as a witness. She failed to appear, and counsel put in affidavit explanatory of her non-attendance, but questioned the authority of the court to compel her to testify in this cause. *Held*, the proper proceeding is to issue an order to show cause why an attachment should not issue against her.

[See Ex parte Woolford, Case No. 18,029; Ex parte Craig, Id. 3,323; Ex parte Gilbert, Id. 5,410.]

In bankruptcy. The attorney for the assignee in this cause applied before me for the usual order and subpoena for Mrs. Elizabeth R. Milligan, wife of James Milligan, one of the petitioners. The affidavit sets forth the facts, and is sufficient both in form and substance, is duly verified, and upon it the assignee is, by law, entitled to the order and subpoena asked for. In re Julius L. Adams, [Cases Nos. 39 and 40.] Section 26 of the bankrupt law [March 2, 1867; 14 Stat. 529] provides: "For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness, and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge, unless he shall prove, to the satisfaction of the court, that he was unable to procure the attendance of his wife." During the trial of this cause, and before the issuing of this order and subpoena, I permitted the attorney for the bankrupts to file an affidavit under section 26 of the bankrupt law, setting forth the reason why she had not obeyed previous orders of the court. I considered that to be the correct practice in order to raise the question under section 26 of the bankrupt law, as to whether the disobedience of the wife to the mandate of the court prohibited the bankrupt Milligan from receiving a discharge. I consider it a well-settled rule of law, that the wife of a bankrupt must obey the orders of the court the same as any other witness, especially when, as in this case, it is shown that within a short time previous to the filing of a petition in bankruptcy by the husband he conveyed to her certain real estate, which now stands in her name of record, and the application asks for her examination touching said real estate. She must attend and be sworn; then any legal excuse or objections can be made in her behalf. "The courts do justice, and also require implicit obedience to their mandates." Any excuse or explanation can at the proper time be given. Courts are very lenient wherever a just or proper cause is shown—sickness and debility are proper excuses. Such excuses should, however, be shown by the certificates of physicians. In this case such certificates, if the facts warrant them, can readily be procured. None, as yet, have been produced before me. The return of the United States marshal shows that the witness was paid certain fees for her attendance as a witness. The proceedings in this cause before me show that the application for the examination of the witness was not made for delay, as the testimony of the witness, if given, must from the very nature of the case be of great materiality, both as to the assignee and the bankrupt Milligan. The courts cannot administer the laws unless they can enforce obedience to their process and orders. It is not the province of the witness to question the rights, power, or duties of the courts. It is their duty to obey. The courts will protect them in all their legal rights. In this case the question whether the wife can be a witness for or against her husband does not arise; as her husband has been adjudicated a bankrupt, his effects, if any, pass into the hands of the assignee, and the contest for the title to the real estate is between the witness and the assignee. Mr. Fuller, one of the counsel for the bankrupt, on presenting the affidavit giving the excuse for the non-attendance of the witness, made a very able and learned argument to show that the court had no power to compel the witness to testify in this cause, and on that ground, under section 26 of the bankrupt law, opposed the granting of the order, and desired that the same be certified to your honor.

I certify, as a matter of law, that this witness must attend and be sworn, and obey the order of the court the same as any other witness. That upon the affidavit showing that the witness was material, the assignee and creditors were entitled to the usual order and subpoena which were granted in this cause. That under and by virtue of said order the witness was compelled to attend. That the excuses shown by the affidavit referred to, unaccompanied by certificates of physicians, were insufficient. That such excuses, and all others which may be shown in extenuation for disobedience to the order of the court, should be shown before your honor, upon the motion on the part of the assignee for an order to show cause why an attachment should not be issued against the witness, etc., etc.

BLATCHFORD, District Judge. Under the circumstances of this case, I think an order to show cause why a warrant should not issue is the proper proceeding.

[NOTE. For prior proceedings in this matter, see Case No. 1,274. For subsequent proceedings, see Case No. 1,275.]

Case No. 1,277.

The BELLONA.

[4 Ben. 503.] [1]

District Court, S. D. New York. Feb. Term, 1871.

CARRIERS—DELIVERY OF CARGO—BILL OF LADING—EXCEPTION.

Raisins were shipped on a vessel, under a bill of lading which contained a clause exempting

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the vessel from damage caused by "any act, neglect, or default of the pilot, master, or mariners," or from damage "resulting from stowage or contact with other goods, for leakage, breakage, damage caused by heavy weather, or pitching or rolling of the vessel, or defective packages," or for damage "arising through insufficiency of strength of packages." Part of the raisins came out in bad order, the tops and bottoms of the boxes being crushed by other cargo. They were re-coopered before being delivered. In each box were layers of raisins, with paper between. When they were delivered, raisins were missing from every box, and the papers in many of them were torn and soiled by finger marks: *Held*, that, notwithstanding the exceptions in the bill of lading, the vessel was liable for the value of the raisins not delivered, no account being given as to how the missing raisins disappeared.

[See Lyon v. Nine Hundred and Twenty-Eight Barrels of Salt, Case No. 8,648; The David and Caroline, Id. 3,593; The Santee, Id. 12,328; The Delhi, Id. 3,770; Carey v. Atkins, Id. 2,399; Willis v. The City of Austin, 2 Fed. 412.]

[In admiralty. Libel against the steamship Bellona for damages for failure to deliver a cargo. Decree for libellants.]

A. J. Heath, for libellants.

G. W. Wingate, for claimants.

BLATCHFORD, District Judge. In March, 1869, one Leask shipped at London, on board the steamship Bellona, 494 boxes of raisins, deliverable to order at New York, under a bill of lading, which was afterwards indorsed to the libellants. The libel alleges, that, after the payment of the freight money by the libellants, to the master or agents of the vessel, at New York, on the arrival of the vessel there, such master and agents neglected to deliver the goods to the libellants in the like good order and condition in which they were shipped. The libel also alleges, that, through the careless, negligent and improper stowage of the goods on board of the vessel, and discharge thereof from the vessel, and the want of proper care on the part of the owners, agents, master, officers and crew of the vessel, and of the persons employed by him or them, and by reason of his or their permitting 69 boxes of the raisins to be injured and damaged and broken open, the covers of the boxes to be torn off, and layers of the raisins to be taken from the boxes, and by reason of the non-delivery of the raisins, and the detention and injury to the same, the libellants have suffered damage to the amount of $500. The answer alleges, that the raisins were put up in very slight and insufficient packages; that they were properly stowed and discharged, without any carelessness, negligence or improper conduct on the part of the owners, agents, master, officers, or crew of the vessel, or of the persons employed by them; that, by reason of the pitching and rolling of the vessel, and the insufficiency in strength of the packages in which the raisins were contained, a small number thereof were, in such transportation, partially crushed or broken, but were at once repaired with proper care by those having charge of the vessel; that a small portion of the raisins may have been lost out of the packages; that all of the raisins, except such small portion, were delivered to the libellants in the same apparent good order in which they were received, except one box, the value of which was allowed out of the freight money by the claimants; and that all but 69 of the boxes were receipted for by the libellants, as having been received in good order. The answer also avers, that, whatever damage happened to the goods was within the perils excepted by the bill of lading, which excepted perils the answer enumerates.

The bill of lading states, that the boxes were shipped in good order and well conditioned, and contracts for their delivery at New York "in the like good order and well conditioned," "damage by * * * improper stowage or otherwise, * * * and all accidents, loss and damage whatsoever, from * * * any act, neglect or default whatsoever of the pilot, master or mariners, being excepted, and the owners being in no way liable for any consequences of the causes above excepted." In another part of the bill of lading are the words: "Not answerable for * * * damage resulting from stowage or contact with other goods, for leakage, breakage, rust, mortality * * * damage caused by heavy weather, or pitching or rolling of the vessel, * * * or defective packages." In another part of the bill of lading are the words: "The vessel is not answerable for damages arising through insufficiency of strength of packages." The libel refers to the bill of lading as delivered to the shipper, and to a copy of it annexed to the libel.

The question in dispute is as to the liability for the loss of such raisins contained in the 69 boxes when shipped, as were not delivered to the libellants at New York. The evidence shows, that 69 boxes came out of the vessel in bad order, the tops and bottoms, that is, the two largest faces of the six faces, being broken more or less. Such breaking was caused by their being crushed by other cargo. After the 69 boxes were taken from the vessel, they were mended and re-coopered, and put in as good external order as was possible, at the expense of the vessel, before they were delivered to the libellants. There were three or four layers of raisins in each box, with paper between every two layers. Raisins were missing from every one of the 69 boxes, and the papers in many of them were torn and soiled by finger marks.

I think that, notwithstanding the exceptions in the bill of lading, the vessel is liable to respond for the value of such raisins actually shipped as were not delivered to the libellants. The claim of the libellants is not for damage to the raisins which were delivered, but for the loss and non-delivery of such as were not delivered. The claimants do not account for those which were not delivered, nor show anything, except that the materials

composing the 69 boxes were crushed by other cargo, caused perhaps by the pitching and rolling of the vessel in heavy weather. The intendment of the bill of lading, in describing the shipment as "boxes of raisins," must, in connection with the evidence, be held to be, that the boxes were filled with raisins in layers. The loss of raisins from the boxes being shown, the presumption of law is, that such loss was caused by the act or default of the carrier, and the burden of proof is upon him to show that the loss happened through a peril excepted in the bill of lading. Clark v. Barnwell, 12 How. [53 U. S.] 272, 280; Rich v. Lambert, Id. 347, 357; Nelson v. Woodruff, 1 Black, [66 U. S.] 156, 160. This burden the claimants in this case have undertaken. But, although they show that the boxes were broken and crushed by other cargo, and although the inference were proper, that there was improper stowage, or contact with other goods, or defectiveness or insufficiency of strength of packages, or heavy weather, or pitching or rolling of the vessel, which caused such breaking of the boxes, yet they do not show that the raisins disappeared and were lost through the mere breaking of the boxes. No evidence was given to show that raisins were found in the vessel outside of the boxes, having escaped of themselves through the apertures caused by the breaking of the boxes. Nor do the claimants show that the raisins disappeared through any act, neglect or default of the pilot, master or owners, or by anything which can properly be called leakage. In fact, no account whatever is given by the claimants as to how or when the missing raisins disappeared, or might have disappeared.

The libellants do not satisfactorily show that any of the raisins were detained from them after the freight was paid. But, for the reasons above stated, the vessel must respond for such of the raisins in fact shipped in the 69 boxes as were not delivered, and a reference is ordered to a commissioner, to ascertain and report the value of the raisins so not delivered.

BELLONA, The, (CROSS v.) See Case No. 3,428.

BELLONA, The, (ELLISON v.) See Cases Nos. 4,406 and 4,407.

Case No. 1,278.

In re BELLOWS.

[3 Story, 428;[1] 7 Law Rep. 119.]

Circuit Court, D. New Hampshire. July Term, 1844.[2]

BANKRUPTCY—LIEN OF ATTACHMENT—ENJOINING CREDITOR—CONTEMPT—PLEADING DISCHARGE OF BANKRUPT.

1. An attachment, on mesne process, is not a lien in the sense of the common law.

2. Where a suit is commenced against the bankrupt, and property attached on mesne process, before proceedings in bankruptcy, the certificate in bankruptcy may be pleaded in bar of further proceedings in the suit.

3. The district court, upon the application of the bankrupt, or of his assignee, before the discharge is granted, may issue an injunction to the creditor, to stay proceedings until the further order of the court.

[Cited in Re Wallace, Case No. 17,094. See, also, In re Foster, Id. 4,960.]

4. If the creditor does not reside within the district, an injunction against his agents or attorneys within the district will be effectual.

5. If the creditor, his agents or attorneys, proceed in the suit, notwithstanding the injunction, they are liable to be committed for contempt.

6. If the bankrupt do not obtain his discharge, the creditor may petition for a dissolution of the injunction, and, if it is granted, he may proceed in his suit to judgment and execution.

7. If the discharge is obtained, and the creditor intend to contest its validity on the trial in the state court, he should apply to the district court for leave so to do.

8. If the validity of the discharge, as such, is not contested, and the state court, on demurrer, should hold the discharge invalid as to the property attached, and the creditor proceed to judgment and execution, the district court should enjoin the sheriff from levying on the attached property, and order him to deliver the same to the assignee, or, if it has been sold, to bring the proceeds into court.

9. An attachment of property on mesne process, bona fide made, before a petition filed in bankruptcy by the debtor, is not a lien or security upon the property within the intendment of the second section of the Bankrupt Act of [August 19,] 1841, [5 Stat. 442,] c. 9.

[Cited in Stoddard v. Locke, 43 Vt. 574. See, also, In re Cheney, Case No. 2,636; Downer v. Brackett, Id. 4,043; Haughton v. Eustis, Id. 6,224; Peck v. Jenness, 7 How. (48 U. S.) 612. Contra, In re Reed, Case No. 11,640.]

10. Such attachment will not entitle the creditor to proceed to judgment in the suit, if the debtor has, pending the suit, lawfully and bona fide obtained his discharge in bankruptcy, and the certificate thereof is pleaded as a bar to further proceedings in the suit.

11. Where an attachment was so made, and a discharge so obtained and pleaded, it was held not to be necessary for the district court to order the attaching officer to deliver the property to the assignee, until the final decision of the state court, in which the suit was pending.

12. Such an order having been made by the district court, it was held, that it should be modified, so far as to permit the property to remain in the hands of the officer, until the further order of the district court, and to await the final action of the state court.

[See note at end of case.]

[Certificate from the district court of the United States for the district of New Hampshire.]

This was a case in bankruptcy, certified by the district judge to this court, under the bankrupt act of [August 19,] 1841, [5 Stat. 442,] c. 9, for a final decision.

The petition was as follows:

"George Huntington, of Walpole, in the district of New Hampshire, and Hope Lathrop of the same Walpole, respectfully rep-

[1] [Reported by William W. Story, Esq.]

[2] [Reversed by supreme court in Peck v. Jenness, 7 How. (48 U. S.) 612.]

resent: That the said George Huntington is the sheriff of the county of Cheshire, in said district, and that the said Hope Lathrop is one of his deputies. That on the 8th day of October, 1842, James [Jenness] Gage & Company, and a large number of the creditors of Philip Peck & Co., of Walpole, in said district, (said firm of Peck & Co. consisting of Philip Peck & William Bellows) caused certain writs of mesne process and of attachment to be issued against the said Philip Peck & Co. and delivered the same to the said Lathrop, or the said Huntington, for service, by virtue of which, they attached a large amount of real and personal property of said Peck & Co., and made returns of these precepts accordingly. That said writs were returnable and returned to the court of common pleas for said county of Cheshire, on the first Tuesday of April, 1843, at which term they were duly entered, and that said suits are now pending in said court. That the said Bellows and Peck, after the attachments were made, filed their several petitions before this honorable court to be declared bankrupts, and for the benefit of the act of congress, entitled an act to establish a uniform system of bankruptcy throughout the United States, were declared bankrupts accordingly, and, as your petitioners are informed, have since obtained a certificate of discharge. That at the October term of the said court of common pleas, 1843, Bellows and Peck severally filed their pleas of discharge in bankruptcy, in bar of further proceedings in said suits, and that it is the intention of the said attaching creditors, as your petitioners are informed and believe, to set forth the said attachments by way of replication to said pleas. That on the —— of ——, 1843, Aaron P. Howland, the assignee of the said Bellows and of the said Peck, filed his petition before your honor, praying for an order on your petitioners for the reasons therein set forth, to deliver said property so attached and held by them as aforesaid, to him, the said Howland. That such proceedings were had upon the said petition, that on the 15th day of January, 1844, an order was issued by your honor, directing your petitioners to surrender and deliver over said property to said Howland, which order, on the 20th day of said January, was served by Albro Blodgett, a deputy marshal of said district, by delivering to each of your petitioners a copy thereof and his return thereon.

"Your petitioners further represent, that since the passing of said order they have been informed that a decision has been made in the superior court of judicature for the state of New Hampshire, that an attachment made precisely as the attachments were made in the case of Bellows and Peck is a lien or security valid by the laws of the state, and that it is saved by the proviso in the second section of the bankrupt act. Your petitioners, therefore, find themselves obliged either to obey said order, and thereby subject themselves to the hazard of suits which may be brought by the creditors, or to disobey the said order and thereby stand charged with the consequences which may ensue thereon. Your petitioners further suggest, that should the parties choose it, they have an adequate remedy by proceedings for a reversal of the decisions of the state court, by a writ of error to the supreme court of the United States. That your petitioners are officers of the state of New Hampshire, and their duty is to obey all precepts coming lawfully from their courts, and that they are bound by her laws and the decisions of her courts. Under all the circumstances of this case, your petitioners represent that they cannot, without great peril to themselves, obey the orders of this honorable court, passed on the 15th day of January, 1844, by delivering up said property, and they most respectfully pray your honor to rescind the order aforesaid, or to take such order thereon that your petitioners shall not be put in jeopardy of their persons or property by reason thereof."

At the hearing, it appeared that the superior court of New Hampshire had made a recent decision, in reference to the legal effect of an attachment of property under mesne process, in this state: whereupon the following questions were adjourned by the district court to the circuit court, for a decision: First. Whether an attachment of property, under mesne process, bona fide made before a petition filed in bankruptcy by the debtor, is a lien or security upon property, valid by the laws of New Hampshire; and thus within the proviso of the second section of the bankrupt act of August 19, 1841? Second. Whether any, and what relief shall be granted to the petitioners? [The court answered the first question in the negative, and rendered an opinion as to the kind and measure of relief proper under the circumstances.]

Mr. Goodrich, for petitioners.

Edwards & Bell, for the assignee.

STORY, Circuit Justice. It is not my intention to discuss the points involved in the first question adjourned into this court, in any manner whatever. So far as my judgment is concerned, they have been fully discussed, and fully decided by this court, in the former cases argued in Massachusetts. The attachment laws of New Hampshire differ from those of Massachusetts in no material respect—at least in no material respect affecting the present question. I consider the whole matter, therefore, settled in Ex parte Foster, [Case No. 4,960;] Parker v. Muggridge, [Id. 10,743.] In re Cook, [Id. 3,152,] and the more recent Case of Vose and others, [Vose v. Philbrook, Case No. 17,010,] since decided; and from those cases I feel

not the slightest inclination to depart. On the other hand, the more I reflect upon the doctrines stated therein, the more I am satisfied, that they conform to the true intent and objects of the bankrupt law of 1841, [5 Stat. 442,] c. 9; and I adhere to them with undoubting confidence. If they are to be overturned, it must be by some tribunal, whose decisions I am bound to obey.

The first question involves two distinct points. 1. Whether an attachment under the state law of New Hampshire constitutes a lien. Second. Whether it is such a lien as is within the saving of the second section of the bankrupt act of 1841, c. 9. The first point is, in my judgment, in the present state of things, a mere controversy about the meaning of words. That an attachment on mesne process is not a lien in the sense of the common law, I think very clear, for the reasons stated in Ex parte Foster, [supra.][3] That it is often called in Massachusetts and New Hampshire, a lien, may be admitted; with what propriety of language I do not inquire. In the elaborate opinion of the superior court of New Hampshire, in the case of Kittredge v. Warren, January term, 1844, in Grafton county, [14 N. H. 509,] it is decided to be a lien. I enter into no debate on that point with the learned judge of the state court. Assuming it to be a lien, it is a contingent conditional lien, connected with mesne process, and wholly dependent for its value and efficacy upon the plaintiff's obtaining judgment in his favor in the suit. The second point is of far more importance; and that is, whether it is a lien within the purview of the saving in the second section of the bankrupt act of 1841, c. 9. I was of opinion in Ex parte Foster, [Case No. 4,960,] that it was not, and for the reasons therein stated. I now retain the same opinion; although my present judgment does not, any more than that in Ex parte Foster, require me, with reference to the merits of the case now before me, to rely on that opinion. One suggestion made at the present argument on behalf of the attaching creditors is, that the attachment in this case is not a payment, security, conveyance, or transfer of property, made or given by the bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor a preference or priority over the general creditors of the bankrupt, within the provision of the enacting clause of the second section of the bankrupt act of 1841, c. 9. I agree to that; but this is so far from aiding the argument, that the proviso of the second section covers attachments on mesne process, that it may be strongly urged the other way, as solely intended to carve exceptions out of the enacting clause, and to guard against any application thereof to liens, mortgages, or other securities made or given voluntarily by the bankrupt, ejusdem generis, and that it could not be designed to include attachments upon mesne process, which are proceedings in invitum, and not ejusdem generis. But I do not dwell upon this topic, as of any decisive and absolute conclusiveness. The whole merits of the present case turn upon other considerations. First, whether the district court, sitting in bankruptcy, has a right to issue an injunction to prevent a creditor, who has made an attachment, from obtaining a priority of satisfaction out of the assets of the bankrupt, pending the proceedings in bankruptcy. Secondly, whether, if the bankrupt obtains his discharge pending the proceedings under the attachment, he has not a right to plead that discharge as a bar puis darrein continuance to further proceedings in such suit, and thus to defeat the creditor's right to a judgment. Now, if he has a right to the latter, the former would seem irresistibly to follow as a duty of the district court sitting in bankruptcy. Both of these points have been long ago decided by this court in the affirmative, in the case of Ex parte Foster, and others which followed it, [supra.] In respect to the right of the district court to issue such an injunction, it seems to me clear in principle; and it is a question of which that court had exclusive cognizance; and it is not a matter inquirable into elsewhere, whether the jurisdiction was rightfully exercised or not.

In respect to the other point, that a discharge in bankruptcy pendente lite was a good bar, and might be pleaded as such to the suit, until I saw the able and learned opinion of the superior court of New Hampshire, in Kittredge v. Warren, I confess, that it never occurred to me that it was a matter susceptible of any judicial doubt. I had long laid it up among those maxims of the law, which are uncontroverted and uncontrovertible. It is clear by the bankrupt act of [August 19,] 1841, [5 Stat. 443,] c. 9, § 4, that this was a debt of the plaintiff, provable under the bankruptcy, and equally clear, that if so provable, then the certificate of discharge operated to discharge the debt. If it discharged the debt and was pleadable as a bar, what ground is there to suggest that a judgment in personam can be rendered in a personal suit (for this attachment suit is no more) against the party? I profess myself wholly unable to comprehend how any judgment can be rendered against any person in a personal suit for a debt which is discharged; for the judgment declares the debt to be due from him, and directs a recovery accordingly. The record itself, upon such pleadings, ascertains that there is no debt; and yet the award of judgment is, or must be, that there is a debt recoverable from the party. If there had been no attachment of property, there could be no pretence to say that any judgment in a personal suit could be rendered against the party; for there could be no debt due or to be satisfied. What possible

[3] See, also, Ex parte D'Obree, 8 Ves. 82.

difference can it make that there is an attachment, if that is to be a mere conditional or contingent security for the money, in the suit of a debt which is no longer a subsisting debt, or for a debt extinguished by operation of law? Suppose a release made by the plaintiff pendente lite is pleaded puis darrein continuance, is it not a perfect bar in that suit against any recovery? Such a release would be a complete bar to any suit in personam, even for the debt, although it were made with a reservation or saving of any accompanying mortgage or other fixed security, although the remedy to recover the latter might remain, and proceedings in rem be maintainable. Suppose, in the present case, no attachment had been made, and a mortgage had been given as collateral security for the debt, (which would be within the saving of the second section of the bankrupt act of 1841, [5 Stat. 442,] c. 9,) the certificate of discharge would clearly be a good bar to a suit in personam for the debt, although not to a suit in rem to enforce the mortgage. In an anonymous case in Lofft, 437, it was held, that a certificate granted, pending a suit, operated in the nature of a release. The case of Davis v. Shapley, 1 Barn. & Adol. 54, establishes also that a discharge in bankruptcy is not a mere personal discharge of the party, but a discharge of his after-acquired goods—thus demonstrating the complete effect of a discharge to prevent any judgment in personam against him or his goods.

The whole error in the argument consists in assuming two propositions as the basis on which it rests, neither of which is, in my judgment, maintainable, either upon the general principles of law, or the obvious purposes and provisions of the bankrupt act of 1841, c. 9. The first is, that the attachment, if it is a lien within the meaning of the second section of that act, becomes, in virtue thereof, not a contingent, or conditional lien or security, dependent for its efficacy upon a judgment being rendered in the particular suit, in favor of the plaintiff for the debt; but that it becomes de facto an absolute uncontingent and unconditional lien, which entitles the plaintiff to proceed to judgment in the same suit for the debt, although the debt is by the certificate of discharge barred as against the bankrupt, and there can be no general judgment rendered against him for the debt. The second is consequent upon the first, that the lien is equivalent to a mortgage upon the property, and entitles the plaintiff to the same rights and remedies that he would have upon a mortgage. Now I utterly deny that either of these propositions is maintainable at law upon any known principles; and it is incumbent upon the party, who asserts them, to establish their validity. In respect to the first, it is against the whole doctrine upon which attachments upon mesne process are founded, to hold that they are any thing more than a mere conditional or contingent security for the debt sued for, provided, that the plaintiff is entitled to a recovery of the debt and does actually recover it in the suit. The bankrupt act of 1841, c. 9, if the lien be saved by the second section, saves only the lien as it is, and the remedy as it is. It does not make a lien absolute, which is only conditional or contingent. It does not change a lien which is founded upon mesne process into an absolute right. It does not supersede, or control, or vary any bar to the suit, which the law either protects or recognizes. Much less does it say, that if the debt is eventually discharged by operation of law, it shall still subsist for the purpose of being satisfied in that very suit, which is a mere proceeding in personam. The bankrupt act of 1841, [5 Stat. 444,] c. 9, § 4, declares that a "discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature, whatever." This is, in substance, like the provision of the English bankrupt acts.[4] And there has never been any doubt, that, after the certificate of discharge has been obtained, it is a perfect bar to any personal action brought to recover any such debt. The certificate, if obtained pendente lite, has been as solemnly held to be a complete bar and a discharge of the debt in any personal action therefor—and may be pleaded as a plea puis darrein continuance. The authorities are full to the point, and are founded upon no reasoning peculiar to the British bankrupt laws, but turn upon the general principle, that any discharge of the debt pending the suit may be pleaded in bar of further proceedings; and that the suit becomes thereby ended. It seems scarcely necessary to cite authorities to the point. But Paris v. Salkeld, 2 Wils. 137, 139; Lovell v. Eastaff, 3 Term R. 554; Parker v. Norton, 6 Term R. 695; Tower v. Cameron, 6 East, 413; Harris v. James, 9 East, 82,—are directly in point, and fully recognize the general principle as beyond any controversy, although they turn for the most part upon other considerations. Mr. Tidd in his excellent work on Practice, (2 Tidd, Pr., 9th Ed., p. 847, c. 38,) states it as a settled doctrine; and Mr. Chitty gives us in his Pleadings the form of the plea, referring in his notes merely to such authorities as show its proper frame, (2 Chit. Pl., 3d Ed., p. 460.)[5] Since the statute of 21 Jac. I. c. 9, § 9, the question as to the effect of an attachment could not arise

[4] See 1 Deac. Bankr. (Ed. 1827,) p. 614, c. 14, § 7, and the act of 6 Geo. IV. c. 16, which, as to this point, does not differ from the prior laws.

[5] See, also, 1 Deac. Bankr. (Ed. 1827,) pp. 614, 617, c. 14, § 7.

in England; and there is no authority before that statute, which sustains the doctrine that the plaintiff under a foreign attachment could pursue his personal action to judgment after a discharge in bankruptcy pleaded puis darrein continuance. See Ex parte Foster, [Case No. 4,960.] I profess myself utterly unable to comprehend how or upon what principles a judgment can be rendered in a personal action for a debt against the defendant, when, upon the pleadings, the debt is admitted to be discharged by operation of law.

Then as to the second proposition. It is difficult to perceive what possible analogy there is between a mortgage on property, and a lien by attachment on mesne process, which ought to govern in this case. A mortgage vests a right of property in the mortgagee—a right positive, fixed, and present. It is in no just sense a contingent right of property; but a positive present transfer thereof. How can that be affirmed of an attachment upon mesne process? What property does the attaching creditor obtain in the property attached,—present, fixed, or vested? If the officer releases the property, or surrenders it to the debtor, or delivers it over to a bailee, can the creditor sue for it in an action of trover, or replevin, or in any other action in rem? There is no pretence to say, that any such doctrine exists or has been recognized by our courts. The case of property seized in execution, stands upon a much stronger ground; and yet the case of Giles v. Grover, 6 Bligh, 277, which underwent the most serious discussion by all the judges of England, establishes, that in such a case, the plaintiff in the execution acquires no property in the goods or lands seized on the execution. In truth, the officer, and the officer only, making the attachment or seizure in execution, acquires a special property therein, and he holds it only so far as the law authorizes it to be applied to the discharge of the judgment obtained by the plaintiff in the personal suit in which the attachment is made. Far different is the situation of a mortgagee of personal or real property. He has a present jus in re, and not a mere jus ad rem, and he may transfer that right to a third person. He may enforce that right against any person in possession of the property, or who subsequently acquires it tortiously as to him. His right in rem is positive, and he may maintain a suit therefor against any person, until that right is extinguished. Nay, in many cases at the common law, his right in rem continues as a subsisting right, although the debt for which it is given is extinguished or paid. In cases of a mortgage of real estate, we all know, that it is so at the common law, where the debt has not been extinguished until after condition broken. In cases of a mortgage of personal property (which is a pledge and more), the same rule applies. If the mortgage is not punctually redeemed at the prescribed time, the property, at law, vests absolutely in the mortgagee, although in equity there is a right to redeem, as there is in regard to real estate. See Story, Bailm. § 287; 2 Story, Eq. Jur. §§ 1030, 1031, and the cases there cited. But then it is suggested, that a mortgage is not discharged or extinguished by the bankrupt act of 1841; but that it may be enforced, notwithstanding the discharge of the bankrupt from the debt. Certainly this is so under the express saving of the second section of the act; and it is unnecessary to consider whether it would have been so or not without that saving. But how may that mortgage be enforced? Certainly not by an action in personam for the debt; but by an action in rem, or by a bill in equity for a foreclosure. The proceeding in such a suit does not compel the bankrupt to pay the debt for which the mortgage was given; but simply forecloses his right to redeem, unless he shall voluntarily pay the debt. It acts, therefore, not at all in personam; but solely in rem. It is, in this respect, precisely like the case of a bottomry bond given by the master of a ship for necessary supplies and repairs. It creates a lien on the ship, which may be enforced against it, but it creates no personal obligation in the owner to pay the debt. Did ever any one hear of an action in personam for a debt, secured by mortgage, where a discharge under the bankrupt law was pleaded, to which it was a valid replication, that the debt was secured by mortgage, so as to oust the debtor of his bar in that suit, and entitle the plaintiff to move a judgment against him in that suit, to be satisfied out of the mortgaged property? That, I imagine, would be a perfect novelty in jurisprudence; and yet it is in effect what is sought to be attained in cases of personal suits against a bankrupt, where there is an attachment. The truth is, that there is no just analogy between attachments on mesne process, and mortgages of property, upon which any solid reasoning can be founded. They are wholly different in their nature, character, and operations, for different objects, and wholly diverso intuitu. They cannot be assimilated to each other by any effort of ingenuity or learning —at least, not in my judgment. We all know what are the ordinary proceedings in bankruptcy, in cases of mortgages. If the mortgagee chooses to come in under the bankruptcy, and surrender his mortgage for the purpose of a sale of the property, the property is sold, and he will be entitled to prove as a creditor for the surplus due him, beyond what the proceeds of the sale will satisfy. If he does not so come in, and the debtor has obtained a lawful discharge and certificate thereof, the mortgagee cannot proceed against him by a personal action for the debt. His sole remedy is to bring his bill for a foreclosure (if the assignee does not choose to bring a bill to redeem), making the proper persons parties, and he will then be entitled to a foreclosure, unless the money is paid by

the assignee or other party in interest, within the time prescribed by the court. But in case of a foreclosure obtained, the creditor must content himself with what the property is worth, and has no farther remedy for the debt against the person or other agent of the bankrupt. See 1 Deac. Bankr. (Ed. 1827,) p. 198, c. 9, § 6, etc., where the principal cases are cited. See, also, bankrupt act of 1841, [5 Stat. 444, 447,] c. 9, §§ 5, 11. I retain, therefore, the opinion, which I have already expressed in the case Ex parte Foster, and the other cases already cited. And with the greatest respect for the opinion of the learned court of New Hampshire, upon this point, in Kittredge v. Warren, I dissent from it toto animo. It has not relieved my mind from a single doubt. It has met the question in a manly and direct manner; and reasoned out the case, as far as it can be reasoned on that side, fully and fairly. It has failed to convince me; and I shall, therefore, act upon my own judgment, until the supreme court of the United States has instructed me otherwise.

It remains for me to say, what answers ought to be made in respect to the questions adjourned into this court. But before I proceed to state, what those answers should or might be, it may be proper to make a few observations upon the practice, which ordinarily regulates the action of the district court in cases of this sort. When a personal action, in which an attachment has been made on the writ, is pending in a state court, at the suit of any creditor, and the period has not passed at which the bankrupt is properly in court, and is entitled, if he obtains a discharge in bankruptcy, to plead it as a bar of the suit, in the nature of a plea puis darrein continuance, it becomes the duty of the court, upon his own application, or that of his assignee, by petition, to grant an injunction against the creditor, to stay further proceedings in the suit until the further order of the court. If the creditor does not reside within the district, the injunction should or may be prayed against him, and his agents and attorneys within the district, to stay further proceedings; and in such a case, a service of the injunction upon such agents or attorneys will be a service upon their principal, and bind him as well as them, personally. If, notwithstanding, the creditor, or his agents or attorneys, should, without the leave of the district court, proceed to take further steps in the cause, it will be a breach of the injunction, for which they will be liable to be committed for a contempt. If no discharge is obtained by the bankrupt, then the creditor may, by petition, apply to the district court to dissolve the injunction; and, if dissolved, the creditor may then proceed to perfect his attachment by judgment and execution. If the bankrupt obtains his discharge, and pleads it as a bar, and the creditor means to contest its validity, as by replying fraud, or that the debt is not otherwise within the discharge, then the creditor should apply to the district court for leave to proceed in the cause and to try the validity of the discharge by a trial in the state court, which is granted as a matter of course, upon suitable proof and affidavits. If the validity of the bar is established by the verdict of the jury, that, of course, ends the right to proceed in the suit, unless a new trial is granted. If the discharge is avoided for fraud, or other matter in pais, then, of course, it is no bar, and there is an end of the defense, unless a new trial is granted. But, if the validity of the discharge, as such, is not contested; and the state court should, as in the case of Kittredge v. Warren, [supra,] upon a demurrer, hold the discharge invalid as to the property attached, I have no doubt, that it would be the duty of the district court to grant an injunction against the creditor, his agents, attorneys, and the sheriff holding the attached property, to restrain the creditor from proceeding to judgment; or, if he has proceeded to judgment and execution, to restrain the sheriff from levying on the property on the execution; and, if the property has been sold by the sheriff, to compel him to bring the proceeds into court. And it will be no excuse or justification to the sheriff, after notice, that he has paid over the proceeds to the creditor, or to his agents or attorneys. And the proceeds may be followed by the proper district court into the hands of the creditor, and his agents and attorneys, wherever he or they may reside. Such I do not scruple to affirm is, and should be, the practice. It would be an utter renunciation of the rightful authority and jurisdiction of the courts of the United States to allow any creditor to avail himself of any unjust and unlawful advantage, merely because his suit is depending in a state court. The laws of the United States are, to the extent of the constitutional limits, paramount to the authority of those of the states. The courts of the United States are the appropriate expounders of the laws of the United States; and are not bound to follow the exposition of these laws by the state courts, unless so far as they approve themselves to their own judgment.

Such being my views with regard to the appropriate modes of proceeding in cases of this nature, it seems to me, that the order of the district court, directing the sheriff and his deputy to deliver up the property, might involve them in some embarrassment and a double responsibility, which might be avoided by a somewhat different procedure. I understand, indeed, that already an injunction has gone against the plaintiffs in the various suits in the state court referred to in the petition. But as it is neither suggested, nor stated upon the case adjourned into this court, no notice of it can be here judicially taken. But this much I may say, that if such an injunction has been awarded, it is not competent for the credit-

ors to take a single step in their suits in the state court, unless under the direction and order of the district court; for otherwise it would be a breach of the injunction.

The answers which I shall direct to be sent to the district court, upon the adjourned questions, are as follows:—as to the first question. It is the opinion of this court, (1). That an attachment of property under mesne process bona fide made before a petition filed in bankruptcy by the debtor, is not a lien or security upon the property, (although valid by the laws of New Hampshire), which is within the true intendment of the proviso of the second section of the bankrupt act of [August 19,] 1841, [5 Stat. 442,] c. 9. (2). If it were, it would not entitle the creditor to proceed to a judgment in the suit, in which the attachment is made, if the debtors have, pending the proceedings, become bankrupts under the act, and have, pending the proceedings, lawfully and bona fide obtained their certificates of discharge from their debts, provable under the bankruptcy, and the same is pleaded as a bar to further proceedings in the suits.

As to the second question. It is the opinion of this court, that, in the present state of the proceedings and pleadings in the suits pending in the state court, as stated in the petition, justice does not at present require, that an injunction or order should be awarded by the district court, directing the petitioners to deliver up the property attached, to the assignee of the bankrupts; and if, as suggested, such an injunction or order has been awarded by the district court, it ought to be modified, so far as to permit the same property to remain in the hands of the petitioners, until the further order of the district court, and to await the final action of the state court in the said suits. And that in case the state court, not contesting, but admitting, that the discharge of the bankrupts was obtained bona fide and without fraud, and as such is valid as a discharge from the debts provable under the bankruptcy, should nevertheless proceed to award judgment for the plaintiffs in the said suits for their debts so provable, on account of such attachments therein, then that such judgment ought to be treated as a nullity by the district court, and as not binding therein. And that, therefore, it will become the duty of the district court, upon the petition and application of the assignee of the bankrupts therefor, to direct an injunction to the plaintiffs in such suits respectively, (if such injunction has not already issued,) prohibiting them respectively from levying any executions on the said judgments, or any of them, upon the property attached in the said suits; and at the same time to direct an injunction to the petitioners, prohibiting them or either of them from proceeding to levy the same executions on the property so attached, or any part thereof, but to deliver up the same forthwith to the assignee of the said bankrupts, to be distributed as a part of the assets of the said bankrupts. And if any of the said executions shall have been by them levied upon the said property attached, then to pay the moneys raised thereby into the said district court. And in case of the disobedience of such order or injunction by the said plaintiffs, or the petitioners, then the district court ought to proceed to enforce obedience thereto, as in other cases of the violation of injunctions.

[NOTE. Reversed by the supreme court in Peck v. Jenness, 7 How. [48 U. S.] 612, on the ground that the attachment constituted a lien, within section 2 of the act of 1841, preserving all liens which may be valid by the laws of the state respectively.]

Case No. 1,279.

BELLOWS v. HALLOWELL & AUGUSTA BANK.

[2 Mason, 31.] [1]

Circuit Court, D. Massachusetts. May Term, 1819.

TRIAL—SPECIAL VERDICT—AMBIGUITY—CORPORATIONS—EXPIRATION OF CHARTER—CONTINUATION—NEW CHARTER—OBLIGATIONS OF OLD CORPORATION.

1. Where a special verdict is imperfect by reason of ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a venire de novo ought to be awarded. Aliter where the plaintiff has only stated a defective title or case.

[Cited in Garland v. Davis, 4 How. (45 U. S.) 147. See, also, U. S. v. Collier, Case No. 14,833; Graham v. Bayne, 18 How. (59 U. S.) 60; Suydam v. Williamson, 20 How. (61 U. S.) 427.]

2. Where a new bank was incorporated with the same name as an old bank, whose charter was expiring, the new bank is not responsible for the notes of the old bank, although the major part of the stockholders may be the same in each bank.

[See Bank of U. S. v. Lyman, Case No. 924.]

3. Whether a charter be a continuation of an old corporation, or the creation of a new corporation, must be decided, not by the persons who are stockholders, but by the legislative intent in the act of incorporation.

4. The charter granted by the Massachusetts act of 23d of June, 1812, c. 47, to the Hallowell and Augusta Bank, is not a continuation of the old corporation of that name.

5. The mere receipt by the officers of a new bank, of the bills of an old bank of the same name, and paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank.

[Error to the district court of the United States for the district of Maine.]

At law. This was a writ of error upon a judgment of the district court of Maine, in an action of assumpsit, brought by the plaintiff to recover of the defendants the amount of certain promissory notes issued by the Hallowell & Augusta Bank. The facts appear from the following special verdict, given in the district court, [unreported,] upon

[1] [Reported by William P. Mason, Esq.]

which judgment was rendered for the defendants.

The jury find specially the following facts, viz: That the bills or notes mentioned in the schedule annexed to the writ were duly issued by the president, directors and company of the late Hallowell & Augusta Bank, which was incorporated on the sixth day of March, A. D. 1804, the act of incorporation of which bank is by consent of parties made a part of this verdict; that on the 23d day of June, A. D. 1812, the defendants were duly incorporated as a banking company; the act of incorporation thereof is by consent of parties made a part of this verdict; that the bills or notes mentioned in the schedule annexed to the writ came lawfully into the hands of the plaintiff, and that he was the lawful owner and bearer thereof at the time of the commencement of this suit; that the payment of the same bills or notes was demanded by Edward Oxnard, the plaintiff's agent, before the commencement of this suit; that from and after the organization of the defendants' bank under the aforesaid act of incorporation, until the thirtieth day of September, A. D. 1814, the defendants, by their officers, received and issued the bills of the late Hallowell and Augusta Bank, and of other banks in good credit, without distinction, paying them out on checks and loans in the same manner, as they did the bills of their own bank, and said other banks; that previous to the said thirtieth day of September, A. D. 1814, the officers, viz. the cashier and several of the directors of defendants' bank frequently, and as often as occasion required, declared to all persons presenting the bills of the late Hallowell and Augusta Bank for payment, at the banking house of defendants, that there was no distinction or difference between the bills issued by the said late bank and those issued by defendants, that both were equally binding upon, and would be paid by defendants, that these declarations were made by several of the officers of defendants at their banking house, and during the hours of business, but such officers were never specially authorized by any vote of the corporation to make such declarations, and there is no proof that the other directors or stockholders knew of such declarations; that in consequence of these declarations and doings of the defendants' agents as aforesaid, and the specific payments hereafter mentioned, the bills of the said late bank, were, prior to the said thirtieth day of September, current and of equal value in the market and in the community with the bills issued by defendants; that the charter of said late bank expired in the month of October, A. D. 1812, and was continued in existence for certain purposes, by another act of the twenty-fourth day of June, 1812, which by consent of parties is made a part of this verdict; that said late Hallowell and Augusta Bank continued to pay specie for their bills up to the thirtieth of September aforesaid; that when application was made to the legislature of Massachusetts for the act of incorporation of the existing bank it was agreed to take the name of "The Hallowell and Augusta Bank." And that the reason assigned by the agents of petitioners therefor, was, that they wished to continue their former business, without interruption, but that reason was not assigned in the petition; that the president, cashier and board of directors, as far as the same was filled, of defendants' bank, were also the president, cashier and directors of the said late Hallowell and Augusta Bank, until the month of October, A. D. 1814; that from the month of October, A. D. 1812, to the month of October, 1814, the defendants' officers had knowledge that the bills of the said late bank, and of other banks as aforesaid, had been received, paid out, and put into circulation in manner as aforesaid, by the officers and agents; and that no vote or act of their corporation was passed or done, to express their dissent or disapprobation thereof until after that time; that there were no accounts kept in the books of defendants' bank, between them and the late Hallowell and Augusta Bank, from the month of October, 1812, to the month of October, 1814; nor were there any accounts kept with any other bank, except those arising from specie deposits; that some time between the month of October, A. D. 1813, and the month of January preceding, dividends of seventy five per cent. of the capital of the said late Hallowell and Augusta Bank were made and paid over to the stockholders thereof; that on the eighth day of September, A. D. 1812, the following vote was passed by defendants. viz.: "To admit as associates of Benjamin J. Porter, Nathaniel Dummer, Thomas Agry, in the Hallowell and Augusta Bank, incorporated June twenty-third, A. D. 1812, all the stockholders in the old bank, to the amount of three quarters of the number of shares they severally hold therein, on their paying the sums required by the corporation." And that at the same time the defendants directed their cashier to inform the stockholders of the said late bank, that they were entitled to three-fourths their number of shares in defendants' bank, on their paying in silver and gold, twenty-five dollars on each share on the first day of October then next, which was then paid, and the residue of said capital was paid in October 1st, 1813; that on the twenty-fifth day of November, 1814, the defendants passed the following vote, at a legal meeting of their directors, viz.: "That the cashier be directed, as soon as may be, to call on such persons as are now indebted on note or otherwise to the Hallowell and Augusta Bank, incorporated March 6th, 1804, and request them to renew their notes payable to the Hallowell and Augusta Bank, incorporated June, 1812, and that on receiving the same, with good security to the satisfaction of the directors, the amount thereof be passed to the credit of the said old Hallowell

and Augusta Bank, in part payment for bills of said bank, taken up and paid by said institution," the debt of the old to the present bank being sixty-five thousand dollars; that on the tenth day of December, 1814, the defendants passed the following vote, viz.—"Whereas, on the eighteenth day of July, now last past our president and directors did borrow of William Bartlett, Esquire, of Newburyport, the sum of fifty thousand dollars, for our use and benefit, and did execute to said Bartlett a bond for the same sum, signed by them, to wit. Benjamin J. Porter, Nathaniel Dummer, Thomas Agry, William H. Page, William Nichols, and Jeremiah Dummer, cashier, for and on behalf, and to the end, that said sum should be paid as speedily as possible; voted, that we do consent and agree to said bond, given as aforesaid, and confirm and fully ratify the transaction, and make the debt our own, and that our president and directors are hereby authorized and directed to pay and discharge the aforesaid debt, and any interest due thereon, out of the funds and property of our said corporation, as soon as the same may be conveniently done;" that the articles of the by-laws of defendants, which are hereto annexed were duly passed and enacted; and that the same, by consent of parties, are a part of this verdict; that at the time the defendants' bank was organized and went into operation, viz. in October, 1812, several persons were stockholders, who never had any interest in the old bank; that during the charter of the old bank, and its continuance by virtue of the act of twenty-fourth June, 1812, the books, accounts, funds and transactions of said corporation were kept separate and distinct, in all respects, from those of defendants' bank, excepting so far as the contrary may appear from the facts herein found. But the business of both banks was transacted in the same building for two years, and afterwards the business of the old bank was done in a separate building, and in a different part of the town. [Judgment affirmed.]

Davis, Sol. Gen., for plaintiff.

The object of this suit is to enforce payment by the defendants of the bills of the former bank.

1st. The present bank is nothing more than a reincorporation of the former bank, and is therefore by law entitled to the privileges and liable for the debts of the former corporation. This corporation is different in its nature and objects from the ancient corporations which have been the subjects of judicial investigation, and in relation to which the rules of law have been settled, such are all that Blackstone mentions. There is little resemblance between a corporation of a town, city, or of the ancient spiritual and eleemosynary corporations, and one established for commercial or monied objects; the exercise of the corporate franchise is wholly different, as will appear from a further examination; indeed as stated by Chief Justice Marshall, in a former case, "the qualities and disabilities of ancient corporations, are not to be ascribed to such a corporation as this, these are precisely what the act of incorporation makes them."

The first difficulty that we may be supposed to meet from an inspection of the several acts referred to in the verdict is, that there were supposed to exist two incorporations, for the same objects, at the same time: this difficulty is easily surmounted. By the act of the year 1804, the old bank expired October 1st, 1812. By the act of the year 1812, the present bank was to commence on that day, and the first instalment to be then paid. By the act of the 24th of June, 1812, the old bank was in fact dissolved after the 1st of October, 1812. Its powers as a bank then ceased, and it was continued for special and necessary purposes only. When there is an existing, acting corporation, another cannot be created, with the same powers and co-extensive jurisdiction. But when the end or purpose for which an institution is created ceases, the institution ceases.

Smith's Case, [King v. Mayor of London,] 12 Mod. 19. The mutilated relict of the old corporation was no bar to the new one. All the charters granted recently in England are confirmations of old charters, when the old corporations were dead. In the case of King v. Pasmore, 3 Term R. 199, the incorporation was granted to new corporators, but it was held to be the same corporation if accepted. The old corporations were revived, resuscitated by the new charters, yet they were considered to be successors and the same, for certain purposes, for rights and liabilities. In the case now before the court a new incorporation was prayed for, obtained and accepted, with the same name and the same corporators, so far as they are mentioned; and the reason assigned is, to continue their business without interruption. This new bank was to go into operation on the day the old bank ceased, and the first instalment to be paid on the first of October, 1812, at the same place, in the same building, and for the same objects; and with a special provision, that the directors of the old bank might be directors of the new one. The president and cashier were the same in both banks, and the defendants shew by their corporate acts, that they considered themselves as successors of the old bank. All the stockholders of the old bank were admitted, by a corporate act, to be stockholders of the new bank; and this before the new bank went into operation. There was a vote directing the cashier to notify the stockholders of the old bank that they were entitled to three quarters of the number of shares in the new bank, and the capital of the old bank was divided soon after the new bank was organized. By a vote of the directors of the new bank, the debts of the old bank were called in and made payable to the new bank.

From this view of the facts it seems clear, that both the legislature, and the corporation itself, considered that the new bank was successor to the old, and that it is a mere revival or reincorporation of the old bank. It follows as a clear principle of law that they are liable for the debts as well as entitled to the franchises of the old corporation.—Mayor, etc., of Colchester v. Seaber, 3 Burrows, 1866. In Luttrel's Case, 4 Coke, 87, it is said, a corporation having franchises, &c. by grant, and afterwards incorporated by another name, the new body will enjoy all the franchises and hereditaments of the old one.

2d. There appears sufficient matter in the special verdict to raise a presumption in law, that the defendants assumed the payment of the bills of the former bank. It shall be presumed from the facts already stated, viz. their acceptance of the new charter—their taking a transfer of all the property—their taking the funds, and debts, and stock of the old bank—their actually paying Bartlett's debt, which was for the old bank—and their crediting the old bank with the interest of that debt—their taking the bills of the old bank and putting them into circulation after the first of October, 1812—and this they did in their capacity of officers of the new bank, and they are estopped from saying that they did it as officers of the old bank, because the law of the 26th June prohibited this under severe penalties. By an express article in the charter, all bills issued from the bank, signed by the president, shall be binding on the bank. The declarations of their agents in the discharge of corporate duties, express the same. The declarations of the cashier and directors as often as occasion required made at the banking house of the defendants, during business hours, to all persons presenting the old bills for payment, that both bills were equally binding on the new bank, in consequence of which declarations of the agents of the defendants, the old bills were current. The officers of the bank were, from the nature of the corporation, legal agents of the corporation for all their transactions, and there can be no doubt that these transactions were within the scope of their agency. It appears also from the verdict, that the defendants were acquainted with these declarations of their agents, and therefore assented to them. This knowledge of the defendants appears also from the by-laws. The statement and representation of an agent within the scope of his authority, are evidence against the principal and equal to his own act. Phil. Ev. 73. In the case of agents of corporations, it shall be intended that they act by deed when done. 2 Bac. Abr. p. 13. When the acts of the agent of a bank have been sanctioned by his principals, and his contracts performed, it carries the highest evidence, that he was lawfully authorized. Rex v. Bigg, 3 P. Wms. 419. A third person cannot produce the evidence that he was authorized, the provisions of the charter concern only the corporation, if they do not conform to their rules, it cannot deprive third persons of their rights. Persons doing business at the bank, are not bound to enquire whether the corporation act according to their own laws, if they exceed their powers they are answerable to the corporation, third persons, strangers, are not to be deceived and to suffer for the fraud of the corporation's agents. The rule of law is, that if one of two innocent persons must suffer, by the fraud of a third person, it shall be that one who put it in the power of the third person to commit the fraud. The confessions of individual members of a corporation, when made in the exercise of corporate duties, may be received in evidence. Hartford Bank v. Hart, 3 Day, 493. If a man pays money with a full knowledge of all the facts, he cannot recover it back. All the negotiations of these officers, prior to September, 1814, have been sanctioned by the defendants; and can the new bank recover back the money paid for their old bills, prior to that time? It appears in the case of Beatty v. Marine Ins. Co., 2 Johns. 114, that if the secretary had stated the loss to the number of officers required by the act to agree to pay it, they would have been held to pay, yet this was altogether a verbal arrangement, but within the agency of the officers of the corporation. When a reasonable expectation is excited, this of itself is a good consideration for a promise—but in this case there was a valuable consideration for the promise or liability to pay the old bills, viz. the profits arising from the discounts as valued by the defendants on putting their notes into circulation.

Wm. Sullivan, for defendants.

This is assumpsit for money had and received to the use of the plaintiff; and to support his declaration, the plaintiff exhibits bills dated at various times, from January 6th, 1806, to August 15th, 1812. And the question is, whether these bills were the promises, either express or implied, of the bank incorporated on the 23d day of June, 1812. The special verdict finds that the bills were issued by the bank which was incorporated March 6th, 1804; the charter of which expired on the first Monday of October, 1812. It does not appear that the bills declared on were ever in the bank now sued; or that the plaintiff possessed them until the commencement of his action. It consequently does not appear that the new bank ever issued these bills in any way. The question then arises whether these banks were so far one and the same, that the promissory notes of the one are to be deemed and taken to be the promissory notes of the other. If so, it must be either because the charter of the new bank makes the new bank responsible for the bills of the old bank, or because some act has been done by the new bank whereby it is bound to pay all the bills issued by the old bank.

It is not pretended that there is any express provision in the act of incorporation, whereby the new bank is made responsible for the debts of the old bank; but it is said that the new bank is but a reincorporation of the old one. In 1812, the charters of many of the banks in Massachusetts expired, and in the same year new institutions were incorporated, many of which took the names of those which had ceased to exist. This new bank was incorporated in June, 1812; but the charter of the old did not expire until October of the same year; and was then continued, for certain purposes, by an act passed by the legislature, in the month of June previous. There were stockholders in the new bank who had no interest in the old bank. The books, accounts, funds and transactions of the two banks were left entirely distinct, and the business of the two banks for a part of the time transacted in different buildings and at different parts of the town. If the argument of the plaintiff's counsel is correct, then there is one institution having two distinct charters, expressing different purposes, to expire at different periods, having different corporators, different funds, and alike only in its officers.

Secondly. Has the new bank done any act whereby it has become liable to pay all the bills issued by the old bank, remaining unpaid. A corporation is a creature of the law —it has no power but that which its act of incorporation confers. A bank is an association of individuals, acting under certain corporate powers, who become interested in the capital stock according to an established ratio. They agree that the stock thus jointly owned, shall be managed according to the provisions of the charter, and the by-laws which the corporation see fit to adopt. The usual modes of making contracts are by seal, by note, and by making a promise in writing signed by the president and cashier. And a corporation cannot contract ,in any other mode. King v. Chipping Norton, 5 East, 239; 1 Bl. Comm. 475; 6 Vin. Abr. 268, 292, 287; 3 Salk. 103; 1 Kyd, Corp. 449, 259. The promises declared on are not made in either of these ways, supposing the corporations to be distinct. An opinion given by the officers of the bank, or their assurances, are not acts of the corporation and are not binding upon it. Beatty v. Marine Ins. Co., 2 Johns. 114; Head v. Providence Ins. Co., 2 Cranch, [6 U. S.] 166; 1 Kyd, Corp. 261; Rex v. Bigg, 3 P. Wms. 419; King v. Pasmore, 3 Term R. 199, 241. If they could in any manner be considered as promises, they were made without a consideration, and on that account void. They were also promises to pay the debts of another corporation, and therefore within the statute of frauds. It must be proved by some vote, or other legal act of the corporators, that they meant to adopt these bills as their own. The officers of the corporation can only act in conformity to the authority given them; and if they did issue these notes with a view to have them considered as their own notes, this would not bind the corporation, unless it could be shown that authority either express or implied was given to these officers, by the corporation, so to do.

STORY, Circuit Justice. If the special verdict in this case be imperfect, by reason of any ambiguity, or uncertainty, so that the court cannot say for which party judgment ought to be given, the judgment of the district court ought to be reversed, and a venire facias de novo awarded for a new trial at the bar of this court. Rex v. Hayes, 2 Ld. Raym. 1518; Rex v. Huggins, Id. 1574, 2 Strange, 882; Rex v. Woodfall, 5 Burrows, 2661; Goodtitle v. Jones, 7 Term R. 47; Bird v. Appleton, 1 East, 111, note a; Gibson v. Hunter, 2 H. Bl. 187; Town of Shrewsbury v. Kynaston, 7 Brown, Parl. Cas. 396, 2 Strange, 1051. But if the verdict be not ambiguous or uncertain in itself, but the plaintiff has stated a defective case or a defective title, then the judgment ought to be for the defendants, and a venire de novo ought not to be granted. Bentley v. Smith, 3 Smith, J. P. (Eng.) 17. We cannot say upon this verdict that there is any ambiguity or uncertainty in the facts found; the defect, if any, (which will presently be considered,) is in the title set up by the plaintiff for a recovery. We are driven therefore to consider the sufficiency of that title, as it stands upon the record.

The plaintiff contends for a reversal of the judgment, in the first place, because the notes in question were made by, and are obligatory upon, the defendants in their corporate capacity. If this ground fail him, he next contends that the defendants have adopted and made the notes their own by the declaration and conduct of their officers. If this position cannot be sustained, he contends in the last place, that the defendants have the funds of the old bank in their possession appropriated to the payment of the notes of the old bank, and that the plaintiff, as holder of the notes now in question, is entitled to so much of these funds as equals the amount of his notes, as money had and received to his use.

The first ground rests on the suggestion that the old bank and new bank are the same corporation, the new charter being but a reincorporation or rather a continuation of the charter of the old bank, which would otherwise have expired by its own limitation. If the premises were well founded, the conclusion would certainly follow, that the new bank is liable for the debts of the old bank. Mayor, etc., of Colchester v. Seaber, 3 Burrows, 1866; Scarborough v. Butler, 3 Lev. 237; Rex v. Pasmore, 3 Term, R. 199; Luttrel's Case, 4 Coke, 87. But we are called upon to admit these premises, not upon the

plain and positive enactments of the statute incorporating the new bank, but upon the collateral facts, that the names of both corporations are the same, the officers are the same, and a majority of the stockholders are the same; and that the business of the old bank was for a time done, and its debts paid, by the new bank. It is certainly true that a corporation may retain its personal identity, although its members are perpetually changing; for it is its artificial character, powers and franchises, and not the natural character of its members, which constitute that identity. And for the same reason corporations may be different, although the names, the officers, and the members of each are the same. An insurance company composed of the same natural persons and officers, and with the same name as an existing incorporated bank, would still be a different corporation from the bank. The similarity of name, of officers, or of members, or even of objects, cannot then, per se, establish the identity of corporations created at different times, by different charters, and having a distinct independent being. And one corporation may transact the business and pay the debts of another corporation without thereby merging in the latter its distinct corporate existence. There is indeed a repugnancy in the statement of the proposition that two corporations are in point of law the same, for it would at the same time establish that there is but one corporation.

To ascertain whether a charter create a new corporation, or merely continue the existence of an old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporators. In the present case, the charter of the old bank was granted by the act of the 6th of March, 1804, and was to continue from the first Monday of October, then next ensuing, until the expiration of eight years. 3 Mass. Gen. Laws, 206. Its existence was therefore limited to the first Monday of October, 1812; and by an act of the 24th of June, 1812, c. 57, all banks incorporated under the authority of the commonwealth, whose corporate powers were limited by law to or at any time before the last day of October then next ensuing, were authorized to continue corporations until the first Monday of October, 1816, and no longer, for the sole purpose of enabling such banks gradually to settle their concerns and divide their capital stock. And the act contains an express prohibition of their acting as corporations for banking generally. This certainly shews a determination on the part of the legislature not to renew or to perpetuate the existence of any of the banks within the purview of the act; and among these the old bank was unquestionably included. The charter of the new bank was granted by an act of the 23d of June, 1812, c. 47, while the old bank was in existence. It does not purport upon its face to be a grant to an existing corporation, but to private individuals. Its capital stock is less by $50,000 than that of the old bank. The stock is to be held, not by the stockholders of the old bank, but by certain persons named in the act, and their associates and assigns. The act refers also to the old bank, as an existing corporation, and declares, not that the directors of the old bank shall be the directors of the new, but that "any director of the Hallowell and Augusta Bank, now existing, may be eligible as a director of the bank hereby established." It further declares that the new bank may take, receive and hold, by assignment, any mortgages held by the old bank "which may be assigned and taken by agreement between the two corporations." This clause affords abundant evidence that the new charter was not granted to the old corporation, for it contemplates assignments of mortgages between the two banks as distinct corporations; and it would be utterly absurd to say that a corporation might contract with, or make conveyances to, itself. Upon the very face of the charter, then, enough appears to shew, that the legislature contemplated the erection of a new corporation. And if the language had not been so express, the same must have been the conclusion of law; for every charter must be taken to be a grant of a new corporation, unless it be granted to an existing corporation. If indeed the new charter had been granted to the old bank, it would not have been binding until it was accepted by it; and there is not the least pretence to say upon this record, that the old bank ever accepted the new charter, or could by law have claimed it as a grant in its corporate capacity. There is then an end of the argument raised on the first point.

And the second point is upon this record equally untenable. For assuming that the declarations of the officers of the bank in respect to matters within the scope of their duty will bind the corporation, it is not found, and certainly cannot be intended upon this special verdict, that such declarations were within the scope of their duty, or were made with reference to the identical notes now in question. Much less is it found as a fact, (which is necessary to the legal inference,) that the notes in question were adopted by the new bank and issued as its own. If it had been found, that the declarations were made in reference to these notes in particular, and that such declarations were within the scope of the duty of the officers of the bank, there would have been some color to have awarded a venire de novo to have found the other fact. Or if the bank officers had actually issued these notes, as cash from the bank, in payment of checks or other dues, with the express declaration that they were good and binding on the bank, and that the bank would guarantee them, I am not prepared to say, that such declarations in reference to the notes held and

issued by the bank would not be within the scope of the duty of the cashier, and would not bind the bank, so far, that if the notes turned out unproductive, the receiver might maintain an action for money had and received against the bank, upon the ground that the bills were not, under such circumstances, a good payment of such checks or other dues. But no facts are found in this special verdict that will enable us to arrive at such a conclusion.

The third point wholly fails for want of facts to sustain it; and it may therefore be at once dismissed.

The questions in this cause have been discussed and decided in the supreme court of this state in another cause, (Wyman v. Hallowell & Augusta Bank, 14 Mass. 58;) and I may therefore be well saved a more minute examination of the principles applicable to them, since I entirely concur in that decision.

Let the judgment be affirmed.

Case No. 1,280.

BELMONT v. LAWRENCE.

[3 Blatchf. 119.][1]

Circuit Court, S. D. New York. Dec. Term, 1853.

CUSTOMS DUTIES—APPRAISAL AND ENTRY—UNDERVALUATION—PENALTY.

Where an invoice of quicksilver from London did not show that the article was the produce of Spain, and its invoice value was raised, by appraisal, to its true value in the London market, and the collector imposed duty on the additional value, and a penalty for the undervaluation, and the importer had not proved or offered to prove, before the appraisers or the collector, that the quicksilver was the produce of Spain: *Held*, that the additional duties and the penalty were properly imposed and collected, although the quicksilver was in fact the produce of Spain.

[See Hertz v. Maxwell, Case No. 6,432; Morris v. Maxwell, Id. 9,834; Roller v. Maxwell, Id. 12,025; McCall v. Lawrence, Id. 8,672.]

At law. This was a suit commenced in the supreme court of New York, [by August Belmont against Cornelius W. Lawrence,] and removed into this court by certiorari, to recover back an excess of duties exacted by the defendant, as collector of the port of New York. The plaintiff, in November, 1846, imported from London 500 bottles of quicksilver, invoiced there September 18th, 1845, at 3s. 6½d. per pound. On appraisal at the custom-house, the price was raised to 4s. 6d. per pound, as the true value of the article in the London market. An additional duty and penalty, amounting to $977.73, were paid November 28th, 1846, under a protest, "that the value stated in the invoice is the true Spanish market value of the goods." A witness on the trial testified that the quicksilver was the produce of Spain. But no evidence was given that that fact was made known to the appraisers or to the collector, (although it might reasonably have been inferred from the testimony of one of the appraisers that they understood that the quicksilver was the produce of Spain), nor did the evidence show what was the market value of the article in Spain. [Judgment for defendant.]

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The court cannot look beyond the proofs set forth in the case for facts governing the rights of the parties. The invoice gives no intimation that the article was the produce of Spain, nor does the plaintiff show that he proved it to be such to the appraisers, or offered to make such proof to them or to the collector. He is bound to show that that fact was within their knowledge, or that they refused to receive evidence of it, before they can be charged with having illegally appraised the goods and assessed the duties. Had it been proved before them that the goods were the produce of Spain, the valuation would have been erroneous, and the imposition of extra duties unjustifiable. There is no proof before the court impeaching the justice of the appraisal, or the authority of the collector to impose and collect the additional duties. If the plaintiff is entitled to relief, it must be had by application to the treasury department. Judgment for defendant.

Case No. 1,281.

BELMONT v. TYSON.

[3 Blatchf. 530;[1] 36 Hunt, Mer. Mag. 202.]

Circuit Court, S. D. New York. Sept. Term, 1856.[2]

SHIPPING—CHARTER PARTY—CONSTRUCTION—CUSTOM—ARBITRATION.

1. Where a vessel was chartered, by A. to B., to carry a full cargo of timber from Apalachicola to Liverpool, at a specified freight per load of so many feet, payable at Liverpool, with a stipulated demurrage for detention, and it appeared that she took on board, in the harbor of Apalachicola, all she could safely take, in view of her draft of water, and then went outside to a proper place to complete her loading, she drawing, when fully laden, from two to three feet more water than the greatest depth on the bar, and the charterer claimed that he was not bound to put on board any cargo outside: *Held*, that the charterer was chargeable with knowledge of the tonnage and draft of water of the vessel, and of the state of the harbor; that the parties must be presumed to have understood that the vessel was to go outside to finish her loading; and that the charterer was liable for the stipulated demurrage, while the vessel was detained outside, waiting for cargo.

[Cited in Isaksson v. Williams, 26 Fed. 645. See, also, Thornton v. Carson, 7 Cranch, (11 U. S.) 596.]

2. *Held*, also, that the charterer was liable to pay, at Liverpool, the stipulated freight,

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

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

[2] [Affirming Case No. 14,316.]

without reference to any custom there, as to deducting for defective pieces of timber.

3. *Held*, also, that an arbitration entered into, at Liverpool, between the consignee of the vessel and the consignee of the cargo, as to the rule of measurement of the timber, which resulted in an award in favor of the charterer, was not binding upon the charterer, and that, therefore, it could not bind the owner of the vessel.

[Error to the district court of the United States for the southern district of New York.]

At law. This was a writ of error to the district court. [William] Tyson brought a suit in that court against [August] Belmont, who was consul of the emperor of Austria, to recover damages for the breach of a charter-party, made at New York, January 31st, 1848, by which the ship Probus was chartered by Tyson to Belmont, for a voyage from New York to Apalachicola, and thence to Liverpool. The charter was of the whole of the vessel. By it, Belmont agreed to furnish her with a full cargo of timber, one half of the cargo to consist of spars 64 to 80 feet long, 23 to 31 inches diameter at the butt, and 15 to 20 inches diameter at top; the other half to consist of square timber, 25 to 50 long, and 12 to 18 diameter, and deck plank, with the necessary quantity of small pieces for stowage, consisting of pine, oak, and cedar. Belmont guaranteed that the whole of the cargo should be ready in Apalachicola on the arrival of the vessel, and that it should be sent to the vessel as fast as the captain might require, and the state of the weather might allow; and, in case the vessel was longer detained, Belmont agreed to pay demurrage, at the rate of 100 Spanish milled dollars per day, for every day's detention, which should happen by his fault, or that of his agent. The freight was to be eighty shillings, British sterling, per load of fifty feet, string measurement, with five per cent. primage, payable immediately on the landing of the timber. At the trial, before Betts, District Judge, in February, 1852, the jury found a verdict for the plaintiff for $7,484.24. [Tyson v. Belmont, Case No. 14,316.] The breaches alleged were the failure to have the cargo ready at Apalachicola; the failure to furnish a full cargo; and the detention of the vessel eighteen days at Apalachicola, waiting for cargo. After judgment, Belmont sued out a writ of error from this court. [Affirmed.]

[For proceedings on motion to amend the action by changing its form from debt to covenant, and to amend the declaration by striking out the name of Jans C. De Vries as plaintiff, see Case No. 14,315a.]

Daniel Lord and Jeremiah Larocque, for plaintiff.

Francis B. Cutting, for defendant.

NELSON, Circuit Justice. I. One of the principal questions arising in this case is, whether or not, according to the true interpretation of the charter-party, the charterer was bound to furnish cargo for the vessel outside of the west pass into the harbor of Apalachicola? The judge charged that, if the jury found that the vessel was as deep as it was prudent to load her inside of the pass, and that the master went to a proper place outside in order to complete the lading, the parties must be presumed to have understood that the vessel was to go outside to finish loading, as, upon the contract, she was to have a full cargo. The two entrances into the harbor are called the east and west passes. The east pass will enable vessels to enter drawing some sixteen feet of water; the west those drawing about thirteen. The ship, in this case, entered the east pass, anchored, and took in timber until she drew the sixteen feet, and then passed out, and anchored at the mouth of the west pass, to complete her cargo. When fully laden, she drew from eighteen to nineteen feet of water.

It is insisted, on the part of the charterer, that he was not bound to furnish cargo beyond the quantity which the vessel could receive within the passes, and get safely out to sea. The owner claims, however, that he was entitled to have a full cargo, and that the charterer was bound to furnish outside the remainder necessary to complete it; and this upon the principle, that the charterer must be presumed to have known the size and character of the ship, and the state of the harbor at the place of loading, and that a full cargo could not be put on board unless a part of it were to be taken in outside of the passes. There is some evidence in the case that this is the custom in the instance of large ships receiving cargo at that port. The evidence, however, is slight, and the case in the court below was not put upon that ground. The voyage was from Apalachicola to Liverpool, with a cargo of timber particularly specified. The whole ship was chartered, the freight to be eighty shillings sterling per load. The owner was, therefore, deeply interested in having a full cargo; and, if the charterer is chargeable with a knowledge of the tonnage and draft of water of the ship, and of the state of the harbor, as I am inclined to think he is, then, as he stipulated to supply a full cargo, it seems to me that the ruling of the court below was right, and according to the fair intent and meaning of the charter-party. The full cargo was, in point of fact, delivered outside of the west pass—that is, the cargo was completed at that place. It is claimed, however, on the part of the shipper, that this was upon condition of waiving any claim for demurrage, which is denied by the master.

II. The next material question in the case is, whether or not an arbitration between the consignees of the ship and those of the cargo at Liverpool, in respect to the measurement of the timber, is binding upon the owner of the vessel. The consignees of the cargo claimed that, according to the custom of that

port, the freight was to be paid per load, solid measure—that is, defective pieces, on account of splits, sap and bark, were not to be counted—which made a difference in the freight, in this case, of over three thousand dollars. There was a deduction of one hundred and fifty loads in consequence of these defects. A dispute arose as to the measurement, whether it should be according to the rule at Apalachicola or that at Liverpool; and the consignees of the ship, and those of the cargo, referred the question, as above stated. The arbitrators decided in favor of the usage at Liverpool, and that the measurement must be as between vendor and vendee, in the case of a sale. The reasonableness of this usage, if it exists, is not very apparent. Certainly, the master or owner, in this case, had no right to dictate as to the quality of the timber put on board. The cargo was selected and delivered at the ship's tackle by the agent of the charterer. Even if such a custom exists at Liverpool, as it respects the consignee of the cargo, I doubt if it can be regarded as a defence in a suit against the charterer for the freight. I can understand his contract in no other way than as stipulating to pay the eighty shillings sterling for every load of timber of such quality as he has delivered on board. This is, I think, the clear sense of it. According to the usage, as claimed at Liverpool, if the whole cargo which the shipper saw fit to ship, were there deemed not merchantable, no freight at all would be due or collectable.

The question here, however, is as to the effect of the arbitration. The court below held that it could not bind the charterer, and that, as the award must be mutual, it did not bind the owner. I am inclined to think this position sound. As I hold the true construction of the charter-party to be, that the charterer was bound to pay the freight at Liverpool according to the measurement at Apalachicola, that is, without excluding bark, sap, or splits, I do not see that the consignee of the cargo had any power, in the absence of Belmont, to change it. If the award had been adverse to him, he might have repudiated it. If the consignee had paid higher freight than was stipulated for in the charter-party, clearly, he could not recover it of the consignor-owner; and, if such higher freight had been paid after an arbitration, that would not, I think, help the case. The same principle is also applicable to the consignee of the ship. Neither he nor the master had any power to change the contract of the owner. So far as respects the authority of the consignee of the ship in this case, it may be, upon the facts, that the master, who was part owner, and was present, acting in the matter, though he did not sign the submission, would be bound, and hence that the award would operate upon his interest. This branch of the case must, therefore, rest upon the position laid down by the court below, namely, that the award was void as it respected the rights of the charterer; and that, if so, it could not operate to bind the other party.

There is another consideration that should be stated. If, as is asserted, it is the custom at Liverpool to pay the freight according to the measurement at that port, and not at the port of shipment, the usage can prevail only in cases where such measurement is not inconsistent with the contract in the charter-party, or can prevail only as it respects the implied engagement of the consignee to pay the freight, leaving the obligation of the shipper to stand upon his contract of affreightment; for, it would be difficult to admit that any custom or usage, however well settled, could be allowed to change his express agreement. In this view, the arbitration in the case may possibly be regarded as a mode of ascertaining the amount of freight to be paid by the consignee, leaving the contract in the charter-party unaffected, except so far as the payment of the freight at Liverpool may be taken in abatement of the amount due from the shipper.

There are some minor points raised in the case, but, if the ruling of the court can be maintained upon the two questions that I have noticed, I think the case free from difficulty. These questions are somewhat embarrassing, but, for the reasons stated, I am, as at present advised, inclined to concur in the disposition of the case by the court below, and to affirm the judgment.

BELMONT, (TYSON v.) See Cases Nos. 14,315a and 14,316.

BELSON, (SPEAR v.) See Case No. 13,223.

BELT, (CONNOLLY v.) See Case No. 3,117.

Case No. 1,282.

BELT v. COOK.

[3 Cranch, C. C. 666.][1]

Circuit Court, District of Columbia. Dec. Term, 1829.

CONTRACTS—EXTRA WORK—QUESTION FOR JURY.

1. Extra work, done upon houses built by contract in writing, cannot be recovered of the owner, unless there was a separate contract between the parties that such extra work should be done by the builder, and paid for by the owner; or unless the owner, while the houses were building, requested the builder to do the extra work, knowing that it was not comprehended in the written contract, and that the cost of the houses would be thereby increased.

2. The mere circumstance of the owner's knowing that the extra work was doing, and not objecting to it, does not raise a contract on his part to pay for it; but is evidence competent to be given to the jury, tending to prove that there was an agreement that the extra work should be paid for by the owner.

At law. Assumpsit [by James Belt against the executors of Thomas Cook] for extra

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

work done upon two houses, under a written contract under seal.

Upon the trial, THE COURT, at the prayer of Mr. Jones, for the defendants, instructed the jury, that the plaintiff is not entitled to recover upon the evidence aforesaid, for the work charged as extra work, over and above the sums specified in the said written contract, unless the jury should be satisfied, by the evidence, that there was a separate contract between the parties that such extra work should be done by the plaintiff, and paid for by the defendants' testator, over and above the sums stipulated in the aforesaid written contract. Or unless the said testator, while the houses were building, required or requested the plaintiff to do the said extra work, knowing that it was not comprehended in the said written contract, and that the cost of the said houses would be thereby increased. And that the mere circumstance of the said testator's knowing that the plaintiff was doing the said work, and not objecting to it, if proved to the satisfaction of the jury, does not raise a contract on his part to pay for it, over and above the sums stipulated in the said written contract; but is evidence competent to be given to the jury, towards satisfying them that there was an agreement between the parties that the said extra work should be paid for by the testator. The defendants' counsel cited Ellis v. Hamlen, 3 Taunt. 52; Starkie, Ev. pt. 4, p. 1002; and Young v. Preston, 4 Cranch, [8 U. S.] 239.

Verdict for plaintiff, $216.61, and interest. Motion for a new trial,—overruled,—and judgment.

BELT v. PICKERELL. See Case No. 3,117.

BELTON v. VALENTINE. See Case No. 1,370.

BELTZHOOVER, (LANE v.) See Case No. 8,047.

Case No. 1,283.

BELTZHOOVER et al. v. STOCKTON et al.

[4 Cranch, C. C. 695.][1]

Circuit Court, District of Columbia. March Term, 1836.

WITNESS—INTEREST IN RESULT—RELEASE.

1. In an action on the case, for negligence of the defendants' driver in running against the plaintiffs' stage-coach, the plaintiffs' driver is not a competent witness for the plaintiffs, without their release.

[See Jones v. The Phenix, Case No. 7,489; The William Harris, Id. 17,695; The Fortitude, Id. 4,953; The Neptune, Id. 10,120; The Peytona, Id. 11,058; U. S. v. The Anna, Id. 14,458. Contra, Dunlop v. Munroe, Id. 4,167; Bank of Alexandria v. McCrea, Id. 849; The Nymph, Id. 10,389; The Hudson, Id. 6,831.]

2. A release, under the seal of one of the copartners, is a sufficient release of a joint right of action.

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

Action on the case, [by Beltzhoover & Co. against Stockton & Stokes,] for negligence of the defendants' driver in running against the plaintiffs' stage-coach.

The driver of the plaintiffs' stage-coach was called as a witness for the plaintiffs.

Mr. Key, for the defendant, objected that he was interested, because it is yet to be ascertained which driver was in fault; and if it was the fault of the witness, the plaintiffs have a right of action against him for his negligence.

But THE COURT (THRUSTON, Circuit Judge, not sitting) overruled the objection, and suffered the witness to be sworn and examined.

On the next day, however, (May 20, 1836,) the jury having been adjourned over, Mr. Key, for the defendant, to show that the witness was incompetent, without a release from the plaintiffs, cited Starkie, Ev. pt. 4, p. 1732, note d, and the cases there referred to.

Mr. Lee, contra. Starkie, Ev. pt. 4, pp. 747, 1728; Case v. Reeve, 14 Johns. 82.

THE COURT was satisfied that they had erred in admitting the witness, without a release, to testify upon the point of negligence.

Mr. Bradley, for the plaintiff, then offered a parol release, signed in the name of Beltzhoover & Company by John Brown, one of the firm, without a seal; and cited Bulkeley v. Dayton, 14 Johns. 387.

THE COURT said it is not a technical release, and was not sufficient to restore the competency of the witness.

Mr. Bradley then offered a release under the seal of the said John Brown, releasing all right of action of the firm against the witness in relation to the transaction.

Mr. Key, contra. The authority in 14 Johns. 387, only decides that one partner may release the debts of the firm, not unliquidated damages.

Mr. Bradley, in reply. One partner has power to release all the rights of the firm. Gow, Partn. 76, 77; Starkie, Ev. pt. 4, p. 758, note.

THE COURT was of opinion, that the release under the seal of one of the firm, stating himself to be a partner, is a sufficient release. THE COURT said that the witness (who had been examined yesterday, without a release), must be examined again, unless the defendants should waive the new examination; which they did.

Case No. 1,284.

BELUN v. WESTERN UNION TEL. CO.

[The case reported under above title in 7 Reporter, 710, is the same as Case No. 1,234.]

BELVIDERE, The, (WILSON v.) See Case No. 17,790.

BEMAN, (CADMUS v.) See Case No. 2,281.

BEMIS, (AIKEN v.) See Case No. 109.

BEMIS, (BLAIR v.) See Case No. 1,484.

BEMIS, (HODGE v.) See Case No. 6,557.

BEMIS, (TAYLOR v.) See Case No. 13,779.

Case No. 1,285.

Ex parte BEN.

[1 Cranch, C. C. 532.][1]

Circuit Court, District of Columbia. April 10, 1809.

ERROR, WRIT OF—SUPERSEDEAS.

A writ of error is not a supersedeas, unless a copy of it be lodged for the adverse party in the clerk's office within the ten days.

[At law. Habeas corpus by the negro Ben for discharge from the custody of the marshal of the District of Columbia. Prisoner discharged.]

Habeas corpus ad subjiciendum. The mittimus returned, was in the following form, viz.: "District of Columbia. County of Washington, ss. Whereas it is represented by Sabret Scott to the subscriber, a justice of the peace, that his negro, Ben, has run away from his service, and otherwise treated him ill, and fears that the said negro Ben will run away again, and therefore prays a commitment for safe keeping: These are therefore to authorize and require you to receive the said Ben, and him safe keep in your jail until his said master releases him therefrom, or he be otherwise legally discharged. Given under my hand and seal this 23d day of March, 1809. (Signed.) John Ott. (L. S.) The marshal of the District of Columbia."

Mr. F. S. Key, for the prisoner, contended that he was free by the judgment of this court, rendered on the 19th of June, 1807, and that the writ of error did not suspend the judgment. The citation was not served until January 12th, 1808. No copy of the writ of error was lodged in the office of the clerk, for the master, as required by the 23d section of the judiciary act of [September 24,] 1789, (1 Stat. 73, [85.]) It was no supersedeas to the execution, because no execution could issue. The judgment of the court only ascertained the right of the negro to his freedom. The effect of the supersedeas is only to stay the execution, not to suspend the judgment.

Mr. Jones, contra. The writ of error was left in the office within the ten days, viz., on the 22d of June, 1807, and while it remained there, no copy was necessary for the adverse party.

THE COURT, then consisting of CRANCH, Chief Judge, and FITZHUGH, Circuit Judge, being divided in opinion, the prisoner was remanded.

But at June term, 1809, the prisoner was brought up again by habeas corpus, and the court being full he was discharged, THE COURT (FITZHUGH, Circuit Judge, contra) being of opinion that the writ of error could not be served so as to be a supersedeas, unless a copy thereof should be lodged in the clerk's office for the adverse party within ten days after the judgment.

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

Case No. 1,286.

BEN v. SCOTT.

[1 Cranch, C. C. 350.][1]

Circuit Court, District of Columbia. Oct. Term, 1806.

SLAVERY—PETITION FOR FREEDOM—SECURITY FOR WAGES.

Upon a petition for freedom the court will not require the defendant to give security for the wages of the petitioner during the litigation.

Ben had filed his petition for freedom, and a subpoena had issued to the defendant [Sabret Scott] to appear at next term, namely, December term, 1806. He now filed another petition, praying that the defendant may be summoned before the court to recognize not to carry the petitioner away, &c.; whereupon THE COURT ordered a subpoena returnable immediately, to answer to this petition; which the defendant obeyed, and gave the recognizance.

Mr. F. S. Key, for the petitioner, contended that the defendant ought to recognize to pay such sum as the court should adjudge him to pay to the petitioner for his services from the time of exhibiting the petition until judgment, in case the judgment should be in favor of the petitioner.

But THE COURT refused; saying they had no jurisdiction in such a summary way to give damages, and they could not compel the defendant to assent to such a judgment.

[NOTE. For subsequent proceedings in this litigation, see Cases Nos. 1,287 and 1,288.]

Case No. 1,287.

BEN v. SCOTT.

[1 Cranch, C. C. 365.][1]

Circuit Court, District of Columbia. Dec. Term, 1806.

SLAVERY—PETITION FOR FREEDOM—CONTINUANCE—PRACTICE.

An affidavit is not necessary to continue negro petitions at the first term.

[Petition for freedom by the negro Ben against Sabret Scott. Application for continuance. Granted.

[For prior proceedings in this litigation, and subsequent disposition of the case, see Cases Nos. 1,286 and 1,288.]

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

THE COURT will not require in all cases an affidavit at the first term to continue cases of negro petitions.

This cause was continued at the cost of the defendant, as the petitioner offered himself ready for trial; and in general the court will not insist on a trial at the first term, but if either party offers ready, it shall be continued at the cost of the party not ready. At the second term the court will require a trial unless good cause be shown on affidavit.

Case No. 1,288.

BEN v. SCOTT.

[1 Cranch, C. C. 407.] [1]

Circuit Court, District of Columbia. June Term, 1807.[2]

SLAVERY—PETITION FOR FREEDOM—ISSUE.

1. The general issue on a petition for freedom is that which puts in issue the simple question, whether free or not.

2. Under the Maryland law of April, 1783, c. 23, the slave imported does not gain his freedom by the omission of the master to prove, to the satisfaction of the naval officer or collector of taxes, that the slave had resided in one of the United States three years before importation.

[See note at end of case.]

Petition for freedom [by the negro Ben against Sabret Scott.] The cause being called for trial, and no issue made up, Mr. Jones and Mr. Morsell, for the defendant, asked for time to put in a plea denying the facts in the petition, which were stated as the ground of the right to freedom. The petition contained also a general allegation that the defendant unjustly held the petitioner in slavery.

THE COURT said that they would receive the general issue only, unless the petitioner should agree to continue the cause.

The defendant's counsel contended that a denial of the special facts was a general issue.

But THE COURT (FITZHUGH, Circuit Judge, absent) said the general issue was that which put in issue the simple question whether free or not.

Mr. Key, for the petitioner, moved the court to instruct the jury, that they must be satisfied that the defendant made it appear to the satisfaction of the naval officer or collector of taxes, that the slave was a resident of one of the United States, agreeably to the Maryland act of April, 1783, c. 23, which prohibits the importation of slaves generally, but excepts those who should have resided three years in some of the United States; and provides that such residence shall be fully proved to the satisfaction of the naval officer, &c.

Mr. Jones, for the defendant. It is sufficient if he proves the fact now, before the court. If the defendant had satisfied the collector or naval officer, he might have been still called upon to prove the fact before this court. The act is merely directory; it is no part of the proviso.

Mr. Key, in reply. The legislature have expressly declared that the proof of the fact shall be made before a certain officer, and in a certain manner. They had probably reasons of policy which required it should be so done; and the manner of proof is equally essential with the substance.

THE COURT (FITZHUGH, Circuit Judge, absent) directed the jury as prayed, but said it was a question of some doubt, and they would hear the point reargued on a motion for a new trial, if the verdict should be against the defendant.

Mr. Jones, for the defendant, then offered a certificate, dated June 16, 1807, (four days ago, this being June 20, 1807,) signed by John Barnes, the United States collector and naval officer at the port of Georgetown; that the defendant had on that day proved to his satisfaction that the petitioner had been a resident three years, &c.

Mr. Key, contended that the importation and oath must be concomitant with the coming in of the master. But if not, yet he ought to have done it during the existence of the law (the act of 1783.) It is his own negligence if he did not. He had till 1796 to do it.

THE COURT (DUCKETT, Circuit Judge, absent) refused to admit the certificate in evidence.

The defendant then offered a like certificate signed by Richard Jamieson, collector of the tax for the county of Washington, dated June 12th, 1807, which was also rejected by the court.

Verdict for the petitioner.

Reversed in the supreme court. [Scott v. Ben,] 6 Cranch, [10 U. S.] 3. [For prior proceedings in this litigation, see Cases Nos. 1,286 and 1,287.]

[NOTE. The decision of the circuit court was to the effect that the omission of the master to make the proof entitled the slave to freedom, but this was reversed in the supreme court, in Scott v. Ben, 6 Cranch, (10 U. S.) 3, for the reasons stated in the syllabus to this case, which represents the supreme court holding.]

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

[2] [Reversed by supreme court, in Scott v. Ben, 6 Cranch, (10 U. S.) 3.]

Case No. 1,289.

The BEN ADAMS.

[2 Ben. 445.] [1]

District Court, S. D. New York. June Term, 1868.

SHIPPING—BILL OF LADING—DELIVERY—MARKS AND NUMBERS.

Where flour was shipped on board of a vessel at New Orleans, bound for New York, by two different shippers, the flour being all branded,

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

"Nonpareil Mills," but the two different lots having also other brands by which they were easily distinguishable, and, for one lot of 1,000 barrels, being of a better quality and a higher value than the other, which was shipped first, a bill of lading was given, in which the flour was stated to be "marked and numbered as in the margin," the entry in the margin being simply "1,000 bbls. 'Nonpareil Mills,'" and on the arrival of the ship at New York, only 439 barrels of the 1,000 were delivered to the consignee, but, all the flour marked "Nonpareil Mills" having been discharged on the dock, a portion of the 1,000 barrels was taken away by the consignee of the other lot of flour, who was allowed to take it by the delivery clerk having charge of the delivery of the cargo: *Held*, that the consignee of the 1,000 barrels was entitled to a delivery of the identical barrels shipped, and was entitled to a decree against the ship for the damages occasioned by the nondelivery to him of the whole number of barrels shipped to him, less the freight and primage.

[Cited in The Santee, Case No. 12,328.]

In admiralty.

Beebe, Dean & Donohue, for libellants.

T. C. T. Buckley and J. K. Hill, for claimants.

BLATCHFORD, District Judge. This is a libel filed by Partridge, Wells & Co., of New York, against the ship Ben Adams, to recover $7,012.50, as the value of 561 barrels of flour, shipped by the Ben Adams, at New Orleans, on the 13th of March, 1865, by T. Prudhomme, consigned to the libellants at New York, under a bill of lading signed by the master of the ship therefor. The bill of lading was for "one thousand barrels of flour, being marked and numbered as in the margin." The entry in the margin was "1,000 bbls. 'Nonpareil Mills.'" The one thousand barrels were, all of them, when put on board of the ship, branded as follows, on one of the heads of each barrel: An outer circle of scroll-work; next within, in a circular form, occupying about two-thirds of the upper part of the circle, with the concave part downwards, the words, "Nonpareil Mills," the remaining one-third, or lower part, of the same circle, being filled up, with the concave part upward, with the words, "St. Louis, Mo.;" next within, a circle of scroll-work; within that circle, the words and figures, "196, choice extra, John F. Tolle." There were, on board of the same ship, on the same voyage, 596 other barrels of flour, all of them, when put on board, branded as follows, on one of the heads of each barrel: An outer circle of scroll-work; next within, in a circular form, occupying one-half of the upper part of the circle, with the concave part downward, the words, "Nonpareil Mills," the remaining one-half, or lower part, of the same circle, being filled up, with the concave part upward, with the words, "A. S. Browning & Co.;" within that circle the words and figures, "196, choice extra." These 596 barrels were of a quality much inferior to the flour shipped by Prudhomme, and were worth considerably less per barrel in the market. They were put on board the vessel on the 4th of March, 1865—that is, nine days before the Prudhomme flour was put on board—and were shipped by Given, Watts & Co., of New Orleans, to Watts, Crane & Co., of New York, under a bill of lading which specified the mark on them as being "Nonpareil." The allegation of the libel is, that the ship arrived at New York, with the 1,000 barrels of the Prudhomme flour, but that only 439 barrels of it were delivered to the libellants. Besides the 1,000 barrels and the 596 barrels, there were on board of the vessel 4,690 other barrels of flour, of various brands, but none of them branded "Nonpareil."

The defence set up in the answer is, that, on the arrival of the ship at New York, notice of her arrival, and of the place of discharge of her cargo, was given to the libellants; that, in accordance with the usage of the port, the flour was discharged from the ship on pier 19, East river, and was thenceforth at the risk of the libellants, who thereupon undertook to remove it; that thereby the bill of lading was discharged; that the ship had on board the 596 barrels, branded "Nonpareil Mills," consigned to Watts, Crane & Co.; that, previous to the 29th of April, 1865, there had been discharged from the ship, and placed on the wharf, 978 barrels of flour, branded "Nonpareil Mills;" that, of this number, the libellants carted away 439 barrels, and suffered and allowed Watts, Crane & Co. to cart away 539 barrels; and that such flour was taken by the consignees respectively, after it had been landed on the dock, and without any notice to the vessel that there was any difference in the two parcels, in quality or brand, and without any actual knowledge on the part of the master or owners of any such difference. The answer closes with an averment that the claimants have always been ready and willing to deliver to the libellants, "on payment of freight, the remaining 561 barrels of flour shipped at New Orleans, branded 'Nonpareil Mills.'"

This answer sets up grounds of defence that are inconsistent with each other. It sets up that the bill of lading for the 1,000 barrels was discharged by the unlading of them on the wharf, and that the libellants negligently allowed Watts, Crane & Co. to cart away 539 barrels, branded "Nonpareil Mills;" and it also sets up a willingness to deliver to the libellants 561 barrels of flour, which are not the barrels shipped by Prudhomme. If the 561 barrels were delivered so as to discharge the bill of lading, or if, as to the 539 barrels, it was the negligence of the libellants which allowed Watts, Crane & Co. to take them, then the ship is not responsible in respect of what was so delivered, or so lost through the negligence of the libellants. But if the ship is responsible for the 561 barrels, then the libellants are entitled to the identical 561 barrels shipped by Prudhomme, or their value, and the contract of affreightment cannot be discharged by turn-

ing over to the libellants 561 barrels of the other and inferior flour consigned to Watts, Crane & Co.

The ship was bound to discriminate between the two parcels of flour, marked "Nonpareil," and to see that each consignee received the proper flour. The 596 barrels shipped to Watts, Crane & Co. were taken on board and stowed, on the evidence, several days before any of the Prudhomme flour was put on board. The latter flour was nearer the top of the cargo, and came out before the other. It does not appear that the shipper of the Prudhomme flour knew, or had notice, that there was any other flour on board of the ship, marked "Nonpareil." It was the business of the ship to know that, and to see that a proper discrimination was made in the Prudhomme bill of lading, and on the ship's manifest, and on the cargo book of the ship, between the "Nonpareil" flour of Prudhomme, and the other "Nonpareil" flour previously put on board. Prudhomme was not called upon, on the facts in this case, to exercise any caution on that subject. The barrels he offered for shipment had marks on them sufficient to show to those in charge of the vessel that there was a likelihood that, without proper care, such barrels might be mistaken for those previously shipped by Given, Watts & Co., and also to show that, with proper care, their identification could be easily secured. Those in charge of the ship chose to throw away all precautions, and to enter on the bills of lading and on the manifest, in regard to both parcels, simply the word, "Nonpareil;" and the conduct of those charged by the claimants with the delivery of the flour at New York, and the language of the answer in the case, serve to show that the obligation of the vessel to both of the consignees is supposed to be discharged by delivering to each the proper number of barrels branded "Nonpareil," whether they are, or not, the identical barrels for which the bills of lading were respectively given. Such was not the obligation of the ship. The libellants are entitled to the identical 561 barrels shipped by Prudhomme, or their value.

The bill of lading in this case has not been discharged by the ship. It is, undoubtedly, the law, that delivery on the wharf, in the case of goods transported by a vessel, is sufficient, if due notice be given to the consignees, and the different consignments be properly separated, so as to be open to inspection by their respective owners. But, where they are delivered on the wharf, there must, in addition to due and reasonable notice to the consignee, be a fair opportunity afforded to him to remove his goods. The Eddy, 5 Wall. [72 U. S.] 481, 495. And the carrier is responsible for the value of the goods, if he delivers them to the wrong person, even though by mistake or imposition. Story, Bailm. § 545b; The Huntress, [Case No. 6,914.] The due and proper separation and designation of the goods by the carrier, for the use of the consignee, is insisted on by all the authorities, as an indispensable prerequisite, in addition to notice to the consignee of the time and place of delivery, to relieve the carrier from responsibility. 3 Kent, Comm. 215; The Eddy, above cited.

In the present case, the ship assumed the obligation of delivering the flour to the proper parties, and undertook to discharge it by employing a clerk, who was stationed on the wharf, and whose business it was to receive orders for the flour, addressed to the ship, and to fill them. Not a barrel of flour was allowed by this clerk to be taken from the wharf, unless a written order for it, addressed to the ship, was presented to and left with him. On the 18th of April, Watts, Crane & Co. gave a written order to the ship to deliver 596 barrels, branded "Nonpareil." On that order, the clerk delivered 539 barrels of the 1,000 barrels shipped by Prudhomme. Watts, Crane & Co. received those 539 barrels, and the libellants did not receive any of them. Before any flour was delivered from the ship, due notice was given to the libellants of the arrival of the vessel at New York, and that she had on board merchandise for them, and that she was discharging at pier 19, East river. But, as the libellants' flour came out, it was not properly separated, so as to be open to inspection by them, nor was a fair opportunity afforded to them to remove it, nor was it designated for their use by the clerk; but, on the contrary, the clerk designated the 539 barrels for the use of Watts, Crane & Co., and wrongfully delivered it to them, and gave the libellants no opportunity to take it. The cartmen of the libellants took no flour, except 439 barrels of the identical flour that had been shipped by Prudhomme. They would have taken the 539 barrels which the cartmen of Watts, Crane & Co. took, but the clerk designated those barrels for the use of Watts, Crane & Co., and delivered it to them on an order given by them to the ship for 596 barrels, branded "Nonpareil." The clerk took receipts from Watts, Crane & Co. for the 539 barrels on such delivery. The evidence clearly shows that the clerk made no discrimination among the barrels, branded, "Nonpareil," but inasmuch as he found on the manifest of the ship 1,596 barrels, marked "Nonpareil," considered that any order for "Nonpareil" flour, whether given by the libellants, or by Watts, Crane & Co., could be properly filled by the delivery of any barrels that were branded "Nonpareil." His attention was called, while delivering the Prudhomme flour on the order of Watts, Crane & Co., to the fact that he was delivering the wrong flour, but he paid no attention to the caution. There is no foundation for the allegation in the answer, that the libellants negligently allowed Watts, Crane & Co. to cart away the 539 barrels.

It is claimed that the clerk was not the

agent of the ship, but merely of the consignees of the ship, and that the responsibility of the ship in rem ceased after due previous notice to the consignees of the time and place of the unlading of the cargo, the moment the flour was landed over the ship's side upon the dock. This is not so, on the facts of this case. The clerk, as agent of the ship, retained the custody and control of the flour, as and after it reached the wharf, and undertook to deliver it therefrom on orders, not permitting the consignees to interfere with it, except with his consent. The case does not fall within the class of cases where the consignee undertakes to remove the goods from the wharf after they are discharged from the ship, and after the responsibility of the ship in regard to them has ceased. It differs from the case of Field v. The Lovett Peacock, decided by this court in April, 1863, [Case No. 4,768,] and from cases of that character, in the fact that, in the present case, no opportunity was afforded by the ship to the libellants to take possession of, and remove, the 561 barrels shipped by Prudhomme; and the 539 barrels of that flour which were taken by Watts, Crane & Co. remained in the charge, custody, and control of the vessel, until the clerk wrongfully delivered them to Watts, Crane & Co.

The libellants are entitled to a decree for the damages sustained by them by the non-delivery of the 561 barrels of flour shipped by Prudhomme, deducting therefrom the freight, primage, and average specified in the bill of lading for the carriage of the 1,000 barrels, and there must be a reference to a commissioner to ascertain and report the amount for which the decree is to be entered on that basis.

Case No. 1,290.

BENARY v. The PRINCE ALBERT.

[The case reported under above title in 15 Int. Rev. Rec. 35, is the same as Case No. 11,426.]

Case No. 1,291.

BENCHLEY v. GILBERT. CURTICE v. STORRS. HILL v. SAME.

[8 Blatchf. 147.][1]

Circuit Court, N. D. New York. Jan. 17, 1871.

REMOVAL OF CAUSES—ACTION AGAINST UNITED STATES COMMISSIONERS.

1. An action commenced in a state court against a commissioner of the circuit court of the United States, to recover back money alleged to have been illegally exacted by him as costs and fees, in a criminal proceeding before him, cannot be removed into this court by certiorari, under section 67 of the act of July 13, 1866, (14 Stat. 171,) which provides for the removal of suits commenced against an officer of the United States appointed under, or acting by authority of, the internal revenue law, on account of any act done under color of his office, &c.

[2. Cited in Eaton v. Calhoun, 15 Fed. 157, to the point that the intention of the removal act is to protect revenue officers and agents against suits in the state courts.]

[At law. Applications for certiorari to remove from a state court to the United States court actions by William Benchley against William W. Gilbert, Albion D. Curtice against William C. Storrs, and William W. Hill against the same defendant. Applications denied.]

John M. Dunning, for plaintiffs.

George J. Sicard, for defendants.

WOODRUFF, Circuit Judge. The above-named three actions were commenced before a justice of the peace for the county of Monroe, to recover back money alleged to have been paid to the defendants respectively by the several plaintiffs, as and for costs and fees, upon an arrest of the plaintiffs severally under warrants issued by the defendants, as commissioners of the circuit court of the United States, and which money is claimed to have been illegally exacted from the plaintiffs. In two only of the cases had pleadings been filed, showing the nature of the cause of action. In the other, a summons to answer to a money demand had been issued and returned, and no further step taken, but the certiorari, as prayed out by the defendants, alleges, in substance, that the cause of action was the same as in the other cases. No injustice can be done to the defendants in assuming that the three are alike. Indeed, they were so treated by the counsel, on the hearing.

The defendant in each suit prayed a certiorari, and the same appears to have been issued by the clerk, in pursuance of section 67 of the act to reduce internal taxation, &c., passed July 13th, 1866, (14 Stat. 171.) It is not objected that a petition for the writ, complying with the requirements of that section, accompanied by the certificate of counsel, was not duly presented to the clerk. As neither party has laid the petition before me, I assume that it conformed to the statute. The certiorari was directed to the justice of the peace before whom the actions were pending, and he has returned the proceedings therein to this court, in obedience to the writ; and thereupon the plaintiffs respectively move "for an order quashing or superseding the said writ of certiorari, and remanding the proceedings, process, and pleadings * * for trial on some day to be named in the said order." The ground of the motion is, that this court has no jurisdiction of the actions thus sought to be removed, and that the same were not subject to removal into this court.

The removal of these cases to this court cannot be sustained by the provisions of the 3d section of the act of March 2d, 1833, (4 Stat. 633,) which related to the laws

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

for the collection of import duties, and acts done under or by color thereof, as the same was extended by section 50 of the act to provide internal revenue, &c., passed June 30th, 1864, (13 Stat. 241,) for the obvious reason, that section 50 of that act was repealed by section 68 of the act of July 13th, 1866, (14 Stat. 173; City of Philadelphia v. Collector, 5 Wall. [72 U. S.] 720; Assessors v. Osbornes, 9 Wall. [76 U. S.] 567;) and all jurisdiction derivable therefrom ceased on such repeal. The only authority which can be plausibly suggested is the section of the internal revenue law above referred to, in pursuance of which the certiorari was apparently issued, namely, section 67 of the act of July 13th, 1866. That section provides for a removal to this court of any suit or prosecution commenced in a state court, against any officer of the United States appointed under, or acting by authority of, the internal revenue law, * * * on account of any act done under color of his office, &c., &c. I am clearly of opinion, that this act does not at all apply to commissioners appointed by the circuit court, and acting as examining and committing magistrates, in the arresting and holding to bail for offences against the laws of the United States. They are neither appointed under the internal revenue laws, nor did they act in the matter which gave rise to the present litigation by authority of that law. Their authority is derived, and their appointment is made, under previous statutes. That authority relates to all offences against the laws of the United States. They act "by authority" of the acts warranting their appointment and declaring their jurisdiction and powers, although the offences with which they deal may be declared such by various other statutes. The statute declaring an offence is not the source of their authority. The authority is general, to deal with all offences, and their jurisdiction is not derived from the last named statutes. If their authority rested upon the statute which defined an offence, they would exercise their office at a hazard which would deter suitable persons from exercising the office at all. For, if jurisdiction depended upon the statute declaring the offence, then power to arrest would be dependent upon the question of fact, whether an offence under that statute had been committed; and, if the offence was not proved, then, the condition upon which the power depended failing, it would be difficult to protect them against actions for false imprisonment in any case in which a party arrested was not proved guilty. They exercise their office at no such hazard. Whether an offence against the laws of the United States has been committed, is the subject of their enquiry, and their authority to make that enquiry and to hold a party arrested therefor, exists independently of any particular statute defining offences. Whether an offence has been committed may depend, as in the present cases, upon the provisions of the internal revenue law, but those provisions are not the law under which they are appointed, nor by authority of which they act in the matter. In short, the officers contemplated by section 67 of the act of 1866, are officers whose authority to perform their official duties is derived from the internal revenue law, either by appointment or by other express authority conferred by it. In the discharge of their official duty, to whatever that duty relates, they act under that law and under its protection. This is gathered not only from the language of the particular section, but also from the language and manifest intent of the acts of 1833 and of 1864. The legislation of 1833 was for the protection of officers of the customs; that of 1864 and 1866 for the protection of internal revenue officers and their subordinates.

There can, I think, be no necessity for such a removal, but, if there seems to be occasion, it is not provided for. If the moneys received by the defendants in these actions were received in the due discharge of official duty, as magistrates, their defence is perfect and will be sustained; and, if any law of the United States should be violated by a refusal to protect them against an illegal claim, which is not probable, they can have a reversal in a higher court.

I am constrained to say that the circuit court has no jurisdiction of these actions, and the writ of certiorari must be dismissed and the proceedings be remanded.

BENDER, (UNITED STATES v.) See Case No. 14,567.

Case No. 1,292.

Ex parte BENEDICT.

[4 West. Law Month. 449.]

District Court, N. D. New York. Sept. 30, 1862.

HABEAS CORPUS — RETURN — DISCHARGE OF PRISONER — POWER OF JUDGE AT CHAMBERS — PRISONER BEYOND JURISDICTION — DISOBEDIENCE OF MARSHAL — PUNISHMENT FOR CONTEMPT — POWER OF COURT.

1. The construction and effect of the two orders of the war department, of the 8th of August, 1862, relative to the arrest of disloyal persons and of persons liable to draft, about to leave the United States, considered and discussed.

[Cited in Ex parte Field, Case No. 4,761.]

2. The president of the United States is not vested by the constitution of the United States with power to suspend the privilege of the writ of habeas corpus, at any time, without the authority of an act of congress.

[Distinguished in Ex parte Field, Case No. 4,761. See Ex parte Milligan, 4 Wall. (71 U. S.) 2.]

[3. A statement by a United States marshal, on the return to a writ of habeas corpus, that he had disobeyed the writ, and deported the prisoner in accordance with instructions from the secretary of war, is a sufficient return.]

[4. At common law a judge at chambers has no power to order the discharge of a prisoner on habeas corpus.]

[5. Where the prisoner is beyond the jurisdiction, and an order for his discharge on habeas corpus would be ineffectual, it should not be granted.]

[6. As the marshal would have been exposed to injurious consequences for disobedience to the order of the secretary, he should not be punished for contempt of court when it appears that he can be punished criminally under the state laws, and that the prisoner has an adequate civil remedy against him.]

[7. Section 28 of the judiciary act, providing that, in all cases wherein the marshal is a party, the writs and precepts therein shall be directed to a disinterested person, who shall execute the same, is not applicable to an attachment against the marshal for a contempt.]

[8. Consequently, as process committing the marshal for a contempt would run to him in his official capacity, the issue of such process will be refused as impracticable.]

[On habeas corpus. Application for the discharge of Judson D. Benedict from the custody of Edward I. Chase, United States marshal. The prisoner being without the jurisdiction at the time of the return to the writ, the court declined to order his discharge from custody. An application was also made to punish the marshal for contempt in disobeying the writ. Application refused.]

HALL, District Judge. The application for the writ of habeas corpus, in this case, was made while I was engaged in other duties; and although I retained the petition and gave the questions presented a hasty examination, before I allowed the writ, I had no time to prepare an opinion upon the questions which then occurred to me as necessary to be considered before granting the petitioner's application. I therefore simply made a note of the authorities examined; and, as the case is one of importance, I shall now state my opinion upon the questions considered at the time the petition for the habeas corpus was under consideration; and refer to the authorities then examined, and some others, which appear to me to require the exercise of the jurisdiction and authority invoked by the petitioner.

The act of congress of September 24, 1789, [1 Stat. 81, § 14.] the judiciary act, declares that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. It appears by the petition and affidavits annexed, that the petitioner is confined in gaol, and the only cause of his detention rendered by the gaoler, is a paper delivered to him by A. G. Stevens, deputy U. S. marshal, of which the following is a copy:

"Marshal's Office, Buffalo. September 2d, 1862. David M. Grant will take from Fort Porter, Thomas Commings, James Parker, Antoine Quantent, Noah B. Clark and Jared Benedict, prisoners confined there, committed under orders of the war department, and remove them to the Erie county jail for safe keeping, and there detain them until further order; and the sheriff or jailer of said county will keep them until further order, in said jail. (Signed) A. G. Stevens, U. S. Dep. Marshal. To Col. E. P. Chapin, and the sheriff and jailer of Erie county."

From this it clearly appears that the petitioner is in custody by color of the authority of the United States, either under the orders of the war department, or of the deputy marshal, who is an officer, deriving his authority as such, from the United States. The petition further shows that when the deputy marshal was applied to by the counsel for the petitioner, and asked "if he arrested the petitioner by virtue of any order, process or paper," that officer said he did not, but showed the counsel a slip cut from a newspaper, purporting to contain a copy of an order of the war department, in the following words:

"War Department, Washington. August 8th, 1862. Ordered: First—That all United States marshals and superintendents, and chiefs of police, of any town, city or district, be and they are hereby authorized and directed to arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in way giving aid and comfort to the enemy, or in any other disloyal practice against the United States. Second—That immediate report be made to Major L. C. Turner, judge advocate, in order that such persons may be tried before a military commission. Third—That the expenses of such arrest and imprisonment will be certified to the chief clerk of the war department, for settlement and payment. (Signed) Edwin M. Stanton, Sec'ry of War."

The affidavit of the counsel also states that the deputy marshal, at the same time, said "that printed slip was his only authority for the arrest of said Benedict."

The petitioner states in his petition that he "is not committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, or by virtue of the final judgment, or decree of any court, or by virtue of any process of any kind or description; that he has neither by act or speech been disloyal to the constitution or laws of the United States, or been guilty of any violation of any order of the war department, or of the president of the United States, or been guilty of any offence or act subjecting him to arrest;" and this petition is verified by the oath of the petitioner. On the case thus made by the pe-

titioner, I should have granted a habeas corpus at once, on the first reading of his petition and the accompanying affidavits, had I not seen a newspaper copy of an order of the war department assuming to suspend, in certain cases, the privileges of the writ of habeas corpus. This order bears the same date as that referred to by the deputy marshal, and is in the following words:

"War Department, Washington. August 8th, 1862. Order to prevent evasion of military duty and for suppression of disloyal practices. First—By direction of the president of the United States it is hereby ordered that until further order, no citizen liable to be drafted into the militia shall be allowed to go to a foreign country, and all marshals, deputy marshals, and military officers of the United States, are directed, and all police authorities, especially at the ports of the United States on the seaboard and on the frontier, are requested to see that this order is faithfully carried into effect. And they are hereby authorized and directed to arrest and detain any person or persons about to depart from the United States, in violation of this order, and report to L. C. Turner, judge advocate, at Washington city, for further instructions respecting the person or persons so arrested or detained. Second—Any person liable to draft, who shall absent himself from his county or state, before such draft is made, will be arrested by any provost marshal, or other United States or state officer, wherever he may be found within the jurisdiction of the United States, and conveyed to the nearest military post or depot, and placed on military duty for the term of the draft; and the expenses of his own arrest and conveyance to such post or depot, and also the sum of five dollars as a reward to the officer who shall make such arrest, shall be deducted from his pay. Third—The writ of habeas corpus is hereby suspended in respect to all prisoners so arrested and detained, and in respect to all persons arrested for disloyal practices. (Signed) Edwin M. Stanton, Sec'ry of War."

The two orders of the war department, bearing the same date, may properly be considered together, and as relating to the same general subject. Whether issued separately or together, whether, if issued separately, the one referred to by the deputy marshal was first issued or not, it may not be very material to inquire; but, as that declares that "all United States marshals, and superintendents, and chiefs of police of any town, city or district, be and they are hereby authorized and directed to arrest and imprison any person or persons who may be engaged, by act, speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States," and the other order assumes to suspend the writ of habeas corpus in respect not only to all persons arrested and detained by virtue thereof, but also "in respect to all persons arrested for disloyal practices," (a term not otherwise contained in the order,) it may be presumed that the order referred to by the deputy marshal was first issued, and that the other order was intended to suspend the writ of habeas corpus in respect to persons arrested under that order, or under the order referred to by the deputy marshal. If the order declaring the writ of habeas corpus to be suspended can be considered as legal and valid, it is necessary to consider its scope and effect, and, as both questions are therefore properly before me, I shall consider both in their order. It is to be observed that the first order cited, confines the power of arrest to United States marshals, and superintendents, and chiefs of police, while the second order, in respect to the cases within it, extends the power to all deputy marshals and all military officers of the United States, and to all police authorities. These officers, many thousands in number, and of every grade of intelligence, are scattered over every portion of our country. To all of these arbitrary powers of arrest, without warrant, and without any prior legal inquiry, and without the slightest preliminary proof of guilt, is assumed to be given. Was it intended, then, that every policeman and every military officer throughout the loyal states, and in localities far removed from the seat of military operations, should be authorized to arrest and imprison any citizen, and that if, on taking the party into custody, or afterwards, such officer should declare that he made the arrest by virtue of the orders of the war department of August 8, 1862, or for disloyal practices, he could keep him in prison, or in his own custody, or compel him to enter the military service, and also require all judicial officers, when the prisoner or his friends applied for a writ of habeas corpus, that the facts of the case might be judicially ascertained and the question of the legality of his arrest and detention considered, to say, "The privilege of the writ of habeas corpus is suspended, and you can have no relief?" Is every man supposed to be subject to militia duty, who has left or shall leave his county since the 8th of August last, and prior to the unknown day in the future when a draft is to be made, no matter under what circumstances, to be punished by being forced into the military service for nine months, without any hearing, without any opportunity to show that he is exempt from militia duty, when the constitution provides that "no person shall be deprived of life, liberty or property, without due process of law?" I am aware that these restraints upon travel have been removed, but was that the original intention of the order?

My personal confidence in the integrity, patriotism, and good sense of the president, as well as the respect due to the high office he holds, compels me to require the most conclusive evidence upon the point before

adopting the conclusion that he has ever deliberately sanctioned so palpable a violation of the constitutional rights of the citizens of the loyal states as the order of the war department, thus construed, would justify and require. Here, and throughout most of the loyal states, we are far removed from the several fields of military operation. All the arts and occupations of peace can be and are pursued with entire security, and all the laws of the state and Union can be administered by the ordinary courts of justice, as freely, as fully, and as efficiently, as in time of profound peace. The execution of the laws of the land has not been resisted by our people. On the contrary, they have responded to the calls of the general government with unexampled unanimity and alacrity, and have offered their blood and their treasure without stint to maintain the authority of constitutional government. They have waited for no conscription, but have sent hundreds of thousands of volunteers into the field to meet, without complaint, all the exposures, all the vicissitudes, and all the dangers of the camp and the battle field. Without waiting for the tax-gatherer, they have voluntarily and freely contributed untold millions to hasten the departure of these volunteers and strengthen the arm of the government established under the constitution of the Union. Is it possible that such orders as those above copied were intended to operate upon such a people, in the loyal states, and place their liberties at the mercy of every military officer, every officer of police, every policeman, and then to suspend the writ of habeas corpus in such a manner as to prevent a judicial inquiry into the question whether the facts of the case would justify an arrest, even under such orders? Can a man, not liable to do military duty, be arrested under such order, and be detained by force in the military service, without the privilege of showing his exemption and procuring his discharge from such illegal restraint? Could it have been intended that military officers of every grade, and policemen of every class, throughout the loyal states, acting upon their own suspicions, or upon any representation which political prejudice, personal malignity, or other motives might suggest, or in the mere wantonness of unusual and arbitrary power, should be authorized to arrest and imprison any citizen, without the possibility of a judicial investigation? Is every official to whom these orders are addressed to determine for himself what shall constitute disloyal practices—a term not known to the law, which has no fixed or reasonably certain definition, and which every arresting officer is left to interpret as his prejudices, his passions, or his interest may incline? And is such interpretation to be subject to no revision, except by a judge advocate at the seat of government, acting upon extrajudicial, if not entirely ex parte testimony, in the absence of the accused? Such a construction of the order would place the liberty of every citizen at the mercy of these officials, one of whom might conclude that to speak disparagingly of the military ability and military conduct of General McClellan was a disloyal practice, and tended to discourage volunteer enlistments; while another might consider the abuse of McClellan a virtue, and hold the expression of a doubt of the superlative ability of Fremont as a disloyal practice of the deepest dye; and yet another might suppose that any person who should read aloud the newspaper accounts of the retreat of Gen. Pope's army from the Rapidan to the Potomac, and express a doubt as to the competency of that general, was discouraging enlistments and giving aid and comfort to the enemy. I confess, nevertheless, that there is some reason for assuming that the fair construction of the language of the order of the war department, if it could properly be considered without reference to the provisions of the constitution of the United States, would lead us to conclude that the privilege of the writ of habeas corpus was intended to be suspended in all the cases supposed, and I understand such a construction has been sometimes insisted upon; but when I consider that the constitution has imposed restraints upon the arbitrary exercise of military power, (at least beyond the lines of military operations,) I am willing to adopt that construction without strong evidence that such was the intention of the orders referred to. Such a construction of these orders, if their validity can be established, would go far towards making our government a despotic instead of a constitutional government.

Even in the midst of our present struggle, we should not forget the teachings and history of the past, and regard as trivial and unimportant, constitutional principles, the persistent violation of which has led to the dethronement of kings, and the overthrow of long established forms of government. We should not forget the letters du cachet of the French monarchs, or the illegal imprisonments under Charles I. In our efforts to read aright and profit by the terrible lesson which the present condition of our unhappy country presents, we should not forget what Hume, and Hallam, and Blackstone, and Marshall, and Story, and Kent, have taught us. The language of Blackstone (1 Bl. Comm. 134–136) has been often quoted and approved, and it states with accuracy the laws and constitution of England, and the practice of the French monarchy at the time he wrote. This, with the proceedings of the house of commons upon the celebrated petition of rights, shows the importance which the sore experience of the people of England had given the questions involved in the present case. Blackstone says, (volume 1, p. 134:)

"Next to personal security, the law of England regards, asserts, and preserves the per-

sonal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observation as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here, again, the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals or by the law of the land. And many subsequent old statutes expressly direct that no man shall be taken and imprisoned by suggestion or petition to the king or his counsel, unless it be by legal indictment, or the process of the common law. By the petition of right (3 Car. I.) it is enacted that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of habeas corpus, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment shall be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the 'Habeas Corpus Act,' the methods of obtaining this writ were so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in cases in which the law requires and justifies such detainer. And lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. pt. 2, c. 2, that excessive bail ought not to be required.

"Of great importance to the public is the preservation of this personal liberty; for, if once it were left in the power of any, of the highest magistrate, to imprison whomever he or his officers thought proper, (as in France it is daily practiced by the crown) there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet, sometimes when the state is in danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reasons for so doing, as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger."

Again Blackstone says, (volume 3, pp. 133–135:)

"In a former part of these commentaries, we expatiated at large on the personal liberty of the subject. This was shown to be a natural, inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case, without the special permission of law,—a doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman Conquest, asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times and the occasional despotisms of jealous and usurping princes, yet established on the firmest basis by the provisions of the Magna Charta, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner; and yet, early in the reign of Charles I., the court of king's bench, relying upon some arbitrary precedents, (and those, perhaps, misunderstood,) determined that they could not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and pro-

duced the petition of right, (3 Car. I.,) which recites this illegal judgment, and enacts that no freeman hereafter shall be imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts and stirring up sedition against the king and government,' the judges delayed for two terms, (including also the long vacation,) to deliver an opinion how far such a charge was bailable. And when at length they agreed it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that, 'if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of their imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.

"These pitiful evasions gave rise to the statute (16 Car. I. c. 10, § 8) whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or any of the members thereof, he shall have granted to him without delay, upon any pretence whatsoever, a writ of habeas corpus, upon demand or motion made to the court of king's bench or common pleas, who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet, still, in the Case of Jenks, before alluded to, who, in 1676, was committed by the king in council, for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, and the chief justice (as well as the chancellor) declined to award a writ of habeas corpus ad subjiciendum, in vacation, though at least he thought proper to award the usual writs ad deliberandum, &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had, in some measure, defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an alia and pluries, were issued, before he produced the party, and many other vexatious shifts were practiced to detain state prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power, by the crown or its ministers, has always been productive of struggles, which either discovers the exercise of that power to be contrary to law, or if legal, restrains it for the future. This was the case in the present instance; the oppression of an obscure individual gave birth to the famous habeas corpus act, (31 Car. II. c. 2,) which is frequently considered as another Magna Charta of the kingdom; and, by consequence and analogy, has also in subsequent times reduced the general method of proceeding on those writs, (though not within the reach of that statute, but issuing merely at the common law,) to the standard of law and liberty."

The complaint contained in the 3d, 4th and 5th articles of the petition of right, referred to by Mr. Justice Blackstone, and to which the reluctant consent of Charles I. was enforced by the British house of commons, (Hume's History of England, c. 51, and copy of petition in note; and see Hall. Const. Hist. c. 7.) related to illegal arrests and imprisonments, and the denial of relief upon habeas corpus. These articles are as follows:

"III. And whereas, also, by the statute called the great charter of the liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned, or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

"IV. And in the eighth and twelfth year of the reign of King Edward III. it was declared and enacted, by authority of parliament, that no man of what estate or condition that he be, should be put out of his land or tenements, nor taken nor imprisoned, nor disherited nor put to death, without being brought to answer by due process of law.

"V. Nevertheless, against the tenor of the said statutes and other, the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before justice, by your majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the cause of their detainer, no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law."

And by the tenth article of this petition of rights it was prayed, among other things, "that no freeman, in any such manner as is before mentioned, be imprisoned or detained," and to this, Charles I., after much delay, and a prior evasive answer, was at last compelled by the house of commons to yield his assent in the customary form, "Let it be law as is desired," and thereby, as Hume says, "give full sanction and authority to the petition." It is true, that he afterwards acted in violation of the rights thus

solemnly recognized; but it is equally true that his head was brought to the block by his oppressed and indignant people.

No further discussion can be necessary to show the importance of the principles involved in this case, or the duty of every judicial officer to construe, with all reasonable strictness, the doubtful language of an executive order capable of being made an instrument of innumerable and gross encroachments upon the liberty of the citizen. There may be some ground for doubt in regard to the true construction of the orders of the war department of August 8, 1862, but I am inclined to think they were not intended to have the operation and effect which it has, as I understand, been contended should be given to them, in accordance with what is alleged to be their true meaning and effect. However that may be, in the view I have felt compelled to take in regard to another question arising in the case, I do not deem it necessary to say more in respect to the proper construction of this order. The question referred to is, whether the privilege of the writ of habeas corpus has been, in any case, legally suspended.

In considering this question, I shall not inquire whether the order under consideration was made, or purports to be made, by or under the authority of the president of the United States. The use of the words, "by direction of the president of the United States," in the first sub-division of the order, and their omission in the second and third sub-divisions, may cast some doubt upon the point, but for the purpose of the present question I shall assume that the first and second orders of the 8th of August, 1862, are in fact and in law the orders of the president of the United States.

Can the president, then, without the authority of congress, suspend the privilege of the writ of habeas corpus? When the counsel for the petitioner, some days since, suggested that he desired to apply for a writ of habeas corpus to bring up the body of the petitioner, I had the impression that congress, at its last session, had passed an act authorizing the president to suspend the writ of habeas corpus, and that he had sanctioned the order of the war department under such authority. If this had been the case, I should have held it to be my duty to refuse a writ, in a case within the scope of the law of congress, and the order of the president; but having, since that suggestion was made, received the acts of the last session, I find that I was mistaken, and that congress has passed no law on this subject. The question of the power of the president to suspend the privilege of habeas corpus, without the authority of congress, is therefore presented in this case, if the order of the war department is deemed to be the order of the president, and to extend to such a case as that now under consideration. The question is one of constitutional law and constitutional construction, and was, I think, generally considered as no longer open to controversy, until it was brought prominently before the public by the Case of Merryman, before the learned and venerable chief justice of the United States. In that case, [Case No. 9,487,] the highest judicial officer in the United States did not hesitate to declare, in respect to the claim that the president had the power to suspend the privilege of the writ of habeas corpus, "that he listened to it with some surprise, for I" (he) "had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by the act of congress." The clause upon which the question arises is found in the first article of the constitution of the United States, which treats of congress and its powers, and is in these words: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it;" and the reasoning of the chief justice in the case referred to, is sufficient, in my judgment, to show that the power of suspension is a legislative and not an executive power, and must be exercised, or its exercise authorized, by congress. But the question does not rest upon the reasoning or authority of the present chief justice. He properly cited the authority of Chief Justice Story, and of the supreme court of the United States, when the chief justice's seat was filled by John Marshall, the ablest constitutional lawyer our country has produced. I can not forbear now to quote that portion of the opinion of the chief justice which refers to the authority of Mr. Justice Story, and the supreme court of the United States. The chief justice says: "But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly held as authoritative by our courts of justice. To guide me to a right conclusion, I have the commentaries on the constitution of the United States, of the late Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States, and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated."

Mr. Justice Story, speaking in his commentaries of the habeas corpus clause in the constitution, says: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the

writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, when the public safety may require it,—a very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus in the cases of rebellion or invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body." 3 Story, Const. par. 1836. And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of Ex parte Bollman, uses this decisive language in 4 Cranch, [8 U. S.] 95: "It may be worthy of remark that this act, (speaking of the one under which I am proceeding) was passed by the first congress of the United States sitting under a constitution which had declared 'that the privilege of the writ of habeas corpus should not be suspended unless when in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the courts the power of awarding writs of habeas corpus." And again, on page 101: "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. The question depends upon political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty and obey the laws." I can add nothing to these clear and emphatic words of my great predecessor.

In the course of his elaborate and well considered opinion, Mr. Chief Justice Taney states his views at length, and I shall make several extracts from other parts of his opinion to show the manner in which the question came before him, the conclusions to which he arrived, and a portion of the argument by which his views are sustained. He says:

"The case, then, is simply this: A military officer residing in Pennsylvania, issues an order to arrest a citizen of Maryland upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a habeas corpus is served on the commanding officer requiring him to produce the prisoner before a justice of the supreme court, in order that he examine into the legality of the imprisonment, the answer of the officer is, that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ. As the case comes before me, therefore, I understand the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of congress. When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it. Having therefore regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of this act without a careful and deliberate examination of the whole subject.

"The clause in the constitution which authorizes the suspension of the writ of habeas

corpus is in the ninth section of the first article. This article is devoted to the legislative department of the United States. It begins by providing 'that all legislative powers therein granted shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives;' and after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants, and the legislative powers which it expressly prohibits, and at the conclusion of this specification a clause is inserted giving congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States or in any department or office thereof. The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted, and it was determined that there should be no room for doubt, where rights of such vital importance were concerned, and, accordingly, this clause was immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus to protect the liberty of the citizen is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases, the power is denied, and its exercise prohibited, unless the public safety may require it. It is true that, in the cases mentioned, congress is, of necessity, the judge of whether the public safety does or does not require it, and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen. It is the second article of the constitution that provides for the organization of the executive department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed was intended to be conferred on the president, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

"The article begins by declaring that the executive power shall be vested in a president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty, nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person shall be deprived of life, liberty or property, without due process of law—that is, judicial process. And even if the privilege of the writ of habeas corpus was suspended by the act of congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the amendments to the constitution, immediately following the one referred to, that is, the sixth article, provides that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence. And the only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws be faithfully executed.' With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground, whatever, for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus, or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning any person without due process of law. Nor can any argument be drawn from the nature of the sovereignty, or the necessities of the government, for self-defence, in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative, or

judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendment to the constitution, in express terms, provides that 'the powers not delegated to the United States by the constitution, and not prohibited by it to the states, are reserved to the states respectively or to the people.'

"While the value set upon this writ of habeas corpus in England has been so great that the removal of the abuses which embarrassed its enjoyment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective, should have been the object of the most jealous care. Accordingly, no power in England, short of that of parliament, can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone, (1 Bl. Comm. 136:) 'But the happiness of our constitution is that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only, or the legislative power, that, whenever it sees proper, can authorize the crown to suspend the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing.' And if the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of citizens than the people of England have thought safe to intrust to the crown, a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign, even in the reign of Charles I."

The chief justice, in his opinion in the Case of Merryman, [Case No. 9,487,] referred to the action of congress at the time of Burr's conspiracy, in 1807, and to the fact that it was not then claimed that the president had power to suspend the privilege of the writ of habeas corpus. There appears to have been no report of the debate in the senate on the bill there introduced, in consequence of a special message from President Jefferson, (as it was considered in secret session,) but in the house the bill was ably and openly discussed by several members; and though the bill only proposed to suspend the privilege "for three months and no longer," in "all cases where any person or persons charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety or neutrality of the United States, have been or shall be arrested and imprisoned by virtue of any warrant or authority of the president of the United States, or from the chief executive magistrate of any state or territorial government, or of any person acting under the direction or authority of the president of the United States," the house, by a vote of 113 to 19, rejected the bill, on the usual motion, "that the bill be rejected;" which is considered a motion of indignity, indicating that the bill is not worthy of deliberate discussion and consideration in the usual form. Hurd, Hab. Corp. 135.

In the case of Johnson v. Duncan, 3 Mart. (La.) 531, this question was brought under consideration; and, though Chief Justice Martin referred to the decision of the supreme court in the case cited by Chief Justice Taney as exclusive authority, he nevertheless proceeded to examine the question as though it had not been authoritatively decided. The whole opinion is remarkable for its vigor and clearness, and will repay the most careful examination; and I will extract a portion of it which directly relates to the question now under consideration. After referring to the argument that all the functions of the civil magistrate had been suspended by a proclamation of martial law, by the officer commanding the military district, the chief justice proceeded as follows:

"This bold and novel assertion is said to be supported by the ninth section of the first article of the constitution of the United States, in which are detailed the limitations of the powers of the legislature of the Union. It is there provided, 'that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' We are told that the commander of the military districts is the person to suspend the writ, and is to do so whenever, in his judgment, the public safety appears to require it; that, as he may thus paralyze the arm of the justice of his country in the most important case,—the protection of the personal liberty of the citizen,—it follows that, as he who can do the more can do the less, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law. This mode of reasoning varies toto caelo from the decision of the supreme court of the United States, in the case of Ex parte Bollman, arrested in this city in 1806, by Gen. Wilkinson. The court there declared that the constitution had exclusively vested in congress the right of suspending the privilege of the writ of habeas corpus, and that body was the sole judge of the necessity that called for suspension. 'If at any time,' said the chief justice, 'the public safety shall require the suspension of the powers vested in the courts of the United States by this act, (the habeas corpus act,) it is for the legislature to say so. This question depends upon political considerations on which the legislature is to decide. Till the legislative will be expressed this court can see only its duties and must obey the law.' 4 Cranch, [8 U. S.] 101. The high authority of this decision seems, however, to be disregarded, and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this state; it is therefore meet to dispel the

clouds which designing men endeavor to cast on this article of the constitution, that the people should know that their rights, thus defined, are neither doubtful nor insecure, but supported on the clearest principles of our laws. Approaching, therefore, the question as if I were without the above conclusive authority, I find it provided by the constitution of this state, that 'no power of suspending the laws of this state shall be exercised unless by the legislature or under its authority.' The proclamation of martial law, therefore, if it intended to suspend the functions of the courts, or its members, is an attempt to exercise powers thus exclusively vested in the legislature. I therefore cannot hesitate in saying that it is in this respect null and void. If, however, there be aught in the constitution or laws of the United States that authorizes the commanding officer of a military district to suspend the laws of this state, as that constitution and these laws are paramount to those of the state, they must regulate the decision of this court. This leads me to the examination of the power of suspending the writ of habeas corpus, and that which it is said to include, of proclaiming martial law, as noticed in the constitution of the United States. As, in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. 'Iniquum est perimi de pacto, id de quo cogitatum non est.' If, therefore, this suspending power exist in the executive, (under whose authority it has been endeavored to exercise it,) it exists without any limitation then the president possesses without a limitation of power which the legislature cannot exercise without a limitation. Thus, he possesses a greater power alone than the house of representatives, the senate, and himself jointly. Again, the power of repealing a law, and that of suspending it, (which is a partial repeal,) are legislative powers. For 'eodem modo quo quid constituitur, eodem modo destruitur.' As every legislative power that may be exercised under the constitution of the United States is exclusively vested in congress, all others are retained by the people of the several states.

"In England, at the time of the invasion by the Pretender, assisted by the forces of hostile nations, the habeas corpus act was suspended; but the executive did not thus of itself stretch its own authority. The precaution was deliberated upon and taken up by the representatives of the people. Delolme, 409. And there the power is safely lodged, without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have gratified when they shall thus have overthrown the columns of public liberty. Id. 275.

"If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, 'martial law can not be used without the authority of Parliament.' 5 Com. Dig. 229. The authority of the monarch himself is insufficient. In the case of Grant v. Sir C. Gould, 2 H. Bl. 69, which was on a prohibition (applied for in the court of common pleas) to the defendant, as judge advocate of a court martial, to prevent the execution of a sentence of that military tribunal, the counsel who resisted the motion said it was not to be disputed that martial law can only be exercised in England so far as it is authorized by the mutiny act and articles of war, all which are established by parliament, or its authority, and the court declaring it totally inaccurate to state any other martial law, as having any place whatever within the realm of England."

In the same case, Mr. Justice Derbigny, in delivering his opinion, said:

"To have a correct idea of martial law in a free country, examples must not be sought in the arbitrary conduct of absolute governments. The monarch who unites in his hands all the powers may delegate to his generals an authority unbounded as his own. But in a republic, where the constitution has fixed the extent and limits of every branch of government in time of war, as well as of peace, there can exist nothing vague, uncertain, or arbitrary, in the exercise of any authority.

"The constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide, that in times of public danger the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision, and had they done it, the states would have rejected a constitution stained with a clause so threatening to their liberties. In the mean time, conscious of the necessity of removing all impediments to the exercise of executive power, in cases of rebellion or invasion, they have permitted congress to suspend the privilege of the writ of habeas corpus in those circumstances, if the public safety should require it. Thus far, and no further, goes the constitution. Congress has not hitherto thought it necessary to authorize that suspension. Should the case ever happen, it is to be supposed it would be accompanied with such restrictions as would prevent any wanton abuse of power. 'In England,' says the author of a justly celebrated work on the constitution of that country, 'at the

time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended; but the executive power did not thus of itself stretch its own authority. The precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals. The proceedings against them were to be carried on no otherwise than in a public place. They were to be tried by their peers, and have all the usual legal means of defence allowed them, such as calling of witnesses, peremptory challenges of jurors,' &c. And can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of a free government, but subversive of the very foundation of our own.

"Under the constitution and laws of the United States, the president has a right to call, or cause to be called, into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power, exercised by his delegate, has placed all citizens subject to military duty under military authority and military law. That I conceive to be the extent of the martial law, beyond which all is usurpation of power. In that state of things, the course of judicial proceedings is certainly much shackled, but the judicial authority exists, and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of habeas corpus, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice, generally, should be stopped; for, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases. The proclamation of martial law cannot have had any other effect than that of placing under military authority all the citizens subject to military service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any larger extent would be trampling upon the constitution and laws of our country."

That the doctrines of these decisions, in regard to the exercise of the power of suspending the privilege of the habeas corpus, have been almost universally considered as incontrovertible, is fully established by reference to the works of many elementary writers, and by the fact that no evidence of the dissent of other jurists or of the profession has been recorded. Hurd, in his work on Habeas Corpus, in reference to the constitutional provision before referred to, says: "Rebellion and invasion are eminently matters of national concern; and charged, as congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to make effectual such measures as it may deem expedient to adopt for their suppression." Page 133. And, (page 134:) "This power has never been exercised by congress." And, again, (page 149:) "The provision (of the constitution) relating to the writ of habeas corpus limits the legislative power."

Smith, in his Commentaries, also considered this provision of the constitution under the head of "Constitutional Restriction upon Legislative Power." Smith, Comm. c. S, § 229. And Curtis, in his history of the Constitution, also refers to it as one of the restrictions upon the powers of congress. 2 Curt. Const. p. 339. In Sheppard's Constitutional Text Book, at page 142, this is given as a restriction upon the power of congress. And in the conclusion of the article "Habeas Corpus," in Appleton's New Encyclopedia, it is said: "It has been solemnly decided that the habeas corpus act can be suspended only by the legislature, and that the proclamation of martial law, by a military officer, is not sufficient." The article on martial law, in the same work, contains the following: "The constitution, by implication, also permits its proclamation, by that clause which provides that the privileges of the writ of habeas corpus shall not be suspended," &c. "The right to judge whether the exigency has arisen belongs, it seems, exclusively to congress. So, in England, martial law and its incident, the suspension of the writ of habeas corpus, required the authority of parliamentary acts to give them a constitutional existence."

When the question of the adoption of the federal constitution was under consideration in the Massachusetts convention, the constitutional restriction upon the power of suspending the privilege of the habeas corpus was discussed by Judges Dana and Sumner, in the presence, doubtless, of Nathaniel Gorham and Rufus King, members of that convention, as well as of the one that framed the constitution of the United States, and both the judges evidently regarded it as certain that congress only could suspend the privilege. 2 Elliot, Deb. 108, 109; Hurd, Hab. Corp. 126, 127. And during Shay's Rebellion it was the legislature of Massachusetts, and not her governor, that suspended the privilege of this writ. Hurd, Hab. Corp. 136. Against these authorities, and

the general sentiment of elementary writers, there stands opposed the practice of the war department, first inaugurated in a period of great excitement and alarm, and the official opinion of the learned and venerable gentleman who now holds the office of attorney general of the United States. For that gentleman I entertain the highest respect. His purity of motive and character, his great legal acquirements, and his undoubted patriotism and ability are unquestioned; but, even in these respects, that excellent gentleman would not wish his friend to claim more than that he was the equal of the learned chief justice of the United States. Placing their opinions upon the same footing, they would only neutralize each other, and then the deliberate opinions of Marshall and Story and Martin and the other justices of the supreme court who concurred in the opinion of their chief in the case of Ex parte Bollman, 4 Cranch, [8 U. S.] 75, supported, as they are, in my judgment, by unanswerable argument, are decisive of the question, and constrain me to decide that the president, without the authority of congress, has no constitutional power to suspend the privilege of the writ of habeas corpus in the United States. The prisoner is therefore, in any view which I have been able to take of this case, entitled to the benefit of the writ of habeas corpus, and to be discharged, unless some reason for detaining him, beyond that set out in his petition, is shown. But other reasons besides those set forth in his petition, or in any warrant or order of commitment under which he may be now held, may be shown. The district attorney of the United States will have notice of the allowance of the writ of habeas corpus, and if, on its return, or at any time, he, or the marshal of the United States, or his deputy, or any other citizen, can show that the petitioner has been guilty of any offence against the laws of the United States, or has in any way subjected himself to legal arrest and imprisonment, it will be my duty (a duty which I certainly shall not hesitate to perform) to commit him to prison by a proper and sufficient order or warrant.

I have thus hastily, though with some labor, written out an opinion in this matter, though the application for a habeas corpus was ex parte, and was decided without the benefit of an argument for or against the application. I have done so because the duty of deciding upon the application was a delicate and responsible, as well as an imperative one; and being compelled to decide a question of such importance, under such circumstances, it was but respectful to those high officials, whose legal opinions, opposed to mine, have led to the arrest of the petitioner and the denial of the privilege of the writ of habeas corpus, that I should state, at some length, the reasons for my conclusions and the authority on which I relied. I have preferred, however, even in expressing my own decided opinions, to adopt the deliberate and eloquent language of departed jurists, of world-wide reputation,—language used by them in deciding cases which had been fully argued, and used, too, after they had had the benefit of a full consultation with their learned associates on the bench,—rather than the less forcible and less authoritative language in which I might have expressed my own opinions. The opinions referred to have been before the profession and the country for more than forty years, and, so far as I know, they had not, until a very recent period, been questioned, or their doctrines assailed by any respectable jurist. I cannot but endeavor to follow, though with feeble and uncertain steps, in the paths of constitutional duty, clearly and distinctly marked with the ineffaceable foot-prints of Marshall, of Story, of Washington, of Livingston, of Martin, and of Taney; and, guided by the serene and steady light of their recorded opinions, I may certainly hope not to go far astray.

I have indorsed the proper allowance upon the petition presented, and upon the writ prepared by the clerk.

On motion for attachment against the marshal for disobedience to the writ of habeas corpus, granted as above:

HALL, District Judge. On the 23rd inst., I allowed a writ of habeas corpus, directed to "Edward I. Chase, United States Marshal," commanding him to have the body of Judson D. Benedict, by him imprisoned and detained, as it was said, together with the time and cause of such imprisonment and detention, before me on the 25th inst., at 10 o'clock in the forenoon, at the United States court room, in this city. On the return day of the writ, the counsel for Mr. Benedict furnishes proof of the service of the writ upon Mr. Chase, in this city, about 5 o'clock in the afternoon of the day on which it was issued. The affidavit of Henry B. Ransom, Esq., who made the service, also states that he and the said Chase went together on the same train of cars to Lockport; that he, the deponent, saw, after his arrival there, the said Benedict in front of said Chase's office, in Lockport,—said Chase, as deponent was informed and believed, being in his office at the time. Mr. Chase, the marshal, did not produce Mr. Benedict, the prisoner, on the return day of the writ; nor did he appear in person to make return thereto; but A. G. Stevens, Esq., delivered me the writ, with a statement or return annexed thereto, of which the following is a copy:

"To the Hon. Nathan K. Hall, District Judge of the United States for the Northern District of New York: The annexed writ was delivered to me between five and six o'clock in the afternoon of the 23d day of September inst. Before that time, and about noon of that day, Judson D. Benedict, the person named in that writ, had been arrested

by me for disloyal practice by order of the president of the United States, and put in charge of Daniel G. Tucker, with directions to convey him to the Old Capitol Prison, in the city of Washington, and said Tucker immediately left Buffalo with the prisoner for that purpose. Under general orders made by the president, through the war department, bearing date the 8th day of August, 1862, said Benedict had been, on September 2d, 1862, arrested by my deputy, A. G. Stevens, for such disloyal practice, and said deputy was ordered by the war department to detain him in custody until the further order of said department. For safe keeping, said Benedict was removed from Fort Porter to the jail of Erie county. Afterwards, as is said, a writ of habeas corpus, directed to said Stevens and William F. Best, the jailer, was delivered to said jailer. The war department was informed by said Stevens of the allowance of said writ, and said Stevens was directed by said department not to regard said writ. But said William F. Best, the jailer, refused to allow me or my deputy, Mr. Stevens, to have any control of the prisoner, or of the writ, and avowed his intention to make return to said writ, and produce the prisoner before your honor. I informed the war department of such refusal and avowal. In answer I received an order made by the secretary of war, saying, in substance: 'Your deputy, Mr. Stevens, was directed to disregard the writ of habeas corpus. If Stevens or the jailer permits Benedict to be discharged on habeas corpus, arrest him again, and convey him to the Old Capitol Prison at Washington.' The original order was delivered by me to Mr. Tucker, into whose charge I delivered the prisoner, and I have no perfect copy. The above is a substantial copy, and in all essential particulars is correct. In pursuance of such order, after said Benedict was, on the 23d inst., discharged from the custody of said Best, and said Benedict had left the United States court room, I arrested him, and put him in charge of Mr. Tucker, with the directions above stated. A formidable insurrection and rebellion is, as is well known, now in progress in this country, and the writ of habeas corpus suspended, and the president of the United States, by one of the orders above referred to, made on the 8th of August, declared the same to be suspended in case of disloyal practices. I would refer your honor to the proclamation of the president of the United States of the 24th September inst. I, therefore, understand that the above arrests are military arrests, in relation to which the writ of habeas corpus is suspended. I have, however, out of respect to your honor, and the judicial authority of the country, thought it my duty to return to you the annexed writ of habeas corpus, and make the foregoing statement. Very respectfully, Edward I. Chase, U. S. Marshal. Dated the 25th day of Sept., A. D. 1862."

The counsel for the prisoner objected to the receipt of this statement or return of the marshal, on the ground that it was not sufficient or proper return to the writ; but as it appears to be in the nature of a return, containing a statement of the reasons which had induced the marshal to whom the writ was directed and delivered, to decline obedience to its commands, I can see no sufficient ground upon which to maintain the counsel's objection. The return is therefore received, and forms a part of the record of the proceedings in the case.

The counsel for the prisoner also asked, in substance:

1st. That an order be immediately made discharging the prisoner;

2d. That proceedings by order of attachment be immediately taken for the purpose of punishing the marshal for a contempt in refusing to comply with the requirements of the writ of habeas corpus.

I declined to make an order for the prisoner's discharge, believing that at common law an order for the discharge of a prisoner, for whom a habeas corpus had been issued, could not regularly be made, by a judge at chambers, until the prisoner was produced under the writ. Besides, the prisoner was then, as I supposed, already beyond the limits of my district, and, consequently, where my order of discharge could have no legal operation or effect.

It is true, that I understood the counsel for the prisoner to suggest that he desired an order for the prisoner's discharge, although he was out of my district, for the reason that he supposed that an order of that kind, made by a judicial officer, would be respected and obeyed, even out of his district; but, notwithstanding the apparently serious manner of the counsel, I cannot but regard the suggestion as practically ironical. At all events, it could have no foundation in law or logic, unless it can be logically argued that because a similar order regularly made, while the prisoner was before me, in my own district, and within my conceded jurisdiction, was disregarded and contemned, the order now asked for, irregularly made, while the prisoner was not before me, would be regarded and obeyed, beyond my district and jurisdiction, where it had no legal force, and might, therefore, be properly disregarded.

Having no disposition to go one step beyond the limits of judicial duty, knowing that I should do nothing to bring the judicial department of the government into contempt by overstepping those bounds and making orders which can legally be disregarded, and having (by an examination of a decision of the supreme court of Massachusetts) been confirmed in my impression that I can make no order of discharge until the prisoner is before me, I adhere to the opinion expressed on the return day of the writ, and to the decision then made, denying the order for the discharge of the prisoner, as prayed for

by his counsel. See Hurd, Hab. Corp. 244; Com. v. Chandler, 11 Mass. 83.

I am aware that in this state, and in some others, statutes have been passed authorizing proceedings upon the writ of habeas corpus and the discharge of a prisoner, in certain cases, where he has not been produced; but these proceedings, in exceptional cases, being founded upon special statutes, only serve to show that the general rule is that declared in Massachusetts; and I know of no act of congress which authorized me, under the circumstances of this case, to make the order asked for.

The question whether I shall proceed to punish the marshal for contempt in disobeying the writ of habeas corpus is entirely different in character from that I have just been considering, and also from the questions which were under consideration when the prisoner was before me, some days since, under the former writ of habeas corpus. So long as the question of the prisoner's discharge from custody was before me, every legal presumption was in favor of his right to his liberty; and those who sought to continue his imprisonment were bound to show affirmatively that there was legal authority for his detention. The question now presented is not whether the prisoner shall be discharged from imprisonment, and restored to liberty, but whether the officer who assumed to arrest and hold him shall be deprived of his liberty, and be committed to prison. Upon questions of this character, the right of the marshal and of the prisoner is the same, and each has a right to demand that he shall not be imprisoned or restrained of his liberty without authority of law, and that this right is not peculiar to these parties. It does not result from the clerical character of the one or the official position of the other, for it is the common birth-right of every American citizen, and the marshal and the clergyman but share it equally with the beggar at their gate. It is therefore my duty, before I authorize any restraint upon the liberty of a citizen, to see that I can proceed at every step upon the most solid and stable grounds. And this is more especially the duty of every judicial officer in cases of alleged contempts, because the power of punishment is exercised upon the sole judgment of the court or judge before whom the proceeding is had, without the intervention of a jury; and. ordinarily, (as would be the case in the present instance,) without any right of appeal. It is very certain that no judge who has a just regard to the rights of his fellow citizen can need any suggestion, other than those of his own judicial mind, to convince him that such a power (a power which I have never yet had occasion to exercise during a considerable period of judicial service, in the courts of this state and of the United States) should be exercised with extreme caution, and only after mature deliberation.

After a careful examination of the return made by the marshal, I am satisfied it is clearly insufficient. It does not directly state, and certainly it does not indirectly show, that the prisoner, Benedict, "was not in his (the marshal's) possession, custody, or power at the time of the service of the writ, or at any time after." Hurd, Hab. Corp. 248, etc., and cases there cited. On the contrary, it shows that the prisoner was arrested in pursuance of an order which directed the marshal to arrest him, and to convey him to the old Capitol Prison in Washington; and under such order he must have been in the possession, custody, and power of the marshal when the writ was served and afterwards, as shown by the affidavit of Ransom, annexed to the copy of the writ. There is no statement or pretence that Tucker acted in any other capacity than as deputy or assistant of the marshal, or that any effort was made by the marshal to obey the writ. The return in fact shows that there was no intention to obey the writ, but, on the contrary, that there was, from the first, a settled purpose to disobey it, and to rely upon the action and orders of the war department to justify or excuse such disobedience. The return shows that Benedict was put into the possession of Tucker, (who is officially known to me as a general deputy of the marshal,) for the purpose of conveying him to Washington; and it is fair to presume that the report that Benedict was the next day taken out of the state, on his way to Washington, is not untrue.

I cannot doubt, therefore, that if I had legal power and authority to grant the writ in this case, as I have already decided after mature deliberation, there has been a contempt of the authority of the law, on the part of Marshal Chase, in deliberately refusing obedience to the writ. What is my power, and what is my duty, under the circumstances of this case? is the question which yet remains to be considered. I can make an order requiring a further return; but if such order should be disobeyed, can I, and ought I, to issue and enforce the execution of an attachment for such disobedience? An order for a further return, if obeyed, would not, under the known and conceded facts of this case, produce any results beneficial to the prisoner; and no return in accordance with such facts would show either the command of the writ had been obeyed, or that (in the view I have taken of the case) there is any legal excuse for disobeying it. Indeed, I do not understand that the marshal can properly take any other position than that he has disregarded the writ under the express orders of one of the chief executive departments of the government. The case presents a conflict of opinion between the executive and judicial departments of the government; and the marshal is placed in a position in which he must disregard the authority of one or the other of such departments. He is

an executive officer, and executive officers are ordinarily expected to follow the instructions of their superiors in the executive department; but a marshal is peculiarly situated. He is properly considered as the executive officer of the courts of his district, and is, ordinarily, to obey the orders and execute the process of the judicial department. The act of congress which provides for his appointment, in order to secure obedience to all judicial process, also provides that the marshal, and also his deputies, shall take, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of ——, under the authority of the United States, and true returns make; and in all things will well and truly, without malice or partiality, perform the duties of the office of marshal, (or marshal's deputy, as the case may be,) of the district of ——, during my continuance in office, and take only my legal fees. So help me God." While, therefore, the marshal is, in one sense, the officer and agent of the president, to aid him in the discharge of his constitutional duty "to take care that the laws be faithfully executed," he is, in a higher sense, the officer of the constitution and the law, and is bound by his oath of office to carry the process of the law into execution. He is, nevertheless, in the power of the president, for the president can remove a marshal who refuses to execute his orders, and may appoint in his stead a marshal who will execute them. If I am right in my conclusions, the marshal should have obeyed the writ, for that has the authority of law, to which rulers, officers, and people are alike subject; but if I am wrong, and the war department is right, his disobedience is justified. I regard the orders and action of the war department as direct and clear violations of the legal and constitutional rights of the citizen, and that department disregards my judicial opinion and official action as erroneous, unauthorized, and improper. The marshal, placed in a position not of his own choosing, must therefore disobey the orders of the war department, or the command of the writ of habeas corpus, and must, in either event, expose himself to very unpleasant and injurious consequences, even if the writ of habeas corpus has been legally suspended. Such a suspension may prevent the prisoner's discharge; but it leaves untouched the question of the illegality of his arrest, imprisonment, and deportation. If these are unlawful, the marshal and others engaged in these arrests are liable in damages in a civil prosecution; such damages to be assessed by a jury of the country. Besides this civil liability, the parties engaged in making this arrest, and carrying the prisoner out of the state, and beyond the protection of its officers and tribunals, may, perhaps, be subject to criminal punishment.

In the proceedings, civil and criminal, which may be instituted under the laws of the state, the great question involved in this case may be deliberately determined, and they may be taken by writ of error or appeal before the highest judicial tribunals of the state and nation. There is, therefore, no necessity, in order to prevent a failure of justice, that I should exercise the power of proceeding as for a contempt in this case, if there is the slightest doubt of the legality or propriety of such a proceeding. And a subordinate executive officer, placed in the disagreeable position now occupied by the marshal, may properly ask that a single judge, in a proceeding where there is no appeal, shall not punish him for disobeying the orders of the chief executive, especially as the law affords the party aggrieved a full remedy for his arrest, imprisonment, and deportation, if they cannot be legally justified, and has also provided for the punishment of the arresting officer as a criminal, if he has proceeded without authority. As I understand the laws of the state, the marshal can be abundantly punished if he has acted without due authority, without resorting to a proceeding for a contempt; and, even if I did not doubt my legal authority to do so, I should not be inclined to take proceedings for that purpose. Indeed, to be subject for two years to a civil action for such damages as a jury may award the prisoner for his arrest and imprisonment, and also to be subject for years to indictment and trial in any one county from Niagara to New York, inclusive, even if such proceedings were almost certain to result in verdicts in his favor, would be to me, and I have no doubt will be to the marshal, a much severer punishment than I could, under the circumstances of this case, consent to inflict.

In justification of my own course in thus deciding that it is inexpedient, even if I have the power, to proceed against the marshal by attachment, I propose to refer very briefly to the provisions of the statutes of this state, which have influenced me in reaching that conclusion. I also propose to refer to them in this opinion because a general knowledge of these provisions may induce arresting officers, and those who incite them to action, to be more careful to ascertain, before making or causing an arrest, that such arrest can be justified, and for a reason far more important than the interests of those officers, or my own justification, I deem it proper to make such reference in order that I may show that the law has made abundant provision for the redress of the injuries inflicted by illegal arrest and imprisonment, and the illegal removal of the party arrested and imprisoned beyond the jurisdiction of the state courts, for the purpose of repressing any disposition to resist these arrests by violence, instead of relying upon legal proceedings for redress and punishment.

The statutes of the state of New York pro-

vide, in the most ample and effective manner, for the discharge of all persons illegally restrained of their liberty, and they require the courts and judicial officers of the state to allow the writ under a penalty of $1,000, unless it shall appear from the petition therefor, or from the documents annexed, that the party applying for such writ is, by the provisions of the statute, prohibited from prosecuting such writs. And the rule which provides fully for issuing such writs also contains the following sections:

"Sec. 61. Any one having in his custody, or in his power any person, who, by the provisions of this article, would be entitled to a writ of habeas corpus or certiorari, to inquire into the causes of his detention, who shall, with intent to elude the service of any such writ, or to avoid the effect thereof transfer any such prisoner to the custody or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor.

"Sec. 62. Any one having in his custody or under his power, any person for whose relief a writ of habeas corpus or certiorari shall have been duly issued, pursuant to the provisions of this article, who with intent to elude the services of such writ, or to avoid the effect thereof, shall transfer such prisoner to the custody or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor.

"Sec. 63. Every person who shall knowingly aid or assist in the violation of either of the two last preceding sections shall be deemed guilty of a misdemeanor.

"Sec. 64. Every person convicted of any offence under either of the last four sections, shall be punished by fine or imprisonment, or both, in the discretion of the court in which he shall be convicted, but such fine shall not exceed $1,000, nor such imprisonment six months." 2 Rev. St. pp. 571, 572.

It is further provided by the statutes of this state (Rev. St., 4th Ed., p. 587) as follows:

"Sec. 30. Every person who shall, without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other with intent either—1. To cause such other person to be secretly confined or imprisoned in this state against his will; or, 2. To cause any such person to be sent out of this state against his will; or, 3. To cause such person to be sold as a slave, or in any way held to service against his will, shall, upon conviction, be punished by imprisonment in a state prison not exceeding ten years.

"Sec. 31. Every offence prohibited in the last section may be tried either in the county in which the same may have been committed, or in any county through which any person so kidnapped or confined, shall have been taken, while under such confinement."

And in addition to these provisions of the New York statutes, it must also be remembered that the prisoner has been taken to Washington, and that in December next the questions in regard to the legality of his arrest, imprisonment, and deportation may be inquired into by the highest judicial tribunal of the United States, in his case or that of some other prisoner in like condition. To the decisions of that august tribunal all will cheerfully submit; and, if I am wrong in the view I have taken of the questions involved in the arrest and imprisonment of Benedict, my error will be corrected.

I have already intimated that there was doubt in regard to my power legally to punish the marshal for a contempt in this case, and I propose now to state very briefly the grounds upon which that doubt is based. Process issued by the courts and judicial officers of the United States is issued in the name of the "President of the United States;" and all process authorizing the arrest or commitment of any person is by law and custom directed to the marshal of the district for the execution and return, except in the cases where other provision had been made by the act of congress. In ordinary cases, then, process issued by me in proceedings for a contempt would commence thus: "The President of the United States of America, to the Marshal of the Northern District of New York—Greeting: You are hereby commanded that you take," &c. And thus the process of the law, committing the marshal for a contempt, would run in the name and authority of the president, and would direct the marshal to commit himself to prison. Such a process would surely be practically, and would probably be legally, ineffective for that purpose; and congress has not, so far as I can ascertain, made any provision for authorizing a judge at chambers to issue process in a different form, in a case like that now before me. It is true, the judiciary act provides (section 28) that, "in all cases wherein the marshal or his deputy is a party, the writs and precepts therein shall be directed to such disinterested person as the court or a judge thereof may appoint, and the person so appointed is hereby authorized to execute and return the same," [Act Sept. 24, 1789; 1 Stat. 87;] but this provision appears to extend only to process issued in causes in court. At all events, it is not clearly applicable to such a case as this; and the power of a judge to direct process to an unofficial person, without express authority by statute, is too doubtful to justify me in issuing any such process, or asking any unofficial person (or if any one would undertake the duty) to attempt to execute it. Such a process, in the hands of any party willing to take the risk of its execution, would probably be resisted as unlawful; and a breach of the peace would be the inevitable result of any attempt to execute such process. No judge should do anything tending to such a result where his duty permits him to avoid doing it.

For the reasons I have now given, I shall

decline issuing process against the marshal for his disobedience to the writ of habeas corpus.

Case No. 1,293.

BENEDICT et al. v. DAVIS.

[2 McLean, 347.][1]

Circuit Court, D. Indiana. May Term, 1841.

PARTNERSHIP—WHAT CONSTITUTES—REPRESENTATIONS—EVIDENCE.

1. If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it.

[Cited in Thompson v. First Nat. Bank, 111 U. S. 541, 4 Sup. Ct. 695. See, also, Buckingham v. Burgess, Cases Nos. 2,087, 2,089.]

2. But this holding out must be such as to justify an inference that the creditor had knowledge of it. Or the representation of partnership must be made to him.

[Cited in Thompson v. First Nat. Bank, 111 U. S. 541, 4 Sup. Ct. 695.]

3. A declaration by an individual that he was a partner, to some four or five individuals, of which the creditor, when he trusted the firm, could have had no knowledge, will not constitute a liability.

4. To rebut such declarations, as conducing to establish a partnership in fact, the contract made between the parties, though by parol, may be proved.

5. A court will not grant a new trial, unless the rules of law, and purposes of justice, require it.

[At law. Action by Benedict and others against the administrators of Davis to charge the intestate as a member of the firm of Allison & Co. There was a judgment for defendants, and plaintiffs moved for a new trial. Motion denied.]

Mr. Niles, for plaintiffs.

Mr. Bradley, for defendants.

OPINION OF THE COURT. This action is brought against the defendants to recover from them, as the representatives of Davis, a partner in the house of Allison & Co. The jury found for the defendants, and a motion for a new trial was made on the following grounds:

First: The jury should have been instructed that Davis, having held himself as a partner to the world, was liable as such.

Second: Evidence was given to the jury in regard to the contract between Davis and the Allisons, which should have been excluded.

Third: The weight of the evidence was in favor of the plaintiffs.

Among other evidence conducing to show a partnership between Davis and the Allisons, several witnesses stated that the former represented himself to them, both before and after the purchase of the goods, for the price of which this action was brought, as a partner. And it is insisted that, on this ground alone, he is chargeable as a partner. That where an individual holds himself out as a partner he is liable as such, though, in fact, he had no interest in the partnership concern.

The doctrine of partnership, though pretty well defined, does not seem, on some points, to have been settled on sound principles. It is laid down that if an individual, as a compensation for his labor, agrees to receive a part of the profits, he will be liable as a partner; and yet if he is to receive a certain sum of money in proportion to a given quantum of the profits, he is not so liable. Now, although this is the established doctrine, in the language of Lord Eldon, in reason, it would seem to be impossible to say, that, as to third persons, they are not equally partners. Ex parte Rowlandson, 1 Rose, 89; Ex parte Watson, 19 Ves. 461. Where a person lends his name to a partnership, though, in fact, he has no interest in it, he is liable as a partner. And this rule is founded upon general policy. Waugh v. Carver, 2 H. Bl. 235. Gow, Partn. 23. To create responsibility, as a nominal partner, the allowed use of the name on bills of parcels used by the firm seems to be sufficient, notwithstanding that the creditor was originally ignorant of the introduction of the name. Gow, Partn. 23; Young v. Axtell, 1 Esp. N. P. 29; 1 Serg. & R. 338.

In the case under consideration the declarations of Davis, in regard to his being a partner, as proved, were made at, and in the neighborhood of, Laporte, in Indiana, to residents of that place; the bills were not made out against Davis as a partner, nor was there any evidence conducing to prove that the plaintiffs had any knowledge that he represented himself to be a partner, or, that the plaintiffs, who are citizens of New York, gave credit to the Allisons on his account. And it is important to inquire whether, from this state of facts, he can be held responsible as a partner. The counsel for the plaintiffs earnestly contends that Davis is liable on the above evidence, though it be in fact clear that he had no partnership interest. That this liability does not depend on the credit given by the plaintiffs to him at the time the goods were sold, nor on their having a knowledge of his having held himself out as a partner, but upon the fact of his having so represented himself. In this view of the case, if there be a liability it arises from general policy, that an individual shall be held bound where, by holding himself out to the world as a partner, he has given the influence of his name to the firm. That a contrary doctrine would enable an individual to practice a fraud upon all who gave credit to the firm. Before a reference is made to adjudged cases on this point, it may be proper to remark, that it is difficult to perceive how a fraud can have been practiced on the plaintiffs, if, at the time they sold the goods, they had no knowledge of

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

Davis, as being connected with the firm, or, as representing himself to be connected with it. It is clear that, under such circumstances, his name or credit could not have operated on the plaintiffs, or in any way influenced their conduct. Such a fraud seems to be too refined for legal comprehension or action. It may be readily admitted that positive proof of knowledge of the above facts, by the plaintiffs, is not necessary to establish the liability of Davis; but such facts must be proved as to authorize the jury to infer this knowledge. This inference might well be drawn from the fact, that the name of Davis was published as a partner in a newspaper, or inserted in a sign over the door of the house in which the goods were kept and sold, or that the bills were made out against him as a partner. But not one of these facts are proved in this case.

In the case of Vice v. Anson, 7 Barn. & C. 409, Lord Tenterden said—the plaintiff, at the time when he supplied the goods, did not know that the defendant either had, or thought she had, any interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion in private letters and society that she was interested, might be prima facie evidence that she had an interest; but the other facts in the case show that she had not any interest. This case is more fully reported in 3 Car. & P. 19, and, also, the decision of the court in bank on a motion to set aside the nonsuit which was overruled. In the case of Dickinson v. Valpy, 10 Barn. & C. 128, Mr. Justice Parke said—if it could have been proved that the defendant had held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. In Chit. Bills, (Ed. 1839,) 43, it is said, if a person represent himself to be a partner, though, in fact, he was not so, and thereby induce a person to give credit to a concern, he will be liable as a partner; but the representation must be by himself, or by some third person by his authority; and it must be general and public, or to the particular creditor, for a representation only to one or more persons which the creditor never heard of, could not mislead him, and he has no right to avail himself of it, in order to fix a party, who, in fact, was not a partner. These authorities show that, independently of the proof of the fact of partnership, there was no such holding out by Davis to the public, or to the plaintiffs, as to make him liable as a partner, and that the court did not mistake the law in their charge to the jury.

The motion for a new trial can not be granted on the second ground. The complaint here is, that illegal evidence was admitted to show the contract between Davis and the Allisons, in regard to his advance to them of five hundred dollars, the amount of which he was to receive in goods at cost. This evidence was introduced by the defendants to rebut and explain the evidence of a partnership given by the plaintiffs. The terms of the contract were repeated by the parties in the presence of the witness, before one of the Allisons, who purchased the goods, left Laporte for that purpose. Now, it is true this contract was made without the knowledge of the plaintiffs, but, in this respect, it stands upon the same footing as the evidence to prove a partnership. And as they had no knowledge of the one, they can complain of no surprise as to the other. In every view the evidence to prove this contract was legal. Whether it was fraudulently entered into or not, was a matter for the jury.

That the weight of evidence, as to the proof of partnership, was with the plaintiffs, must be admitted. At least this is my view on the subject. But the preponderance is not such as to authorize the court to set aside the verdict and give a new trial. To authorize this it is not enough that the court differ, in their opinion of the evidence, from the jury. There was some impeachment of two or three of the witnesses, from the facts proved, and the circumstances of the case. The jury had the facts fully before them, and gave such weight to the witnesses as they believed them to be entitled to. Under all the circumstances we are not convinced that the rules of law, and the purposes of justice, require a new trial, and the motion is overruled.

Case No. 1,294.

BENEDICT et al. v. MAYNARD et al.

[4 McLean, 569.] [1]

Circuit Court, D. Michigan. June Term, 1849.

AGENCY—RATIFICATION.

Where notes and mortgages are received in payment of a debt, and the creditors object to the arrangement, on the ground that the agent was not authorized so to receive them; a proposal was made by the debtors to return the notes and mortgages, which the creditors refused to do, and brought suit on the mortgage, etc.; the court instructed the jury, that by refusing to return the instruments and bringing suit, they sanctioned the acts of their agent.

[See People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181; Lawrence v. New Bedford Com. Ins. Co., Case No. 8,140.]

[At law. Action by Lewis Benedict & Co. against William S. Maynard & Co. on a promissory note. Verdict for defendants.]

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

Mr. Lockwood, for plaintiffs.
Hawkins & Emmons, for defendants.

OPINION OF THE COURT. This action is brought upon a note of hand. In 1841 defendants did business as merchants, under the firm of Wm. S. Maynard & Co.; and the plaintiffs were engaged in business under the name of Lewis Benedict & Co. The note was given by the defendants for $2,103.10, payable one day after date, for value received. Certain credits were indorsed on the note, and it was cut through in the usual mode of cancelling a note by the banks. The note was offered in evidence, but objected to until its appearance should be explained. Mr. Kingsley, a witness, stated that the note was placed in his hands for collection, and he was instructed by plaintiffs to take mortgages or notes due, or soon to become due, to secure the payment of the above note, and that on such condition a reasonable time would be given. He received certain notes on good men, and a mortgage—one of the notes the defendants promised to pay, if the promisor did not. The mortgage was not assigned until sometime in February, 1843. He did not give up the note until sometime afterward. At the same time witness said to the defendants, if in making the arrangement, it should not be satisfactory, they must make it so. The defendants proposed to give the larger of two mortgages for $1,800, the other for $1,600. The farm covered by the smaller mortgage was more valuable than the farm covered by the larger mortgage. But witness understood, when he took the mortgage, it covered the more valuable farm. The assignment of the mortgage was absolute, at Benedict's risk and costs. Defendants said that the mortgage was to be received in payment; witness replied, that he had no authority to receive it as such. Took the mortgage, and witness observed, if it was not right, defendants must make it so. When the mortgage was received, the balance of the note was paid to the plaintiffs. After the arrangement was made, the defendants proposed to the plaintiffs, if they were dissatisfied with what their attorney had done, they were requested to return the papers, and place the parties as they were. But they never offered to return the evidences of claim.

The court instructed the jury that the inquiry for them was, whether the note had been paid. The mortgage for $1,800 was assigned, and the balance was received or paid by notes. It is not clear that Kingsley, the agent of the plaintiff, was authorized to receive the mortgage and the notes, in discharge of the note on which suit is brought. There seems to have been no unequivocal understanding, that the instruments assigned should be received in payment. But, when one of the plaintiffs, afterward, had a conversation with one of the Maynards, in which he said, if you are dissatisfied with your attorney, give me back the papers, and we will stand as we were, the papers, it seems, were not returned, nor offered to be returned. It appears after this, that suit was brought on the mortgage bond. This act confirmed the contract made with Kingsley. For it was the duty of the plaintiffs to return the papers as proposed by the defendants, if they did not assent to the terms on which they were received by their agent. The defendants insisted that they were given in discharge of the note now sued on. After this conversation, by bringing suit on the mortgage and using the notes, the plaintiffs subjected themselves to the conditions under which they were transferred to the plaintiffs. And the facts being before you, gentlemen of the jury, it will be for you to determine whether the mortgage and notes were received in payment or not. If they were so received, you will find for the defendants. Verdict for defendants.

Case No. 1,295.

BENEDICT v. MAYNARD et al.

[5 McLean, 262.][1]

Circuit Court, D. Michigan. June Term, 1851.

GUARANTY—DILIGENCE—RECEIVERS—AGENCY.

1. The plaintiff indorsed two post notes of the Bank of Washtenaw, Michigan, for fifteen thousand dollars, which notes were discounted by the Mechanics' and Farmers' Bank of Albany, and by that bank the funds of the notes were paid to the creditors of the Washtenaw Bank to the amount of $2445 61. At the time of the indorsement, Benedict took to the Washtenaw Bank certain securities, which were sold at auction, and bought by Benedict for $19,250. The Washtenaw Bank failed, and James Kingsley, receiver of said bank, agreed to collect the securities, rendering a strict account, and paying over to Benedict the amount received, until the Mechanics' and Farmers' Bank was paid, including interest, costs, and expenses, and the remainder of the securities to be paid to the creditors of the Washtenaw Bank. A part of the securities were retained by Benedict. The defendants became the security of Kingsley, that they should faithfully perform, &c. Action was brought by the plaintiff against defendants, on the covenant. Defendants demurred because the plaintiff did not set forth in his declaration in what manner he used diligence to collect the New York securities. This *held* not to be necessary. The averments in the declaration *held* to be sufficient.

2. The duties of receiver of the Washtenaw Bank, and agent, not inconsistent.

3. The securities, being sold to the plaintiff, were subject to the contract, and not to his acts as receiver.

[At law. Action by Lewis Benedict against Maynard and Morgan on an instrument of guaranty. Defendants demur to the declaration. Overruled. For verdict on trial of the action, see Case No. 1,296.]

Barstow & Lockwood, for plaintiff.
Emmons & Vandyke, for defendants.

OPINION OF THE COURT. This is an action of covenant founded upon an instru-

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

ment under seal, dated the 4th of July, 1850. Among other things the covenant recites that about the 1st of October, 1838, the plaintiff indorsed two post notes of the Bank of Washtenaw, then doing business in Washtenaw county, Michigan, for fifteen thousand dollars each, dated the 1st of October, 1838, and payable in six and nine months from date; and which were discounted by the "Mechanics' and Farmers' Bank, of Albany," on which the bank paid the drafts and checks of the Washtenaw Bank, to the amount of twenty-four thousand forty-five dollars and ninety-one cents, which notes were protested when due for nonpayment. At the time of this indorsement, Benedict took from the Washtenaw Bank certain securities, which were sold at auction in 1839, with the consent of the bank, and bought by Benedict for nineteen thousand two hundred and fifty dollars.

The Washtenaw Bank failed, and James Kingsley, receiver of said bank, some time subsequently, made a proposition to Benedict to receive said securities, to collect the same, rendering a strict account, and to pay over to Benedict the amount received until the Mechanics' and Farmers' Bank should be paid, with all interest and expenses, counsel fees, costs, and a reasonable commission incurred by the said Benedict, and the remainder of said securities to be paid to the creditors of the Washtenaw Bank. A part of the New York securities were retained by Benedict, who was to account for the same. And the defendants bound themselves that Kingsley should faithfully execute the trust. In consideration of the above, Benedict agreed to place all the securities, except those in New York, &c., into the hands of Kingsley, who was to collect and account for the same, &c. And the president and directors, and others interested in the stock of the Bank of Washtenaw, santioned the arrangement. The securities amounted, nominally, to one hundred and thirty thousand dollars; the debt to Benedict exceeded twenty thousand dollars.

The defendants demurred to the declaration, and assigned for causes of demurrer: 1. That the plaintiff has not set forth in his declaration in what manner he used reasonable diligence to collect the said securities, &c. 2. That he has not in the 3d and 4th counts of the declaration shown any diligence used by him to collect them. 3. That the plaintiff has not averred performance of any thing on his part to be performed, or shown what expense he has incurred, &c.

The main ground of the argument on the demurrer was, that the contract was illegal and void at law, as Kingsley, the receiver, was a statutory agent, and was bound strictly by the law in the performance of his duties. That he was bound to collect or sell the assets of the bank, and account to its creditors. That he had no authority to pay commissions to Benedict, or costs. That the receiver had no power to give him a preference over the other creditors of the bank.

The duties of the receiver are specially pointed out in the statute, and, among others, "he is authorized to redeem all mortgages and conditional contracts, and all pledges of personal property, or to sell such property subject to such mortgages, contract, or pledges." That the receiver is bound by the authority under which he acts, is admitted. He cannot substitute his own discretion, where the law has enjoined upon him a positive duty. But the powers exercised under this contract were derived from the contract, and not specially from the statute. Benedict held these securities as his indemnity, and both in law and equity he was authorized to hold them, until the debt he had paid, or was responsible for, was discharged. He was connected with the "Mechanics' and Farmers' Bank," of Albany, which paid the drafts of the Washtenaw Bank. This gave credit to the new bank, and, perhaps, enabled it to commence operations. He was personally responsible for these allowances, as indorser, and he, at the same time, received the transfer of the securities. It is not probable that the receiver had the means of redeeming these securities, or any part of them, by the assets of the bank which at first came into his hands. And he could not claim any part of them, in the hands of Benedict, until his demand was paid. He could compel Benedict to use proper diligence in collecting the moneys, but he could not claim possession of the notes, bonds, &c., or money before full payment to him. Under these circumstances, Benedict agrees to authorize Kingsley, as his agent, to make the collection, and pay over to him, as by the contract was stipulated. There is nothing illegal in this arrangement. Kingsley was not acting as receiver in this matter, in collecting the assets of the bank to be distributed among its creditors. Until the money was paid to Benedict, the receiver could not claim anything of him as assets of the bank. After the pledge was redeemed, all the surplus became assets of the bank, and Kingsley was bound to deal with them as such. This arrangement was manifestly for the interest of the creditors of the bank, the president, directors, and stockholders desired it, and the person appointed to make the collection was the legal agent, for the collection of the assets of the bank. It was his duty to wind up the concerns of the institution, in as short a time, and in as economical a manner, as could be done. This, the interest of the creditors of the bank required, and was specially enjoined by the law. Benedict did not stand as a creditor merely; he was a creditor, but he held in his hands, perhaps, almost all the assets of the bank, honestly pledged for his indemnity. His claim was equitable and just, and might well receive, as it did receive, the sanction of a court of chancery.

It is objected that the receiver had no power to allow the commissions to Benedict, or to pay costs. No court could refuse to allow these. It was a charge for labor and expense

in the business of the bank. Benedict did not receive the notes, bonds, or stock, at the amount called for upon their face. Many of them were no doubt worthless. This may be presumed from the amount of securities he received, which exceeded his responsibilities for the bank, some five or six hundred per cent. He could only claim the amount that should indemnify him, and that he was entitled to. From the nature of the business, he could not avoid costs, and he was entitled to a reasonable compensation for his labor. This necessarily arose out of the nature of his securities, and the obligations of the Washtenaw Bank. And it was proper and legal, in the covenant under consideration, to provide for their payments.

The purchase of these securities by Benedict, he being the trustee, and the sale being made by him, on ordinary principles, would not be valid, unless sanctioned by the cestui que trusts. But this purchase was not insisted on. From the first to the last of this transaction, Benedict seems to have acted in good faith, and with the view to promote the interest of the stockholders of the bank.

This covenant is dated 4th of July, 1840. Benedict's indorsements were made 1st October, 1838; one of the notes was payable in six months, the other in nine; so that after the last note was protested, less than two years transpired before the securities were placed in the hands of Kingsley. Those securities consisted in mortgages on real estate, stocks of various kinds, and other evidences of indebtment. We think that the averments in the declaration of the performance of his covenants by the plaintiff is sufficient. Upon the whole, the demurrer to the declaration is overruled.

Case No. 1,296.

BENEDICT v. MAYNARD et al.

[6 McLean, 21.][1]

Circuit Court, D. Michigan. June Term, 1853.

PLEADING—VERIFICATION—AMENDMENT — PROOF.

1. Under a rule of court, if the signature of the parts to the instrument on which the action is brought, is denied by plea, the plea must be sworn to, or the signature is admitted.

2. A motion to make the affidavit, when the cause is called for trial, refused.

3. The affidavit should be made at the time the plea is filed.

4. The instrument being admitted, by the pleading, it may be read, as it appears upon its face.

[At law. Action by Lewis Benedict against Maynard and Morgan on an instrument of guaranty. Verdict for plaintiff. For decision on demurrer to the declaration, see Case No. 1,295.]

Barstow & Lockwood, for plaintiff.

Hawkins, Fraser & Emmons, for defendants.

OPINION OF THE COURT. This action is brought on a covenant to pay money. On the cause being called, a motion was made by defendants to add an affidavit, denying their signatures, which was opposed by the plaintiff's counsel. The court overruled the motion. The affidavit should have accompanied the plea when filed. To permit it now to be filed, would be a surprise on the plaintiff; he alleges his witnesses, by whom the instrument can be proved, have not been summoned, as the execution of the instrument was not denied. The instrument being offered in evidence, objection to it was made, that there was a variance between it and the one stated in the declaration, in this: that Maynard in the instrument, appears to have signed it as president; the word president appears to have been stricken out. The oyer gives the signature without the designation of president. It was also objected that the instrument was drawn for several individuals who have not executed it. The signatures, as they appear on the face of the instrument, are admitted by the pleading.

If the defendants desired to take advantage of any defect of execution, they should have pleaded non est factum, and filed, with the plea, an affidavit of its truth. The word president being stricken out, the court will presume, from the admission of the pleading, that it was so stricken out, at or before it was signed.

The plaintiff proposed to read the declaration and oyer, and not produce the original instrument; but the court said it was unnecessary; the original instrument was admitted by the pleading, and the instrument was truly set forth in the declaration, and copy of the instrument annexed to it.

With the assent of the parties, the jury found a verdict for $9000. Judgment.

Case No. 1,297. ✓

The BENEFACTOR.

[8 Ben. 426.][1]

District Court, E. D. New York. May, 1876.[2]

COLLISION AT SEA — STEAMER AND SCHOONER — CHOICE OF DANGEROUS COURSE—CHANGE IN EXTREMIS.

1. A steamer and a schooner came in collision in broad daylight in the Atlantic ocean, off Squam beach. The schooner was bound up the coast, close-hauled on the port tack, heading about north by west and running about eight miles an hour. The steamer was running down the coast about ten miles an hour. Each vessel sighted the other several miles off. The steamer claimed that she had shaped her course to

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

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

[2] [Affirmed by the circuit court in Case No. 1,298, and that decree was affirmed in The Benefactor, 102 U. S. 214.]

pass inshore of the schooner and would have passed her in safety, if the schooner had not, when the vessels were a short distance apart, luffed up across her bow. It appeared that she would have passed not more than thirty or forty feet off. The steamer struck the schooner on her starboard quarter, and she sank in about five minutes and was a total loss with her cargo: *Held*, that it was doubtful whether the schooner did attempt to luff, but if she did, it was only a change in extremis.

2. That the cause of the collision was the fault of the steamer in endeavoring to pass ahead of the schooner, and so close to her. Having made choice of so dangerous a mode of passing, it made no difference whether she misjudged, by so slight a distance, or whether the schooner, by a like misjudgment, thought the steamer was not going to clear her, and, at the last minute, luffed.

[Cited in The Beta, 40 Fed. 900.]

3. That the steamer was liable for the damages.

[In admiralty. Libel in rem by the owners of the schooner Susan Wright against the steamship Benefactor (the New York & Wilmington Steamship Company, claimants) for collision. A separate libel was filed by the crew of the schooner for the loss of personal effects, and a petition of intervention by the owners of the schooner's cargo to recover value of the same. Decree for libellants and interveners, the damages in the aggregate being assessed at $61,810.49.

[Subsequently an appeal was taken to the circuit court, where this decree was affirmed, (Case No. 1,298,) and on appeal to the supreme court the judgment of the circuit court was affirmed, (The Benefactor, 102 U. S. 214.) For proceedings on the part of the claimants to limit their liability pursuant to Rev. St. § 4283, and the Fifty-fourth admiralty rule, see Case No. 10,200, 103 U. S. 239, 247.]

On February 26th, 1875, a collision occurred about two miles off Squam beach, on the New Jersey coast, between the steamship Benefactor and the schooner Susan Wright, whereby the latter with her cargo was lost. The owners of the vessel and of the cargo filed separate libels to recover the damages, which libels were consolidated by order of the court. The collision took place about ten o'clock in the morning. The schooner was coming up the coast, heading about north by west, close-hauled on her port tack, and the steamer was going down the coast, intending to pass inside of the schooner, their courses crossing at a slight angle. The schooner was struck on the starboard quarter by the steamer and sank in about five minutes.

R. D. Benedict, C. A. Tweed, and Beebe, Wilcox & Hobbs, for libellants.

Owen & Gray, for claimants.

BENEDICT, District Judge. These are actions to recover of the steamship Benefactor the sum of $145,113.00 for the loss of the schooner Susan Wright and her cargo, lost in a collision which occurred between these two vessels on the 26th of February, 1875. The place of the collision was off Squam beach, about two miles off shore. The time of the collision was about ten o'clock in the morning. The weather was fine and clear. There were no vessels near to interfere with the navigation. The steamer was bound outward from New York, running some ten knots an hour, and the schooner was bound to New York, running eight knots, close-hauled upon the wind, which was west to west-north-west. Each vessel was seen by the other at the distance of some miles, and there was nothing to prevent their passing each other in safety. They came together without slackening their speed—and the schooner sank almost immediately with her valuable cargo.

On the part of the steamer, it is charged that the steamer saw the schooner approaching her course and ported her helm to pass inshore of her; that the schooner then also ported and the vessels upon these courses would have passed each other in safety, but that, as the vessels neared each other, the schooner suddenly luffed across the bows of the steamer, whereupon the steamer bore away at once, let go her spanker and stopped her engine, but had not time to avoid the schooner.

Upon the evidence there is great room to doubt whether an effort was made to luff the schooner, as is charged by the steamer. If such an effort was made, it was at the last moment, and when little or no change in the course of the schooner could have been effected, and it was in extremis.

The fault causing the collision was the fault of the steamer in attempting to pass ahead of the schooner and so close to her. When the vessels neared each other, the course of the steamer, as the pilot on the schooner, who is called as a witness by the steamer, judges, would have carried her from 30 to 40 feet clear of the schooner. There was no necessity for thus "shaving" the schooner, and it was highly improper so to do. The steamer having chosen such a dangerous course, it matters not whether she misjudged her ability by forty feet and so ran into the schooner, or whether the schooner, by reason of a similar misjudgment, was led to suppose that the steamer could not clear her, and, at the last moment, luffed.

A steamer has no right under circumstances like these needlessly to place herself in such close proximity to a sailing vessel that the error of a moment will bring destruction. There must be a decree for the libellants, with an order of reference to ascertain the amount of the loss.

Case No. 1,298.

The BENEFACTOR.

[14 Blatchf. 254.] [1]

Circuit Court, E. D. New York. June 11, 1877.[2]

COLLISION—STEAMER AND SCHOONER—DANGEROUS PROXIMITY—FAILURE TO CHANGE COURSE.

A collision took place between a steamer and a schooner on the open sea, in clear weather, in broad daylight, the vessels seeing each other at a distance of seven or eight miles and for twenty minutes or half an hour. The schooner did not change her helm except in the moment of peril, when her master attempted to port, but did not succeed, and was compelled to abandon his wheel: *Held*, that the steamer was in fault in attempting to pass the schooner at too short a distance off, and that the schooner was free from fault.

[Cited in The Raritan, 32 Fed. 848; The Beta, 40 Fed. 900.]

[See note at end of case.]

[Appeal from the district court of the United States for the eastern district of New York.

[In admiralty. Libel in rem by the owners of the schooner Susan Wright against the steamship Benefactor (the New York & Wilmington Steamship Company, claimants) for collision. A separate libel was filed by the crew of the schooner for the loss of personal effects, and a petition of intervention by the owners of the schooner's cargo to recover value of the same. Decree for libellants and interveners, the damages in the aggregate being assessed at $61,810.49. Case No. 1,297. Claimants appeal. Affirmed.

[Subsequently an appeal was taken to the supreme court by the claimants, and the judgment of the circuit court was affirmed. The Benefactor, 102 U. S. 214. For proceedings on the part of the claimants to limit their liability pursuant to Rev. St. § 4283, and the fifty-fourth admiralty rule, see Case No. 10,200, 103 U. S. 239, 247.]

This was an appeal from a decree of the district court, in admiralty, in favor of the libellants, in a suit in rem against the steamship Benefactor, in a cause of collision. This court made the following findings of fact: The collision between the steamship Benefactor and the schooner Susan Wright, in controversy in this suit, took place a little after ten o'clock in the forenoon of the 26th day of February, 1875, off Squam beach, New Jersey, and about three miles distant therefrom. The weather, at and prior to the time of the collision, was fine and clear, and the wind about west northwest and strong. The steamship was bound from New York to Wilmington, and the schooner from Matanzas to New York. The steamship was observed by those in charge of the schooner when six or seven miles distant therefrom, and from twenty to thirty minutes before the collision. At that time the steamship bore a point or two off the starboard bow of the schooner. The schooner was close-hauled, sailing on a course about north by west, at the rate of about eight miles an hour. The steamship was proceeding on a course about south southwest, at the rate of about ten miles an hour, with her sails set, and the wind free, and making much leeway. At this time the courses of the two vessels were such as to cross each other, if continued, and such as to bring the two vessels either together or into close proximity to each other, and the two vessels were proceeding in such directions as to involve risk of collision. On the windward side of the two vessels, and about three miles distant therefrom, was the New Jersey shore, trending, at that point, about north by east and south by west, and on the leeward side was the open ocean, without any obstruction to safe navigation. There was nothing to prevent the steamship from seasonably changing her course so as to pass either to windward or to leeward of the schooner and give her a wide berth. From the time when the steamship was observed, as above stated, she was watched by those in charge of the schooner, and the schooner was kept close-hauled upon her course. The steamship was also kept upon her course, without slacking speed or stopping, until the vessels were only a few lengths apart and a collision was imminent, when the peak of her mainsail was lowered, her engines were slowed and stopped, and an effort was made to pass to leeward of the schooner, but without success. After the steamship was within a few lengths of the schooner and a collision was imminent, the captain of the schooner attempted to avoid the impending collision or lessen its force, by porting the helm of the schooner, but, after putting the schooner's wheel only about two spokes to port, he was driven away therefrom by the nearer and dangerous approach of the steamship, which struck the schooner on her starboard quarter, in consequence of which the schooner sank almost immediately, with her cargo. The schooner kept her course until the steamship was in close proximity and the collision was imminent, and, if there was any change in the schooner's course after that, and before the collision actually took place, it was very slight, had no effect in producing the collision, and was made in extremis.

Beebe, Wilcox & Hobbs, for libellants.
Owen & Gray, for claimants.

HUNT, Circuit Justice. Nothing can be more clear than that the occurrence of a collision between a steamer and a schooner upon the open sea, in clear weather, in broad daylight, with no storms, the vessels sighting each other at a distance of seven or eight miles, and for twenty minutes or half an hour, was the result of a great negligence.

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

[2] [Affirming The Benefactor, Case No. 1,297. Decree of the circuit court affirmed in The Benefactor, 102 U. S. 214.]

The duty of avoiding the collision belonged to the steamer, and she had the most abundant opportunity of doing it. The principal fault of the steamer was in not making the proper arrangement to avoid the schooner, when first discovered. A very slight deviation from her course would have made the divergence so marked as to avoid all peril or alarm, and would not have produced any perceptible effect upon her own voyage. Instead of that she pursued a course which, according to her own evidence, would have carried her to the windward of the schooner a cable's length only, or seven hundred and twenty feet. The wheelsman of the steamer testifies, that, after he took the wheel, the schooner was on his port bow, and he noticed that she kept off a little, (i. e., ported her helm, carrying her to the east;) and that the captain ordered him to port the helm which he says was done. He further says, that, if the schooner had kept this course and the steamer had kept her course, he would have passed the schooner on the port side, a cable's length from each other, that is, seven hundred and twenty feet. This, with vessels whose conjoined speed equalled eighteen miles an hour, was quite too close a calculation. An allowance of thirty seconds of time, which could be absorbed by a slight excess of steam or a slight increase of wind, is very far from an exercise of reasonable prudence. The presence of a large steamer in such close proximity might well disturb the composure of the navigation of a smaller craft.

There is really but a single question of fact in the case, to wit, whether the schooner so deviated from her course as to justify the action of the steamer. It is by no means clear that the evidence given by the mate, Norwood, establishes such a justification, but I am disposed to rely upon the evidence of the captain of the schooner, which is clear, consistent throughout, and in apparent harmony with all the circumstances of the case. If his testimony is credited, there was no change except in the moment of peril. He attempted to put his wheel a-port, but did not succeed in his attempt. The emergency compelled him to abandon the wheel and go to the forward part of the vessel. Whatever was done in this crisis, whether wise or otherwise, is not to be charged as a fault upon the captain. It is the fault of those who forced the emergency upon him. To the same effect is the evidence of the pilot of the schooner, McNamee.

The collision was occasioned by the fault of the steamer, and she should be condemned therefor. The decree of the district court was right, and should be affirmed, with costs.

[NOTE. On appeal by the claimants, the judgment of the circuit court in this case was affirmed by the supreme court, on the ground that it was the imperative duty of the steamer to keep out of the way of the schooner; and, although there was no special finding that the steamer saw the schooner, it would have been a gross fault on her part if she did not. In delivering the opinion of the court, Mr. Chief Justice Waite, remarked that, "as the responsibility of avoiding the collision was on the steamer, it was a fault in her to get so close that a slight change in the course of the schooner, in the midst of what seemed to be imminent peril, would bring the vessels together. It is clear that those on board the steamer were deceived as to the movements of the schooner by the leeway they themselves were making, and that they expected to pass to the windward, when they should have shaped their course to go to the leeward." The Benefactor, 102 U. S. 214.]

Case No. 1,299.

The BEN FLINT.

[1 Abb. (U. S.) 126;[1] 1 Biss. 562;[1] 6 Am. Law Reg. (N. S.) 707.]

District Court, D. Wisconsin. Jan. Term, 1867.

MERCHANT SEAMEN—RIGHT TO BE CURED.

1. A seaman who has received an injury or contracted a disease while in the service of the ship, is entitled to be cured or cared for at the expense of the ship. This right is an ingredient in the compensation to be paid to the seaman under the contract of shipment; and is enforced by an award of additional wages.

[Cited in The Guiding Star, 1 Fed. 349; Peterson v. The Chandos, 4 Fed. 651; Longstreet v. The R. R. Springer, Id. 672; The City of Alexandria, 17 Fed. 394; The A. Heaton, 43 Fed. 596. See, also, The Nimrod, Case No. 10,267; Reed v. Canfield, Id. 11,641; The Forest, Id. 4,936; Ringold v. Crocker, Id. 11,843; Knight v. Parsons, Id. 7,886; Babcock v. Terry, Id. 702; Myers v. The Lizzie Hopkins, Id. 9,993; The North America, Id. 10,314; Brown v. The Bradish Johnson, Id. 1,992; The W. L. White, 25 Fed. 503; The Vigilant, 30 Fed. 288.]

2. The general rule that a seaman is entitled to be cured at the expense of the ship, is applicable to seamen employed on the lakes and navigable rivers within the United States.

3. The claim of a seaman to be cured at the expense of the ship is not forfeited because the hurt or sickness may have been incurred through his negligence, unless something more is shown than mere ordinary carelessness, consistent with good faith in the prompt discharge of duty in obedience to orders. To forfeit the claim, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct; such as gross negligence operating in the nature of a fraud upon the owners,—willful disobedience to orders,—persistent neglect of duty.

[Cited in Peterson v. The Chandos, 4 Fed. 651.]

4. It seems, that where the sickness or disability of the seaman is caused or aggravated by the neglect or misconduct of any of the officers of the ship, an allowance may be made to the seaman for the expenses of his care, beyond the termination of the voyage.

5. But in the absence of misconduct or neglect on the part of some officer, the obligation of the vessel to provide for a disabled or sick seaman is only co-extensive with the obligation of the seaman to the vessel. It terminates, in ordinary cases, when the shipping contract is dissolved.

[Cited in The City of Alexandria, 17 Fed. 394; The Lopez, 43 Fed. 95. See, also,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and Josiah H. Bissell, Esq., and here compiled and reprinted by permission. The syllabus is by Benjamin Vaughan Abbott, Esq., and the statement by Josiah H. Bissell, Esq.]

Nevitt v. Clarke, Case No. 10,138; Richardson v. The Juliette, Id. 11,784; The Cambridge, Id. 2,335.]

[In admiralty. Libel by Stephen Morgan against the schooner Ben Flint for expenses of curing libellant of injuries received in service of the vessel.]

[This schooner was employed in transporting lumber from ports on Lake Michigan, in the state of Michigan, to the port of Chicago, in the state of Illinois. Libellant was a seaman on board during the summer of 1866, but contracted before departure on each voyage at the rate of the then current wages. In the month of September he shipped on board, at Chicago, as seaman for the round trip, from there to Manistee, in Michigan, and back, at the rate of two dollars and fifty cents per day. The vessel was freighted at Manistee with lumber in the hold and on deck, leaving a passage way to and from either side forward of the mainmast and the cabin. The lumber near the mainmast being stowed about four and a half feet above deck, the main-boom was brought up to an elevation above the lumber of about eighteen inches, and supported by blocks placed on the saddle, and resting against the mainmast. These blocks or false saddles were known to all on board not to be fastened to the mainmast, and that the boom was so elevated solely for the purpose of managing the vessel. The vessel being about to enter the harbor at Chicago on her return trip, the wind blowing fresh, an order was given by the officer in command to take in the mainsail, which extended over the starboard side. When the order was given, libellant and two other seamen who were standing on the larboard side of the vessel forward, immediately proceeded to that duty. One of the seamen about three feet from the mainmast crawled through the space between the lumber and the boom, and libellant following was hurt by the boom dropping across his back. The third seaman proceeded along the passage way. The wind blowing fresh at the time caused the boom to drop, although it was secured in the usual way from shifting. The vessel moored at her dock in Chicago, when the officers desired libellant to go to the marine hospital in that city, but he preferred to leave for his home in Milwaukee. They paid him his full wages, and one day extra, and assisted him to the cars for Milwaukee. The hurt rendered libellant unfit for duty for several days, requiring medicine and medical advice, nursing and attendance in Milwaukee, to recover for which this libel is brought. Libellant was not an experienced seaman on board a sailing vessel, but was obedient and dutiful.][2]

Stark & McMullen, for libellant.
Emmons & Van Dyke, for respondent.

[2] [From 1 Biss. 562.]

MILLER, District Judge. It is contended that the officers of the vessel had neglected their duty in not fastening to the main mast the blocks upon which the boom rested. This, I think, is not tenable. The blocks were placed against the main mast in the usual manner, known to all on board, merely for the temporary support of the boom. The object of the elevation of the boom, and the existence of the passage way, were equally well known. If no passage way had existed, or if libellant had been required or ordered to pass under the boom,—in either case the vessel would be in fault in not securing the blocks or the boom from dropping. I do not think the vessel was in fault in this respect.

It is not necessary to prove by authorities that a seaman, having received an injury or taken sick whilst in the service of the ship, without his fault, is to be cured, or rather cared for, at the expense of the ship. This rule is very ancient, and is universally recognized. Sound policy in favor of commerce, to induce seamen to ship for long voyages, and to perform laborious and hazardous duties on board, and also intrinsic equity sanction the rule. The rule is beneficial to the owner, while he may deem it onerous. It encourages seamen to ship on lower wages, diminishes temptation to plunder, and encourages them in the discharge of duty; and the master will be watchful of their health, and careful of their exposure to disease and accidents. The right to claim for such expenses, or such duty on the part of the ship or vessel, in contemplation of law, is a part of the contract for wages, and a material ingredient in the compensation for the labor and services of the seaman. And in the admiralty a remedy may be applied on the principle of additional wages; and in case of neglect or injuries of the seaman on the part of the ship's officers, it may be extended beyond the time of shipment or the return of the vessel to her home port. The services of a seaman are maritime, and whatever enters into the compensation for such services, and is reducible to money, is in equity decreed as a just remuneration for such services.

This ancient and now universal marine rule, is as applicable to seamen or mariners on the lakes, and on rivers flowing into the ocean, as on the high seas. Seamen or mariners on board boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States are merchant seamen, and are entitled to all rights, and subject to all duties as such. But upon the equitable principle of the marine law, the same consideration under the rule may not be extended indiscriminately to all classes of seamen. Humanity, and the interests of commerce, demand a liberal extension of the rule towards seamen on vessels employed in foreign trade. But the same liberality need not be extended to a seaman shipping for a

voyage for a few days on the lakes,—particularly when additional wages are demanded at the commencement of each voyage. It appeared that libellant demanded increased wages before shipping for each voyage, as the season advanced. And he knew that a marine hospital existed in Chicago, where seamen are cared for after being discharged from service, and where the officers of the vessel wished him to go. It is true that libellant was not obliged to enter the marine hospital as a patient.

Claimant's advocate contends that libellant was in fault for passing over the lumber and under the boom, and cannot therefore sustain his libel. To entitle a sailor to sustain a libel for care and attendance, required in case of sickness or personal injury while in the service of the vessel, the disability must have occurred without his fault. Libellant testifies that he took the course over the lumber to save time; but he had better have said that he thoughtlessly followed the lead of a reckless brother sailor. Sailors are wards of the admiralty, and are rather excused than condemned for accidental mistakes while in the faithful and obedient discharge of duty. Even after punishment for willful disobedience, if they return to duty, their full wages in many cases are allowed. A strict rule of forfeiture should not be applied to a sailor. What may be negligence or fault in persons employed in service on land, may not be in sailors employed on board of vessels. Ordinary negligence, consistent with entire good faith, as in this instance, should not prejudice a sailor's just rights. The marine law rather overlooks ordinary negligence, but punishes those gross faults and vices which affect or prejudice the ship's service or discipline. The accident occurred to libellant while in the prompt discharge of duty, in obedience to a proper command. The dropping of the boom was unforeseen, and not caused by him. Under such circumstances, I do not think that libellant was in fault. To forfeit a claim for care or attendance under the rule, the disability or sickness of the seamen must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty. Walton v. The Neptune, [Case No. 17,135;] Reed v. Canfield, [Id. 11,641;] Johnson v. Huckins, [Id. 7,390;] Pierce v. The Enterprise, [Id. 11,145;] The Nimrod, [Id. 10,267.]

The following cases will explain the principle upon which relief has been allowed sick and disabled seamen: In Harden v. Gordon, [Case No. 6,047,] the rule is elaborately discussed, and the court came to the conclusion that the expense of curing a sick seaman in the course of the voyage is a charge on the ship, and in this charge are included not only medicines and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore; that the court of admiralty has jurisdiction to enforce the payment of these expenses, by a libel, for they are in the nature of additional wages during sickness; and that no stipulation contrary to the maritime law to the injury of seamen will be allowed to stand, unless an adequate additional compensation is given to them. In the case of The George, [Id. 5,329,] the mate took sick during a foreign voyage, and was put on shore, where expenses were incurred for medicines, medical advice, and attendance. It was adjudged that the ship owner should be held liable. In the case of The Nimrod, [Id. 10,267,] a suit for mariner's wages, no deduction was allowed for expenses attending the sickness of a seaman during the voyage, exceeding the balance of his wages. [So, also, in The Forest, Id. 4,936, where the expenses attending the sickness of a seaman during the voyage exceeded the balance of his wages.] [3] And in Freeman v. Baker, [Id. 5,084,] it is decided, that a promise of a seaman, sick in a foreign port during the voyage, to pay bills for his medicine, &c., is void, and does not release the ship of liability. See, also, The William Harris, [Id. 17,695;] Brundet v. Tober, [Brunent v. Taber, Id. 2,054;] Ringold v. Crocker, [Id. 11,843;] The Atlantic, [Id. 620;] Walton v. The Neptune, [Id. 17,135.]

The following cases extend the benefit of the rule beyond the time of service of the seaman, as limited by the shipping articles; but it will be observed that misconduct on the part of the officers of the vessel formed an essential ingredient in each case:

In Reed v. Canfield, [Case No. 11,641,] the ship Albion, having been employed in a whaling voyage on the Pacific, came to anchor in the harbor of New Bedford, her home port. The master soon after landed, and gave permission to one of the mates also to go on shore. Both of the mates expressed a desire to avail themselves of this permission, on the return of the boat from landing the master. They both concluded to go on shore, taking with them a boat's crew. The ship being left without officers to enforce discipline, the boat's crew, including libellant, remained on shore after landing the mates, until a storm ensued, which rendered the passage of the boat from shore to the vessel tedious; and libellant's feet were so frozen that they had to be amputated. The disability to libellant would not have happened but for the unwarrantable departure of the officers from their duty.

In Brown v. Overton, [Case No. 2,024,] libellant, a seaman on board the ship Madison, in a voyage from Calcutta to Boston, while reefing a top sail, was thrown from the yard by the sudden motion of the sail and violence of the wind, and broke both of his legs. The master, with the aid of a passenger and one of the crew, set the bones, and secured them in bandages and splints as

[3] [From 1 Biss. 562.]

well as they could. Libellant was placed in a hammock, and continued lying in it until four days after the arrival of the ship at Boston, without proper attention, when he was removed to a hospital. He was decreed indemnity for all he had suffered from the omission of the master to go into Saint Helena, the nearest port after the accident, for surgical aid, and the master's culpable neglect of him during the voyage and after arriving at Boston, including expenses incurred after leaving the ship.

In the case of Croucher v. Oakman, 3 Allen, 185, at law, the plaintiff was allowed to recover for damages for the unlawful act of the master in wounding and then discharging him in a foreign port, while employed in the prosecution of a voyage. The plaintiff was allowed for necessary expenses at the foreign port, and for his return, months after the time mentioned in the shipping articles.

And in Moseley v. Scott, 5 Am. Law Reg. (N. S.) 599, at law, plaintiff shipped on board a steamboat as cabin-boy, for a trip to Nashville and back to Cincinnati. During the voyage he became sick with small-pox to such a degree that he was not able to attend to his duty, and was compelled to take to his bed on board, where he remained until the return of the boat. The master and officers of the boat during his confinement on board neglected to furnish him with sufficient medicine, medical advice, attendance, nursing, and diet necessary for his comfort and cure. By reason of such neglect, plaintiff's feet were so frozen that they had to be amputated, which confined him in a hospital several months. A demurrer to the petition, according to the practice in the state of Ohio, was overruled. See, also, Nevitt v. Clarke, [Case No. 10,138,] where the ship in a foreign voyage was sold to foreigners without arrangements being made for the return of a sick seaman.

These are all the American cases that I have had access to. In the first class, misconduct or neglect of the officers of the vessel was not material. In the second class, their misconduct and neglect towards the seaman became an important item for the consideration of the court. Upon every principle of humanity and equity, owners of vessels should be held liable, in amount measured by the actual loss to the seaman, for his sickness or disability caused or aggravated by the misconduct or neglect of their officers.

From this review of American cases I have arrived at the conclusion that, in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman, should only be co-extensive in duration to that of the seaman to the vessel. The privileges and liabilities of the parties are, in contemplation of law, measured by the shipping articles. Interests of commerce do not require that the privileges and duties of ship owners and seamen should be extended beyond the reason, nature, and terms of the shipping contract, unless for fault, misconduct, or neglect on the part of officers of vessels towards their seamen; or perhaps, when the removal of a sick or disabled seaman from the vessel, or a change of treatment then being practiced might prejudice his recovery within a reasonable time. Humanity and equity might require indulgence in extreme cases. Libellant received the hurt complained of without fault on the part of the officers of the vessel while coming into the port of discharge; and after his discharge and receipt of his wages, he traveled by land about ninety miles to the city of Milwaukee. He cannot recover against the vessel for expenses incurred by him in this city, and his libel must be dismissed. Decree accordingly.

BENHAM, (INGERSOLL v.) See Case No. 7,036.

BENITY, (CENTRAL PAC. R. CO. v.) See Case No. 2,551.

Case No. 1,300.

BENJAMIN v. CAVAROC et al.

[2 Woods, 168.][1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

MORTGAGES—FORECLOSURE—STATUTORY REMEDY—EQUITY JURISDICTION OF FEDERAL COURTS.

1. A mortgage on real estate to secure a debt executed by public act according to the law of Louisiana, although it imports confession of judgment, may be enforced by suit in equity.

2. The fact that there is a statutory remedy in Louisiana on such a mortgage does not oust the jurisdiction of a court of equity to enforce it.

[Cited in Kimball v. Mobile, Case No. 7,774. See, also, Davis v. James, 2 Fed. 618.]

3. Where, under the jurisprudence and laws of a state, want of privity is not an obstacle to the enforcement by one person of a contract made for his benefit by another person with a third person: *Held*, that the equity courts of the United States, sitting in such state, will enforce such a contract at the suit of the beneficiary.

In equity. Heard on demurrer to the bill.

The case made by the bill was substantially as follows: The Louisiana Cotton Manufactory, a body corporate of the state of Louisiana, executed certain bonds with interest coupons attached, and to secure the payment thereof at maturity, granted a mortgage by authentic act before a notary public. Complainant [Henry W. Benjamin] was the holder of certain of said bonds with coupons annexed, and some of his coupons had matured and were due and unpaid.

The bill further alleged that before the bringing of this suit, the said mortgage had been enforced by executory process in a state court at the suit of another holder of certain of said bonds and coupons, and the mortgaged property had been sold by the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

sheriff to the defendant, Charles Cavaroc; that out of the purchase price a certain specified sum was paid by Cavaroc to the sheriff in cash, and the remainder was retained by him, to be applied under the stipulations in the sheriff's deed, and, according to law, to the payment and satisfaction pro tanto of the bonds and coupons, other than the matured coupons held by the plaintiff in the proceedings in the state court; that the residue of the purchase price so retained by Cavaroc was insufficient to satisfy said bonds and coupons except to a certain extent which is specifically stated; and that to this extent, the property remained affected in Cavaroc's hands, by the mortgage, and that he became, by virtue of the premises, personally liable to that extent to the respective holders of the said bonds and coupons, and the precise amount alleged to be so due by Cavaroc on each of said bonds and coupons was specifically stated in the bill.

It was further alleged that subsequent to the purchase by Cavaroc, he entered into a certain written contract or agreement with the other parties, who are made defendants, wherein it was recited that he had purchased said property for the other defendants, and that the same was thereby transferred to them in certain respective portions which were specifically stated, and that in said contract it was stipulated by and between Cavaroc and the other defendants that the latter should assume and pay to the holders respectively of the bonds and coupons outstanding ratably, in proportion to their respective interests in the property, the amounts for which it was averred that said Cavaroc had become personally liable as aforesaid; the said assumption constituting a part of the consideration of the said transfer from Cavaroc to the other defendants. It was averred that by reason of the said alleged transfer, and the stipulation between Cavaroc and the other defendants, the latter became personally bound and liable to be called upon in a court of equity to pay and satisfy ratably, and in proportion to their alleged respective interests in the property, the said outstanding bonds and coupons to the same extent as the said Cavaroc was alleged to have become personally liable, and the precise sums for which each of the said defendants had become so personally liable were set forth.

The bill prayed for the sale of the property under the mortgage upon such terms as to cash and credit payments as might correspond with the dates of the maturity of the bonds and coupons, and for a personal decree against the defendants respectively for specific sums of money, according to the averments of the bill.

To this bill the State National Bank and the firm of Vincent & Co. demurred, and assigned as grounds of demurrer: 1. That there was no equity in the bill, and if plaintiff was entitled to any relief at all as against the defendants, on the grounds set forth in his bill, he had a plain, adequate and complete remedy at law. 2. There was no privity of contract between the complainant and the defendants who demur.

[Demurrer overruled.]

Thomas J. Semmes and Robert Mott, for complainant, cited De Brueys v. Freret, 18 La. Ann. 80; Landry v. Landry, 12 La. Ann. 167; Code Pr. art. 732; Walker v. Dreville, 12 Wall. [79 U. S.] 442; Thompson v. Central Ohio R. Co., 6 Wall. [73 U. S.] 137; Hersey v. Turbett, 27 Pa. St. 418.

Henry B. Kelly, (with whom was James McConnell,) for defendants.

The mortgage on which the rights of complainant are founded is a Louisiana mortgage, and was granted by authentic act before a notary. It imports confession of judgment, and, in default of payment by the debtor, entitles the creditor to instant execution by writ of seizure and sale against the property, on simple petition and without citation. Code Pr. arts. 732-734; Loret Elements de la Science Notariale, 377; Succession of Tete, 7 La. Ann. 96. It is therefore an instrument entirely different in its effect from an English mortgage. The remedies appropriate to the enforcement of the rights of a mortgagee, under a Louisiana mortgage, are not equitable remedies in any sense, but statutory, and code remedies. The chancery jurisdiction of the federal courts is the same in all the states, and the rule of decision is the same in all; its remedies are not regulated by the state practice. U. S. v. Howland, 4 Wheat. [17 U. S.] 108; Dodge v. Woolsey, 18 How. [59 U. S.] 347; Barber v. Barber, 21 How. [62 U. S.] 583; Cropper v. Coburn, [Case No. 3,416.] With regard to the statutory remedies, unknown to either the common law or equity system of England—such, for instance, as the remedies on a Louisiana mortgage, all of which are statutory, and, like the contract upon which they are based, unknown to either system—they are to be enforced by actions at law and not by suits in equity. Parsons v. Bedford, 3 Pet. [28 U. S.] 434.

II. There is no privity between the complainant and the defendants who demur, and therefore this suit cannot be maintained against them. 1 Chit. Gen. Pr. 336; Tweddell v. Tweddell, 2 Brown, Ch. 101; Woods v. Huntingford, 3 Ves. Jr. 129.

WOODS, Circuit Judge. A very learned and elaborate brief has been filed by counsel for defendants who demur, to show that a mortgage like the one referred to in the bill, executed according to the law of Louisiana, is not such a mortgage as is recognized by equity jurisprudence, but is a public act before a notary which imports confession of judgment and that the remedy upon it is

statutory and at law, by writ of seizure and sale. There is no question that the mortgage mentioned in the bill was executed to secure a debt evidenced in part by the bonds held by complainant. It was a security for a debt. A suit upon the bonds at law would not give adequate relief because the plaintiff could not in such a suit assert his prior lien over other ordinary judgment creditors. One of the main purposes of the suit is to enforce a lien upon property. This cannot be done by a court of law which simply renders judgment for the amount due plaintiff and leaves him to make his money out of the property of defendant by writ of fieri facias. It is said, however, that the plaintiff has a statutory remedy by seizure and sale, to which he might have resorted. But the court could not have granted an order of seizure and sale in this case, because the writ can only issue where the evidence submitted to the court is authentic and makes full proof of every allegation of the petition. De Brueys v. Freret, 18 La. Ann. 80; Landry v. Landry, 12 La. Ann. 167; Code Pr. art. 732. Complainant holds no such evidence against any of the defendants except Cavaroc. The proof against the others is an agreement under private signature. But the fact that a state legislature has conferred upon the state courts the jurisdiction to enforce equitable rights by a statutory proceeding does not oust the equitable jurisdiction of the United States courts. That cannot be interfered with in any degree by state legislation. Bennett v. Butterworth, 11 How. [52 U. S.] 674, 675; Thompson v. Central Ohio R. Co., 6 Wall. [73 U. S.] 137; In re Broderick's Will, 21 Wall. [88 U. S.] 520; Noyes v. Willard, [Case No. 10,374.] But it seems that the very question raised by the first ground of demurrer is settled adversely in the case of Walker v. Dreville, 12 Wall. [79 U. S.] 440. That case went up from this court. It was a petition in which complainant set out that defendant was indebted to her in the sum of $5,492, which sum was secured by mortgage, and the prayer was that defendant be condemned to pay the amount so alleged to be due, and that the mortgaged premises be adjudged and decreed to be subject to the payment of said debt, interest and costs. The judgment or decree of the court was in accordance with the prayer of the petition. The case was taken to the supreme court of the United States by writ of error, and the writ of error was there dismissed on the ground that the case belonged to the equity side of the court and should have been brought up by appeal.

The second ground of demurrer is want of privity between complainant and defendants who demur. Under the jurisprudence of this state this want of privity would not be an obstacle to a suit in a court of the state to require the defendants to perform a contract made by them for the benefit of a third person not a party to the contract. Code Pr. art. 35. By this article the liability to suit of the person thus contracting is expressly created, and the right to sue is also given to the person for whose benefit the contract is made. In other words, there is an obligation created in favor of the beneficiary of the contract against the person making the contract, although the beneficiary is not a party to the contract. Can this court enforce this liability? The question seems to be distinctly answered by the supreme court of the United States in the case of In re Broderick's Will, 21 Wall. [88 U. S.] 520, where the court says: "Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state. * * * Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

This court has jurisdiction of this case to enforce a lien upon property to which the defendants claim title. They are therefore proper and necessary parties. The court having the defendants properly before it will proceed to do complete justice by enforcing directly against them the liability which they incurred by entering into the contract with Cavaroc or with the sheriff for the benefit of the complainant and others. Demurrer overruled.

Case No. 1,301.

BENJAMIN v. GRAHAM.

[4 N. B. R. 391. (Quarto, 130.)]

District Court, S. D. New York. Jan. 26, 1871.

BANKRUPTCY—ACCOUNTING TO ASSIGNEE.

The defendant in an equity suit, must account, before a master, for property received by him. Orders of reference to a master will be settled on notice.

In equity.

C. H. Woodbury, for plaintiff.

T. Darlington, for defendant.

BLATCHFORD, District Judge. In this case the defendant must account before a master for the moneys, notes, and merchandise received by him from Lockwood & Marsh, embraced in the twenty-three items set forth in this answer, the account to embrace interest on the moneys and on what shall be found to have been the value of the notes and merchandise, such interest to be computed from the commencement of this suit. The order of reference to the master will be settled on notice.

Case No. 1,302.

BENJAMIN v. HART.

[4 Ben. 454;[1] 4 N. B. R. 408, (Quarto, 138.)]

District Court, S. D. New York. Jan. Term, 1871.

APPEAL IN BANKRUPTCY—FORM OF BOND.

1. In a suit in equity under the jurisdiction created by the bankruptcy act, a decree was entered for the plaintiff. Within ten days thereafter the defendant gave notice of an appeal to the circuit court, as required by the eighth section of the act, to the clerk of the court and to the plaintiff, but gave no bond as that section requires. After the ten days had expired, he presented to this court a bond for approval, as a bond on the appeal. The bond was entitled in the circuit court, with the title of the cause, was in the proper amount, and referred to an appeal "to reverse the final decree rendered in the above entitled suit by the judge of the district court," but did not in any other way state the decree appealed from. *Held*, that the right of appeal given by the eighth section cannot be enlarged by the court.

2. That, as no bond was given within the ten days, no appeal could now be allowed.

3. That, if the bond was correct, there was no reason why it should not be approved.

4. That, as there was in the bond no statement of the court which rendered the decree, except by a reference to the title of the cause, and as the cause was entitled in the circuit court, the bond was not a sufficient bond and could not be approved.

5. That, as no bond was given within the ten days, the issuing of execution on the decree could not be stayed.

[In equity. Bill by Edward Benjamin against Julius Hart. From a decree for complainant, defendant appeals, and presents his bond on appeal for approval. Bond not approved.]

C. H. Woodbury, for plaintiff.

C. F. Whittemore, for defendant.

BLATCHFORD, District Judge. This is a suit in equity. The final decree, which was in favor of the plaintiff, was entered December 31st, 1870. The defendant, within ten days after the entry of the decree, gave notice to the clerk of this court and to the plaintiff, as required by section 8 of the bankruptcy act, (this being a suit in equity in this court under the jurisdiction created by that act,) that he claimed an appeal to the circuit court from the decree of this court. But the defendant did not, at the time of claiming such appeal, give or file any bond as required by such 8th section. That section provides, that no appeal shall be allowed "unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals," nor unless the appeal shall be claimed and notice thereof be given to the clerk and to the opposite party, within ten days after the entry of the decree appealed from. The defendant neither gave nor filed any bond within the ten days. Now, after the expiration of the ten days, a bond is presented to me to be approved, with a view to its being given and filed as and for the bond on such appeal. It is quite clear that, as no bond was given within the ten days, no appeal can now be allowed. The right of appeal given by the 8th section cannot be enlarged by this court. In re Alexander, [Case No. 160.] Still, if the bond is in proper form, and was properly executed, and is in a proper amount, and the sureties are sufficient, there is no reason why I should not approve it, as a bond which would be a proper one, if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal, if such a course shall seem proper to him.

The bond is executed by the defendant and by two sureties. It is dated January 11th, 1871. It was sealed and delivered and acknowledged by the principal and one of the sureties on that day, and by the other surety on the next day. It is entitled in the circuit court for this district, with the name of the plaintiff and the name of the defendant. Then follows the bond, which is for $6,500 penalty, the decree being for $3,121.10. The condition of the bond is as follows: "Whereas the above-named Julius Hart has prosecuted an appeal to the circuit court of the United States for the southern district of New York, to reverse the final decree rendered in the above entitled suit by the judge of the district court of the United States for the southern district of New York, now, therefore, the conditions, &c." The only reference in the bond to the decree appealed from is the foregoing reference to it as a decree rendered "in the above entitled suit." The names of the parties to the decree are not given otherwise than by a reference to the title at the head of the bond, nor is there any statement as to who the party is in whose favor the decree was rendered, except what may be gathered from the statement that Julius Hart has prosecuted an appeal to reverse the decree, nor is there any statement as to the court in which the decree was rendered, except the statement that it was rendered "in the above entitled suit," and what may be gathered from the fact that the appeal is stated to be to the circuit court for this district. The title of the bond is thus made by the bond itself a necessary part of it, and, reading the bond with the title, the decree appealed from is stated to be a decree rendered by the circuit court. The bond should have been entitled in the district court. The printed form of bond used in this case is the one proper to be used on an appeal from the circuit court to the supreme court, and, as printed, is entitled in the circuit court. The plaintiff is entitled to a bond clearly and accurately stating by what court the decree appealed from was rendered. This is not such a bond.

[This view is independent of the question as to whether the written word "Circuit" was inserted in place of the written word "Dis-

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

trict" in the title of the bond (the written word "District" having been previously put in place of the printed word "Circuit" in such title), after the bond had been executed by one of the sureties, and before it was executed by the other surety, and was so inserted without the knowledge or consent of the surety who first executed it. On that question I express no opinion.] [2]

It follows that I cannot approve the bond as proper in form, and that, as no bond was given within the ten days, I cannot stay the issuing of execution on the decree.

BENJAMIN, The, (LOWE v.) See Case No. 8,565.

Case No. 1,303.

BENJAMIN v. NELSON.

[Nowhere reported; opinion not now accessible.]

Case No. 1,304.

BENJAMIN v. TILLMAN.

[2 McLean, 213.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

NEGOTIABLE INSTRUMENTS—ACCEPTANCE—EVIDENCE—"VALUE RECEIVED."

1. The acceptance of a bill is evidence against the acceptor, in behalf of the drawer, of so much money, under the money counts.

[See Frazer v. Carpenter, Case No. 5,069; Boyce v. Edwards, 4 Pet. (29 U. S.) 111.]

2. In a bill of exchange, or other negotiable instrument, the words "value received" are not necessary.

At law.

Mr. Cooper, for plaintiff.

Mr. Joy, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, the general counts for money had and received, lent, &c., only, being contained in the declaration. The plaintiff offered, in evidence, a bill drawn by him, payable to Lansing, and accepted by defendant, but which did not contain the words "value received," and, on that ground, it was objected to.

The question is, whether this bill is evidence under the money counts. A bill, as well as a note, is prima facie evidence for money had and received by the drawer or maker to the use of the holder; and, on acceptance, is evidence of money had and received by the acceptor to the use of the drawer. 1 Salk. 283; Grant v. Vaughan, 3 Burrows, 1516; Bayley, Bills & N. (5th Ed.) 357; [Page v. Bank of Alexandria,] 7 Wheat. [20 U. S.] 35; 3 Gill & J. 369; Tatlock v. Harris, 3 Term R. 174; Vere v. Lewis, Id. 182. It was decided, in Hardr. 485, that debt would not lie by the payee of a bill of exchange against the acceptor. And in the case of Gibson v. Minet, 1 H. Bl. 602, Eyre, C. J., said, "that the presumption of evidence which a bill of exchange affords has no application to the assumpsit for money paid by the payee or holder of it, to the use of the acceptor; and that it must be a very special case which will support such an assumpsit." 3 East, 177. In the case of Barlow v. Bishop, 1 East, 434, 435, it was held, that the plaintiff can, in no case, recover under the general count, unless money has actually been received by the party sued, and for the use of the plaintiff; and, also, in the case of Waynam v. Bend, 1 Camp. 175. In the case of Raborg v. Peyton, 2 Wheat. [15 U. S.] 385, the court say: "Prima facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of those funds for the use of the holder." And, again: "We are, therefore, of opinion that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor, when it is expressed to be for value received." In the cases of Smith v. Smith, 2 Johns. 235, and Saxton v. Johnson, 10 Johns. 418, it was settled that a note not negotiable was admissible in evidence under the count for money had and received.

As between each party to a bill of exchange, or negotiable promissory note, and every other party, there is a sufficient privity in law; and as such negotiable contract is presumed to be a cash transaction, and, as a money consideration is presumed to pass at the making, and at each indorsement of the instrument, each party, liable to pay, is held responsible, as for so much money had and received to the use of the party who is, for the time, the holder, and entitled to recover. Shaw, C. J., Ellsworth v. Brewer, 11 Pick. 316; State Bank v. Hurd, 12 Mass. 172; Butler v. Wright, 20 Johns. 367. It will be seen, from the above citations, that there is great contrariety in the authorities, as to what shall be evidence under the money counts. The more modern English authorities, which, however, are not altogether consistent, limit the evidence to a money transaction between the parties on the record, whilst the American authorities give a more liberal view, and many of them require nothing more than an indebtment. In the case under consideration the plaintiff being the drawer of the bill, which the defendant accepted in favor of Lansing, and the plaintiff, being now the holder of the bill is, prima facie, entitled to recover. And we think that the acceptance is an admission by the acceptor, that he has received from the drawer the amount of the bill.

It is, however, contended that as the

[2] [Taken from 4 N. B. R. 408, (Quarto, 138.)]

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

words "value received" are omitted in the bill, that it does not afford prima facie evidence of indebtment. But the law is well settled that, in a negotiable instrument, these words are not necessary. Grant v. Da Costa, 3 Maule & S. 352. A declaration on a bill of exchange was demurred to, because it was not stated to have been given for value received, but the court said it was a settled point that it was not necessary, and gave judgment for the plaintiff. Poplewell v. Wilson, 1 Strange, 264; Claxton v. Swift, 2 Show. 496, 497; Mackleod v. Snee, 2 Ld. Raym. 1481; Chit. Bills, (Ed. 1839,) 182. Where a note or bill is not declared on, but is used as evidence, under the money counts, it is said to be less conclusive than where the action is founded upon it. That it is used as a paper from which the jury may infer so much money was lent, paid, or had and received, or that an account was stated. Story v. Atkins, 2 Strange, 725.

The jury found for the plaintiff. Judgment.

Case No. 1,305.

BENJAMIN v. The WATCHMAN.

[21 Law Rep. 40.]

District Court, S. D. New York. 1858.

SALVAGE—PURCHASE BY SALVOR.

A party who has purchased the vessel while she was a wreck can in no case be regarded as a salvor, in the sense of the maritime law. Otherwise the court would be called upon to decree to him a share of the property saved as compensation, and then decree the surplus to him as owner. A libel brought in such case can only be to obtain, by the intervention of the court, a confirmation of the sale to him and of his title, and there is no authority in law for such a proceeding.

[Note. This case is nowhere more fully reported. The opinion, if one was written, is not now accessible.]

Case No. 1,306.

The BENJAMIN ENGLISH.

[2 Lowell, 218.][1]

District Court, D. Massachusetts. March, 1873.

SEAMEN—WAGES.

1. Where the master of a vessel engaged in the coasting trade agreed with the owner for sixty dollars a month as wages for himself and for his minor son, who acted as cook, and it was understood that two-thirds of this sum were for the master's services and one-third for those of his son, and the owner of the ship had died insolvent,—*held*, the contract was severable, and there was a lien on the vessel for wages due the son.

2. Where, in such a case, the master had received earnings of the vessel, but not enough to pay all the wages,—*held*, the net earnings so received were to be appropriated to the master's and cook's wages pro rata.

In admiralty. Wages. Libel by a boy of sixteen years old for services as cook on board the schooner Benjamin English, at twenty dollars a month. The schooner was employed in the coasting trade during the summer of 1872, and the evidence tended to show that the master, who was the father of the libellant, had agreed with the owner, who had since died insolvent, that he would serve for forty dollars a month, and his son for twenty dollars; that the master had received the earnings of the vessel and paid its disbursements, and had rendered an account in which a charge was made for the libellant and himself at sixty dollars a month, and by which a balance remained due to the master. The answer averred that the contract was solely with the master, at sixty dollars a month, and that he had more money in his hands than was needed to pay all that was due for the wages of both him and his son. None of the seamen signed any articles. [Decree for libellant.]

G. A. King and H. P. Harriman, for libellant.

J. M. Day, for claimants.

LOWELL, District Judge. The theory of the libel is, that the master engaged the libellant at twenty dollars a month, as he hired the other men, and that the owner of the vessel assented. The defence, as I understand it, is, that the contract was entire for the services of father and son for sixty dollars a month, payable to the father. It is proved, to my satisfaction, that the sum of sixty dollars was arrived at by estimating the wages of the master and cook at the several rates contended for by the libellant, and the contract was in its nature severable, or rather was two contracts, so that if either the libellant or his father had failed to perform his part, the other, having fulfilled his own, might sue for liquidated damages at the rate agreed on. And when it turns out that the owner's estate is deeply insolvent, the libellant may justly claim a lien for his services, like any other seaman, unless it be true, as alleged in the answer, that the father has actually received the payment for them. The father may, if he chooses, permit the libellant now to proceed, or may, as next friend, bring a libel in his name, notwithstanding the circumstances that he happened to be master of the same vessel. The master has no lien on the ship, by our law, but the master's son has one. The disability does not extend to his family.

On the other hand, I do not find the proof to be that the father had emancipated his child

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

quoad this voyage, and notified the owner thereof, so that a settlement could not afterwards be made with the former, or that payment to him would not release the debt. It was very candidly admitted at the argument, that it was not until the insolvency was discovered that this point was brought prominently to the mind of the father. In his evidence concerning the contract, which was admitted without objection, though perhaps part of it was not admissible, the other party having died, the father seemed to attempt to give the color of an emancipation to his conduct and conversation with the owner and with his son; but the account which he rendered, and his course of dealing with his son for years before, throw much doubt on his intentions, and even the facts that he gives do not seem to me to amount to such notice as would bind the owner to deal only with the son. If, therefore, it were true, as set up in the answer, that the master had funds unaccounted for, more than enough to pay the full sixty dollars a month, the son must look to the father for his pay. But the evidence has no tendency to bear out this allegation.

Still I do not regard the rights of this libellant to stand precisely like those of any other seaman. His contract is involved with that of his father: to the two together there would be due about four hundred dollars; and if the father has received out of freight-money two hundred of this, he cannot now say he will appropriate these payments exclusively to his own wages, for which he has no lien, and leave the libellant, or himself on the libellant's behalf, his full charge upon the vessel as against the general creditors. It was held by Judge Sprague, that, in some cases, a creditor having two debts is bound to appropriate a payment in the way most beneficial for the debtor, as, for instance, towards the debt for which he holds a lien; and certainly that rule would be peculiarly fitted to a case in which he pays himself out of money in his hands: The Antarctic, [Case No. 479.] I have decided that a rule of even more general application requires payments to be appropriated to the earliest items of an open account: The A. R. Dunlap, [Id. 513.] Taken either way, the result in this case is the same; and the wages of both father and son will be deemed paid pro rata, as they accrued, if the account shows that something has been received on account. It appears, then, to be the true rule for this case, that one-third of whatever remains due to the libellant's father should be held to be for the wages now sued for, and to that extent there is a lien on the schooner. The account was not fully examined at the trial, and I do not know whether there is enough remaining due to pay the libellant in full. If the parties cannot arrive at the balance due by their own investigations, it will be necessary to have it examined by me, or by an assessor.

Interlocutory decree for the libellant.

Case No. 1,307.

BENKARD v. SCHELL.

[5 Int. Rev. Rec. (1867,) 3.]

Circuit Court, S. D. New York.

CUSTOMS DUTIES—ACTION TO RECOVER EXCESSIVE DUTIES—EVIDENCE—REFERENCE—FREIGHT AND TRANSPORTATION CHARGES—COMMISSIONS—FIXING COSTS AND CHARGES—PROTEST—APPEAL TO TREASURY DEPARTMENT—DURESS—COMPULSORY EXACTION—RESPONSIBILITY OF COLLECTOR FOR ACT OF ENTRY CLERK.

[1. In an action to recover excessive duties claimed to have been illegally exacted by a collector of customs, where the claim embraces items of account too numerous for the consideration of the court and jury, a reference will be made to an officer of the court to adjust the same.]

[Followed in Crookes v. Maxwell, Case No. 3,415.]

[2. Such illegal exaction cannot be proved by the testimony of a customs official that he had adjusted the amount of overpaid duties from papers on file, together with a statement of the same, where he produces but a part of the entries, and no proof of payment of the alleged excessive charges is made by plaintiff.]

[3. In such a case, proof by a customs official of the practice of the government in respect to appeals to the secretary of the treasury, and the refunding of duties, is admissible in evidence as bearing on the construction of the law.]

[4. A report made at the request of customs officials, without express instructions from the treasury department generally as to what charges were properly exacted, based upon information obtained from merchants and others, is inadmissible in evidence as not forming a proper standard by which to determine what charges were properly made in the case in hand.]

[5. Freight and transportation from the port of shipment is not a dutiable charge, under the customs act of March 3, 1851.]

[6. Commissions on importations from continental Europe cannot be charged for, in excess of 2 per cent., except that commissions on importations from Paris may be charged at the rate of 3 per cent.]

[See Munsell v. Maxwell, Case No. 9,932.]

[7. Costs and charges actually paid should be added to the invoice, and not arbitrarily fixed by the customs officials.]

[8. Act March 3, 1857, requiring a protest by the importer within 10 days of the time of entry of the goods, does not require a protest to be attached to each particular entry, but allows them to be prospective and continuous. Brune v. Marriott, Case No. 2,052, followed.]

[9. A failure to appeal from the decision of the collector as to the rate or amount of the duty does not bar a recovery against the collector for the refunding of the excess of duty exacted, as Act March 3, 1857, providing that the collector's decision shall be final and conclusive "as to the liability of the importation to duty or exemption," unless an appeal is taken, etc., refers to the liability of the importation to duty, and not to the rate or amount of duty imposed.]

[10. When charges are added to the entry by the importer, under protest, and by reason of a refusal of the entry clerk to receive such entry unless such additions are made, and for the purpose of obtaining possession of the imported goods, the additions so made are not voluntary, so as to preclude the importer from recovery of the excess exacted.]

[11. The exactions being compulsory, the collector cannot insist that the appraisement was conclusive.]

[12. The act of the entry clerk in compelling the addition to the entry was official, notwithstanding that the collector gave no instructions to him, other than to make entries according to law and the treasury regulations.]

Before SMALLEY, District Judge.

At law. This was an action brought [by Benkard and Benjamin H. Hutton] against the defendant [Augustus Schell] to recover back duties collected by him of the plaintiffs as collector of New York, alleged to be illegally exacted.

Mr. E. Delafield Smith appeared for the plaintiffs, and opening the case to the jury, stated that the plaintiffs imported goods from various places in Europe, and that on their being entered, the collector had added to the value of the goods on which the duties were to be paid, certain commissions, and charges for inland transportation and for cases, &c., &c., which increased the value, and, of course, the duty, above what was the true value; that he supposed it would be admitted to be the law that the collector could not add any charge for inland transportation, and that the only commissions which could be added were the usual commissions; that what was the usual commission and charges had been ascertained by Mr. Phillips, one of the government officers connected with the custom house, and that for years duties had been refunded by the government in accordance with this report of Mr. Phillips, by virtue of consents given by the district attorneys of the United States, but that of late the government had required the importer to prove the fact before the court; that the objection would probably be taken for the defence that no appeals had been made to the secretary of the treasury, but as to this he should show that when appeals had not been taken, it was in consequence of letters from the secretary of the treasury to the effect that they were not necessary, and that another point of defense might be taken on the terms of the protest some of which were intended to apply to all future importations of a similar character, but he supposed it was pretty well settled that such protests were sufficient. Charles G. Clark was sworn and testified that he had been employed in the auditor's department since January, 1864, and had charge of protests and refunding; that he had adjusted the amount of overpaid duties in this case, and he produced the statement made up by him; that he had brought up only a part of the entries relating to this case, which would be about 500 in number.

District Attorney Courtney, who appeared for the defendant, said he did not propose to try the case by specimens; that the plaintiffs must prove their payments, for he should not admit that payments had been made. This, he understood, had been the great wrong perpetrated heretofore on the government.

Mr. Smith said that all parties had agreed that the entries were so numerous that the court would not investigate them, and that as he understood, Mr. Clark had made up this statement by consent of Mr. Allen, the assistant district attorney, who had also examined it, he thought that under that understanding Mr. Clark's evidence should be taken.

The district attorney said that they might as well understand at once the position that he took, and the instructions which he had received from the government; that the court was aware, from report at least, that great fault had been found at the treasury department in regard to the manner of adjustment of amounts, and to the payment or refund which had been made to parties claiming the return of duties, illegally exacted, in this class of cases; that fraud had been openly charged in regard to the action and conduct of certain clerks in these matters, and the government had found it necessary to regulate them by enforcing some strict rules in regard to their trial; that he knew nothing about the payment of duties by plaintiffs in this case, though he had no doubt that what Mr. Hutton would say about it would be substantially correct, but he was there to protect the interests of the government, and had besides received very explicit instructions from the treasury department, which he would read. The letter was then read as follows:

"Treasury Department.

"Solicitor's Office, Oct. 24, 1866.

"Sir: Herewith I transmit a copy of a letter which I have just received from the secretary of the treasury, in relation to the conduct of suits instituted against the collector of customs at New York for the return of duties alleged to have been illegally exacted, and you are requested to conform your action to the views therein expressed.

"Very respectfully, Edward Jordan,
"Solicitor of the Treasury.

"Saml. G. Courtney, U. S. Attorney, New York."

"Treasury Department, Oct. 23, 1866.

"Sir: I have considered your letter of the 14th of August relative to instructions which should be given in the matter of certain suits instituted against the collector of customs at New York for the return of duties alleged to have been illegally exacted.

"I am of opinion that the instructions which have heretofore been given to the district attorney to plead the act of limitation to all claims instituted against the collector should be reiterated.

"Where prospective protests are relied on, it is my opinion that their legality should be resisted, and the matter left to the decision of the court.

"The district attorney should be instructed to bring to the notice of the court the informality which it is represented has for some time existed, of having the statement

upon which the judgments are rendered, made up in the custom house. I fully concur with you in the opinion expressed, 'that no verdict should be permitted except for a sum certain after a settlement in an appropriate way of all questions both of law and fact, and that it should be either by a jury or by some officer of the court, its clerk, one of its commissioners, or some other like officer who will be amenable to its order, and whose report should be subject to exception by either party as to matter both of law and fact.'

"The district attorney should be instructed to reserve by bill of exception all points of law decided by the court adversely to the United States.

"I am, very respectfully, H. McCulloch,
"Secretary of the Treasury.

"Hon. Edward Jordan, Solicitor of the Treasury."

After this letter had been read, Mr. Courtney continued: The court is aware that for the last eighteen months none of those so-called collectors' cases have been tried—this court refusing to make any order of reference or to take any steps backward or forward in them. I have therefore, under the circumstances, been obliged to bring this class of cases for actual trial before the court so that the legal principles involved may be decided, and such course as to adjustment of amounts, in accordance with the principles settled, may be adopted as may be satisfactory, to the government and the parties.

SMALLEY, District Judge, said: This is a class of cases with which I am very familiar, and the history of them is this: The very same difficulties which the court found in trying those cases years gone by, seem to present themselves here. Here is an illustration. Here are some five hundred entries. Now the court and jury cannot undertake to examine these five hundred entries, and yet not to examine them in some way would be a denial of justice. Now I will state my judicial knowledge of the history of these cases. When I first had the honor to come to preside in this court there were a great many of this class of cases on the calendar. The practice that prevailed at the time in trying them as stated by the district attorney at the time, Judge Roosevelt, and the clerk of the court, and I think by Judge Nelson on some occasion, was to hear the case fully, that all the questions of law that might be raised on either side should be passed upon, the whole case considered, then a verdict rendered, and as far as the assessment of damages was concerned it was referred to the custom house authorities. That was the practice in this court when first I had the honor to preside here—that was the rule in fact. It struck me as being very loose practice. In the custom house there was no one responsible. What officer should make it up? What clerks should be instructed with the duty of investigating the necessary papers, or who should be held responsible for the report? This, to my mind, was very vague and indefinite. I suggested that difficulty to the district attorney and to the different counsel, and stated to them that I was willing, with the consent of all the parties, to refer the investigation of the records of the custom house to the collector by name, although, indeed, he was defendant, or to the auditor by name, and that he should be responsible; that some person should be responsible to the court for the correctness of the report. That rule was adopted that term, and very many cases, by the consent of the district attorney and counsel were referred in that way. After a time, however,—I don't recollect how long, perhaps twelve months, perhaps longer,—complaint was made of unreasonable delay in the custom house on the part of the officers to whom these cases were referred, in adjusting these claims; complaint was made here by counsel in open court. I then took occasion to state in presence of the district attorney, that if those complaints were well founded, the cause must not be permitted to exist, and that if I found that they were well founded, I would revoke every order made to the custom house, and refer them to an officer of the court who would see that the reports were properly executed and presented to the court for action within reasonable time. Some little time after this Mr. Griswold came into court with affidavits in reference to some cases in which he had been counsel for the plaintiffs, and in which verdicts had been rendered, setting forth that the papers were delayed a long time in the custom house, notwithstanding the various applications had been made for them, and that he could get no adjustments made. I thereupon revoked the rule of reference and had them referred to in the clerk of the court, stating that I would revoke every case that was on the calendar whenever complaint was made to me officially that those delays were made, after suitable instruction, and that no reports were made. Some two or three weeks afterward Mr. Griswold again came into court with affidavits in some thirty or forty cases of the same character, in which verdicts had been taken and reference made, and I revoked them all and referred them to the clerk of the court. This was in 1862. From that time I had little to do with trials or this class of cases till 1864 and 1865. I was occasionally here, but other business engaged me. I, however, learned from a public report that some committee of congress, or some one acting for a committee, was here, and had made animadversions on this mode of practice—the practice of referring those custom house cases to the adjustment of the clerk of the court. I looked at the report and found a very scandalous statement, one perhaps technically true, but really false; and it was evident to me that

whoever was the author of that statement had forgotten the rule of morals as well as of law—that the suppression of a truth is the suggestion of a falsehood. In this case it was a very foul suppression of truth. The report stated that Judge Nelson had made the change of reference from the custom house to the clerk of this court for the benefit of the clerk who was his son-in-law, Mr. White, omitting to state the fact that the precedent had been made by a judge who had no connection with Mr. White, and that Judge Nelson only allowed the practice established by his junior for reasons satisfactory to himself. Judge Nelson naturally felt as a pure judge and an honorable man would, assailed for his action in court in an official report emanating from the legislative branch of the government, and he revoked the rule and practice established by me, and said he would make no further references. I had no further conversation with Judge Nelson on the subject, but I could well understand what influenced him to revoke these rules of reference. I am disposed to follow the same rule I made then. My own opinion is not changed since I revoked the former rule of reference in those cases, and, so long as I have the honor to sit upon this bench, I shall carry out the dictates of my own judgment, as to the proper manner of trying these cases. I do not believe Judge Nelson revoked my rule on the matter because he thought the reference was improper, but because this committee had presumed to assail in his judicial character one of the most able, upright and conscientious judges that ever presided in a court of justice, simply because he followed a precedent set by a junior who had perhaps given the question more thought than he had, by a statement which suppressed that fact, and by its suppression left a false and foul imputation and was false and calumnious in the highest degree. I am now disposed to go back to my former rule, and let some of these cases be entered upon and all the questions raised, and have reference of the cases made to some officer of the court to make the adjustments. We cannot sit all the time trying these cases. We see the absurdity of such an attempt for a court and jury to take up the five hundred accounts here; there are not days enough in the year to afford us time for it. You may take up two or three cases or more if you choose, and investigate them, and have every question raised passed upon by the court and jury, and take a general verdict, as we did before this base and calumnious report I referred to was made and refer the matter to an officer of the court. I shall be disposed to consult with the district attorney and counsel for the plaintiff in regard to the proper officer of this court, but it must be an officer of the court, responsible to the court and removable at pleasure.

Mr. Courtney—That, your honor, is in substance what my instructions from the department call for.

THE COURT—I have taken occasion to give a history of the practice in these cases because the report of this committee on custom house, as shown to me, I repeat it, was false and calumnious. Technically it may be true that some cases were referred, but the important truth was suppressed, that the judge was merely following the precedent set by me, and I repeat emphatically that in this case the suppression of the truth was a suggestion of falsehood.

Mr. Smith then proposed to prove by Mr. Clark that he made up a report of the facts of these copies.

THE COURT said that was not evidence unless it was agreed to by the district attorney, and that under the instructions which had been given, he was not authorized to agree to it; the best way, therefore, was to try the three entries produced if they covered all the questions involved.

The district attorney said it was very simple to present some of the entries to the court and have the ruling of the court, whether the additions were properly made and then the proper officer could make the adjustment for the rest as the court had suggested.

The judge said that would be the rule, and the district attorney should have opportunity to appear on the adjustment. It was impossible for the court and jury to sit and try all the various entries, which embodied 2,000 papers.

It appeared, on further examination, that the entries produced were barred by the statute of limitations, and the court took a recess to enable others to be produced from the custom house. Several entries were then produced, and Mr. Clark testified that the excess of duty on the overvaluation of the first was $12.94 on charges; that the charges were those which were put on the entry by the appraisers, over and above the proper amount as stated in Mr. Phillips' report, and that this sum was paid with the duties before the goods were delivered to the plaintiffs. Several other entries were also put in, dated in 1857 and 1858, and the witness states that the overcharge of duty on them was on one $4.32 and another $11.10, and on a third $2.28, and a fourth $11.28, the third being on commissions and the others on charges. All the entries had protests attached except the third. On cross-examination the witness said he went into the custom house in June, 1864; that this suit was commenced in 1862; that he knew nothing of the protests except that he found them on file with the papers; that he could not tell from the entries what the charges that were added were for, and only told the amount of overcharge by taking the amount allowed for charges in Mr. Phillips' report and deducting that from the charges which appeared in the entry, but that the entry did not show what the charges were

for, and he did not know and had no personal knowledge of the payment of the duties or the delivery of the goods.

Samuel G. Ogden was then called and testified that he was auditor of the custom house, and had been since 1842. Mr. Smith offered to prove by him what had been the practice of the government in respect to appeals to the secretary of the treasury and refunding duties. The district attorney objected on the ground that such a practice could not control the law.

THE COURT allowed the evidence as bearing upon the construction of the law.

The witness said that the act of 1857 had been considered to have no reference to cases like this, but only to cases where the rate of duty was involved, and that letters from the secretary had taken that view. He produced several letters, the last of which is as follows, the others having reference not to this, but to analogous cases.

"Treasury Department, June 9, 1862.

"Sir: I am in receipt of your report of the 24th ult., on the appeal taken by Messrs. Benkard & Hutton on the assessment of duty by you on certain charges added by the appraisers to their invoices per Hansa, in February, Bremen and Hansa in March last, the applicants contending that the said charges are included in the invoice price of the goods. As it appears from the report of the appraisers that the charges added by them to the invoice were the usual costs and charges to be added to the actual 'market value or wholesale price' to fix the dutiable value, I perceive no reason to interfere with your decision in the case. I would here state for your information that this class of cases is not deemed as coming under the provisions of the fifth section of the act of March 3, 1857, [11 Stat. 195, c. 98,] that section having special reference to the liability of goods, wares or merchandise to duty or exemption therefrom, and not from charges.

"I am, very respectfully,

(Signed) "S. P. Chase,

"Secretary of the Treasury.

"Hiram Barney, Esq.,

"Collector, &c., New York."

He further testified that Mr. Phillips' report had its origin in instructions from the treasury department in February, 1856. In adjusting statements made for return of duties on charges, upon instructions then recently issued from the department, there was a difficulty in ascertaining the amount of charges on which duties should be paid. For this purpose application was made to the appraisers, as being parties most familiar with the subject, to report what charges should be considered as dutiable. In pursuance of that request Mr. Phillips made this report of what charges he considered dutiable. This report was afterwards adopted by the court in a case which came up, which held that the duty should be retained on the amount which he reported as dutiable, and the excess should be refunded. Since the report both the court and the custom house authorities have adopted it and acted upon it.

On cross-examination, he said: We requested Mr. Phillips to make the report, but had no special instructions from the treasury department to have him make it.

Mr. Phillips was also called and gave a similar account of his report, which he said he made from such information as he could get here from merchants and others.

Mr. Ogden recalled, stated that he had recently received drafts from the treasury department for the refund of duties in similar cases, the amount of which had been ascertained in conformity with Mr. Phillips' report; the last had come that very morning, but the judgments were rendered perhaps a year ago.

Mr. Hutton, one of the plaintiffs, proved that the plaintiffs had been in the habit of appealing to the secretary in similar cases, until they were stopped by a letter from the secretary of the treasury, which he produced, and that the protests attached to the entries were made by his direction generally when the entry was made, and always within time, and that he himself made the protest in all cases where he swore to the entries, and always presented the protests with the entries.

THE COURT here ruled that Mr. Phillips' report could not be received as evidence in the case, or as forming any proper standard by which to determine what charges were properly added.

The case was then adjourned to enable the plaintiffs to conform their testimony to this ruling.

When the court reassembled Mr. Hutton was recalled, and producing several more entries, testified that there were on them certain additions for charges and commission, where no charges or commission at all had been paid by his firm, and that the usage was in many of the principal markets in Europe, which he named, to render their invoices of goods "free on board" at the port of shipment; that the charges were added here on compulsion because the custom house authorities refused to receive the entries unless they were added, and they accordingly specified them on the entry as added "by compulsion." On cross-examination he said that he could not say, that he himself made the additions, or that the requirement was made in every case, because the rule having been settled in one case, they would conform to it in subsequent cases.

Henry D. Moore, the plaintiff's custom house clerk, was called, and testified that he made the entries at the custom house, and that the additions of commissions and charges on the face of the entries were made by him; that they were added because they were compelled.

to add them; that he had presented entries where they had not been added, and the entry clerk refused to pass them, and before they could be passed he had been compelled to add them. On cross-examination he said he did not see the collector himself about the matter; made up the entries just as they were before he went to the custom house, but considered that there was compulsion in the case because he knew the entries would not be passed unless the additions were made, from the fact that they had been refused before.

Mr. Schell, the defendant, was called as a witness, and testified that he was collector from July 1, 1857, till April 8, 1861; that he recollected having considered the subject of requiring importers to make additions to their entries, and his conclusion was that it was not his duty to instruct or to control the merchant in making his entry. The law prescribed the mode in which the entry should be made, and the importer made it on his own responsibility entirely; the collector had nothing to do with the form of the entry, except to see that it complied with the regulations; I never gave any instructions with reference to the plaintiff's case; I never gave any instructions to the entry clerks for the addition of commissions; I never directed any person to compel the importers to add to their entries, or instructed any one to request or compel the plaintiffs to add to their entries. Cross-Examined—The deputy collector who had charge of the entry department is dead, I believe; the matter would not have been deputed to him; it would have been an assumption on his part to exercise that power which no merchant would submit to and the department would not permit; charges are usually assessed on the invoices by the appraisers, if the importer does not choose to do it himself; I can give no information as to what took place on the entries in this case; I never saw them till this morning. Redirect—I considered this question after I took the office; I gave instructions to receive the entries under the law; the advances that were made on invoices came to my knowledge; I had no instructions to give about it; the officers had to discharge their duties; whatever advances the appraisers made they made on their own responsibility; they assessed the duties according to the law and the regulations of the department; I can't tell about these goods; the practice in the office was that the merchant delivered his invoice and bill of lading; then he made the entry showing the charges, which he presented to the deputy collector or the entry clerk; the entry was sworn to, and the duty was then assessed by the entry clerk, and the merchant deposited the duty or gave bond; the invoice was then sent to the appraisers' office, and a permit was given to the merchant before he could receive his goods; if the invoice was returned "correct," the entry was liquidated. The duty was assessed by the entry clerk under the law, on the value as set forth in the invoice. If the appraiser afterwards makes it more, the merchant is called on to pay more than he deposited. If the deposit is in excess of the duties the excess is refunded. The appraiser's return controls the assessment of the duties, but if the merchant is dissatisfied he has the right to appeal. The entry would have been passed though it did not contain the costs, charges and commissions. I recollect three or four cases where it was done. That was the general practice.

The testimony was here closed.

Requests to charge were made by both parties, which we have not room for.

SMALLEY, District Judge, (charging the jury.) Before leaving to the jury the questions of fact, the court proceeded to dispose of the questions of law involved. After stating for what the action was brought, and referring to the importations, entries and protests of the plaintiffs, he said: The plaintiffs claim that their evidence tends to prove: 1. That in some cases they paid no freight or charges of any kind; that the goods were "free on board." 2. That in other cases they have been compelled to add an arbitrary sum for costs and charges more than the amount paid by them. 3. That they were compelled to pay an extra charge for commissions above the usual rate in the market in which the goods were purchased. 4. That they duly protested against these exactions, and only submitted to them for the purpose of obtaining possession of their goods. The defendant resists the recovery because he says that inland freight was properly added to the invoice, under the act of March 3, 1851, and that the other costs and charges were proper and legal under the treasury instructions and the law. This raises a question which has been a good deal discussed, and about which there has undoubtedly been some diversity of opinion in the courts. On Feb. 1, 1856, the then secretary of the treasury, Mr. Guthrie, himself an able lawyer, issued treasury regulations in a pamphlet form, in which he says: "Freight and transportation from the port of shipment to the port of importation is not a dutiable charge." This construction was thus early given to the act by the treasury department. If that is a correct construction of the law, such charges are in violation of the law, and cannot be sustained. The question seems to have come before the circuit court in a case in California in 1858,—Gibbs v. Washington, [Case No. 5,380,] in which the court came to the same view as the secretary of the treasury did in issuing the regulation which I have read. Again, a treasury circular was issued, dated May 1, 1863, while the present chief justice of the United States was secretary of the treasury, reaffirming the principle laid down in the treasury regulation of 1856, and conforming to the decision of the circuit court of Cali-

fornia in the case of Gibbs v. Washington, [supra.] This decision, certainly of a very respectable court, does not seem to have been overruled, and has only once been questioned, in the case of Warren v. Peasley, [Case No. 17,198,] in an opinion by Judge Curtis. I think, therefore, on looking at the law itself, and the treasury circulars of the different administrations, that the charges added for inland freight were illegal. I do not mean by that that they were understood to be illegal at the time they were made. I mean that it was an erroneous construction of the law, and nothing more.

Then as to commissions—in all these protests which have been brought to the notice of the court, it seems that they were charged 2½ to 3 per cent. commissions. The statute requires the charge of the "usual rate" of commission. This has received a judicial construction. If it had not, it would seem to be very difficult for lawyers to differ upon the subject. There really seems to be room for but one opinion. It is not what the importer may have paid as commissions. He may have got the goods without paying any commissions, but he would still be liable for a charge for commissions. and must pay the duty upon them. On the other hand he may have paid much more than the usual rate of commissions. But he is not bound to pay on more than the usual rate, because that is the sum fixed by law, and what is the usual rate is a question of fact. A number of witnesses have been examined upon that subject. The plaintiff himself, Mr. Hutton, an old, experienced and very intelligent merchant, and two or three custom house officers, Mr. Phillips and Mr. Ogden, I think, testified upon that point. The evidence is uniform. There is no discrepancy that the usual rates of commission in continental Europe are two per cent., except Paris, where they are three per cent., and that for Great Britain, they are one and a half per cent. All the importations that I have examined in this case came from continental Europe, and consequently upon this evidence, only two per cent. commissions should have been charged, that being the usual rate. If there were any from Paris the commissions should have been three per cent. If, therefore, the commissions upon any of the entries from continental Europe, except Paris, were increased above two per cent. any commissions demanded above that rate were illegally exacted, and if they are proved upon the part of the plaintiff in this case, they should be refunded; and if from Great Britain, where the usual rate is one and a half per cent., if any greater commissions were exacted, they were illegal and should be refunded.

The costs and exchanges should unquestionably be added to the invoice—that is, what was actually paid. They have no right at the custom house, any more than the merchant has the right to make an arbitrary estimate for purposes of convenience. It seems that for many years they have adopted what has oftentimes been called in the court (and I have had it in previous trials before me) Phillips' Report, for the convenience of the parties, the custom house and the merchant, which may be in the main, and probably is, nearly correct. But that is used only by consent. The custom house has no more right than the merchant to fix an arbitrary value upon these costs and charges. The merchant is bound to enter the actual costs and charges as they were paid. If there were more paid; if the goods were delivered "free on board," free from all those charges, then it has rightly been held in this court that the importer was not liable for any, for the reason that it is to be supposed that those charges were paid by the seller and made up a part of the marketable value of the goods. There are many cases as well by Judge Nelson as the other judges sustaining this point.

The second objection of the defendant is that there were no protests sufficient to enable the plaintiffs to recover in these cases. The act of February, 1845, required the protest to be made "at or before" the entry. The act of March 3, 1857, under which these entries were made, changes the expression "protest," but uses language very similar, and says it must be done within ten days of the time of the entry of the goods. The language of this act as to what the protest shall contain, is precisely like that of the act of February, 1845, probably being copied from it, and provides that the protest shall set forth distinctly and specially the objection to the payment of the duties so that the collector may know the reason of the protest. We have already seen what these protests are. They seem to set forth as clearly and distinctly as the English language will well admit, the objections which the merchant makes to paying these duties. I cannot well conceive making them more clear.

But it is objected that in some of these cases there have been no protests filed at the time, or even within ten days. It is conceded, however, that there had been previous protests filed, which claimed to be prospective and continuous, and which the merchants intended to be so. The question of prospective protest has undergone a good deal of discussion in the courts, but it seems to be now well settled so far, at least, as this circuit is concerned, and I think, unless the decisions are overruled by the supreme court of the United States, the law of the land is settled. The first time that the question arose whether a protest of this kind was valid as to subsequent importations, was in Maryland, before Chief Justice Taney in the case of Bruce v. Mariotti, [Brune v. Marriott, Case No. 2,052,] which appears to have been tried in April, 1849. The question was discussed before the chief justice by a very able lawyer, then, I think, holding an official relation to the government, Reverdy Johnson,

who maintained that the protests were invalid and insufficient, but the chief justice decided that they are clearly sufficient, and says that there is nothing in the letter, the reason or the spirit of the law, which requires one of these to be attached to every particular entry that is made. That case went up to the supreme court and was decided there in January, 1850. [Marriott v. Brune,] 9 How. [50 U. S.] 620. The question was again pressed upon the supreme court by Mr. Reverdy Johnson, with his usual ability, as the report of the case will show. Justice Woodbury delivered the opinion of the court, sustaining the opinion of the chief justice. So far as appears from the report, this was the unanimous opinion of the supreme court. It came up again before this court in November, 1855, Judges Nelson and Betts sitting together, in the case of Steadman v. Maxwell, 3 Blake, 369. [Steegman v. Maxwell, Case No. 13,344.] They held the same view, and that has been followed in this circuit in very many instances, among which is the recent case of Fowler v. Redfield, [Case No. 5,003,] not reported, decided by Judge Nelson in December, 1862. I am at a loss to conceive how a distinction can be made between this class of prospective protests and the protest that was presented in the case of Bruce v. Mariotti, for clearly this is a guide as distinct and specific, and, I think, a little more so than the protest in that case.

Another suggestion may be made. All these protests were made under the act of February, 1845, the language of which is adopted in the act of 1857. Now it is hardly to be supposed that the eminent lawyers to be found in both branches of congress, when they adopted the language of the act of 1845 in the act of 1857, did not know what construction the courts had given it. It cannot be that the supreme court decided this question in 1850, and that this legislation took place six years afterward, in ignorance of it. If it had been the design or the desire of congress to change the construction which the government and the court had given it, it is very natural to suppose that they would have used different language in the act of 1857, in order to indicate their design in some manner. There is but one case that I have ever seen in which the decision in Bruce v. Mariotti [supra] has been criticized, and that was the case of Warren v. Peasley, [supra,] where Judge Curtis, in the Massachusetts circuit court, ruled that the protest was insufficient, and very ingeniously (for he was a learned and able judge, possessed of a very acute and logical mind,) attempted to make a distinction between the two cases. But I must confess, from the examination I have given it, it seems to me to be a distinction without a difference. The principle in each appears to be precisely the same. Again, if there were no judicial decisions upon this subject, we reach the same result in reasoning. What was the object of the legislation providing for this protest? It was that the collector should be advised distinctly and specifically what the merchant insisted he ought not to pay, and which he protested against as an illegal exaction, and that he intended to hold the collector responsible under the law for the exaction. Why is it necessary to repeat it? This case furnishes a very fair illustration of it. Here is a merchant making some 500 entries in this port, at least one almost every week in the year, and perhaps more, of precisely the same character. What sound reason is there for compelling him to go through the formula of saying in each one of these cases "I protest," when he has told the collector in the first case that he protests against that and against all similar exactions. I am at a loss myself to see any good purpose that would be answered by the court's adopting that construction.

The third objection made to the recovery in this case is that no appeal was taken to the secretary of treasury under the fifth section of the act of 1857. In giving a construction to that act it is perhaps well and wise to consider the purpose of the act. That it is a severe act, one that was intended to and does limit and restrict the common law and equitable rights of the merchant, all must agree. It is a well-settled rule of construction in all courts, that acts of this description shall be construed strictly; that they shall not be extended any further than the language of the law requires. But they must be enforced as far as the language does require.

The language of this act, so far as this question is concerned, saying that the decision of the collector shall be final and conclusive unless it is appealed from under certain conditions afterward described, says that the decision of the collector shall be final and conclusive "as to their liability to duty or exemption therefrom." What is meant by liability to duty or exemption therefrom? We have had the difference between the rate of duty and the liability to duty very clearly explained by Mr. Ogden. Now it is very clear that "liability to duty or exemption therefrom" does not in itself, by any fair implication of language, extend to the rate of duty that may be imposed, or to the amount of duty, but simply to the question is it dutiable? I have had put into my hands the opinion of a very able lawyer, formerly upon the bench, now at the bar again, who considered the act to apply not only to exemption from duty entirely, but to the rate of duty. I am inclined to think that his reasoning upon that subject, though not necessary here, is probably sound. The question here is not whether this language of the act necessarily implies that the decision of the collector shall be final, when he decides whether a certain article is liable to duty, or if liable, at what rate of duty, 5, 10 or 15 per cent. It is not the question

here whether this property was liable to duty. It is conceded that it was. It is not the question what the rate of duty should be—whether any of this property should pay one per cent., or another. It is admitted to be liable to duty, and the rate is conceded. The merchant and collector agree upon that.

The collector claims, however, that certain charges should be added. That the merchant denies. Now does it necessarily follow from the reading of the language, that the decisions of the collector shall be final upon that question, construed as I have already stated it should be? Such would be my construction, without authority; but I am happy to find that I have been anticipated in this by the decision of the treasury department itself, having charge of these questions. It seems to be the decision of Secretary Cobb, Dec. 20, 1859, and, again, April 7, 1860, upon this precise question, in instructions to custom house officers throughout the country, that in such cases the rule requiring appeal did not apply, and that it was unnecessary to take it. Secretary Chase, on June 9, 1862, took the same view of it, in a very full and masterly letter, that no appeal was required. This was in relation to this particular class of cases—costs and charges. It also appears from various pieces of evidence that these instructions of Secretary Cobb and Secretary Chase have been acted upon by the treasury department. In a great variety of instances hundreds, and perhaps thousands, hundreds of thousands of dollars have been refunded, which would not have been refunded if this act of March 3, 1857, [11 Stat. 195, c. 98,] had been understood as applying to this class of cases. It appears that on March 30, 1865, Mr. Secretary McCulloch repudiated this construction. But even in that case—I do not remember the name of it—it appears that he reconsidered it and ordered to be paid judgments rendered on that ground, so that that can hardly be considered as a revocation of the previous action of the department, although in this case his instructions to the district attorney are unquestionably such as to require him to raise that question and a great many others. I hold, therefore, that upon that ground an objection cannot be sustained; that there is no bar to recovery in this class of cases, in this section of the act of 1857.

Again, it is claimed, that the additions to these entries were the acts of the plaintiffs, and in consequence, that the payment of the duties thereon are voluntary, and therefore that the plaintiffs should not recover. That is to a certain extent a question of fact which will be submitted to the jury. If, however, the evidence of the plaintiff and of his custom house clerk is true, if the jury give it credence, taking it in connection with some further testimony which has been offered this morning—if the jury give credence to their statement that when they made those entries they were told by the entry clerk of the custom house that they must make these additions or he would not receive the entry, and that they acted under these instructions for the purpose of obtaining possession of their goods, making a protest at the time and saying that it was added by compulsion, then that was not the voluntary act of the merchant. In one sense it might be called perhaps the act of the collector; but we cannot call that the act of the merchant, which was done under what may be called legal duress, so far as the word "duress" can properly be applied to property instead of to persons, which is not a strictly proper application of the term, although other courts have used it before. This is a question of fact which will be submitted to the jury, and if they find these facts they will be told that this objection also is of no avail.

Another objection to recovery in this case is that the action of the appraiser was conclusive, and that the collector was by law bound to collect the duty on the amount returned by them. Without going into any elaborate discussion of the principles which might be involved in that proposition, it is sufficient to say that in this case, if this act of the plaintiffs was based upon a compulsory act of the collector, if the plaintiffs put the entries on these to obtain possession of the goods and protested at the time, saying they were illegal; but if he put the additions on because they would not otherwise pass the entry, if that was the foundation of it, this, too, falls to the ground. The original wrong was in the collector or his agent, and he cannot now turn round and say, "I forced you to put it on, else I would not let you have your goods." The English of it would be this: "But when it was put on it went into the hands of the appraisers, and the appraisers accepted it and made no change, and when it came back I was bound to exact the duty, and now I will not pay it back to you because you put it on there." How came he to put it on there? It comes back to that question.

In this position is the objection which has been practically offered here this morning, by the evidence, that the collector is not liable for the action of his entry clerk. The statement of Mr. Schell as to what he thought would be done is a matter of no consequence here. Mr. Schell stated that he gave no instructions to the entry clerk, other than to enter the goods according to law and the treasury regulations, and he does not think they used any compulsion in this case: but that is not evidence. No one doubts that the statement of Mr. Schell is strictly true, that his instructions to all his clerks were to perform their duties according to law or the treasury regulations emanating from his superior, the treasury department. It is now claimed in his behalf by the counsel for the government, that the entry clerk

did that without his authority, and that therefore, although it was an official act, he was not bound by it. Probably there have been thousands of these cases tried in this and other places within the last twenty years. I presume this is the first time this objection was ever made, and I cannot regard it with favor now. It must be overruled. Let us look for a moment. Suppose this principle was admitted to be sound, what would be the position of the merchant? He goes to the proper officer. The immense business of the custom house must be divided among various branches, each having a separate and distinct head, and having clerks under them. This is a necessity. The custom house here is a large part of the treasury department—a sub-treasury department of itself. The merchant goes to the entry clerk and is told, "I cannot take your entry here, unless you make certain additions to it." "But" he replies, "I do not consider these right; I will not make them; I did not pay these charges; it is a violation of the law to require me to make them." "Well, I shall not take your entry unless you do." There stands his cargo of goods, liable to injury or destruction; he cannot litigate the question then, and he says "I will put it on, but at the same time I will tell you why I put it on that it is because you compel me to do it," and he protests at the very moment. He writes upon the entries by "compulsion," and leaves with the entries a protest that he makes the addition because he is compelled to do it in order to get possession of his goods, that it is illegal, and that he intends to get it back if the law will sustain him. That is the English of it, without going through it further. This would leave the merchant at the mercy of every little entry clerk, if the clerk—here to-day and there to-morrow—alone was responsible. The gross injustice which is manifest in the practical operation of this principle, is sufficient to show that it cannot be founded in law. The law has sometimes been said to be the perfection of human reason. There is reason in law—it is the spirit of it. But I do not think there is any reason by which such a principle could be maintained. It is true that Mr. Schell gave his officers most explicit instructions to act according to law, but it is equally true that he says he knew they were making these exactions. He supposed, probably, that it was according to law. No doubt he did, or he would not have done it. And if he knew it and the money went into his hand, on another principle he would be liable. I refer to the old rule, qui facit per alium facit per se, which applies here most emphatically. So that I think this objection is without any foundation. It would hardly do, when money has been illegally exacted by an officer under Mr. Schell's control and paid by him into the treasury, (and whatever the rule was before, Mr. Schell is personally protected now,) it would hardly do to turn round and tell the importers that they must look up the entry clerk, who when found might be responsible. This disposes of the questions which seem to me to be questions of law. Various requests to charge have been made, which I shall not take particular notice of, but the defendant will have the benefit of them so far as I have declined to comply with his requests. There remain only two or three questions for the jury which I will now submit to them. 1. Was the amount of costs and charges paid by the defendants on these entries equal to the amount on which duties were paid? 2. Were the commissions stated in the entries at the usual rate? 3. Were the additions on these entries made by the plaintiffs voluntarily, or to obtain possession of the goods?

The jury found a verdict for the plaintiffs.

[NOTE. A reference was ordered to adjust the amount of recovery, and judgment was thereafter entered for plaintiffs. Pending writ of error to the supreme court, the parties agreed to set aside the proceedings, that a new trial should be had. For such new trial, see Hutton v. Schell, Case No. 6,961.]

The BENLEDI. See Case No. 807.

Case No. 1,308.

BENN et al. v. LECLERCQ et al.

[30 Leg. Int. 185;[1] 18 Int. Rev. Rec. 94; 5 Leg. Op. 145.]

Circuit Court, D. Massachusetts. May 17, 1873.

COPYRIGHT—DEPOSIT OF TITLE OF DRAMA—TITLE NOT ORIGINAL.

A person who deposits in the copyright office the title of a drama not original with himself, cannot secure such title to the exclusion of others who have applied such title to a dramatic composition founded on the same story, before the date of such deposit.

In equity. This is a suit in equity [by Walter Benn and others] to restrain the defendants [Carlotta Leclercq and Arthur Cheney] from the infringement of the plaintiffs' copyright by representing a play called "The New Magdalen." The title of the play copyrighted by the plaintiffs was in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins' celebrated novel of the above title, by Walter Benn, author of sundry dramatic works, and with directions, cast of characters, etc." It appeared in defence that Wilkie Collins, a celebrated English author, had made and published a novel with the title of "The New Magdalen," and it was alleged that at the time of the deposit of title by the plaintiff, Mr. Benn, he had composed a drama under the same title partly adapted from the novel so far as it was published, and partly antici-

[1] [Reprinted from 30 Leg. Int. 185, by permission.]

pating the novel when the novel should be published. It was proved that before the deposit by Mr. Benn of the title, Mr. Collins had gone far in the completion of this drama. There was a hearing on Thursday afternoon on a motion for a temporary injunction, when the decision was reserved. The judge has now denied the motion. He said that the plaintiff by his copyright secures only the dramatic composition of which he is the author. He could not prevent others from composing or publishing a similar book on the same subject, provided they did not pirate from his book, but relied on their own intellectual and mental powers. It was clear that Mr. Benn could not be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor as the title of a drama, Mr. Collins having applied it to an original drama before the plaintiff deposited it for copyright. The judge referred to the case of Osgood v. Allen, [Case No. 10,603,] recently decided in the district of Maine. He, however, said that cases might occur in which a title would be protected independent of the contents of the book. But they would not occur under the copyright laws, but under the common law provisions, which protect the stamp put on goods offered for sale, the protection being analogous to that granted in case of trademarks. But no such state of facts existed in this case as that the court would prohibit the use of the title on this ground.

G. S. Hillard and M. F. Dickinson, Jr., for plaintiffs.

W. D. Booth and T. W. Clarke, for defendants.

SHEPLEY, Circuit Judge. In this case a bill in equity was brought to enforce rights claimed by the plaintiff, Mr. Benn, under a copyright. On the 28th of February, 1873, he deposited with the librarian of congress the title of a drama, substantially in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins' celebrated novel of the above title, by Walter Benn, author of sundry dramatic works, and with directions, cast of characters, etc." This is the title. It is not "The New Magdalen" alone, but it is the whole title as filed and recorded. By this deposit undoubtedly Mr. Benn would have secured the dramatic composition bearing the title he had deposited so far as it was original with him, provided he subsequently complied with the other provisions of the statute requisite to be performed to perfect the copyright. But in securing this product of his mind, the dramatic composition of which he is the author, he secures that only. And the rule applied in this court in numerous cases applies here also. He secures only that which was his own. He cannot prevent others from composing or publishing a similar book on the same subject, provided they do not pirate from his copyrighted book, but rely on their own intellect and mental power. The rule is familiar, and the present case forms no exception to it. The complainant sets forth that defendant not only acts and represents a drama with the same title, but that it contains the same cast of characters, and that this cast is secured to him by the copyright. There is no evidence of this, for there is no evidence of the cast of characters of the complainant's play and no evidence that complainant's play has ever been performed at any place where defendants could have seen and copied it.

It appears in defence that Wilkie Collins, a celebrated English author, has made and published a novel under the title of "The New Magdalen." And at the time of the deposit of title by Mr. Benn it is claimed that he had composed a drama under the same title, partly adapted from the novel so far as it was published, and partly anticipating the story of the novel, where the novel was not published. It was proved that before the deposit by Mr. Benn of the title, Mr. Collins had gone very far in the completion of this drama. It is clear, then, that Mr. Benn cannot be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor was it original as the title of a drama, for it was applied to an original drama by Mr. Collins before Mr. Benn deposited it for copyright. The case, then, presents this simple question: Can a person who deposits in the copyright office the title of a drama not original with himself, secure to himself such title to the exclusion of others who have applied such title to a dramatic composition, founded on the same story, before the date of such deposit? The statement of the proposition is its refutation. In Osgood v. Allen, [Case No. 10,603,] (the case on the proprietorship and use of the words "Young Folks," as a title or part of a title to a magazine or newspaper,) this court held as follows, and it sees no reason to change or reverse the doctrine there affirmed. It must not be understood that the court will not protect a title in any case. Cases may occur in which a title would be protected independently of the contents of the book. But they would not occur under the copyright laws. They would occur under the common law provisions, which protect the stamp put on goods offered for sale, and the protection would be analogous to that granted in case of trade marks. In that case it must be shown that the defendant had pirated an original title, the product of the copyrighters, not a title taken from a composition of the same class or character to which another author had already appropriated it. Now Mr. Collins cannot be charged with piracy of the title in this case, for he had used it as a title for a novel and a drama before Mr. Benn conceived the idea of depositing it for copyright. No such state of facts as that under which the court would prohibit the use of the title exists here. The dramatic composition

of plaintiff has not been represented. It follows from this that the injunction must be denied.

BENNER, (CHESTER v.) See Case No. 2,660.

BENNER, (UNITED STATES v.) See Cases Nos. 14,568 and 14,569.

Case No. 1,309.

Ex parte BENNET.

[1 Pa. Law J. 145; 1 Pa. Law J. Rep. 28.]

District Court, E. D. Pennsylvania. 1842.

BANKRUPTCY — DIVESTITURE OF PETITIONER'S ESTATE—DECREE.

The property of a petitioner in bankruptcy is not divested out of him, until the decree has been made: hence, such property is subject to execution by any one of his creditors, until the time of the decree.

[See Downer v. Brackett, Case No. 4,043; Ex parte General Assignee, Id. 5,305; Ex parte Dudley, Id. 4,114.]

In bankruptcy. On the 29th March, 1842, Bennet filed his petition for the benefit of the bankrupt act, but before time enough had passed to obtain a decree of bankruptcy, one of his creditors issued a fi. fa. and levied on certain personal chattels returned and specified in Bennet's petition: and the property was just about to be sold by the sheriff.

A rule having been granted to stay proceedings under the levy, Mr. Chester, in support of the rule, argued as follows: The policy of the bankrupt act is equality among all creditors. Bennet has filed his petition, swearing to facts which show that he is entitled to be decreed a bankrupt; a decree will pass as matter of course. To allow a fi. fa. to be executed after a petition filed, would defeat the objects of the act, and encourage frauds. A man need only confess a judgment to a favourite creditor, and that creditor obtains his whole debt, while other creditors are defeated; or, if this would be considered a fraud on the act, he can facilitate, by mere inaction, the obtaining of a judgment, if the creditor be a favourite one, or retard judgment, if the creditor be not a favourite one; and all this in a manner which shall render it impossible to say whether his action has been done in good faith, or not. It is much better to say, that when a petition has been filed, setting forth such facts as will entitle a party to a decree, this property shall be protected. The law is thus settled in the western district of Pennsylvania. Such a petition may properly have this effect, for while it depends on various circumstances whether a party shall be disregarded and certificated, a decree of bankruptcy comes also in necessary sequence to the petition; and when the decree is obtained, justice is done to all the creditors alike. At all events, let the levy be continued till the time when the decree will in ordinary course, be made; and if the petition be withdrawn, or the decree be refused then let the sale be made. (Curia adv. vult.)

On a subsequent day his honour, [ARCHIBALD RANDALL, District Judge] gave his opinion:

The bankrupt law enacts, that the property of every bankrupt who may, by a decree of the court, be declared a bankrupt, shall, "from the time of such decree, be deemed to be divested out of such bankrupt," and shall be vested by the decree in the assignee named by the court. Section III. We can carry the policy of the act no further than the act itself has been pleased to define. By the terms of the act, the petitioner's property ceases to be his, only from the time of the decree. Before the decree passes, it must therefore be subject to execution. A decree does not necessarily follow the petition. The petition may be withdrawn; the debts may be all paid; the petitioner may die, or other circumstances may perhaps intervene before a decree is obtained, and to prevent it. There will probably be found inconveniences, whichever way the law be settled; but it is obvious that if filing a petition in this court, will prevent executions, a fraudulent debtor has a most simple resort to keep his creditors at bay, until he can so arrange his concerns as effectually to defy them. The rule was discharged.

Case No. 1,310.

BENNET et al. v. ALEXANDER.

[1 Cranch, C. C. 90.] [1]

Circuit Court, District of Columbia. April Term, 1802.

BANKRUPTCY—DISCHARGE OF BANKRUPT — EFFECT ON BAIL.

A discharge of the principal under a commission of bankruptcy issued after the return of the sci. fa. against the bail is no discharge of the bail.

At law. Scire facias, returnable October 18th, 1801.

Mr. Youngs, for the defendant, after pleading "payment," and "no such record," moved for leave to plead the discharge of Charles Love, the principal, under the bankrupt law. The discharge was dated in December, 1801. The commission of bankruptcy issued October 20th, 1801.

But THE COURT refused to admit the plea, being of opinion it was no bar.

BENNET, (DOREMAS v.) See Case No. 4,001.

BENNET, (MORRISON v.) See Case No. 9,843.

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

Case No. 1,311.

Ex parte BENNETT.

[2 Cranch, C. C. 612.][1]

Circuit Court, District of Columbia. May Term, 1825.

HABEAS CORPUS — PROCEEDINGS ON RETURN OF WRIT—INSUFFICIENCY OF COMMITMENT — CERTIORARI TO COMMITTING MAGISTRATE.

1. A warrant of commitment must be under the seal of the committing magistrate, and must show a charge upon oath.

[Cited in Erwin v. U. S., 37 Fed. 486. See, also, Ex parte Burford, 3 Cranch, (7 U. S.) 448; Ex parte Sprout, Case No. 13,267; Ex parte Williams, Id. 17,699.]

2. Upon habeas corpus, if the commitment be informal or insufficient, the court will discharge the prisoner from that commitment, but will recommit him in proper form, if there be sufficient cause.

3. If the commitment be regular and formal, and for an offense for which the committing magistrate had a right to commit, it seems that the court, upon habeas corpus, will, upon the request of the prisoner, issue a certiorari to the magistrate, to certify the informations, examinations, and depositions taken by and remaining with him in relation to the commitment; and if none such shall have been taken, will summon him to appear and state upon oath the evidence upon which he issued his warrant of commitment; and upon ascertaining such evidence, will consider the same and will bail, remand, or discharge the prisoner, unless he shall desire that the witnesses may be re-examined, in which case he will be remanded until the witnesses can be had.

[Cited in Re Martin, Case No. 9,151. See, also, U. S. v. John, 4 Dall. (4 U. S.) 413; Johnson v. U. S., Case No. 7,418; Veremaitre's Case, Id. 16,915; Ex parte Jenkins, Id. 7,259; Ex parte Van Aernam, Id. 16,824; U. S. v. Bates, Id. 14,544.]

At law. Upon the return of the habeas corpus, in behalf of N. V. H. Bennett, it appeared that he was committed by virtue of the following warrant: "District of Columbia, Washington County, ss. Whereas, or the information of Samuel C. Raymond on oath, it has been made to appear that N. V. H. Bennett, now before me, being accused of having feloniously stolen and taken away from four to five hundred dollars in bank notes the property of one N. Wood; and wearing apparel, to wit: One pair of blue ribbed pantaloons, two shirts, &c., the property of J. Scott, on examination and search made, one pair of pantaloons and two shirtees bearing the description given by said Raymond before the examination, were found on the said Bennett; and he not having it in his power to give the required security for his appearance, he is therefore hereby committed to your jail and custody for future examination, or till he shall be otherwise released according to law. Witness my hand this 26th day of May, 1825. Daniel Rapine. George H. Gloyd will execute this complaint. D. R. To the Marshal, District Columbia."

Mr. Jones for the prisoner, moved for his discharge. 1. Because the warrant is not under seal; and does not charge any offence upon oath. 2. Because the offence, if any appears by the evidence to have been committed in New York, cannot be tried here.

He cited 1 Chit. Crim. Law, 33, 89, 93-95, as to the form of the warrant; and contended that the magistrate had no right to commit for an offence committed out of this district, unless upon demand from the executive of the state in which the offence was committed. Const. U. S. art. 4, § 2. [1 Stat. 18;] Judiciary Act 1789, § 33, (1 Stat. 73;) Act Feb. 12, 1793, § 1, (1 Stat. 302,) respecting fugitives from justice; Act March 3, 1801, § 6, (2 Stat. 116,) as to fugitives in the District of Columbia; People v. Jess, [Wright,] 2 Caines, 213; Simmons v. Com., 5 Bin. 617; People v. Gardner, 2 Johns. 477, 479; Com. v. Cullins, 1 Mass, 116; Rex v. Anderson, 2 East, P. C. 772.

THE COURT (nem. con.) discharged the prisoner on the ground of the want of a seal, and the informality of the warrant, and did not recommit him, because there was no evidence that he had committed any offence in the District of Columbia.

The prisoner was afterwards arrested again and committed upon a charge of stealing lottery tickets and a penknife, from B. O. Tyler in this county, and was again brought before the court by habeas corpus, when Mr. C. C. Lee and Mr. Jones, for the prisoner, contended that although the commitment be perfectly regular and formal and states that the party is charged on oath with an offence for which the committing magistrate has a right to commit, the court can and will rehear the case and revise his judgment. 3 Bac. Abr. tit. "Habeas Corpus," p. 438, (B) 13; 1 Chit. Crim. Law, 113; Cald. 295; 1 Leach, 270; 4 Chit. Crim. Law, 123, etc.; Ex parte Bollman, 4 Cranch, [8 U. S.] 114; Com. v. Holloway, 5 Bin. 512; Claxton's Case, 12 Mod. 566.

THE COURT, on the next day, which was the last day of the term, decided (THRUSTON, Circuit Judge, dissenting, and wishing further time to consider the question,) that they would examine the witnesses, as they were all present; but said that they would not consider themselves bound by this case as a precedent. After examining the witnesses, THE COURT ordered the prisoner to find bail in $500, and upon his refusal, the prisoner was remanded.

NOTE, [from original report.] In this case, CRANCH, Chief Judge, and MORSELL, Circuit Judge, were disposed to lay down the rule of proceedings upon habeas corpus, as follows, (but as THRUSTON, Circuit Judge, wished for further time for consideration they did not give the opinion in public,) namely: Upon the return of the habeas corpus, if the commitment be in all respects regular and formal, and for an offense for which the committing magistrate had authority to commit, the court will, upon the request of the prisoner, issue a certiorari to certify the informations, examinations, and depositions taken by and remaining with the committing magistrate, in relation to such commit-

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

ment; and if none such shall have been taken, will summon him to appear and state upon oath the evidence upon which he granted the warrant of commitment; and upon ascertaining such evidence, will consider the same, and thereupon proceed to discharge, bail, or remand the prisoner, as the magistrate ought to have done, unless the prisoner shall require that the witnesses shall be re-examined by the court, in which case they will order the witnesses to be summoned, and remand the prisoner until such witnesses can be had.

If the commitment be so bad upon its face that the court must discharge the prisoner from that commitment, the court will, if they have sufficient evidence before them, commit the prisoner de novo, and order the witnesses to recognize for their appearance, at the proper time and place, to testify on behalf of the United States.

If the witnesses, upon whose testimony the prisoner was committed by the magistrate, cannot be had immediately, and the prisoner will not consent that their testimony shall be stated by the magistrate, and that the court shall proceed to act upon such statement as if the witnesses were present and had testified before the court, or if the committing magistrate be dead, the court will remand the prisoner for further examination until the testimony of the witnesses can be had.

Case No. 1,312.

In re BENNETT et al.

[8 Ben. 561.][1]

District Court, E. D. New York. Nov. Term, 1876.

BANKRUPTCY — COMPOSITION PROCEEDINGS — ASSENT OF CREDITOR PROCURED BY EXTRA PERCENTAGE—KNOWLEDGE BY BANKRUPT—REFUSAL TO CONFIRM THE COMPOSITION.

1. Where an offer of money was made by the bookkeeper of the bankrupt, but without his actual knowledge, to induce a creditor to assent to a proposal for composition, who nevertheless refused to assent, and a payment of money to another creditor, who did assent, was shown, made also by the bookkeeper, and of which no explanation was given but the bare denial by the bookkeeper that it had any relation to the matter of composition: *Held*, that the evidence was sufficient to warrant the inference that unfair advantage had been offered to induce some of the creditors to assent to the composition, and that the whole proceeding was thereby vitiated, and the composition must fail.

2. That, the bookkeeper being the person actually employed to obtain the assent of creditors, the bankrupt was chargeable with what he did in the matter, without having actual knowledge thereof.

3. That it made no difference, that the offer made was refused and that the requisite proportion of the creditors had signed without counting the debt of the one to whom the payment was made.

[In bankruptcy. Motion by Bennett & Smith to approve a composition with their creditors. Denied.]

BENEDICT, District Judge. In this proceeding the composition proposed by the bankrupts, to pay 35 per cent. has been accepted by the requisite proportion of creditors, but the application to have it approved and recorded is opposed by one of the creditors upon the ground that an advantage has been given or offered to some creditors over others, in order to procure an assent to the composition.

It appears in proof that one Hotchkiss, a bookkeeper of the bankrupts and then employed in procuring the assent of the creditors to the composition, offered to one creditor named Chichester, $125 in addition to the 35 per cent proposed in the composition, if he would assent to the composition, and at the same time told him that he had obtained the assent of a creditor named Peak, by the payment of $100, to his attorney Hatch. Hotchkiss denies that he made such an offer as described by Chichester, but it is plain from his evidence that, at the least, he gave Chichester to understand that an extra percentage would be given, provided he would assent to the composition.

Hotchkiss also admits that he paid Hatch $100, at about the time Hatch signed the composition. He denies that this payment had any relation to the composition, but furnishes no explanation of the payment. Hatch signed the composition as attorney for his partner Peak, who was a creditor and proved a debt of $2,479 12-100 and assented to the composition when he was no creditor at all.

Peak and Hatch were partners in the "law and collecting business." Two notes of the bankrupts when past due had been placed in the hands of this firm for collection, by one Berry. After the notes had been in their hands about a month, Peak, one of the firm, proved in this proceeding a debt of the amount of the notes, setting forth copies of the notes and stating that they had been handed over to him by the bankrupts for value and before maturity. Thereafter Hatch, the other partner, as the attorney of Peak, signed the composition and received about that time from Hotchkiss, the bookkeeper of the bankrupts, $100 in cash. This proof and the absence of explanation warrants the inference that a secret advantage has been given to some of these creditors over others, in order to procure their assent to this composition or to ward off opposition, and vitiates the whole proceeding. It is of the essence of a composition that all the creditors be treated alike. When it appears that any creditor has been induced to assent to a composition by the offer of a sum in addition to the amount fixed by the composition to be paid to all the creditors, justice requires that the composition should fail.

In the present case it does not appear affirmatively that the bankrupts knew of the offer made to Chichester or of the payment made to Peak & Hatch. Hotchkiss says he was directed by the bankrupts not to make any such offer or payment. But it is admitted that Hotchkiss was the bookkeeper of the bankrupts, engaged in procuring the assent of the creditors to this composition, and the offer and payment made by him was

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

plainly for the benefit of the bankrupts. It is not necessary that actual knowledge of his acts be brought home to the bankrupts. I agree with the doctrine declared by Judge Lowell, in Re Sawyer, [Case No. 12,395,] that, if a creditor is induced to vote or sign by any unfair means, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors, or makes the composition voidable by any of them, from the nature of the case.

In this instance Chichester, to whom the offer of $125 was made, refused to assent to the composition, and the statutory proportion of the creditors have signed without counting the debt proved by Peak. But the fact remains, that Peak, claiming to be a creditor and having proved a debt as such, has signed the consent to accept the composition by his partner Hatch, upon the payment of $100. This fact taints the whole and compels the rejection of the composition.

The motion to record the composition is therefore denied.

Case No. 1,313.

In re BENNETT.

[2 Hughes, (1877,) 156;[1] 12 N. B. R. 257.]

Circuit Court, D. South Carolina.

BANKRUPTCY—ASSIGNEE—RECEIVER—MORTGAGEE IN POSSESSION.

1. After the appointment of an assignee in bankruptcy, a receiver should not be appointed of the lands of the bankrupt lying under mortgage, the assignee being clothed by law with like functions to those of a receiver.

[See Myers v. Seeley, Case No. 9,994.]

2. Under the statute law of South Carolina relating to the rights of mortgagees in mortgaged lands, of which the mortgagors are out of possession, the register's assignment to an assignee in bankruptcy of the bankrupt's estate, where lands covered by mortgage are embraced, will be construed as putting the mortgagee out of possession, and as giving the mortgagee the same rights as to rents and profits, if he make claim to them, which he could have acquired by actual entry had there been no assignment of the lands in bankruptcy.

[Appeal from the District Court of the United States for the Eastern District of South Carolina.

[In bankruptcy. Petition by Mrs. Bennett, mortgagee of real estate of I. S. K. Bennett, a bankrupt, claiming the rents and profits after the adjudication of bankruptcy. From a decree of the district court sustaining exceptions by the assignees to a master's report, the mortgagee appeals. Decree modified.]

WAITE, Circuit Justice. The material facts of this case, as found by the special master, are as follows:

I. S. K. Bennett was adjudicated a bankrupt, October 8th, 1872, upon a creditor's petition filed July 31st, of the same year. Soon afterwards assignees were elected and qualified. The estate of the bankrupt consisted almost exclusively of twelve parcels of land lying in Charleston, Colleton, Georgetown, and York counties. The South Carolina Loan and Trust Company held a first mortgage upon two of these parcels, and the estate of one Payne a similar mortgage upon a third. Subject to these liens, Mrs. Bennett, the mother of the bankrupt, held a mortgage on the twelve parcels. One Sanders had a mortgage behind that of Mrs. Bennett upon the land in York county, and there were several judgment creditors whose judgments constituted liens upon that in Charleston county. The Loan and Trust Company had a suit pending in the state court (to which Mrs. Bennett was a party) for the foreclosure of its mortgage, and the lands in Charleston county were advertised for sale under executions issued at the instance of the judgment creditors upon their judgments, when the petition in bankruptcy was filed. At that time and for some time afterwards, all parties interested believed that the real estate when sold would realize more than enough to satisfy all the incumbrances upon it.

On the 8th of November, 1872, the assignees having taken the real estate into their possession, filed in the district court their bill in equity against all the lien creditors, setting forth the nature and character of each lien, and the conflicting interests in respect thereto, and asking that the rights of the respective parties might be adjudicated in that suit; that the property might be sold free from all incumbrances, and that further ex parte proceedings by the several lien creditors might be enjoined. The injunction asked for was granted, and all the defendants subsequently answered. Mrs. Bennett filed her answer March 1st, 1873, in which she asserted the validity of her mortgage, and claimed that "under skilful management the estate of the bankrupt could be made to pay all his debts in full and leave a surplus for the benefit of himself and family." She made no claim to the rents and profits of the land, and did not ask to have them subjected to the payment of her mortgage debt. The several judgment creditors in their answers attacked the validity of Mrs. Bennett's mortgage. Testimony was taken, and, on the 21st May, 1873, a decree was entered, with the written consent of all parties, directing a sale of the entire property by the assignees; that the costs be paid out of the proceeds of the sale, and "that the assignees pay all and any taxes, charges, and assessments upon said several premises out of the proceeds of the sale, * * * and likewise apportion and retain the commissions to which they may be properly entitled, and that they hold the surplus subject to the further order of the court." Under this decree

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

the property has been sold, but the proceeds are not sufficient to pay in full the amount due upon the mortgage of Mrs. Bennett.

On the 30th May, 1873, Mrs. Bennett filed her petition in the district court in which she claimed that she was lawfully entitled to receive the rents and profits of the real estate covered by her mortgage from and after the 8th October, 1872, the date of the adjudication in bankruptcy. A rule was thereupon made upon the assignees to show cause why the rents and profits received by them, after deducting any amount due for taxes, should not be paid to her, and why they should not account to her for rents and profits which they might thereafter collect. To this rule the assignees made a return. The whole case was then referred to Samuel Lord, Jr., as special master, "to inquire and report what costs, expenses, and counsel fees are due and unpaid, in the matter of the bankrupt's estate, whether general or special; and further, to report out of what funds in the hands of the assignees the same should be paid; with leave to report any special matter."

The master reported that the rents and profits which had been received by the assignees after November 8th, 1872, the date of the filing of the bill to adjust the rights and priorities of the lien creditors, belonged to Mrs. Bennett, and could not be applied to the payment of any other counsel fees and expenses than such as were incurred for the benefit of that fund. To this part of the report the assignees excepted. The district court sustained the exception, and held that all the rents and profits collected by the assignees, were assets in their hands for the payment of the general creditors and not part of the mortgage security. The case is now here to obtain a review of this ruling of the district court.

By an act of the general assembly of South Carolina, passed in 1791, (5 St. 170,) it was provided as follows: "Sec. 2. That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by the mortgage had elapsed; but the mortgagor shall still be deemed the owner of the land and the mortgagee the owner of the money lent or due, and shall be entitled to recover satisfaction of the same out of the land in the manner above set forth (sec. 1); provided, always, that nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession." Rev. St. p. 536, c. 116, § 1. Under this statute it has been held that when the mortgagor is "out of possession," the rights and remedies of a mortgagee are the same as at common law, and that he is "out of possession" when he has made an absolute conveyance of the mortgaged property in fee and his grantee has gone into possession. Durand v. Isaacks, 4 McCord, 56; Stoney v. Shultz, 1 Hill, Eq. 468; Matthews v. Preston, 6 Rich. Eq. 307; Mitchell v. Bogan, 11 Rich. Law, 688; Laffan v. Kennedy, 15 Rich. Law, 257. In the case last cited, "the court holds that when there is a mortgage in fee, the mortgagor, whilst he retains the fee, is not deprived of the ownership of the land and the rights incident thereto by the temporary occupation of a tenant who holds under him." This goes as far as any case has gone in limiting the operation of the words of the act, and by the strongest implication concedes that if the fee is conveyed the required possession is gone.

The assignment in this case, under the operation of the bankrupt act, transferred the fee to the assignees. Bennett had no longer any estate in the mortgaged property. Whatever right he had was then absolutely conveyed and his grantees went into possession, not as his tenants but as owners. It is true that this conveyance may not have been voluntary, and that in one sense it was by operation of law, but it is equally true that its effect was to divest the mortgagor of his title and possession and place them both in the assignees. This is the legal effect of the adjudication of bankruptcy, the appointment and qualification of the assignees, and the official assignment by the register or judge. It is a conveyance by the bankrupt in the same sense that the deed of a sheriff after judgment, execution, levy, and sale by him is a conveyance by the judgment debtor. In the one case the register or judge, and in the other the sheriff, is made by law the agent of the owner to convey. When, therefore, the assignment was made, the bankrupt mortgagor was out of "possession," and Mrs. Bennett became invested with all the rights and powers of a mortgagee at common law. As such, she could obtain the possession of the mortgaged property by an appropriate possessory action at law, or subject the accruing rents and profits of the land to the payment of her mortgage by a proceeding in equity. She could also, upon proper demand and notice, require tenants in possession to pay their rent to her, but she could not bring the mortgagor or his assignees to an account for profits arising from their own use and occupation, or for rents actually received by them from their tenants before entry was made or demand and notice given. These are familiar principles both in and out of South Carolina, (Matthews v. Preston, supra; Ex parte Wilson, 2 Ves. & B. 252;) and it was conceded by the counsel for the assignees upon the argument, that they are applicable to this case, if the parties occupy the position towards each other of mortgagor and mortgagee at common law. The theory is, that until the mortgagee actually intervenes to assert his right to the profits of the land, they may be rightfully received and appropriated by the mortgagor and those to whom he assigns. The unqualified assent by

the mortgagee to the possession by the mortgagor or holder of the equity of redemption is equivalent to a license to occupy and to enjoy all the benefits of the occupation. Until this license is revoked, the possession is lawful, and he who is in under it cannot be charged as a wrongdoer. It is for this reason that, according to the weight of authority, a recovery of the possession by the mortgagee from the mortgagor or one holding under him in ejectment, only carries with it the right to recover mesne profits from the time of notice by the mortgagee to quit, or in the absence of such notice or its equivalent, from the time of the commencement of the action of ejectment. Sanderson v. Price, 1 Zab. [21 N. J. Law,] 637; Notes to Moss v. Gallimore, 1 Smith Lead. Cas. 926-941, [315-318.][2] Possession with the consent of the mortgagee is not wrongful, and damages for detention cannot be recovered until such consent has been in some form withdrawn.

It remains only to apply these principles to the facts of the present case. Mrs. Bennett, having become by the operation of the assignment a mortgagee at common law, and the assignees being only the owners of an equity of redemption after condition broken, had the right to proceed at once to subject the accruing rents and profits of the land to the payment of her debt. For this purpose all the remedies known to the law in such cases were open to her. This right was one of the incidents of her mortgage. She might exercise it or not as she chose. If she lay by and without objection permitted the owner of the equity of redemption to appropriate the profits of the land to his own use, her power over such as he appropriated was gone. Until she acted her right was dormant. It only had effect when it was exercised.

The assignee in bankruptcy is especially the representative of the unsecured or general creditors. He is not the agent or representative of secured creditors who do not in some form make themselves parties to the bankruptcy proceedings. He cannot deprive a secured creditor of the benefit of his security, neither is it any part of his duty to enforce the security rights of such creditor. To charge him as the agent or representative of such a creditor for such a purpose, it must in some form appear that he has been specially required to perform that duty. When the assignees took possession of these lands, they took it for the benefit of the general or unsecured creditors. They had become the owners of the equity of redemption of a mortgagor in possession. They succeeded to the rights of such an owner and became entitled to all the benefits and advantages of such a possession. This gave them the right to receive and appropriate without liability to account, the rents and profits of the land until such time as the mortgagee made claim to them under her mortgage. When so collected they at that time inured to the benefit of the unsecured creditors. The possession of the assignees was then in no sense that of the mortgagee. It was that of a mortgagor with the assent of the mortgagee. It seems clear, therefore, that Mrs. Bennett is not entitled to the rents collected before the time of the filing of the bill by the assignee to adjust the rights of the lien creditors. They were received by and for the owners of the equity of redemption without objection from her as mortgagee. It does not appear from anything in the case, as it is presented, that the ownership of the rents and profits was in any manner brought to the consideration of the court under the bill filed by the assignees, or that the collections made pending that litigation were by virtue of any authority derived from that suit. The assignees, being rightfully in possession, asked to have the rights of the several parties adjudicated and the lands sold. They did not surrender the possession or control of the land to the mortgagee or the court, neither did they ask the court to determine who should be entitled to the rents collected during the pendency of the litigation. All parties interested were called in, and while they were enjoined from commencing any other suit for the adjudication of their rights, there was nothing to prevent them from presenting all their claims and having them adjudicated in that. Mrs. Bennett could not commence a possessory action, and thus avail herself of the use of the land, but she could assert in that suit her right to the accruing rents and have them adjudicated to her. This she did not do, but permitted the assignees without objection to continue in the enjoyment of all the advantages which resulted from their possession with her consent. The decree ordered the sale of the lands, but did not adjudge the rents to the mortgagee. The case is not different in effect from what it would have been if Mrs. Bennett had filed her bill against the assignees in possession to foreclose her mortgage and neglected to take the necessary steps to reach the rents pending the litigation. It matters not that she was required by the assignees to assert her rights, for when she did come in and did present her claim she became an actor, and was entitled to the same relief she would have had if she had herself originally instituted the suit. In Boyce v. Boyce, 6 Rich. Eq. 318, which is supposed to give her the rents collected pending the litigation, the fund did not come into the hands of the administrator until after the mortgagee had asserted his claim to it in a suit where the administrator brought the whole of an insolvent decedent's estate into court and called upon all creditors and claimants to present their demands and have the order of their payment adjudicated. It presented, therefore, a case in which an attempt was made to reach rents and profits

[2] [From 12 N. B. R. 257.]

before they had come into the possession of the mortgagor.

For these reasons, I am clearly of the opinion that the bill filed by the assignees, and the proceedings under it, did not have the effect of subjecting the rents thereafter collected to the satisfaction of Mrs. Bennett's mortgage. But on the 30th May, 1873, she did file in the bankrupt court a formal demand, and asserted her right to have the rents applied upon her mortgage. According to Matthews v. Preston, 6 Rich. Eq. 307, at common law "the implied authority of the mortgagee to receive and appropriate the rents and profits might be terminated at the will of the mortgagor. He had only to notify the tenant of his mortgage and demand the payment of the rent to himself (both as to that which is in arrear and to that which is to accrue) to render any subsequent payment to the mortgagor illegal. After such notice, the mortgagor might maintain his action at law for the rent, or he might resort to the more summary proceeding by distress under the law of landlord and tenant." The assignees in bankruptcy administer the estate of the bankrupt as officers of the court. The court in effect takes the property into its own possession and holds it for the creditors and claimants according to their respective rights. Until Mrs. Bennett asserted her claim to the rents the possession in this case was for the general creditors, who were the beneficial owners of the equity of redemption, and the rents when collected followed this ownership. The general creditors occupied the position of owners of the equity of redemption in possession with the consent of the mortgagee. But when Mrs. Bennett demanded the rents this consent on her part was withdrawn, and, under the ruling in Matthews v. Preston, the further payment to the general creditors or for their account became illegal. Thenceforward the court held and received for her account, not theirs.

There was no necessity for the appointment of a receiver, because in legal effect the assignees already occupied that position. They were acting for the benefit of whom it might concern. They received and held the rents for such persons as should for the time being be entitled thereto. According to Matthews v. Preston, a mere notice to a tenant and demand of the rent terminated the authority of the mortgagor to receive and appropriate, and at the same time transferred the ownership to the mortgagee. In order to put an end to the authority of a mortgagee to collect the rents, it is only necessary for the mortgagor to manifest his intention so to do. For this purpose, according to Bank of Washington v. Hupp, 10 Grat. 28, "slight acts will be deemed sufficient;" and in Boyce v. Boyce, where, as here, the mortgaged property was in court, a claim for the rents made to the court by a party to the suit in the progress of the cause was all that was required. As the court has the property and the parties all within its jurisdiction, it has the power to adjudicate upon all conflicting claims. I am, therefore, of the opinion that the rents collected after May 30th, 1873, are applicable to the payment of any balance that may remain due upon the mortgage of Mrs. Bennett after exhausting the proceeds of the sale of the land, and that the order of the district court must be modified accordingly.

Mrs. Bennett asks that the taxes upon the lands due previous to May 30th be paid out of rents collected before that time. That question is not now open, inasmuch as by the decree of May 21st, entered by the consent of all parties, it was ordered that the taxes be paid from the proceeds of the sale of the lands. The report of the special master is in all respects affirmed, except as hereinbefore indicated.

Case No. 1,314.

In re BENNETT et al.

[2 Lowell, 400;[1] 12 N. B. R. 181.]

District Court, D. Massachusetts. March Term, 1875.

PARTNERSHIP—DISSOLUTION—SOLVENCY OF ONE PARTNER—BANKRUPTCY.

1. Where one partner of a firm, which had been dissolved, petitioned for an adjudication of bankruptcy against himself and his late copartner, and it appeared that the petitioner had undertaken to pay all the joint debts, and had given a bond to the defendant, with a solvent surety, conditioned for such payment, and that the creditors did not desire an adjudication, and that the defendant was solvent,—*Held*, that the petition must be dismissed.

2. A partner petitioning, under such circumstances, against himself and his copartner, must prove that the latter is insolvent in the ordinary sense of being unable to pay his debts, including the joint debts.

3. Semble, the court would have power to retain such a petition until the solvent copartner should have paid the joint debts.

In bankruptcy. Bankruptcy of partners. Bennett petitioned for adjudication against himself and his late partner, Amos. It appeared in evidence that the firm was dissolved in December, that Bennett received a conveyance of all Amos's interest in the joint property, and undertook to pay all the joint debts, and that Bennett gave a bond to Amos, with one Haynes as surety, conditioned to pay all said debts and to save Amos harmless therefrom. The plaintiff and defendant had kept an eating-house together for about a month, had not agreed in the management of the business, and had separated upon the terms above mentioned: debts for furnishing and supplying the rooms were still outstanding to the amount of $2,000, or more. Amos testified that he was solvent. It was admitted that Haynes, the surety, was abundantly able to respond.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 12 N. B. R. 181, contains only a partial report.]

W. W. Blackmar and H. N. Sheldon, for petitioner.

I. T. Drew and A. Russ, for respondent.

LOWELL, District Judge. I ruled in Stowers's Case, [Case No. 13,516,] that a partner would not necessarily be estopped from filing a petition in bankruptcy against the firm, by the fact that, upon a recent dissolution of the partnership, he had undertaken to pay all the joint debts. The point is a nice one, but does not need to be reviewed at present.

In this case, the evidence decidedly preponderates in favor of the proposition that Amos is not insolvent. The definition of insolvency which applies to traders in matters connected with preferences, namely, a present inability to pay the debts as they mature, does not govern a case of this kind; because the retired partner is not necessarily insolvent in not paying debts for which he had received an indemnity, and which ought to be paid by the remaining partner.

Section 36 of the bankrupt act (Rev. St. § 5121) does not expressly provide under what circumstances two partners may be adjudged bankrupts, on the petition of one of them; but by necessary intendment refers us to section 11 (Rev. St. § 5021) which requires a debtor to set forth in his petition that he is unable to pay his debts in full, not that he is unable to do so when and as they mature. Accordingly the form of a petition by copartners, as prescribed by the supreme court, avers that the members of the copartnership owe debts which they are unable to pay in full; and the petition in this case follows that precedent.

Now, I do not doubt that for many purposes under the bankrupt act a firm may be considered insolvent when its joint assets will not enable it to pay its joint debts as they mature. But I do very much doubt whether a partner of undoubted solvency can be made bankrupt by his copartner by evidence that the firm is insolvent in that sense. If there has been a joint act of bankruptcy, the creditors may proceed against both; but in that case the solvent partner would have an opportunity to clear himself by paying all the joint debts, which he cannot safely do by intrusting the money to his insolvent copartner.

In Thompson v. Thompson, 4 Cush. 127, which is a leading case upon the abovementioned definition of insolvency, the remarks of the court seem to take for granted, that, if the firm cannot pay its debts as they mature, either partner may petition. But the point was not decided in that case, and has since been held otherwise by the same court: Pierce v. Stockwell, 11 Cush. 236; Hanson v. Paige, 3 Gray, 239. In the latter case, Thomas, J., in delivering the judgment, and dealing with the objection that it was not alleged in the petition that the partners in their individual capacity were insolvent, says: "We cannot doubt that there must be a substantial averment of this fact; for if one of the partners were solvent, such solvent partner would have the legal right of settling the affairs of the partnership. * * * Again; as each partner is liable in solido for the debts of the company, a partnership cannot, with strictness, be said to be insolvent, while any of the partners are able to pay its debts." Page 242. In this case there is no evidence that the firm is insolvent in any sense, excepting that certain of its debts are outstanding and overdue. The evidence seems to prove that the bankruptcy was contrived between Bennett and the surety on the bond, and was intended to work in some way for the benefit of the latter. Whether he could escape his liability in this way I do not say, but he seems to have been advised that he could; while, on the other hand, the creditors appear to be content to rest on the responsibility of Amos, fortified as it is with the bond and the admitted ability of the surety. Several of them have so testified. This bond seems, of itself, to make Amos solvent, since he is not proved to owe any considerable amount of separate debts, and it would work a delay and injury to the creditors, though they might not suffer eventual loss, to complicate the matter by proceedings in bankruptcy.

The English law had formerly a great deal to say about concerted bankruptcies, and a great many adjudications were set aside by the lord chancellor, and afterwards by the courts of bankruptcy, because they were obtained from bad motives, and to work some collateral result other than the benefit of the creditors. I doubt if our law, or, indeed, the latest statute in England, leaves much discretion to the courts in this matter. Under our statute there would seldom be occasion for the exercise of such a discretion, and I have seen no statute or decision which gives or claims it in express terms, though there are some intimations one way and the other. I am not at present satisfied that it exists.

A recent amendment to the bankrupt law makes a collusive bankruptcy possible at present. It gives an advantage, in respect to a discharge, to those debtors who are put into bankruptcy against their will, and thereby encourages an actual delay on the part of insolvent debtors in coming before the court, while the same law throws difficulties in the way of the creditors, by requiring a certain proportion of them to petition. The consequence is, a temptation to debtors to procure a petition to be brought against them, and to admit the sufficiency of one that is insufficient. Before this amendment, a collusive bankruptcy was unknown, in fact, and useless to any one, because our proceedings gave no advantage to one sort of bankruptcy over another. But even now, if it should be discovered in the course of the proceedings, after adjudication, that the petition was collusive, or insufficient, the remedy probably would be, not a dismissal of the proceedings,

but a denial to the bankrupt of the peculiar benefit which involuntary proceedings give him. Assuming no discretion in this case, yet as I find the petition to be brought by one partner for ends of his own, it becomes me to require the petitioning partner to make out his case fully and clearly. I am not satisfied that the petitioner Bennett has made out the insolvency of his late partner Amos, the defendant, under any test which can be applied in such a case. I adhere to an intimation which I made in Stowers's Case, [supra,] that the court probably has power to see that the joint debts are paid before dismissing the petition, if any creditors request such action; but there is no such application in this case.

Adjudication against Bennett only. Petition dismissed as to Amos.

Case No. 1,315.

In re BENNETT.

In re ERBEN.

[2 N. B. R. 181, (Quarto, 66:) 8 Am. Law Reg. (N. S.) 34; 6 Phila. 472; 25 Leg. Int. 316; 1 Balt. Law Trans. 21; 1 Chi. Leg. News, 22.]

District Court, E. D. Pennsylvania. 1868.

BANKRUPTCY—EXEMPTIONS—VESTED EXPECTANCY.

Under the provision of the fourteenth section of the bankrupt law of March 2d, 1867, [14 Stat. 523,] excepting from operations of the act the property of debtors exempted from the levy and sale by the laws of the state, a vested expectant interest of a bankrupt in a sum of money payable at his own death, or at the death of another person, may, in Pennsylvania, be set apart for the use of the bankrupt; so, however, that its appraised present value, estimated as in case of life insurance, does not exceed three hundred dollars, or that the bankrupt does not receive more than three hundred dollars, if the value thus estimated exceeds that amount.

[Cited in Re Bear, Case No. 1,178.]

In bankruptcy. In Bennett's case the bankrupt was one of the children of an intestate, whose land having been sold under proceedings in the orphan's court of the proper county of the state, a third of the money produced was invested so as to secure to the intestate's widow the receipt of the interest for her life, and to his children the receipt, in equal shares, of the capital at her death. The widow was living when the inventory and appraisement of the bankrupt's effects were made, and the date of the allotment of what was set apart for his own use under the provisions of the fourteenth section of the act of congress. His expectant vested interest in the share of the capital payable at her death was appraised at its present value, estimated as in case of life insurance. The valuation was of less amount than three hundred dollars. The bankrupt claimed, and the assignee set apart for him, this item of the estate as excepted from the operations of the proceedings in bankruptcy, by the fourteenth section of the act of congress of 2d March, 1867, [14 Stat. 523,] under the head of property "exempted from levy and sale, upon execution or other process or order of court by, the laws of the state * * * to an amount not exceeding that allowed by those laws in force in 1864."

In Erben's case the bankrupt had effected an insurance on his own life in a sum of money payable at his death to his wife. It was alleged that he had been solvent when the insurance was effected, and that it formed no part of his estate. But he had paid the annual premiums after his insolvency. This insurance had been appraised as part of the assigned estate, and had afterwards been claimed and set apart for the use of himself as exempt under the provisions of the act of congress, and those laws of the state upon which the question arose in Bennett's case.

Upon the hearing of these cases in the court of bankruptcy, the judge said that in the case of a similar expectant interest in corporeal property, which interest could be levied on and sold under an execution, he would have had no doubt of the applicability of the exemption laws of the state. But the expectant interests here in question could not be sold under an execution. They could not be reached by a creditor in a court of the state, otherwise than by way of attachment execution, a proceeding under which there could be no sale, in the strict sense of the word. In each case the question of exemption depended, under the act of congress, altogether upon the effect of legislation of the state, or depended upon a meaning of words, which was to be determined according to the effect attributable to them by the courts of the state under such legislation. He therefore asked the assistance of the two judges of the courts of the state, Strong, of the supreme court, and Hare, president of the district court for the city and county of Philadelphia.

Strong and Hare, sat accordingly as assessors, and heard the questions argued by counsel, on 16th Sep., 1868.

Strong and Hare, on the 18th of September, 1868, expressed their concurrent opinion that the expectant interests in the money payable at the respective deaths of Mrs. Bennett and Mr. Erben, were included in the meaning of the words "property exempted from levy and sale upon execution or other process or order of the court by the laws of the state," and would be exempted under these laws to an amount not exceeding three hundred dollars in each case.

I. S. Serrill, for Erben.
Mr. Dawes, for Bennett.
Mr. Bispham, contra.

CADWALADER, District Judge. The opinion of the learned assessors appears from proceedings of the register and of assignees, who were lawyers, to coincide with prevalent views of members of the legal profession in

the state. I fully concur. In these cases, therefore, the respective exemptions are sustained.

BENNETT'S CASE. See Cases Nos. 1,312–1,315.

Case No. 1,316.

BENNETT v. ADAMS.

[2 Cranch, C. C. 551.][1]

Circuit Court, District of Columbia. April Term, 1825.

EVIDENCE—FORMER TRIAL—DECEASED WITNESS—PROOF BY GENERAL REPUTATION.

1. When evidence is offered of what a deceased witness testified at a former trial of the same cause, that evidence must be of the very words of the deceased witness.

2. A power to release a debt cannot be proved by general reputation.

THE COURT (THRUSTON, Circuit Judge, absent) decided, that when evidence is offered of what a deceased witness testified, at a former trial of the same cause, that evidence must be of the very words of the deceased witness. It is not sufficient for the witness to state what he understood to be a substance or effect of the language of the deceased witness. Phil. Ev. (Ed. N. Y. 1820.) 199.

THE COURT also decided that a power to release a debt could not be proved by general reputation.

Verdict for plaintiff, $63.68.

BENNETT, (ALLEN v.) See Case No. 214.

BENNETT, (ANGELL v.) See Case No. 387.

Case No. 1,317.

BENNETT v. BENNETT.

[3 Cranch, C. C. 647.][1]

Circuit Court, District of Columbia. Nov. Term, 1829.

TRIAL—CONTINUANCE—DEMAND OF SECURITY FOR COSTS.

A notice given at the trial term in Alexandria, that security for costs will be required, is no ground for postponing the trial.

[See Hawkins v. Willbank, Case No. 6,247.]

Mr. Neale, for the defendant, [James H. Bennett,] now, at the trial term, gave notice to the plaintiff [Bennett's Executor] that he should require security for costs.

Mr. Taylor objected that this notice ought not to delay the trial; the defendant having obtained continuances of the cause, and not having given a previous notice, according to the act of Virginia, p. 111, § 23.

Mr. Lee, the clerk, stated that the practice of the court was not to delay trial when the notice was not given before the trial term.

THE COURT (nem. con.) refused to delay the trial. Verdict for the defendant.

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

Case No. 1,318.

BENNETT v. BENNETT.

[1 Deady, 299.][1]

District Court, D. Oregon. Oct. 26, 1867.

DIVORCE — CUSTODY OF CHILDREN — AWARD BY FEDERAL COURT — DIVERSE CITIZENSHIP OF DIVORCED PARENTS — PRESUMPTION AS TO DECREE —STATE STATUTES—JUDICIAL KNOWLEDGE—AUTHENTICATION OF RECORD — REVENUE—HABEAS CORPUS—"CONTROVERSY"—JUDGE AT CHAMBERS.

1. In a suit for divorce, the statute of California (Hitt. Laws, § 2419) gives the court power to make such order for "the maintenance and education of the children of the marriage, as may be just:" *Held*, that as a proper means of exercising this power, the court may award the custody of such children to either parent; and that although such award may appear unauthorized by such statute as construed in another forum, it cannot be questioned in such forum collaterally.

2. The domicil of the wife follows that of the husband during the existence of the marriage relation, but a divorce leaves the wife at liberty to choose her own domicil, and therefore where parties living in California were divorced, and the man removed to Oregon and acquired a domicil here while the woman remained in California, they became citizens of different states, and the latter may maintain an action against the former in the national courts in Oregon, on account of such difference of citizenship.

3. A decree of divorce, given in a court of California, which provides that it may be modified upon the application of either party—sufficient cause being shown therefor—is not a temporary decree; and the presumption is that it remains unchanged, which presumption can only be overcome by record evidence to the contrary.

4. The national and state courts not being foreign to one another, as the state courts are, but subordinate parts of a complete system of government, with limited and separate jurisdictions, and the former having judicial knowledge of the laws of the several states, and, therefore of the mode of authenticating the judicial records thereof: Semble, that the act of May 26, 1790, (1 Stat. 122,) prescribing the mode of proving the judicial records of a state when used in another state, does not apply to a case where such record is sought to be used in a national court.

[Cited in New England Mortgage Security Co. v. Vader, 28 Fed. 268.]

[See U. S. v. Biebusch, 1 Fed. 213.]

5. The certificate of a judge to the form of attestation of a clerk to a copy of the record of a state court, did not show whether he was the sole judge, chief justice or presiding magistrate thereof, but it appeared from the laws of such state relating to the organization of such court, that it consisted of a single judge: *Held*, that the authentication was sufficient under the act of May 26, 1789, (1 Stat. 122.)

6. The act of July 13, 1866, (14 Stat. 143,) provides that a party having an interest in an instrument issued without being stamped, may have a stamp affixed thereto, by applying to "the collector of internal revenue of the proper district." Quaere, is the proper district, the one

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

where the instrument was issued, or where it is owned or sought to be used?

7. Where one person claims the legal right to have the custody of an infant child, and that right is denied and the custody of such child withheld by another, this constitutes a controversy within the purview of the constitution of the United States, (article 3, § 2,) and if the parties thereto be citizens of different states, it is a controversy within the judicial power of the United States to hear and determine by the proceeding known as the writ of habeas corpus.

8. Section 14 of the judiciary act (1 Stat. 81) which authorizes the courts of the United States to issue writs of habeas corpus, is not restrained in its operation by the proviso thereto, except in the case of prisoners in jail under or by color of the authority of a state of the United States, in which case the writ can only issue to bring the prisoner into court to testify.

9. According "to the usages and principles of law," mentioned in section 14 of the judiciary act, the power thereby given to the district court to issue writs of habeas corpus, may be exercised by the judge thereof at chambers.

At law. On October 14, 1867, Susan Bennett exhibited her petition to the judge of the district court, praying for the allowance of a writ of habeas corpus, directed to Sanford J. Bennett, to obtain the custody of her infant child, Anna Bennett, alleged to be unlawfully detained from the petitioner by said Sanford J. Bennett. On the same day the writ was allowed and issued On October 22, the respondent and petitioner appeared before the judge, and the respondent then moved that the writ be dismissed for want of jurisdiction. After argument, by consent of parties, the decision of the motion was reserved until the final hearing. On October 24, the respondent made a return to the writ. To portions of the return the petitioner demurred, and after argument the demurrer was overruled. The petitioner then replied to the return, and the cause was tried and heard upon the questions of fact and law arising upon the evidence and pleadings, which are stated in the opinion of the judge. [Petition granted.]

Lansing Stout, for petitioner.

J. H. Mitchel and William R. Willis, for respondent.

DEADY, District Judge. From the proofs submitted by the parties, and the admissions in the pleadings, I have found certain conclusions of fact which it will be proper to state before considering the questions of law that arise thereon. They are these:

I. That in the month of August, 1862, at Oakland, in the state of California, the respondent and petitioner were lawfully married to one another, and that they continued to live together, in said state, as man and wife, until June 30, 1866, when the petitioner commenced a suit against the respondent in the district court of the seventh judicial district, in and for the county of Sonoma, state of California, to obtain a dissolution of the bonds of matrimony then existing between the petitioner and respondent, and for the care and custody of the said infant child, Anna Bennett, the issue of said marriage.

II. That on July 10, 1866, the respondent, Sanford J. Bennett, was duly served with a summons to appear and answer the complaint of the petitioner in said suit, and that on July 17, 1866, he appeared in said suit and answered the complaint of the petitioner therein; and that afterwards, to wit: on September 26, 1867, and after due proceedings were had in the premises, to all of which the respondent appeared by his attorneys, the said district court of the seventh judicial district, among other things, for and on account of extreme cruelty by the respondent to the petitioner, did adjudge and decree a dissolution of the marriage aforesaid, and that the petitioner being the most proper person therefor, have the care and custody of said infant child, Anna Bennett, the issue of said marriage; which decree and adjudication the said district court of the seventh judicial district, had authority and jurisdiction then and there to pronounce and make, and the same still remains in full force and effect.

III. That the legality of the restraint herein complained of and in the petition herein alleged, has not been previously adjudged.

IV. That on or about July 26, 1866, the respondent removed from the state of California to the state of Oregon, taking with him the said infant child, Anna Bennett, and that he has remained in said state of Oregon ever since, and kept therein, in his custody and control, the said infant child.

V. That said respondent removed said infant child to the state of Oregon, as aforesaid, pending the litigation aforesaid, among other things for the custody of said infant child, for the purpose of placing it beyond the reach of the process of said district court for the seventh judicial district, and thereby preventing the petitioner from having the care and custody of said child, if the same should be decreed to her by said court.

VI. That at the date of the petition and the issuing of the writ of habeas corpus herein, the petitioner, Susan Bennett, was a citizen of the state of California, and the respondent, Sanford J. Bennett, was a citizen of the state of Oregon.

Upon the evidence, I deem these conclusions of fact to be established beyond a doubt, unless it be the one concerning the motive or purpose with which the respondent took the infant child and removed with it beyond the jurisdiction of the court in California, pending the litigation there for the divorce and its custody. The fact of the removal is admitted. The motive with which it was done can only be inferentially known. Considered in connection with the circumstances under which it occurred, the most reasonable inference is, that it was done for the purpose of evading the power and authority of the court, where the parties and child had their regular domicil.

The second and sixth of these conclusions

of fact involve to some extent questions of law. By the second of them it is found that the court in California had authority and jurisdiction to make the decree it did, awarding the custody of the infant child to the mother. In opposition to this conclusion, it was argued by counsel for the respondent, that the law of California did not authorize the court to provide for the custody of the children of the marriage, in a suit for divorce, and that therefore its decree in this respect is void. The act of California declares that, "In any action for a divorce, the court may, * * * at the final hearing, * * * make such order for the * * * maintenance and education of the children of the marriage, as may be just." Hitt. Laws, § 2419.

The argument for the respondent rests upon the proper construction to be given to the words "maintenance and education." Can it ever be necessary and proper in providing for the maintenance and education of the infant children of divorced parents, to provide for their custody? It seems to me that this question can admit of but one answer, and that in the affirmative. As a necessary and proper means to the maintenance and education of an infant child, the party charged with that duty ought to have the custody of it. Take this case for an illustration. If the court had no power to change the custody of the child from the father to the mother, of what avail would be its order that the mother have the maintenance and education thereof. The child is a female, about five years of age, and whoever has the custody of it must or may control and direct its education. The one is implied in the other. The power being given to the court pronouncing a decree of divorce, to make such order upon this subject as to it may appear just—to provide for the maintenance and education of the children of the marriage—it legitimately follows, that as a means to that end, the court may properly control and dispose of the custody of such children.

Again, the court is to make such order in the premises as may be just. The decree of divorce necessarily terminates the conjugal relation of the parties. The family is broken up. The children can no longer remain with both of the parents. One or the other, therefore, must be deprived of the society and services of its offspring. In such a case justice may require, that when the divorce is caused by the fault or misconduct of the father, other things being equal or even unequal, that the custody of the children be given to the innocent party—the mother. But this is not all. The statute of California also declares that the court "may at any time thereafter annul, vary or modify such order, as the interest and welfare of the children may require." Hitt. Laws, § 2419.

It cannot be contended that the power to modify is more comprehensive than the power to make the original order. If the interest and welfare of the children are to influence the action of the court in modifying the order for maintenance and education, it is but reasonable to conclude that the legislature intended, that such interest and welfare should be considered and provided for in making the order in the first instance. To do this, especially in the case of infant children, the court must have the power to place them in the proper custody—to give them to that parent most likely, under the circumstances, to promote their interest and welfare. In this case the California court, sitting as a trier of the fact, found that the father was not a proper person to have the custody of this infant child and that the mother was. Under the circumstances, the court was authorized to make such an order for the maintenance and education of this child as to it might appear just, as between the parties, and at the same time calculated to promote its interest and welfare. That the court in the exercise of this power and for these ends, had authority to give the custody of the child to the mother, as a means of providing for its maintenance and education, in a way conducive to its interest and welfare, it seems to me there can be no doubt. This question was argued by counsel for the respondent, upon the assumption that the judgment of the California court was open to review here, and that if it appeared that such court had misconstrued the statute from which it derived its authority, its action should be disregarded as null and void. But I am satisfied the law is otherwise. The court had jurisdiction of the parties and the cause. The cause was the controversy between the parents concerning the divorce and the future maintenance and education of the children of the marriage. Admitting for the purpose of the argument, that the court erred, either as to the fact or the law, in giving the custody of the child to the mother, as a means of providing for its maintenance and education, yet that error can only be corrected by appeal to the proper court of review in California. But collaterally, the legality of this judgment cannot be questioned here or elsewhere. It is conclusive upon the parties to it, throughout the United States, until reversed or modified by the proper court in the jurisdiction where it was given. 2 Am. Lead. Cas. 721.

The sixth conclusion finds that at the date of the commencement of this proceeding, the respondent and petitioner were citizens of different states—the former of Oregon and the latter of California. There is no dispute as to the citizenship of the respondent, but as a matter of law, it is denied that the petitioner is a citizen of California. This denial rests upon the general rule of law that the domicil of the wife is controlled by that of the husband—that in law she is incapable of acquiring a domicil different from that of her husband. It is admitted that this is the general rule, but when the rea-

son of the law ceases the law ceases with it. The domicil of a woman divorced from her husband is no longer that of the latter, but in the place of her own choosing. And this even appears to be the rule before a decree for divorce, where the wife is litigating for a judicial separation from the husband, on account of misconduct on his part, which entitles her to have the marriage dissolved. Bish. Mar. & Div. § 728; Barber v. Barber, 21 How. [62 U. S.] 582. In the case of Barber v. Barber, supra, the parties while domiciled in the state of New York were divorced simply from bed and board. The divorce was granted at the suit of the wife and the court also decreed her alimony. To prevent the enforcement of this decree as to alimony, the husband left the state and acquired a domicil in the state of Wisconsin. The wife retained her residence in New York, and sued the husband in the United States court for Wisconsin, to enforce the decree of alimony and prevailed there. The husband appealed the cause to the supreme court. Among other things, it was objected on the behalf of the husband that the national court in Wisconsin had no jurisdiction, because the parties to the suit were not citizens of different states. The supreme court held, that even where a divorce was only from bed and board, that the control of the husband over the location of the wife ceased, and that her domicil thereafter must be deemed to be of her own choosing, and that therefore the court had jurisdiction on account of the different citizenship of the parties, and affirmed the decision of the court below. In this case the parties were divorced absolutely and upon the authority of Barber v. Barber, as well as upon principle, thereafter, the domicil of the wife was according to the fact of her residence and not that of her husband. The return of the respondent denied the existence of the alleged judgment in the court of California, and on the hearing of cause, the petitioner to support the issue on her part, offered in evidence, what purported to be a transcript of the judgment roll of that court. The respondent's counsel objected to the reading of the transcript, and it was admitted in evidence subject to the objections. After careful consideration of the arguments and authorities, I have concluded that the objections to the admission of the transcript are not well taken.

The objections may be briefly stated as follows: I. The decree for the custody of the child, as set forth in the alleged transcript, is only temporary and not final. II. The certificate of the judge to the attestation of the clerk is insufficient. III. The certificate of the judge is not legally stamped.

The first objection is easily disposed of. The decree provides in terms that it may be modified or changed hereafter, upon the application of either party, upon sufficient cause shown. But surely this is no reason why the decree should be treated as temporary, or why it is not absolute in the meantime. The decree in this respect only reserves to the court the power to modify it hereafter; and the law gives that power to the court whenever the interest or welfare of the child may require its exercise, independent of the reservation in the decree. Until changed, the decree is binding and absolute. The presumption is, that it remains unchanged, and that presumption can only be overcome by record evidence to the contrary. This decree may also be appealed from within a year, as I read the laws of California, but until an appeal is taken, it must be deemed a final decree. The mere right of appeal does not qualify or impair the force or effect of a final decree in an inferior court. The appeal must be actually taken, and that under such circumstances and with such security as would make it operate as a supersedeas. There is no presumption that an appeal has been taken, but the contrary.

The second objection admits of more controversy. The act of May 26, 1790, (1 Stat. 122,) prescribing the mode of proving the judicial records of a state, when used in another state, provided that in addition to the attestation of the clerk and the seal of the court, there shall be "a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." Counsel for the petitioner maintains that this act does not apply to the authentication of a state record in the national courts, but only when used in the courts of another state, and that, therefore, the certificate of the judge is here unnecessary.

On several occasions when this subject has been before the inferior courts of the United States, it seems to have been assumed that this mode of authenticating state records is necessary to make them evidence in the national courts. Craig v. Brown, [Case No. 3,328;] Mewster v. Spalding, [Id. 9,513;] Tooker v. Thompson, [Id. 14,097.] But it seems very questionable if this interpretation of the act is the correct one. Of course congress, by virtue of its general power to regulate the mode of proof and procedure in the national courts, may prescribe in what manner and by what means a record of a state or other court shall be proved therein. But was this act passed for such purpose, or was it intended to have any such effect? The act appears to have been passed in pursuance of article 4, § 1, of the constitution. This clause of the constitution has but one object in view—to declare that full faith and credit shall be given in each state to the judicial records, etc., of every other state; and then, as a practical means of making his abstract declaration effectual and useful, to authorize congress to prescribe the manner in which such records should be proved or authenticated, when used in another state, and the effect thereof when proven. Prior

to the adoption of the constitution, under the rule of the common law, the judicial records of each state were treated as foreign judgments in every other state, and therefore only primary evidence of the facts and conclusions therein contained. In addition, each state might, for itself, prescribe in what manner such records should be proved, and might make that proof so difficult or uncertain, as to practically prevent their being used at all. Among a people about "to form a more perfect union," this was felt to be a serious evil, and consequently this provision was inserted in the constitution, and the act of May 26, 1790, [1 Stat. 122,] was passed to carry it into effect. As the state courts do not take judicial knowledge of each other's laws, and could not, therefore, know, without other proof, whether the certificate of the clerk was in due form or not, congress supplied the means of proof, by providing that the judge of the court should certify that the attestation of the clerk was in due form —that is, according to the law of the state where the record was made. But the evil to be prevented by the constitutional provision never existed or could exist, so far as the national courts are concerned. The national and state governments, although vested with distinct jurisdictions, are in no sense foreign to each other, but are subordinate and limited parts of one complete system of government. On principle, then, in the courts of the United States, the judgment of a state court ought to be regarded as a domestic judgment—a judgment given within the territorial sovereignty of the United States, and provable in the ordinary way, by the certificate of the custodian of the original—the clerk of the court. The national courts take judicial knowledge of the laws of every state in the Union. Owings v. Hull, 9 Pet. [34 U. S.] 624; Woodworth v. Spaffords, [Case No. 18,020.] This doctrine can only be maintained upon the theory that the states are a part of the general government and territorially within the jurisdiction of the United States. This being so, the courts of the United States do not require the certificate of the judge of a state court, that the attestation of the clerk thereof is in due form of law. They determine that matter by their knowledge of the laws of the state where it was made. For these reasons, then, it appears to me that in this court, a judicial record of the state of California, is admissible in evidence without the certificate of the judge of the court to the sufficiency or form of the attestation of the clerk.

But as the cases which I have been able to find upon the subject, have been decided upon a contrary assumption, in deference to their authority, I proceed to examine the objection upon the theory, that such certificate is necessary. It is admitted that the certificate of the judge is sufficient, so far as it relates to the attestation of the clerk—that it is in due form of law. The objection is, that it does not appear from the certificate that the person who made it, is either the sole judge, chief justice or presiding magistrate of the court that made the decree, or even that he is the judge of that court at all. The language of the certificate, so far as it relates to the person who made it, is as follows: "I, J. B. Southard, district judge of the seventh judicial district of the state of California, do hereby certify," etc. The official character of the judge is repeated in the same words after his signature to the certificate.

From the transcript itself, and from the certificate of the clerk, it appears that the decree was made in the district court of the seventh judicial district, in and for the county of Sonoma, state of California. It does not appear, then, from the certificate itself, that J. B. Southard was, at the date of making it, the sole judge, chief justice or presiding magistrate of the district court, in and for the county of Sonoma. Whether the county of Sonoma is within the seventh judicial district, of which J. B. Southard certifies that he is district judge, or whether the district court for Sonoma is held by one or more judges, does not appear from this certificate. Unless, then, the judicial knowledge of the court, as to the laws of California, will supply these deficiencies in the certificate, the transcript cannot be read in evidence under the act of May 26, 1790. The constitution of the state of California (article 6, § 5) requires the legislature to divide the state into a certain number of judicial districts: "In each of which there shall be a district court, and for each of which a district judge shall be elected," etc. Hitt. Laws, § 177. In pursuance of this authority, the legislature of California created the "Seventh Judicial District," including among others therein, the county of Sonoma. Id. § 1337. By section 1358 of the same compilation, it appears: "There shall be held, in the seventh judicial district, terms of said court, as follows: In the county of Sonoma," on certain Mondays therein named. The words "said court," in the paragraph just quoted, refer to the words "district court," previously used in the same act. Take these facts thus proved beyond controversy and add them to the statement in the certificate, "I, J. B. Southard, district judge of the seventh judicial district of the state of California, do hereby certify," etc., and the proof is complete. The district judge of the seventh judicial district, is thus shown to be the judge of the district court in and for the county of Sonoma, and the sole judge thereof, and therefore the person authorized to certify that the attestation of the clerk is in due form.

The case of Owings v. Hull, 9 Pet. [34 U. S.] 624, 625, is a case exactly in point. The circuit court for the district of Maryland, on the trial of an action, admitted in evidence, a copy of a bill of sale executed in Louisiana, without proof to account for the non-production of the original. On error,

the supreme court held, that the court below was bound to take judicial notice of the laws of Louisiana. By those laws it appears that this contract being entered into before a notary, the original properly remained with that officer, and the party only took a copy. In this way the non-production of the original was decided to be sufficiently accounted for, without other proof.

The third objection is yet to be considered. It appears that the certificate of the judge was made and issued without being stamped. It also appears that it was liable to a stamp duty of five cents. On October 21, 1867, before offering to use the certificate, the petitioner procured the collector of internal revenue for this collection district to stamp the same and remit the penalty. This proceeding took place under section 158 of the internal revenue act of June 30, 1864, as amended by the act of July 13, 1866, (14 Stat. 143.) This act authorizes the party issuing the instrument, or any person "having an interest therein, to appear before the collector of the revenue of the proper district," and apply to have the same stamped. The objection is, that the proceeding did not take place before the collector of the proper district, and, therefore, the stamping is without effect.

For the respondent, it is maintained that there can be but one proper district, and that is the one in which the certificate was made and issued. On the other hand, counsel for the petitioner insist that at least where the party making the application is not the one who issued the instrument, the proper district is the one in which the instrument is proposed to be used. It would seem that the word "proper" is used in the act for the purpose of excluding the idea that the proceeding might take place before the collector of "any" district. But which is the proper district is a question easier asked than answered. I am not well satisfied in my own mind how the act ought to be construed in this respect. The objection may be well taken, but it is very technical. The petitioner is an innocent party, having an instrument and desirous of using it in this district. Under these circumstances she has had it stamped here, and I will consider it sufficient.

The only remaining question to be considered is that of jurisdiction. By the constitution, (article 3, § 2,) the judicial power of the United States extends to all controversies between citizens of different states. This is a controversy—a legal controversy—to be tried and determined by judicial proceedings and judgment. The controversy arises upon the alleged legal right of the petitioner to the custody of her infant child, and the denial and withholding of that right by the respondent. This is also a controversy between citizens of different states. The parties, although man and wife, have been divorced by the decree of a competent court in a sister state. Since then, the citizenship of the wife depends upon the location of her domicil in fact, and does not follow that of the husband. The fiction of law, that the domicil of the wife follows that of the husband, is based upon the legal power of the husband over the person of the wife, as an incident of the marriage relation, and ceases with the reason of it—the existence of the relation itself. It is clear upon principle, and upon the authority of Barber v. Barber, supra, is not open to controversy. But, although the judicial power of the United States extends to and includes a controversy of this kind, it does not necessarily follow that the courts of the United States have jurisdiction and authority to try and determine it. The rule is long since established, that whatever may be the extent of the judicial power of the government of the United States, its courts can only exercise such jurisdiction as may be conferred upon them by congress, excepting only the original jurisdiction of the supreme court, which is given and limited by the constitution itself, and therefore beyond the power of congress to enlarge or diminish. The only authority of this court, or the judge thereof, to exercise jurisdiction or judicial power over this controversy, by means of the proceeding, suit or remedy known as habeas corpus, is derived from section 14 of the act of September 24, 1789, (1 Stat. 81,) commonly called the "Judiciary Act." It enacts: "That all of the before mentioned courts of the United States"—referring to the supreme court and district courts—"shall have power to issue writs of habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment; provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." This section consists of two distinct affirmative sentences or clauses, and a qualifying proviso. The first sentence confers the power upon the courts generally to issue the writ of habeas corpus agreeable to the principles and usages of law. The second sentence confers the power upon either of the justices of the supreme court and the judges of the district courts, to grant the writ for the purpose of inquiring into the cause of commitment. The proviso limits the power of exercising jurisdiction by means of the writ in the case of prisoners in jail unless they are in custody by authority of the United States. The general scope of the

proviso is also qualified by the last clause of it, which allows prisoners in jail to be brought up on habeas corpus to be used as witnesses, without regard to the authority under which they may be in custody. In Ex parte Bollman, 4 Cranch, [8 U. S.] 75, the supreme court decided, that the proviso extended to and qualified both the previous sentences of the section, and that therefore, in the case of a prisoner in jail—the case specified in the proviso—neither the courts nor the judges of the United States, could grant the writ to inquire into the cause of commitment, except in the instances named in the proviso. This construction of the section has ever since been maintained by the supreme court. Ex parte Dorr, 3 How. [44 U. S.] 105. The object and policy of it are apparent. It was intended to prevent conflicts between the judicial authorities of the national and local governments, and this was accomplished, by limiting the courts of the former, in the exercise of their jurisdiction by means of habeas corpus, in the case of prisoners in jail, to such persons as were in custody by the authority of the United States. As prisoners can only be in jail in the United States by authority, either of a state or the United States, this limitation upon the general power previously conferred in the section, amounts to no more than it the proviso had read thus: "Provided, that the writ of habeas corpus shall in no case extend to prisoners in jail under or by color of the authority of any state of the United States." Public authority—the authority to confine in jail, in this country, only exists in a state and the United States. It follows, then, that the legal effect of the proviso is the same, whether stated as in the statute or as I have just suggested. One expression is the exact equivalent of the other. It is therefore apparent, that the power conferred by the first two sentences of this section, except as to the single instance of prisoners in jail by authority of a state, is not affected, qualified or diminished by the proviso. Its only office is to exclude from the operation of the general power already conferred, the cases of persons in jail by authority of a state, or, stated conversely, not in custody by authority of the United States.

In opposition to this construction of the section, counsel for the respondent maintained that the power to exercise jurisdiction by means of habeas corpus was confined to the cases enumerated in proviso—prisoners in custody by authority of the United States. But this construction rests the general power upon the proviso alone, and simply ignores all the rest of the section. The proviso was not added to the section to confer jurisdiction, but to limit that already granted in the previous part of it. The office of a proviso is to restrain, avoid or impose conditions upon that which precedes it. Without this proviso, upon the letter of the section, the writ might have extended to prisoners in jail under the authority of a state. To prevent this—to avoid the operation of the power conferred by the previous words of the section, in this respect, this proviso is added. What was before absolutely conferred, is now, in the case of prisoners in jail, given conditionally. They must be in custody by the authority of the United States, or the writ shall not extend to them. But this condition in the proviso only extends to the cases of prisoners in jail. In all other cases the general authority conferred by the first two sentences of the section remains unimpaired and unqualified. The case of Ex parte Dorr, 3 How. [44 U. S.] 105, is cited and relied upon by counsel for respondent as supporting his construction of the section. In June, 1844, Dorr was convicted and sentenced to imprisonment for life, by the judgment of the state court of Rhode Island, for the crime of treason against the state. Access to Dorr being denied, the case came before the supreme court, on application on his behalf, for a habeas corpus to bring him before the supreme court, to enable him to sue out a writ of error to the state court. The court refused the application on the ground that Dorr was in prison under the sentence of a state court. The motion does not appear to have been argued, and the court treated it as a matter too plain for argument. But in the course of its brief opinion, in commenting upon section 14, the court says: "The power given to the courts in this section, * * * as regards the writ of habeas corpus is restricted by the proviso to cases where a prisoner 'is in custody under or by color of the authority of the United States.' * * * The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable." The case before the court, and which alone it decided, was the case of a prisoner confined by authority of a state, and the language of the opinion, unless the contrary is manifest, must be confined to the case then under consideration. The question whether the power to issue the writ was restricted to the cases enumerated in the proviso, was not before the court or in the case. Besides the court impliedly qualifies its general statement as to the restrictive effect of the proviso, by limiting it to the case of "a prisoner"—the only case before it. Read with reference to the subject under consideration, this paragraph in the opinion of the court only states, "that in case of a prisoner, the proviso restricts the general power given by the section, to persons in custody under the authority of the United States." But this is not all. In the next clause in the opinion, the court states the rule, conversely, thus:—"Neither this or any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence of execution of a state court, for any other pur-

pose than to be used as a witness." This shows beyond question, the point the court was considering and what it intended to decide. If there is room for a difference of opinion as to what was intended by the first statement of the court, the second one is explicitly against the color now attempted to be given to it. And even, if upon the whole, the language of the court would authorize the conclusion attempted to be drawn from it by counsel, I should hesitate to adopt it. The construction is manifestly erroneous, not to say more—the point was not in the case nor before the court, and I should feel warranted in treating it as an inadvertence of expression readily perceived and easily corrected by an examination of the subject and the context.

The district courts of the United States have power to exercise jurisdiction by means of habeas corpus in all controversies to which the judicial power of the United States extends. As has been shown, that power extends to this controversy, on account of the citizenship of the parties. The power is given by this section; and it is not restricted by the words, "which may be necessary to the exercise of their respective jurisdictions." These words apply only to the last antecedent phrase—"and all other writs not specially provided by statute." In the case of Ex parte Bollman, supra, the supreme court examined this question at length and decided expressly that this grant of power—to issue writs of habeas corpus—could not be taken "in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally." Again the court says, in the same case: "From this review of the extent of the power of awarding writs of habeas corpus, if the section be construed in the restricted sense, from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature." Of course the reasoning and conclusion of the court in Ex parte Bollman apply to the district courts as well as the supreme court. No distinction between them is made by the court, and none could be made, for as the court says in the same case, "the power is granted to all" (the courts of the United States) "in the same sentence and by the same words." Conkling's commentary on the case is to the same effect, and he adds, "The propriety of the latter construction"—against the limited sense—"was demonstrated by a masterly reductio ad absurdum." Conk. Pr. 77.

It may be said that a power given to a court to issue writs of habeas corpus, cannot be exercised by the judge thereof. Certain writs of habeas corpus only issue from a court, because they are not used except in aid of the jurisdiction of the court in cause before it. But this is the writ ad subjiciendum, and according to the rule prescribed in this section 14—"the usages and principles of law"—may be issued by a judge. Where a court is constituted with more than one judge, it might well be from the nature of its organization, that a grant of power to such a court, to issue writs of habeas corpus ad subjiciendum, could not be exercised by a single judge thereof. Perhaps, for that reason, the second sentence in the section was inserted, giving the justices of the supreme court power to issue the writ in case of commitment. It is true the judges of the district court are included in this provision, but this may have been deemed expedient, out of abundance of caution, to prevent an inference that the power was intended to be denied them. Conk. Pr. 79. This question was not made on the argument. But it has occurred to me during the consideration of the case, and being a question relating to jurisdiction, I do not think it proper to pass it over in silence. After careful deliberation, I have concluded that the power conferred upon the district court to issue the writ ad subjiciendum, may be exercised by the judge thereof. This is "agreeable to the principles and usages of law," regulating the issuing of this writ, as I understand them. If the power conferred upon a judge by the second sentence of this section, to issue the writ to inquire "into the cause of commitment," applies to this case, of course this question would be an immaterial one. But I am not satisfied that the word "commitment," as there used, was intended or can be construed to apply to a case of restraint imposed by a private person. The technical sense of the word—and I am not aware that it has any other signification—is a restraint or confinement by public authority. On the argument of this cause, the case of Barry v. Mercein, [Case No. 1,062,] decided by Judge Betts in the circuit court for the southern district of New York, was relied on by counsel for respondent. The report of the case is not here, but numerous citations from the opinion of the judge, are to be found in the argument of counsel when the same case was before the supreme court on error. 5 How. [46 U. S.] 103. The case was this: Barry, an alien, was married in New York to Mercein, a citizen of New York. Afterwards the parties separated and Barry returned to Liverpool, Nova Scotia. An infant child of the marriage remained in the custody of her mother and her father. Barry applied to the supreme court of the United States for a habeas corpus to obtain the custody of the child. The court refused the writ, because of its want of original jurisdiction. In denying the motion, Story, justice, seemed to assume that the inferior courts of the United States could exercise the jurisdiction. True, this is not asserted in so many words, but certainly nothing is said or sug-

gested to the contrary. The court says: "Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court, assigned to that circuit and district" (of New York) "creates no legal obstruction to the pursuit thereof." Ex parte Barry, 2 How. [43 U. S.] 65. In pursuance of this suggestion of the supreme court, Barry applied to the circuit court of the United States for the district of New York. No justice of the supreme court was present, and the application was heard by Judge Betts. He denied the writ on several grounds, the most important of which were want of jurisdiction, and that it appeared that the father was not entitled to the custody of the child. The second ground was a sufficient reason for denying the writ, even if the court had jurisdiction. But, on the question of jurisdiction, the case is not in point. The court was asked to take jurisdiction on account of the difference in citizenship of the parties, and could not take it on any other ground—that the petitioner was an alien and the respondent a citizen of the state of New York. The parties had not been divorced, and the marriage relation was subsisting between them in full force. The rule of law being that the domicil of the wife follows that of the husband, the allegation of the different citizenship of the parties could not be sustained. But in this case the different citizenship of the parties is a fact established beyond dispute. Since the cause was submitted, I have found a case exactly in point. U. S. v. Green, [Case No. 15,256.] Aaron Putnam, a citizen of New York, had a habeas corpus directed to Timothy Green to obtain the custody of his infant child. The case was in the circuit court for the district of Rhode Island. The respondent was the maternal grandfather of the child, and it had been left with him by the mother on her death-bed. The case was finally compromised, but Mr. Justice Story issued the writ and compelled a return to it. The question of jurisdiction was not directly raised, but it could not have escaped the attention of court and counsel. The inference is, that the court considered that it was not open to controversy.

Apart from the mere legal question concerning jurisdiction, this is a case, which, upon the merits, this court ought to take cognizance of and give the petitioner the relief prayed for. The respondent found the petitioner in California and married her there. Married her, too, upon a public profession that he had united with the church of her faith—a profession which his answer in the California court substantially admits was a mere pretense to obtain her consent to the marriage. Afterwards, when a controversy arose betwen the parties, involving the custody of the infant child of this marriage, and while that controversy was being litigated in the court of their domicil, respondent, to defraud the petitioner of the probable results of that litigation, left the state and carried the child to Oregon, and compelled the petitioner to follow him here to enforce her rights against him. If it was thought proper and right by the framers of the constitution and congress to give the national courts jurisdiction of a controversy between citizens of different states, where the matter in dispute is mere rights of property—to be measured by mere dollars and cents—why should their jurisdiction not extend to the more important controversy like this, where the matter in dispute is the custody and control of an infant child of the parties. The objection, that the control of the domestic relations belongs properly to the state courts, and that therefore the United States courts ought not to take cognizance of questions concerning them, is merely begging the question. The domestic forum in California has determined who is best fitted and entitled to have the custody of this child. The matter has been adjudged, and this proceeding, rendered necessary by the improper conduct of the respondent, in abducting the child, is only for the purpose of enforcing that adjudication against the respondent. The purpose of this proceeding is not to appoint a guardian, but to enforce a right in the petitioner already established by the judgment of a competent court. If, in the course of the litigation, any question arises, involving the domestic relations, it must be determined for the purpose of this adjudication, as it would be in any other action, suit or proceeding. If A, a citizen of California, sues B, a citizen of Oregon, in the United States circuit court for this district, to recover possession of real property in this state, as he doubtless may, in the progress of the proceeding, it may be necessary to determine questions of marriage, legitimacy, guardianship, or any other question involving what is called the domestic relations of the parties or those under whom they claim. But no lawyer would pretend for a moment, that the court ought not to take jurisdiction of the action on that account.

The premises considered, it is adjudged that the petitioner is entitled to the custody of the infant child, according to the force and effect of the decree of the court of the seventh judicial district of California for the county of Sonoma, and the marshal is ordered to deliver it to her to keep accordingly.

Case No. 1,319.

BENNETT v. BOGGS.

[Baldw. 60.] [1]

Circuit Court, D. New Jersey. April Term, 1830.

FISHERIES—DELAWARE RIVER—COMPACT BETWEEN NEW JERSEY AND PENNSYLVANIA — CONSTITUTIONAL LAW — IMPAIRING OBLIGATIONS OF CONTRACTS.

1. The compact between New Jersey and Pennsylvania recognises the right of fishery in riparian owners on the Delaware.

2. The third section of the act of 1808, defining a fishing place, applies only to shore fisheries: a common right of fishery is necessarily indefinite.

3. The penalties of the law of 1822 attach to any person who uses a gilling seine or drift net on the Delaware, unless he has the right of fishing on the opposite shore.

4. An entry under this law by a person claiming only by common right is void.

5. This court must decide on a state law precisely as the courts of the state ought to do.

6. The act of 1822 is not repugnant to the constitution of the United States.

7. The proprietors of New Jersey had no right in the Delaware beyond low water mark.

[Cited in Pea Patch Island, Case No. 10,872.]

8. The right to the bed of the river was in the crown, therefore the compact of 1676 did not give a common right of fishery therein.

9. The rights of the crown devolved on the states by the Revolution, and were confirmed by the treaty of peace to them in their sovereign capacity.

[See M'Ilvaine v. Coxe, 4 Cranch, (18 U. S.) 209; Bank of U. S. v. Daniel, 12 Pet. (37 U. S.) 33; Martin v. Waddell, 16 Pet. (41 U. S.) 367; Russell v. Jersey Co., 15 How. (56 U. S.) 426.]

10. The constitution of New Jersey confers general powers of legislation.

[Cited in Bonaparte v. Camden & A. R. Co., Case No. 1,617.]

11. The legislature has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common law right.

[Cited in Bonaparte v. Camden & A. R. Co., Case No. 1,617; Atkinson v. Philadelphia & T. R. Co., Id. 615; The Martha Anne, Id. 9,146. See, also, Smith v. Maryland, 18 How. (59 U. S.) 71.]

12. The only restraint upon them is, that they cannot, by any law, impair the obligation of a contract.

[Cited in Bonaparte v. Camden & A. R. Co., Case No. 1,617.]

[See, also, Green v. Biddle, 8 Wheat. (21 U. S.) 1; Spooner v. McConnell, Case No. 13,245; Baltimore & S. R. Co. v. Nesbit, 10 How. (51 U. S.) 395; Griffing v. Gibb, Case No. 5,819.]

13. If a right is not founded in a contract, or secured by the constitution, it may be taken away by a state law, however long it may have been exercised.

14. This court can inquire only into the constitutional power of the legislature; not on the policy, justice, or wisdom of their acts.

[See Fuentes v. Gaines, Case No. 5,145.]

15. Neither the state or federal constitution secures a common right of fishery in the Delaware to the people of New Jersey.

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

At law. This case came before the court on a case stated by counsel, as follows: "This action is brought for the recovery of eight penalties, under the seventh section of the supplement to an act of the legislature of New Jersey regulating fisheries in the river Delaware, passed November 28th, 1822, and assented to and adopted by the legislature of Pennsylvania January 29th, 1823, prohibiting the use of gilling seines in said river, except in certain cases, mentioned in a previous section of the act, under a penalty of 250 dollars for each and every such offence. The plaintiff resides at, and rents, and fishes a shore fishery in the township of Waterford, in the county of Gloucester. His haul is from the upper line of the lands of Benjamin Cooper down to the mouth of Cooper's creek. Petty's island lies between this fishery and the Pennsylvania shore. On part of this island, on the Jersey side, is another fishery; so that the two seines sweep partly over the same pool, when out, though hauled in on different sides of the river. These gilling seines are made of fine twine, so as to be imperceptible to the fish, whilst the water is turbid from the spring freshets, when they are most successfully used. They are usually about fifty or sixty fathoms in length; are extended across the channel, and drift with the tide. In passing up the river, all the fish which come in contact with them, and are too large to pass through the mesh of the net, are entangled by their gills, and, seldom able to extricate themselves, are thus taken, from whence these seines derive their name. The defendant's net was of the size authorized by the act to be used in certain cases. The defendant is a citizen of Pennsylvania, and resident in the county of Philadelphia. He owned a gilling seine, and was in the habit of drifting between the island and Jersey shore, both in and below the pools of the above named fisheries. On the 23d, 24th, 25th and 26th days of March last, the defendant and one William Eager were drifting in the channel of the river with their net, opposite to the fishery of the plaintiff, when their net and boat were seized on the last named day, at the instance of the plaintiff, and the summons in this cause served on the defendant. This seine, when taken, was not within the sweep of the plaintiff's net, nor so as to obstruct him in his haul. The boat and seine were adjudged to be forfeited by two justices, and ordered to be sold. The defendant appeared on the return day, and caused his appearance to be regularly entered. The defendant has given a bond to the prothonotary of the court of common pleas of Philadelphia county, accompanied by the following description, viz.: (Description) 'From Samuel Bower's wharf and lands at Kensington to Fisher's Point, the size of the net is about fifty fathoms, and of a mesh of about six inches. Samuel Boggs.' (Prout the bond and description.)

It is admitted that there is a mistake or clerical error in this description, and that it should have been Fish's Point, instead of Fisher's, there being no such place as the latter. Bower's lands and wharf are in Kensington, in the city and county of Philadelphia, in the state of Pennsylvania; and Fish's Point is in the township of Waterford, aforesaid, in this state, about five miles above Kensington. On each side of the river there are numerous owners of the shore within the bounds of this description, from whom the defendant had no lease or permission to enter a fishery in front of their lands. The defendant, when taken, was drifting within the bounds named in his description, that is to say, below Fish's Point, and above Bower's wharf, nor had he at any time fished above low water mark with his seine, or entered upon the shore of the plaintiff, but had always drifted in that part of the river which is covered with water at all times of the tide. (These fisheries on the river Delaware have been used and occupied by the respective owners of the adjacent shores as private property, before and ever since the Revolution). The defendant therefore insists that he has a right to fish with his seine in any part of the river Delaware, by virtue of the aforesaid bond and description within the bounds therein mentioned. But he furthermore insists that the act under which the plaintiff seeks to recover is unconstitutional and void, being in restriction of a right common to all the citizens of the United States, and that no recovery can be had by virtue thereof. The plaintiff insists that the bond and description given by the defendant is not in compliance with the act, and that he had no right to drift with his net in the river Delaware; and, moreover, that the said act is constitutional, and the provisions therein contained wise and salutary, and greatly beneficial to the community, in preserving a valuable species of fish, which the gilling seines have a tendency to destroy and frighten from our waters. Upon this statement of facts it is agreed to submit this case to the court. If they shall be of the opinion that the defendant was authorized under the act to fish by virtue of his license, or that the act is unconstitutional, then that judgment shall be entered for the defendant, with costs; otherwise, that judgment shall be entered in favour of the plaintiff, with costs of suit. And it is further agreed that the copies of the several acts of the states of Pennsylvania and New Jersey, relative to fisheries in said river, printed in the Pamphlet Laws of said states, shall be read in this court; and that either party shall be permitted to turn this state of the case into a special verdict." Dated, September 9th, 1829.

The act of New Jersey, on which this suit is founded, is contained at large in the Pamphlet Laws of 1823, (page 30,) and in the Laws of Pennsylvania of the session of 1822–1823, (page 19.) The points material to this case are the following: The fourth section (Pamph. Laws Pa. 1823, p. 19, &c., Laws N. J. 1823, p. 30) enacts, that every owner or possessor of a fishery on the Delaware, within the jurisdiction of New Jersey, shall, before he occupies the same, give to the clerk of the court of common pleas of the county wherein the fishery, or the greatest part thereof, may be, a description in writing of their pool or fishing place, designating the beginning and ending point, the extent on the river shore, the township and county where situated, the number of men generally employed in fishing the same—and shall give bond with surety to the said clerk, to the amount of 500 dollars, conditioned for the payment of all fines and penalties created by this law, and incurred by any infraction thereof; which description and bond shall be filed in the clerk's office. If any person shall fish in any fishery so entered, or draw a net within the same, or in the river opposite the shore included within the boundary thereof, without the permission of the owner or possessor, he shall forfeit 250 dollars. By the fifth section, the same penalty is imposed on any person who shall make use of a seine or net in the Delaware, within the jurisdiction of the state, or of the concurrent jurisdiction of the state and Pennsylvania, between the 1st of April and 10th of July, without having so entered their fishery, or at any place on the Delaware within the state, other than opposite the shore boundaries of a fishing place or pool so described and entered. Section 6, Pamph. Laws Pa. 21, authorizes the owner or possessor of any fishery on the Delaware, within the jurisdiction of the state, below Trenton, who has entered the same as a fishery, and given bond to fish in front of, and opposite the bounds thereof, with a gilling seine or drift net of mesh not larger than six and a half inches, and the net not more than six fathoms in length—the boat used, to have the name and place of abode of the owner painted legibly on the gunwale thereof. The seventh section imposes a penalty of 250 dollars on any person who shall use a gilling seine or drift net in the Delaware within the sole or concurrent jurisdiction of the state, without first entering his seine or net, and giving bond, or beyond the angles of the shore boundaries of a fishery so entered, or with a mesh larger or a net longer than mentioned in the sixth section, between the 1st of March and 10th of July. The thirteenth section, in addition to the penalties, creates a forfeiture of the boat, seine, net and tackling, used in violation of the law.

This act was a supplement to an act of 1808, which, in the third section, defined a pool or fishing place to be "from the place or places where seines or nets are usually thrown in, to the place or places where they have been usually taken out; or from the place or places where they may hereafter be thrown into the water, to the place or

places where they may be taken out." The fifth section imposes a penalty of 100 dollars on any person who shall use a gilling net in the Delaware. 5 Smith Laws, 8, 9. Both of these laws were adopted in Pennsylvania, and declared to have the same effect on the citizens of that state as on those of New Jersey. This was deemed necessary by Pennsylvania, as by the compact between the two states, made in April, 1783, it was agreed that the river should be a common highway for each state, with concurrent jurisdiction on the water, each retaining jurisdiction on the dry land between the shores, and that all offenses or trespasses committed on the river, should be cognizable in the state where the person charged should be first apprehended. By a proviso in the third clause, the legislature of each state may exercise the right of regulating and guarding the fisheries on the Delaware annexed to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted during the season for catching shad, by vessels riding at anchor on the fishing ground, or by persons fishing under claim of a common right on said river. 2 Dall. Laws, 143, 145; Patt. Laws, 47, 49, 76, 77. The declaration set forth, that on the 23d of March, 1829, at the township of Waterford, county of Gloucester, and state of New Jersey, the defendant made up a gilling seine or drift net in the river Delaware, without having entered his gilling seine or drift net fishery, or giving bond or making a description of his pool or fishing place, or designating the number of men employed therein according to law. It also set forth the same act committed on seven other different days. The defendant pleaded nil debet.

Mr. Wall and Mr. Wood, for plaintiff.

1. The entry of the defendant is not such a one as is contemplated by the sixth section of the act of 1822, and will not excuse him from the penalties of the seventh section. Such entry can only be made by the owner of the land on the shore of the river, and for a pool or fishery in front thereof: that made by the defendant is for a fishery in the Delaware, opposite the land of others, where he can acquire no right under the fourth section: he comes, therefore, directly within the penalties of the law. The only question which can arise is on the validity of the law, on the ground of its repugnance to the concessions made by the proprietors of Jersey in 1676, (Leaming & S. 390,) the constitution of the state, and the United States. The grant from the king to the Duke of York, and from him to Carteret and Barclay, was bounded by the river Delaware: so was the grant to William Penn. Leaming & S. 3, 8, 10. The right to the bed and waters of the river was therefore in the king, and neither of the proprietors could have any right therein, or to the islands or fisheries. 1 Chalm. Op. 59; [Corfield v. Coryell, Case No. 3,230;] [Handly's Lessee v. Anthony,] 5 Wheat. [18 U. S.] 374. As the river was the property of the crown before the Revolution, the right to it devolved on the two states by that event; they claimed to the middle of the river, and the treaty of peace with Great Britain confirmed and ratified their claim. The concessions of the proprietors of Jersey, in 1676, could not bind the crown, or the states on whom its rights devolved; the proprietary governments were mere riparian owners, who might grant any rights to low water mark, but no further. Though they claimed and exercised the right to regulate the fisheries in the Delaware before the Revolution, (Leaming & S. 480, § 13; Allin. Laws, 279, c. 412, 80, 559,) yet it was without any authority over the bed of the river. Immediately after the peace, in April, 1783, New Jersey and Pennsylvania made a compact by which the Delaware was made a common highway, with a proviso that each state might regulate the fisheries annexed to the respective shores, so that they might not be interrupted by vessels at anchor, or persons fishing by common right. Rev. Laws N. J. 57; 2 Dall. Laws 143, 145. This was an express recognition of the rights of riparian owners to the fisheries on the shores of the Delaware, as they had existed from time immemorial in New Jersey. They were subject to the public rights of navigation, and of government in their regulation, but the shore owners had the exclusive right of fishing in front of their lands; the laws regulating such right affirmed its existence, and were passed for their protection. The right of fishery was descendible and alienable as other property, and might be conveyed separate from the land to which it had belonged, and as such has been uniformly recognised by the laws. Patt. Laws, 417, 543, 653. There is no common right of property in New Jersey, and the public right consists only in jurisdiction. 4 Griff. Law Reg. 1286, 1294. So far as the right of fishery in navigable waters is public, it may be regulated by law at the discretion of the legislature. Vatt. Law Nat. b. 1, c. 20, §§ 234, 235, 239, 244–248, p. 168.

But if the right is common, the legislature of New Jersey has full power, by the state constitution, to regulate and control this right as they please, both as the sovereign power of the state, and by the rights which devolved on the state from the crown. The compact between the states was before the adoption of the constitution of the United States, which cannot have a retrospective operation upon it, on general principles. Ruth. Inst. c. 5, pp. 88, 99. Neither the compact or the laws are repugnant to the constitution: it has been decided by this court that the laws regulating oyster fisheries are constitutional. 4 Wash. C. C. 377, 378, [Corfield v. Coryell, Case No. 3,230;] [Gibbons v. Ogden,] 9 Wheat. [22 U. S.] 203; [Willson v. Black Bird Creek Marsh Co.,] 2 Pet. [27 U.

S.] 251, S. P. The same decision has been made in Pennsylvania. Kean v. Rice, 12 Serg. & R. 203. The right of a state to regulate fisheries has been recognised in Massachusetts, (5 Mass. 266, 269;) in Connecticut, (2 Conn. 481;) in New York, (20 Caines, 90;) and New Jersey, (1 Halst. [6 N. J. Law,] 78.) It is a general principle of jurisprudence, laid down by all writers. Harg. Law Tracts, 10, &c.; Ang. Water Courses, 102, 108; Chit. Game Laws, 425; 1 Bl. Comm. 160. It cannot be denied that this power was in parliament, or that the powers of parliament devolved on the states by the Revolution. [Dartmouth College v. Woodward,] 4 Wheat. [17 U. S.] 651; [Johnson v. M'Intosh,] 8 Wheat. [21 U. S.] 584. And the constitution of New Jersey has imposed no restriction on the power of the legislature, who may limit, restrain and control the right of fishery in the Delaware, whether it is common or public, or grant the exclusive right to riparian owners. Their rights have been always recognised; and from their long enjoyment without interruption, a public grant will be presumed. Bealey v. Shaw, 6 East, 214; Cowp. 102, 103; 3 Durn. & E. [3 Term R.] 159; 3 Bl. Comm. 264. And when the right enjoyed has been exclusive, the grant will be presumed to have been so. The prohibition of the constitution of the United States against impairing the obligation of contracts, extends only to private rights,—[Dartmouth College v. Woodward,] 4 Wheat. [17 U. S.] 629, 630,—not to public corporations,—[Terrett v. Taylor,] 9 Cranch, [13 U. S.] 52,—nor to a law directing payment for improvements on land recovered under an adversary title,—2 Gall. 138, [Society for the Propagation of the Gospel v. Wheeler, Case No. 13,156,]—nor to an ex post facto law passed by a state during the Revolution,—[Pierce v. Turner,] 5 Cranch, [9 U. S.] 173. Admitting that there was a common right of fishery in all the inhabitants of the state, it was competent for the legislature to take it away, and give the exclusive right to riparian owners, as it did not impair the obligation of a contract. It is no constitutional objection to a state law that it takes away a vested right, unless it is repugnant to the constitution of the state. Satterlee v. Matthewson, 2 Pet. [27 U. S.] 410.

Mr Croxall and Mr Southard, for defendant.

The legislature may regulate the fisheries in the Delaware by prescribing the mode, &c. of catching fish, the kind of seines, the time of the year for fishing, and otherwise direct how the common right of fishing may be enjoyed. But they cannot prohibit the exercise of the right, which is common to all the inhabitants of the state, to fish in the Delaware, which is an arm of the sea, a navigable river, where the tide ebbs and flows as far as Trenton. This right is secured by Magna Charta to all the subjects of England, and cannot be made private property. Paley's Mor. Phil. 80. The enjoyment of this right is secured to the public in all civilized nations; the sea, the shore, and right of fishing therein, are common property, which cannot be appropriated to private use. Code Nap. Justin, 67; 1 Pandects, tit. 8; 3 Kent, Comm. 342; Gro. B. P. b. 2, c. 3; Puff. Law Nat. b. 4, c. 6; 2 Dom. Civil Law, p. 400, b. 1, § 1. The title to tide water rivers and arms of the sea, by the law of England, is in the king, for common benefit, and he cannot by his prerogative grant them for private purposes, since the adoption of Magna Charta. Bracton, b. 12; Glanv. b. 9, c. 2; 1 Reeve, Eng. Law, 224; Dav. Ir. K. B. 56; Chit. Game Laws, 243, 269. The king's grant can give an exclusive right to take none but royal fish. 1 Mod. 105; 6 Mod. 73. A subject has a right to fish in all navigable rivers for common fish, (1 Salk. 357;) and no prescription against this common right is good, (4 Durn. & E. [4 Term R.] 439; 6 Mod. 163; Willes, 265;) or for a free or exclusive fishery, unless the prescription goes as far back as the time of Henry II., (2 Bl. Comm. 39; 2 Inst. 30, 272; Mag. Char. § 3.)

It is a bad traverse to set up a private right of fishery in an arm of the sea. 2 H. Bl. 182. Prima facie, every subject has a right to take fish on the sea shore, between high and low water mark, (2 Bos. & P. 472;) and by the common law there can be no private right below low water. Beyond that, the right is a public one, a res sacra, which is unalienable, as it concerns the country at large; Schultes, Aq. Rights, 10, 17, 62–73. A private grant is good only so far as it does not interfere with the public right. Id. 79, 128. The charter to the Duke of York could give no private right of fishery in the Delaware below low water mark; a grant from the proprietors could not give it; and this, with the other principles of the common law, was adopted on the settlement of this state. 1 Bl. Comm. 157, 167; 1 Mass. 60; [Green v. Liter,] 8 Cranch, [12 U. S.] 242. And by act of assembly it was declared, that no man should be deprived of the benefit of the common law. Leaming & S. 128, 129, 369. The Duke of York was bound to govern according to the constitution of England. 1 Halst. [6 N. J. Law,] 70. And the constitution of the state continued the common law, and such statutes as had been practised on before its adoption. Article 22. The proprietors of New Jersey, in 1676, recognised the rights of the inhabitants according to the common law; granted them a common right of fishery in all the waters of the colony. Leaming & S. 390. And subsequent laws have confirmed this right. Allin. Laws, 309, 347; Patt. Laws, 18, 79. This right is so highly respected, that where A threw oysters into a public river in which there was a common right of fishery, and B took them away, A could not recover dam-

ages. 1 Penn. [2 N. J. Law,] 391. On the other hand, a person who fished in the Delaware by common right, recovered damages for cutting his seine. 2 Penn. [3 N. J. Law,] 936. And no law was ever passed denying this common right till 1808. Rev. Laws, 551. There is no private right of fishery in the waters of this state, (2 Pa. 943;) the shore owners have an exclusive right of drawing seines upon their land; but in the water, beyond the ebb of the tide, they have only a common right, (Arnold v. Mundy, 1 Halst. [6 N. J. Law,] 78;) such is the law in Pennsylvania, (Carson v. Blazer, 2 Bin. 475;) and in the other states the private right of fishery depends on the ownership of the bed of the river, (17 Johns. 195;) or on a grant to low water mark, (2 Conn. 481; 6 Conn. 518; 4 Mass. 315, 140; 3 Greenl. 269.) There must be an express grant by the state to give a private right beyond it. 3 Kent, Comm. 336, 344. When a river is the boundary between two states, they have each a right to the middle: but there can be no private property by virtue of riparian ownership beyond the low watermark. [Handly's Lessee v. Anthony,] 5 Wheat. [18 U. S.] 374. No grant can be presumed in favour of the shore owners which the proprietors were not authorised by the charter or the deed of the duke of York to make; they had no right in the bed of the river; and as their express grant could confer no right, a grant by prescription could have no more force.

But if such a grant could be presumed in a common case, it cannot be where it would be unconstitutional. 16 Mass. 488. The common right of fishery was secured to the inhabitants of the state by the compact of the proprietors in 1676, which no law can impair; it is an inviolable right, (1 Bl. Comm. 48,) which courts will protect by declaring a law repugnant to it to be unconstitutional, and void, (1 Bin. 419; [Vanhorne's Lessee v. Dorrance,] 2 Dall. [2 U. S.] 304.) The legislature cannot take away a vested right, (7 Johns. 493;) or transfer the property of A to B, (2 Bay, 252; [Ogden v. Blackledge,] 2 Cranch, [6 U. S.] 277; [Roach v. Com.,] 2 Dall. [2 U. S.] 210; [Fletcher v. Peck,] 6 Cranch, [10 U. S.] 135;) nor shall the general words of a law receive such a construction as to affect existing rights, (4 Burrows, 2462.) The right to regulate the public or common right of fishery gives no power to destroy it, or to grant an exclusive right to shore owners. The use of gilling nets may be prohibited as a matter of expediency, but the right to use them cannot be prohibited to the people generally, when it is granted to a particular class. If this mode of fishing is prejudicial to the public, it is equally so by whomsoever it is done. Though the general powers of the legislature are competent for all purposes of regulating fisheries within the state, yet they have no authority to give to riparian owners the right claimed under the laws in question, nor to make it penal for the other inhabitants of the state to exercise a right secured to them by the common law and Magna Charta.

BALDWIN, Circuit Justice. Two questions are submitted to the court: 1. Whether under the laws of this state the defendant has a right to fish with a gilling seine or drift net in any part of the river Delaware, within the boundaries specified in the description of his fishery; 2. If he has not such right, whether these laws are constitutional.

The definition of a pool, or fishing place, in the third section of the act of 1808, which is still in force, enables us to ascertain the true object and meaning of the law in requiring every owner or possessor of a fishery on the Delaware, to describe his pool or fishing place according to the fourth section of the act of 1822. Connecting the proviso in the compact of 1783 with the third section of the law of 1808, and the fourth section of that of 1822, we can have no doubt of the meaning of the legislature in every part of the law. The compact authorizes the guarding of fisheries on the river annexed to the respective shores, against interruptions by persons fishing under claim of common right on the river; thus making a plain distinction between a fishery annexed to the shore, and a fishery by common right on the river. The words, fishery, pool, or fishing place, as defined in the act of 1808, can apply only to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river. A person thus fishing can be in no sense the owner or possessor of a fishery; there can be no pool or fishing place which is his by any other right than what is common to all the inhabitants of the state; it cannot be that fishery intended by the compact, and be guarded against the claim of common right, without placing both the compact and laws in direct contradiction with themselves. To a fishery by claim of common right there can be no locality of township or county—no beginning or ending point—the extent on the shore cannot be defined: the bond to be given is a security for infraction of the law "at such fishery" by command or permission of the owner or occupant of such fishery, by himself or tenant—and could never have been intended to be given by one fishing by common right. The recovery on the bond is contemplated to be against the owner, possessor, tenant or agent, and a penalty is imposed on any persons who shall fish in the fishery so entered, opposite the river shore included in the description, without the permission in writing of the person owning, possessing and entering the same; words which in their nature exclude claimants by common right, who cannot enter or describe

what they cannot own or occupy in their own right. The words of the law, the meaning of the legislature, are too plain to admit of a doubt; they can have no other application than to the owners of land on the shores of the river to which fisheries were annexed; they were bound to describe and enter their fisheries, and give their bond, according to law. By doing so they were secured in the exclusive right of fishery in their own pools, opposite their own lands, and acquired the right of using in front of their boundaries gilling seines or drift nets, which were prohibited by the fifth section of the act of 1808. To give any person any right under the law of 1822, or to avoid the penalties for using gilling seines, he must have, as owner or possessor, a fishery to enter. It would be nugatory to enter and describe what he neither owned, occupied, or claimed in his own or any derivative right. The case before the court affords as strong an illustration as could be made. The defendant lives in Philadelphia, he owns or claims no part of either shore of the river, which is owned by other persons, from whom he has no permission; yet he enters as his fishery a space of five miles, from Kensington to Fish's Point, comprehending both shores. A single observation suffices to show that this is not such a fishery as is contemplated by the law. If the defendant has a right of fishing within these boundaries, under these laws, he takes away the right of fishing opposite to ten miles of land on the shore from the owners, and enables him to sue them for penalties, if they fish within his boundaries. Such a pretension is too extravagant to be supported, and yet if it stops short of it, the provisions of the law cannot be complied with. The entry must give him exclusive rights within his boundaries, or it gives him none; and if he may so appropriate five miles on each shore, there can be no limits assigned to this fishery when he is no shore owner. It is clear then that the defendant is in no better situation by having made his entry than before. He had no antecedent right, and could acquire none by the mere forms he has pursued; they were evidently for the purpose of evading the laws of New Jersey, which applied only to riparian owners within the boundaries of their own fisheries, annexed to their land, and duly entered. Entertaining no doubt of the meaning and express provisions of the law, we have thought it better to express ourselves in general terms, than to found our opinion on any departure of the defendant's entry from the requisitions and forms of the law: being decidedly of opinion that he could not make an entry and description in any form or manner which could avail him, we have not entered into any examination of its particulars in description or otherwise. The case stated admitting that the defendant has made use of a gilling seine in the manner stated, he has directly violated the provisions of the fifth section of the act of 1808, and the seventh section of that of 1822, and is liable to the penalties imposed. He could not make the entry required by the fourth section, and therefore was not authorized under the sixth to use a gilling seine or drift net. This case then, in our opinion, is clearly within the law, and if the law is valid, our judgment must be for the plaintiff.

Sitting in the circuit court, we are bound to decide on the laws of a state precisely as we would if sitting in a state court. [Wilkinson v. Leland,] 2 Pet. [27 U. S.] 656. They are the rules of our decision, unless they are repugnant to the constitution, laws or treaties of the United States, which are the supreme law of the land, as well in the state as federal courts. Whether these laws are so repugnant, is the next object of our inquiry.

Questions of a similar nature have heretofore occurred in this state. The subject was very fully discussed in this court in the case of Corfield v. Coryell, [Case No. 3,230,] which depended on the validity of the laws regulating oyster fisheries, and was most thoroughly considered. It was contended in that case that the law was repugnant to the following clauses of the constitution of the United States: the eighth section of the first article, granting congress power to regulate commerce; to the second section of the fourth article, as to the privileges and immunities of citizens of one state in every other state; and the second section of the third article, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. But the court decided, on great deliberation, that none of these provisions affected the validity of that law. The laws relating to the fisheries are open to the same objections, but they have not been distinctly presented to the court in the argument of this case. We have, however, thought proper to notice them, in order to express our entire assent both to the opinion and the reasoning of Judge Washington. The defendant's counsel have taken another objection to the validity of this law, which, though not directly contended to be founded on that provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, yet must come within it if the ground assumed is correct. They contend that, by the principles of the common law, there can be, neither by grant or prescription, a private right of fishery in an arm of the sea, a navigable river, or one in which the tide ebbs and flows; that the right of fishing in such waters is common to all the inhabitants of the state, and is expressly secured to them by a compact with the proprietaries of New Jersey in 1676; and that the legislature cannot prevent the exercise of that common right. Leaming & S. 390.

The charter of Charles II. to the Duke of York, bounded his grant by the Delaware river and bay, [Corfield v. Coryell, supra,] and comprehended no part of either; the grant from him to Lords Carteret and Barclay ran by the same boundaries, so that the claim of New Jersey to any part of the bay or river below low water mark, cannot be maintained by virtue of these grants. The charter to William Penn was bounded on the east by the Delaware, and included no part of the river, the right to the entire bed of which remained in the crown till the Revolution, though claimed by the proprietors of New Jersey from a very early period. 4 Wash. C. C. 385, 386. [Corfield v. Coryell, Case No. 3,230.] The rights of the crown being extinguished by the treaty of peace, those claimed by New Jersey to the river and bay were thereby confirmed, unless a better title should be found to exist in other states. But these rights accrued to the state in its sovereign capacity, and not to the proprietaries; they claiming only by grant, must be confined to its boundaries; an acquisition after its date could not pass under the charter to the proprietors; it was territory newly acquired, under the operation of the treaty, by New Jersey and Pennsylvania, and by them made the subject of the compact between the two states. It follows, then, that the proprietors in 1676 had no right of either property or fishery in the Delaware, to the common use of which they could grant a right to all the inhabitants of New Jersey; the crown alone could grant a common right of fishery beyond the bounds of the state. The king was no party to a compact made in derogation of his rights, which devolved on the state unimpaired by the unauthorized acts of the proprietors. The mere fact of their claiming beyond the limits of the charter could give them no title. Their compact in 1676 could create no right in the inhabitants which restrained or limited the exercise of the powers of sovereignty over the river, which the state derived from the paramount title of the crown. A compact between the proprietors and people of a state is a contract, the obligation of which cannot be impaired by a state law, but the one in question was without any obligatory force in giving the right of fishing in the Delaware. Its exercise under a claim from the proprietors, was an encroachment on the rights of the crown and the state. The compact was inoperative to confer any right such as is now claimed, although the present laws had never been passed. A repeal of the law would only save the penalty, and the defendant would be still without any right. This clause of the constitution then cannot avail him.

The constitution of this state, adopted the 2d of July, 1776, declares that the government of this province shall be vested in a governor, council, and a general assembly. There is no clause restricting the powers of the government as to the subjects of legislation; no part of it has been relied upon by the counsel of defendant as being inconsistent with their laws in relation to the fisheries in the Delaware; but they rest their alleged unconstitutionality on general principles. Congress have declared, in the 34th section of the judiciary act,—1 Story, 67, [1 Stat. 92,]—that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States, in cases where they apply. In determining what is the law of New Jersey, we must look first to its constitution, which is a supreme law, binding on the legislature itself, and if it contained any restraint on the legislative power over fisheries, its obligation would be paramount, but as it contains none, the law which must govern our decision exists only in the acts of the government, organized by the people, under their constitution. We find its powers plenary, unrestrained, and brought into action by the acts under our consideration, which embrace the case submitted to us. We may think the powers conferred by the constitution of this state too great, or dangerous to the rights of the people, and that limitations are necessary, but we cannot affix them, or act on cases arising under state laws as if boundaries had been affixed by the constitution previously. We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of a state unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The supreme court have decided, (Satterlee v. Matthewson, 2 Pet. [27 U. S.] 412–414,) that a state law, though an unwise and unjust exercise of legislative power—retrospective in its operation—passed in the exercise of a judicial function—creating a contract between the parties to a pending suit where none existed previous to the law—declaring a contract in existence prior to the law, founded on an immoral or illegal consideration, to be valid and binding on the parties—or divesting rights which were previously vested in one of the parties—is neither ex post facto, a law impairing the obligation of contracts, or repugnant to the constitution of the United States. All the decisions of the federal courts, which have declared state laws void, have been founded on their collision with the constitution, laws, or treaties of the United States, or on the provisions of state constitutions, but not on the general principles as-

serted by the defendant's counsel. Were this court now to adopt them, we should disregard the high authority referred to, and submit state laws to a test as fallible and uncertain as all rules must be which have not their source in some certain and definite standard, which varies neither with times, circumstances or opinions. An ex post facto law is one which inflicts a punishment for doing an act innocent at the time of its commission. It is easy to ascertain whether a state law is within this provision. There can be no controversy about the definition of a contract, and if a state law does impair its obligation, it is clearly void. Though it is a very delicate, and has been found a very difficult matter to define the obligation of a contract, or the acts which do impair it; yet there is a fixed and certain standard to which they must be applied, and a definite rule by which to regulate their application. But there is no paramount and supreme law which defines the law of nature, or settles those great principles of legislation which are said to control state legislatures in the exercise of the powers conferred on them by the people in the constitution. If it is once admitted that there exists in this court a power to declare a state law void, which conflicts with no constitutional provision—if we assume the right to annul them for their supposed injustice, or oppressive operation, we become the makers and not the expounders of constitutions—our opinion will not be a judgment on what was the pre-existing law of the case, but on what it is after we shall have so amended and modified it as to meet our ideas of justice, policy and wise legislation, by a direct usurpation of legislative powers, and a flagrant violation of the duty enjoined on us by the judiciary act. It is therefore not material to the decision of this case, to examine further into the existence of a right of fishery in the Delaware, common to all the citizens of this state prior to the passage of the acts in question, since in our opinion the admission of such a right would not avail the defendant, it not being protected by any law paramount to those which have regulated or taken it away. A common law right to a common fishery in the Delaware, is to be enjoyed in subordination to the laws which regulate its use. It is a legitimate subject of legislation, and we cannot pronounce the law void because, in the exercise of an unbounded constitutional power, the government of New Jersey have restrained it within limits narrower than those allowed by common law, or common right. Neither do we think it necessary to examine into the extent of the rights of riparian owners in front of their lands. They undoubtedly had rights of fishery to a certain extent, under the colonial government, which were recognized by New Jersey and Pennsylvania, in the compact of 1783. It is admitted, that from a very early period of the history of the state, shore fisheries have been considered as private property, capable of being devised and alienated with or separate from the land to which they were annexed, subject to taxation, and taxed as other real estate. It is not pretended that there ever existed a common right of fishery in the citizens of the state, on or over the lands thus owned to low water mark; beyond it the states, since the treaty, are owners of the river in full sovereignty, to which no one could acquire any right but by some law or grant subsequent to its acquisition. The existence of such law or contract is not pretended, and it cannot be maintained as a legal proposition, that a mere permissive right of fishery is so solemn as to be incapable of restraint or regulation by the sovereign authority of a state. We can perceive nothing in those laws but the exercise of their legitimate power of sovereignty over its unquestionable domain. The legislature, for reasons of policy of which they are the sole judges, authorized the owners of those fisheries, who have complied with the conditions prescribed in the law, to use gilling seines or drift nets in the Delaware, opposite to their respective fisheries, and to prohibit the use of such seines or nets to all others, under such penalties as were thought sufficient to enforce its provisions. In thus enlarging the private, and restraining the common right of fishery, they have infringed no constitutional injunction; their acts are the law of the state; they apply to the case under our consideration, and we are bound to adopt them as the rule of our decision.

It is said that the case of Arnold v. Mundy, 1 Halst. [6 N. J. Law,] 1, etc., decided in the supreme court of this state, is in opposition to our opinion. We have carefully examined it, and find that the plaintiff claimed under no law of the state, but by virtue of an East Jersey proprietary warrant, surveyed in 1818, on ground covered by water in front of his land. The only question before the court was, whether by virtue of such warrant and survey he had an exclusive right to catch oysters in the water over the ground so surveyed. It was decided that he had not such right, and could not maintain trespass against the defendant, who claimed under common right.

At the time of this decision there was no law giving this exclusive right to the plaintiff, or imposing any restrictions on the defendant; the case depended on the common law of the state, and settled nothing more. The validity of no state law was in question before the court; that of 1822 had not been passed; there was therefore no connection between that case and this in any one principle. If the court, in pronouncing their judgment, or any judge in delivering his opinion, had declared by anticipation that a law like the present would be void, (1 Halst. [6 N. J. Law,] 78,) the declaration would in its nature be extra-judicial, and we could not consider it as a judicial exposition

of an existing law. The court, or the judge who gave it, would not be bound by such opinion when the validity of the law came before them judicially; still less could a court of the United States regard it as of any other authority than the opinion of learned and highly respectable judges, on a case not before them. It is a rule of the supreme court, from which it would depart only under very peculiar circumstances, to adopt the decisions of state courts on the construction and validity of local statutes, and the exposition of local common law, but they could not extend this rule to declarations of courts or judges which were not authority even in the courts in which they were made. This court is authoritatively bound by the decision of the supreme court of the United States, but it is only by such as are judicially made. The opinion which would be given on a matter which neither was, nor could be, before them, would be entitled to all possible respect, but would be no authority to control our judgment. It cannot be expected of us to yield a greater deference to what fell from any of the respected judges in the case of Arnold v. Mundy, than to similar expressions from one or more of the judges of the supreme court of the United States. [Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 413.

Judgment must be rendered for the plaintiff.

Case No. 1,320.

BENNETT et al. v. HOEFNER.

[17 Blatchf. 341.] [1]

Circuit Court, N. D. New York. Dec. 9, 1879.

APPEARANCE—NOTICE TO SOLICITOR.

Where the defendant in a suit in equity has appeared by a solicitor, notice of application for a decree, after an order pro confesso, must be given to such solicitor.

[Cited, but not followed, in Austin v. Riley, (8th Cir.) 55 Fed. 837.]

[In equity. Bill by Jacob B. Bennett and others against Anselm Hoefner. Defendant moves to set aside a decree for complainants. Motion granted.]

James S. Gibbs, for plaintiffs.

Osgoodby, Titus & Moot, for defendant.

WALLACE, District Judge. The motion of the defendant to set aside the decree entered at the June term of this court must be granted, because no notice of an application for such decree was given to the defendant. The order pro confesso was properly entered, but, notwithstanding that, the defendant was entitled to notice of application for the decree. Equity rule 18 provides, that, after the order pro confesso, the cause shall proceed ex parte; but this does not mean without notice to a party who has appeared in the cause. Such party is entitled to notice, and has the right to be heard as to the form of the decree, and upon such other questions as can be presented upon the complainant's pleadings and proofs. This is the uniform construction given to the rule throughout this circuit. If this notice had been given in this cause, under rule 19 the defendant could not now be permitted to answer. As it is, the decree must be set aside. Under the circumstances, the defendant's default is excusable. An order will be entered allowing the answer filed June 14th, 1879, to stand as the answer in the cause.

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

BENNETT v. The J. H. GAUTIER. See Case No. 7,319.

BENNETT, (MAHONEY MIN. CO. v.) See Cases Nos. 8,968 and 8,969.

BENNETT, (MARSH v.) See Case No. 9,110.

Case No. 1,321.

BENNETT et al. v. MARYLAND FIRE INS. CO.

[14 Blatchf. 422;[1] 17 Alb. Law J. 363; 2 Month. Jur. 250; 24 Int. Rev. Rec. 167.]

Circuit Court, N. D. New York. March 13, 1878.

INSURANCE—PRINCIPAL AND AGENT—RATIFICATION—PROOF OF LOSS — WAIVER — ASSIGNMENT OF POLICY—PLEADING AND PROOF.

1. Circumstances stated which amounted to a ratification, by a fire insurance company, by silence, of the act of its agent, in accepting the responsibility of a broker to whom the assured paid the premium, in lieu of the money of the assured.

[See Miller v. Life Ins. Co., 12 Wall. (79 U. S.) 285; Southern Life Ins. Co. v. McCain, 96 U. S. 84.]

2. The policy not requiring the payment of the premium in money, the premium was paid by the acceptance by the agent of the promise of the broker, in lieu of the money, and the company could not cancel the policy without repaying the premium to the assured.

3. Provisions in a policy of fire insurance for notice of loss and proofs of loss are for the benefit of the insurer, and can be waived.

4. Notice of loss to the agent of the insurer was, in the absence of knowledge of the revocation of his agency, notice to the insurer.

5. After knowledge by the insurer of the fact of loss, its repudiation of the policy without objecting to the sufficiency of the notice of loss, was an acquiescence in the sufficiency of such notice.

[Cited in Timayenis v. Union Mut. Life Ins. Co., 21 Fed. 227.]

[See, also, Norwich & N. Y. Transp. Co. v. Western Mass. Ins. Co., Case No. 10,363; Bang v. Farmville Ins. Co., Id. 838; Ramsey v. Phoenix Ins. Co., 2 Fed. 429; Akin v. Liverpool & London & Globe Ins. Co., Case No. 121.]

6. Repudiation by the insurer of liability for the loss was a waiver of the necessity of furnishing proofs of loss.

[Cited in Ball & Sage Wagon Co. v. Aurora F. & M. Ins. Co., 20 Fed. 236.]

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

7. An assignment by parol of the right of action on a policy of fire insurance, after a loss, is sufficient to transfer the cause of action.

8. Where the answer to the complaint, in an action on a policy of fire insurance, only denies the allegations of the complaint, the defendant cannot prove a defence based on a breach of any conditions in the policy other than such as are conditions precedent to the right of the plaintiff to recover.

[At law. Action by George Bennett and others, administrators of Morris Bennett, deceased, against the Maryland Fire Insurance Company, on a fire insurance policy. Defendant moves after verdict for a new trial. Motion denied, and judgment ordered for plaintiffs.]

W. L. Dailey and W. F. Cogswell, for plaintiffs.

E. H. Benn, for defendant.

WALLACE, District Judge. This is a motion for a new trial by the defendant. None of the objections urged to the recovery are tenable.

First. Hamlin was the agent of the defendant, authorized to make insurance and deliver policies. The assured paid the premium to a broker, and Hamlin, knowing of the payment, accepted the responsibility of the broker, by an agreement with him, in lieu of the money paid by the insured. The assured, subsequently desiring to build an addition, which would increase the risk, applied to Hamlin to endorse a consent. Hamlin informed the assured that he would have to forward the policy to the company, but the consent would be given, and the assured might rely upon it and go on with his addition. The company knew that the policy had been issued, and declined to take the risk, and so notified Hamlin. Notwithstanding this, Hamlin did not inform the assured. Some time after this, Hamlin forwarded the policy to the company, to obtain the consent of its officers to the building of the addition, at the same time informing them of the whole transaction relative to the premium. The company retained the policy, and did not notify Hamlin that consent would not be allowed, or that the policy would be deemed cancelled. It thus appears that the company knew that the policy had not been recalled by Hamlin, and that the assured supposed it to be in force and was acting in reliance upon that assumption. By silence, the defendant ratified the act of its agent in accepting the responsibility of Nichols in lieu of the money of the assured. Slight acts are sufficient to constitute a ratification; and silence, when good faith requires the principal to speak, is sufficient.

Again, the policy did not require payment of the premium in money; and, when the agent of the defendant accepted the promise of Nichols, in lieu of the money of the assured, the premium was paid. The agent became liable to the defendant for the premium, to the same extent as though he had received the money of the assured; and the assured were protected to the same extent as though they had paid their money to Hamlin. If they had paid Hamlin the money, and he had failed to remit it to the defendant, the defendant, nevertheless, would have been bound by the policy. It is equally liable now. Hotchkiss v. Germania Fire Ins. Co., 5 Hun, 90; Goit v. National Protection Ins. Co., 25 Barb. 189; First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305, 311; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117. Under these circumstances, the defendant could not cancel the policy without repayment of the premium to the assured. Instead of doing this, the defendant, with full knowledge of all the facts, retained the policy when it came into its possession for another purpose, without expressing any intention of repudiating the transaction.

Second. The policy required the assured, in case of loss, to give notice in writing to the company forthwith, and, as soon after as possible, to serve proofs of loss. As soon as the fire occurred, the assured notified Hamlin, and he wrote to the company. Shortly thereafter, the assured heard that the defendant disclaimed liability, and one of them went to the office of the company, and was informed by its officers that the policy had been cancelled and was not in force at the time of the loss. Then the assured gave written notice of the loss to the company, and served proofs of loss, both of which were shortly after returned by the defendant, upon the ground that the defendant had no policy on the property and nothing to do with the loss. When Hamlin wrote to the company, his act enured to the assured and satisfied the condition requiring written notice forthwith. The proofs of loss were served as soon as practicable under the circumstances, as appears by the testimony. But, both of these conditions were made a part of the policy for the benefit of the defendant, and could be waived by the defendant. The defendant received notice of the loss forthwith, but not notice in writing. Notice by the assured to Hamlin, whom the defendant had held out as its agent, was, in the absence of knowledge on the part of the assured that Hamlin's agency had been revoked, notice to the defendant; and, when, after this had been given, and one of the assured saw personally the officers of the defendant, and they, instead of objecting to the formality of the notice, told him that the defendant repudiated the policy, they acquiesced in the sufficiency of the notice.

No objection can be heard to the sufficiency of the service of the proofs of loss. If they had been served immediately after the interview between one of the assured and the officers of the defendant, they would have been in time, clearly. When, in that interview, the defendant repudiated all liability for the loss, the assured were absolved from

making proofs of loss. The proofs, however, were forwarded, and were returned by the defendant, as of no interest to it. The defendant waived the condition in this regard. Norwich & N. Y. Transp. Co. v. Western Mass. Ins. Co., [Case No. 10,363,] and cases there cited.

Third. After the fire, the assured transferred, by an oral agreement, his right of action to the plaintiff's intestate; and the other individuals to whom the loss was payable by the policy, as their interests might appear at the time of the loss, assigned their interest to the plaintiff's intestate. The assignment by parol was sufficient to transfer the cause of action. Kessel v. Albetis, 56 Barb. 362. It operated as an appointment of the assignee as trustee, within section 113 of the Code of Procedure, and authorized him to maintain the action.

Fourth. The defences presented by these various objections urged to the plaintiffs' right to recover, are the only ones of which the defendant can avail itself under the pleadings in this action. The complaint does not set out the policy, but describes it sufficiently to permit it to be put in evidence, and alleges that the assured and the plaintiffs have duly performed all of the conditions of the policy. The issue tendered by the answer is, in substance, a denial of the averments of the complaint. The rights of the parties are to be ascertained, not by the rules of pleading at common law, but by those adopted by the Code.

Under this issue, it was incumbent on the plaintiffs to prove the execution and delivery of the policy, the plaintiffs' interest and title to sue, the loss by fire of the property described, the amount of the loss, and notice and proof of loss in due form given to the defendant. The defendant was at liberty to controvert all the facts which it was incumbent on the plaintiff to prove, including the performance of any condition precedent to the plaintiffs' right to recover, (Code, § 162; New Code, § 533,) but it could not avail itself of any defence based on a breach of any other conditions in the policy, because no such defence was set up in its answer.

The defendant is, therefore, precluded from relying upon the breach of any condition in the policy, except of such as the plaintiffs were bound to show affirmatively had been complied with, as a condition precedent to their right to recover. No issue is tendered by the answer, to the effect that the policy became void because the risk was increased by the act of the assured; and the same may be said of the other defences not hitherto discussed. While, it is true, evidence appeared on the trial from which breaches of these conditions might be inferred, the plaintiffs were not required to meet that evidence, because not notified by the answer that such issues were to be tried.

Judgment is ordered for the plaintiffs, upon the verdict.

BENNETT, (MOTTE v.) See Case No. 9,884.

Case No. 1,322.

BENNETT v. PENDLETON.

[1 Cranch, C. C. 146.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

RECOGNIZANCE — TAKEN OUT OF COURT — JUSTIFICATION — EXONERATION OF MARSHAL.

[A recognizance of bail taken out of court is only de bene esse, and upon the return of the writ and recognizance the plaintiff may object to the sufficiency of the bail, and if adjudged insufficient, the marshal is not discharged. In order to save himself he must take a bail bond, for the appearance of the defendant in all cases. Poe v. Mounger, Case No. 11,240, followed.] [2]

Recognizance of bail. The same order was made in this case as in the preceding, [Poe v. Mounger, Case No. 11,240;] the plaintiff's counsel having alleged that the recognizors resided out of the District of Columbia.

The defendant was committed for want of bail; and a rule entered that the bail should not be received without justifying.

Case No. 1,323.

BENNETT v. SCOTT.

[1 Cranch, C. C. 339.] [1]

Circuit Court, District of Columbia. July Term, 1806.

PARTNERSHIP—SALE BY ONE PARTNER—PLEADING.

If the goods sold belonged to a partnership at the time of sale, the action must be brought in the name of all the partners, although the defendant was ignorant of the partnership.

[At law. Action by Charles Bennett, one of the firm of Bennett & Watts, against James S. Scott.]

E. J. Lee, for plaintiff.

Mr. Youngs, for defendant.

THE COURT instructed the jury, that if they shall be of opinion, from the evidence, that the goods sold and delivered by Charles Bennett to the defendant, were, at the time of the sale, the joint property of C. Bennett and J. Watts, and sold for their joint benefit, the law raises a promise from the defendant to Bennett and Watts jointly, and not to Bennett alone; and that Bennett alone cannot, in the lifetime of Watts, support this action, although the goods may have been sold in the name of Bennett, and the defendant was, at the time of the purchase, ignorant of the existence of the partnership.

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

[2] [The syllabus of this case is taken from Poe v. Mounger, Case No. 11,240.]

Case No. 1,324.

BENNETT v. SHERMAN.

[3 Law Rep. 181.]

District Court, D. Massachusetts. June Term, 1840.

SEAMAN—PUNISHMENT BY MASTER.

Case of a libel by a seaman on board of a whaling ship, against the captain for an assault, in causing him to be seized up and flogged. The court refused, under the circumstances of the case, to make a decree of damages in favor of the libellant.

In admiralty. This was the case of a libel for an assault. The libellant was a seaman on board the ship Mount Vernon, of New Bedford, of which E. S. Sherman was master, in a whaling voyage, commencing in November, 1837, and which was finished by the arrival of said ship, at New Bedford, in the month of March last. The libellant alleged, that in the month of May, 1838, on the high seas, while he was in the forecastle, at dinner time, one of the crew, James Rayner found fault with some of the food, "as not being fit for a man to eat," but put it into the libellant's dish, who then said, "You say yourself, that this is not fit for a man to eat; why do you put it into my dish?" That thereupon, one John Collins, one of the seamen of the ship said, "it was good enough for a Frenchman," and then spit in the libellant's face several times, calling him a damned Frenchman, with other opprobrious expressions; and coming behind the libellant, seized him by the throat, thereby causing an effusion of blood from his throat and nostrils. That the libellant went and complained to Captain Sherman of the maltreatment and abuse that he had received, who ordered the mate to seize the libellant up; that notwithstanding the libellant's remonstrances, Sherman insisted upon the execution of his orders; that the libellant was accordingly seized up to the mizzen rigging, and that the said Sherman, then and there inflicted upon his back and neck, about two dozen lashes, with nine-yarn rattling stuff, doubled, so as to make four parts or strands, for no cause whatever; by which he suffered extreme pain; and for which he claimed damages in the sum of 100 dollars.

The respondent, in his answer, alleged, that on the first day after leaving New Bedford, on the voyage, he called all hands aft, and announced to them (the libellant being present and hearing the same) the rules and regulations, which he should require to be observed, for the maintenance of proper discipline on board said ship and to promote the objects of the voyage; and, among other requirements, distinctly stated, that there must be no quarreling or fighting on board the ship, and that a disobedience of that order would be severely punished; that this order, so important for the safety of the ship, and success of the voyage, was repeatedly promulgated to the crew prior to the day in which the transaction stated by the libellant, occurred, and was peculiarly requisite, in relation to that ship and voyage, as the crew consisted of a large number of persons, strangers to each other, and to the officers, and of whose characters the officers had and could have no knowledge previous to the commencement of the voyage. That two of the crew having disobeyed that order, they were seized up in the usual manner for punishment, and the whole crew were called aft, the said Bennett among them, to witness the correction. But it being the first offence, and hoping for a beneficial effect from mild and gentle treatment, he remitted the threatened punishment on that occasion, ordering the men to their duty, and distinctly stating to Bennett and the rest of the crew, that for the next similar invasion of that order, he should certainly punish the offenders. That in the instance in reference to which the libellant complained, the said Bennett came upon deck with his face scratched, and bloody, and complained to the respondent, that John Collins had been fighting him; representing, that he (the said libellant,) had not been at all to blame. Whereupon said Collins was ordered aft, and the whole crew were summoned to witness his punishment; that the said Collins was then, "in the presence of the crew, seized up, and corrected in a proper manner;" that it was then stated to the respondent, by several of the crew, that said Bennett was more to blame than the said Collins, that he had dared the said Collins out to fight, and commenced the affray, that thereupon the respondent made particular and deliberate inquiry of the crew individually, who witnessed the quarrel, and they severally, and without exception, informed him, that Bennett commenced the fight, and was most deserving of punishment; that thereupon, he ordered him to be seized up, and in the presence of the crew, administered to him a mild and proper correction, giving him not exceeding eight blows, on his back; the said Bennett then having on a pair of woollen trowsers, a woollen jacket, and woollen shirt; the instrument used being made of seizing stuff, consisting of four tails. That this was the whole extent of the punishment received by said Bennett; that no blood was let, and no marks made upon his person. That his clothes were not taken off, or let down; and that he made no complaint of the punishment. The respondent concluded, by emphatic averment, that his treatment of said Bennett, and of all the ship's company, during the whole of the voyage, was kind and paternal, without any infliction of punishment in a state of angry feeling, and never for any other purpose than for the preservation of discipline, and such as was necessary to secure the welfare and comfort of his ship's company, and the safety of the property committed to his charge, and that from interchange between

himself and the libellant, after the said punishment, during said voyage, and since their return to New Bedford, he has good cause to believe, and does believe that this prosecution has been stimulated by some other person, and not upon the motion of said Bennett himself. The evidence in the case, was from the testimony of Samuel Farmer, one of the crew, produced on the part of the libellant; and for the respondent, the deposition of Humphrey A. Shelley, the mate, and the testimony of George A. Coville, boat steerer, David Miller, second mate, and Joseph Enos, boat steerer, witnesses examined on the stand.

Samuel Farmer, the witness, produced on the part of the libellant, had his berth in the steerage, and was not with the men in the forecastle, and his testimony respecting the affray, was altogether derived from what was related by the libellant, when he made his complaint to Captain Sherman, and from what was said by Collins when called up for punishment. His repetition of what was stated by the libellant, on that occasion, corresponded in the main with the statement in the libel, with this addition, that to Collins's reproachful remark, the libellant replied that a Frenchman was as good as he; and that immediately thereupon, the libellant was seized by the throat by Collins, and severely handled, as stated in the libel. He further testified, that when the respondent's determination to chastise the libellant was announced, the mate, Mr. Shelley, interposed in his behalf, and said he ought not to be flogged, adding, that Collins was an impudent, saucy fellow, a man who would impose on a Frenchman. J. Collins, he says, received four dozen blows, and the libellant, two dozen, inflicted by the captain, with all his strength; and that said libellant's clothing, when he received the blows, was a cotton shirt and trowsers, without a jacket. The mate's deposition sustained the captain's statement. He contradicted the testimony of Farmer, representing him as expressing to Captain Sherman, that the libellant was innocent, and Collins the sole offender in the affray. After the punishment of Collins, Captain Sherman, he says, was going to let Bennett go unpunished; "but all the crew, and those that saw the fight, in the forecastle, said, that Bennett was most to blame, and ought to be flogged." That, thereupon, Bennett was seized up, and received from the captain, six or eight blows, with a piece of worming stuff about twice as large as a cod line. George A. Coville, (boat steerer,) confirmed the mate's statement as to the circumstances relative to the punishment inflicted by Captain Sherman, on those two men. Collins, he said, received twenty-four blows, and Bennett, seven or eight. With this, the testimony of Miller, second mate, corresponded. These two witnesses, and also, Enos, (a boat steerer,) all confirmed the mate's testimony, as to the declaration made by the crew, when it appeared that the captain was about to dismiss the libellant, unpunished. There was a collision of testimony in three particulars. The opinion said to have been pronounced by the mate, of the libellant's entire innocence. The number of blows received by the libellant, and his clothing, at the time. In regard to the first particular, it was mentioned only by Farmer; and Miller said, that he and the mate stood together, at the time, and that no such objection was made by that officer, to the punishment of Bennett, and it was expressly and repeatedly denied by the mate, when closely questioned on that point. As to the number of blows, the libellant alleged, that he received two dozen; so said Farmer. In this they are contradicted by four witnesses, all present on that occasion. As to the libellant's clothing, at the time, it was not described in his statement. Farmer said, that he had on a cotton shirt and trowsers. All the other witnesses agreed that he was clothed in a woolen shirt and trowsers, or pantaloons. One only, Miller, mentioned a jacket in addition.

The case was argued on the evidence by E. Bassett for the libellant, and by Clifford for the respondent.

DAVIS, District Judge. If it were necessary for a satisfactory decision in this case, to ascertain, precisely, in what particular, and in what manner, or degree the libellant was to blame, in the affray at dinner, in the forecastle, I should find it difficult to come to a conclusion. It altogether rests on the libellant's declarations; none of the men, who were in the forecastle at said time, are produced as witnesses. My inference from all that appears in the case, is, that the impression under which Captain Sherman proceeded, when he commenced the punishment of Collins, was reasonable and discreet. Of the severity of that punishment, it would be out of place, in this case, to express an opinion. It is sufficient to say, that I conclude from the degree of that punishment, that Captain Sherman proceeded with a persuasion that Collins was the sole offender, and that Bennett should go unpunished. He was led to depart from that favorable consideration, in reference to Bennett, by the united declarations of the men who were called to witness the punishment. Influenced by these declarations, and, as there is reason to believe, purely influenced by considerations of prudent regard to the maintenance of peace and quietness among the ship's crew, and the advancement of the interests entrusted to his care and direction, he inflicted punishment on the libellant not with severity, not exceeding eight blows, and with an instrument which has been exhibited, and the manner of using it described; and which I cannot pronounce an unlawful or improper one, for occasions requiring chastisement on board a ship at sea. It was said in the argument for

the libellant, that Captain Sherman should not have so suddenly reversed his favorable determination, respecting Bennett, by those declarations made by the crew. His decision does not appear to have been made immediately on the general expression of the crew, that the libellant was in fault. He avers that he made deliberate and particular inquiry of the crew, individually, who witnessed the quarrel. This is corroborated by the mate's testimony, who mentions the names of four or five of the men, who declared that the libellant was to blame, in the affray. It was argued that the punishment should have been suspended until the facts of the case were more particularly and deliberately inquired into. I should doubt, whether any action in reference to the libellant's culpability, would have been less severe, if founded on such examination. It is not probable that those men would have retracted the declaration which they had made, in the presence of the whole ship's company, officers and crew. Captain Sherman's prompt decision on the subject, his motives being just and laudable, should not, I think, under the circumstances of the case, be visited with a decree of damages. Besides the declaration of the crew, which it would have been imprudent and unsafe, entirely to disregard, he might very properly consider, that in such affrays, it is seldom that either of the parties is entirely free from fault, and that among a ship's company, it is not an usual thing, or to be expected, that men should insist on corporal punishment of one of their number. Captain Sherman's situation was perplexing, and if, in his decision, he made a mistake, it was not in anger, from ill will, or any unworthy disposition or motives in reference to the libellant. The punishment was slight in the number of blows, and as appears probable in the degree of force which was applied. A different course, considering the united representations of the crew, who witnessed the affray, and with disregard to their declarations, might have occasioned deep umbrage, and have been disastrous or injurious to the voyage.

The closing allegation, or expression of belief in the respondent's answer, has no influence in the decision, and had better have been omitted. Seamen, when beaten or injured, or supposing themselves injured by an officer, frequently utter expressions of deep resentment, and threaten what they will do at home, when the voyage shall be finished. All this is of no use, and does not improve their condition. Bennett's deportment and actions on the subject, after the usage of which he now complains, should not be interpreted to his disadvantage. As to the supposed instigation of a suit, suggested not to have been originally intended by the libellant, it is a common remark in such cases, sometimes suggested in argument, at the hearing, but seldom, if ever, included in the answer. The court might be misled, and engage in a useless inquiry, by entering into an examination of the truth of such suggestions. Extraneous influences, producing suits of this description, are often imagined, and sometimes doubtless, existing, may be the effect of generous sympathy, and, in the official organs, should be viewed, as a portion of decided duty in their profession.

Case No. 1,325.

BENNETT v. The TEVERE.

[5 Adm. Rec. 364.]

District Court, S. D. Florida. Sept. 6. 1855.

SALVAGE—AMOUNT—SALE OF VESSEL—CHARGES—FOREIGN CONSUL—COMMISSIONS.

[1. The Sardinian brig Tevere, bound from Cuba to Bremen, while on Alligator reef, and in peril of total loss, was assisted by three sloops carrying 39 men, who carried out an anchor, lightened the brig, and, after heaving her off, towed her into port. The services were rendered in bad weather, and were attended with considerable risk to the persons and property of the salvors. The vessel and cargo were valued at between $17,000 and $20,000. *Held*, that as the necessary repairs to the vessel would cost more than her worth after repair, and that as the master could raise no money, the court would order a sale of the vessel and cargo, and award 42 per cent. of the net value to the salvors.]

[2. Where the net value of property ordered to be sold to pay salvage is necessary to be known to the court, for the purposes of its just decision, the court may determine the legality, justice, and amount of all charges against it, and may order the same to be produced before it for such determination.]

[3. The consul of Spain had no right to consular fees from the proceeds of the sale of such vessel for attending such sale, when it appeared that the vessel was Sardinian, the cargo owned by Belgians, and that interests of Spanish subjects were in no wise affected.]

In admiralty.

S. R. Mallory, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This brig, Gallo, master, laden with sugar, and bound from Trinidad de Cuba to Bremen, about three o'clock in the morning of the 18th of July, ran ashore upon Alligator reef, where she remained in great peril of total loss, for about twenty-two hours. The crews of the sloops Texas, Mary H. Williams, and Dolphin, numbering thirty-nine men in all, carried out an anchor, lightened the brig of thirteen hogsheads and one hundred and twenty-eight boxes of sugar, and two hogsheads of rum, and heaved the brig off the reef. Having lost her rudder, they towed her into port. These services were rendered in very bad weather, and were attended with considerable danger of injury to the persons and property of the salvors, and some little danger to their lives. The particular facts are stated in the libel; and, it is evident, both from the allegations and proofs, that this brig and cargo would have been

totally lost, but for the services of the libellants. The brig and cargo may be estimated to be worth from $17,000 to $20,000, more or less. Both will be sold, and forty-two per cent. upon the net value will be decreed, as a reasonable salvage. This salvage, when divided, will make the shares amount to between sixty and seventy dollars. The brig suffered very considerable injury while on the reef. Surveyors report, that her repairs would cost more than she would be worth, after they were made. The master can raise no money, either by bottomry or hypothecation in this port or Havana, with which to repair the vessel, or pay the salvage upon brig and cargo. To sell cargo sufficient for these purposes, would leave little or none remaining. Under these circumstances the wisest course would seem to be, that the court should make an order directing a sale of the vessel and cargo. It is therefore ordered, and decreed, that the marshal proceed to advertise and sell at public auction the Sardinian brig Tevere, her tackle, apparel and furniture and cargo, and bring the proceeds into the registry of the court; that the duties, costs, expenses, wharfage, storage, labor bills, notary and surveyor's fees, keeper's charges, and all other costs and charges incurred upon the property in consequence of the disaster (except the master's expenses in going to Havana to raise money or to charter a vessel, and except his proctor's fees) which are proper charges to be made against the residue in the master's hands after paying salvage be first ascertained and allowed by the court, and deducted from the gross proceeds of sale of the said brig and cargo, and that forty-two per cent. of the remainder be allowed the libellants for salvage in full compensation for their services rendered said brig and cargo; that the clerk pay the salvage, costs, expenses, duties, and charges to the several parties entitled to receive them, and, the residue of the money remaining in court, pay to Captain Gallo, master of said brig, for and on account of whom it may concern.

(Oct. 3, 1855.)

THE COURT having heretofore, to wit, on the 6th day of September, 1855, pronounced its decree in this case, awarding to the libellants, for their salvage, forty-two per cent. upon the net proceeds of the sale of said brig and cargo, directed by the said decree, to be ascertained by first deducting from the gross amount of sales, the wharfage, storage, labor bills, duties, and all other costs and charges, incurred upon the property, in consequence of the disaster, to be ascertained and allowed by the court, (except the master's expenses in going to Havana and his proctor's fees,) the remainder to be considered the net proceeds. Now on this 3rd day of October, among other bills of charges presented to the court to be allowed against said gross proceeds of sale, Mr. Sallas, consul for Spain, presents a bill containing among other charges a demand for four hundred and ninety-two dollars, being two per cent. commissions on the amount of the proceeds of the sale of said brig and cargo, as a compensation to him for attending the sale of the said brig and cargo, made by the marshal by order of the court; and he claims that he presents said bill to the court, not intending thereby to admit the right, or jurisdiction of the court, to decide upon his right to such commission, but expressly denies such jurisdiction, but he presents the bill in order that the amount, just as it is, and on his own authority in his office of consul of Spain, may be deducted from the gross proceeds of sale, in ascertaining the amount of salvage. Wherefore, the premises duly considered, THE COURT decides:

First. That in salvage causes, the real or net value of the property being often an important fact necessary to be known in order to a just decision of the cause, the jurisdiction of the court, to ascertain that fact, by ordering to be produced before it, all charges upon the property, and by deciding upon the legality, justice and amount of such charges, is ample and complete; whether the charges consist of wharfage, storage, duties, consular fees, or whatever may be their nature, or by whomsoever claimed, or by whatsoever right or law existing, the exercise of the jurisdiction in the manner indicated, depending upon the discretion of the court upon a view of the circumstances.

Second. Whatever may be the rights or privileges or perquisites of office attached to Mr. Sallas, as consul of Spain, in cases in which the interests of Spanish subjects are concerned, he has no right, by attending a sale of wrecked property, belonging to persons not subjects of Spain, and conducted under the authority and by order of this court, to entitle himself to the commission claimed by him, or any other fee or emolument of office. And in regard to the sale in the present case, the vessel being Sardinian, and the cargo being supposed to belong to Belgians, having been consigned to Bremen, the commission charged by Mr. Sallas for attending the sale, is not a proper and legal charge to be made against the proceeds of the sale of said brig and cargo, and ought not to be allowed, or paid, or deducted from said proceeds. Wherefore, it is ordered, that the aforesaid commission be disallowed as not being a proper and legal charge upon said proceeds.

BENNETT, (UNITED STATES v.) See Cases Nos. 14,570-14,574.

Case No. 1,326.

BENNETT v. WILSON.

[1 Cranch, C. C. 446.][1]

Circuit Court, District of Columbia. Nov. Term, 1807.

CONTINUANCE—DILIGENCE—EVIDENCE—BOOK ACCOUNT.

1. The court will not continue a suit at law, at the motion of the defendant, on the ground that the plaintiff had not answered a bill of discovery, he being absent, and the bill seeking relief as well as discovery.

[See Marsh v. Hulbert, Case No. 9,116.]

2. The defendant's book of accounts in his own handwriting is not evidence for him, although it contains the first entry.

Mr. C. Lee, for the defendant, moved for a continuance of the suit at law, on the ground of a bill for a discovery not answered, and now ready to be taken for confessed, the defendant. Bennett, being absent, and the usual notice having been given by publication, and of the death of Thompson, the most material witness. If a bill for a discovery be taken for confessed, the suit at law will be perpetually enjoined. 2 Har. Ch. Pr. 231, 233.

Mr. Swann, contra. The English practice applies only to cases where the party is in contempt.

THE COURT (DUCKETT, Circuit Judge, absent) refused to continue the cause on the ground that Bennett had not appeared to the bill for discovery; because it also sought general relief, and prayed an injunction, stating all the grounds of defence to the suit at law, and drew the whole subject-matter into equity. There was no affidavit stating that other testimony could not be had in lieu of Thompson's; and Wilson may obtain an injunction upon giving security. The plaintiff at law ought to have a judgment for his security.

Mr. C. Lee, for the defendant, on the trial offered the defendant's book of accounts in the defendant's own handwriting, and said it was the original entry of the transaction and settlement of the account upon which the promissory note was given.

But THE COURT (DUCKETT, Circuit Judge, absent,) refused to permit it to be read in evidence.

BENNING, (BANK OF UNITED STATES v.) See Case No. 908.

BENNINGTON, (FIRST NAT. BANK OF NORTH BENNINGTON v.) See Case No. 4,807.

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

Case No. 1,327.

BENNITZ v. UNITED STATES.

[Hoff. Land Cas. 104.][1]

District Court, D. California. Dec. Term, 1855.[2]

PUBLIC LAND—GRANTS—GENERAL TITLE OF SUTTER—VALIDITY.

[The "general title of Sutter," derived from Gov. Micheltorena, is valid.]

[See note at end of case.]

[Appeal from decision of the board of California land commissioners.]

Claim [by William Bennitz] for five leagues of land [called the "Rancho Breisgau"] in the county of Shasta, rejected by the board, and appealed by the claimant.

Jeremiah Clarke, for appellant.
S. W. Inge, U. S. Atty.

The appellant in this case claims under the general grant by Governor Micheltorena on the twenty-second of December, 1844, which has already been considered and passed upon by this court in the Case of S. J. Hensley. It appears in evidence that the present claimant was one of those in whose favor Capt. Sutter had reported, and for whose benefit the general grant was made. It further appears that the claimant in 1845 placed a tenant upon the land, by whom a portion of it was cultivated, and who continued to reside upon it until the summer or fall of 1846, when he was killed by the Indians. There seems no reason to suppose that the claimant ever abandoned his grant, and under the ruling of this court in the Case of Hensley, we think the claim should be affirmed.

NOTE, [from original report.] The validity of the Sutter general title was affirmed by the circuit judge in U. S. v. Hensley [nowhere reported: opinion not accessible; reversed in U. S. v. Hensley, 1 Black, (66 U. S.) 35.]

[Bennitz v. U. S. was reversed by the supreme court in U. S. v. Bennitz, 23 How. (64 U. S.) 255; and in rendering the opinion Mr. Justice Campbell said: "The merits of the claims arising under the general title of Sutter have been discussed in the cases of U. S. v. Nye, 21 How. (62 U. S.) 408, and U. S. v. Bassett, Id. 412. This claim is in all respects similar, and, for the reasons assigned in those cases, is invalid."]

BENNITZ, (UNITED STATES v.) See Case No. 1,327.

Case No. 1,328.

In re BENSON.

[8 Biss. 116;[3] 16 N. B. R. 377.]

District Court, D. Indiana. Nov. Term, 1877.

BANKRUPTCY—ESTATE IN ENTIRETY—DIVORCE.

1. Real estate was conveyed to A. and B., husband and wife, to be held in entirety. A.

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

[2] [Reversed by supreme court in U. S. v. Bennitz, 23 How. (64 U. S.) 255.]

[3] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

subsequently went into bankruptcy, and between the date of the adjudication and his discharge B. obtained a divorce. The assignee in bankruptcy of A. claimed one-half interest in the land as the property of A.

[Cited in Re McKenna, 9 Fed. 29.]

2. *Held*, that in Indiana the common law rule as to tenants by entirety has not been changed, except that the husband, under the statutes of that state, does not acquire any legal interest or estate in the lands of the wife.

3. *Held*, that when the adjudication in bankruptcy was made, A. had no interest in the real estate which passed to his assignee, and that if he gained an alienable interest by the divorce, it was a new acquisition subsequent to the adjudication, which cannot be claimed by the assignee.

4. Effect of divorce discussed, but not decided.

[In bankruptcy. Petition by the assignee in bankruptcy of James Benson for an order to sell certain real estate of the bankrupt. Dismissed.]

De Bruler & Hatfield, for bankrupt.

James M. Warren, for assignee.

GRESHAM, District Judge. In this case the assignee presents his petition for an order to sell the interest of the bankrupt in certain real estate. On behalf of the bankrupt this application is resisted.

The facts are not matter of dispute, and are substantially as follows: The real estate in question is situated in this district. The adjudication of bankruptcy was made March 29, 1877. The estate is largely indebted, and there are no assets unless this real estate is assets. March 4, 1870, one Kirkpatrick conveyed to the bankrupt and his wife, Margaret, the land in question, to be held in entirety. In August, 1877, the Perry circuit court decreed a divorce to Margaret Benson. No discharge had been granted to the bankrupt. Counsel for the assignee insist that at the date of the adjudication the bankrupt had an interest in said real estate, which was subject to levy and sale upon execution; that this interest passed to the assignee by virtue of the deed of assignment, and that the decree of divorce made Benson and his wife tenants in common, the effect of destroying the marital relation being to sever the estate in entirety.

On the other hand, it is urged by the counsel for the bankrupt that at the time of the adjudication the husband had no such interest in the land as could have been seized and sold upon execution against him; that consequently no estate in it passed to the assignee; and that, if by a subsequent divorce any new or different holding was created by reason of the changed relation of the tenants, that was the creation of an interest after the bankruptcy, and so vests in the bankrupt unaffected by his deed of assignment.

The statute of Indiana on the subject reads as follows, (1 Gavin & H. St. p. 259, §§ 7, 8:)

"Section 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy."

"Sec. 8. The preceding section shall not apply to mortgages nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees as such shall be held by them in joint tenancy."

In Davis v. Clark, 26 Ind. 428, the supreme court of Indiana, considering these sections of the statute, uses this language: "At common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law, they cannot take the estate by moieties; both are seized of the entirety per tout, and not per my. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor."

The court, in the same case, decided that the statute has not changed this common law rule, but has expressly recognized it; that the husband does not under the statutes of that state acquire any legal interest or estate in the lands of the wife, but the same, and the profits thereof, remain her separate property; and that when land is conveyed to husband and wife, the former has not such an estate in the lands as is subject to sale upon execution. The right of survivorship does not constitute a contingent or vested remainder, but is a mere accident of the estate.

To the same effect is the case of Arnold v. Arnold, 30 Ind. 305. The rule is there settled on a proceeding in partition between the heirs of the deceased husband and the surviving wife that the whole estate remains to the survivor, which is declared to have been the law in this state from the statutes of January 2, 1818. In the same direction is Simpson v. Pearson, 31 Ind. 1.

There are some other cases in Indiana, and these cases and others in the different states are examined in an elaborate opinion of the supreme court in Chandler v. Cheney, 37 Ind. 391.

The subject is exhaustively discussed, and this conclusion is reached, as is well stated in the head notes: "The same difference which existed at common law between joint tenants and tenants by entireties continues under our statute. In both the title and estate are joint, and both have the quality of survivorship; but the marked difference between the two is this: In a joint tenancy, either tenant may convey his share to a co-tenant or to a stranger, who thereby becomes a tenant in common with the other co-tenant; while neither by the entirety can

convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the cotenants. There may also be partitions between joint tenants, but not between tenants by entireties.

"While such an estate exists no interest in it can be sold upon execution for the debts of the husband or wife, but the conveyance creating it may be set aside for fraud."

In this opinion the case of Ames v. Norman, 4 Sneed, 683, is noticed and the ruling therein, that "during their joint lives the husband may dispose of the estate. He may lease or mortgage it, or it may be seized and sold upon execution for his debts," is strongly condemned as being a departure from the settled law and also from the principles which the case itself states in all their strength.

And finally in Jones v. Chandler, 40 Ind. 588, the same court adheres to its former opinions and holds that the following clauses in a will: "To my son Algernon R. Jones, his wife and his heirs, seven-thirtieths of all my estate" created an estate by entirety in Jones and his wife, and he could not alienate it nor could it be sold on execution against him to her prejudice.

These decisions settle the question as a rule of property in Indiana.

When the adjudication in bankruptcy was made Benson had no interest in this property which he could alienate. Under the deed of assignment the assignee took no interest whatever, whether present or contingent.

The question of divorce remains to be considered. This separation was decreed some months after the adjudication; and although the statement of facts is by no means full, it is to be inferred that as the divorce was in favor of the wife, it was by reason of the fault of the husband. The question, what is the effect of the divorce under such circumstances, is one of great difficulty.

The statute on the subject provides that "a divorce granted for misconduct of the husband shall entitle the wife to the same rights so far as her real estate is concerned, that she would have been entitled to by his death." 2 Rev. St. Ind. 1876, p. 330, c. 4, § 18. But here at once arises the question, what is her real estate? In those instances where her title to real estate is affected by the marriage; the application of this statutory rule presents no serious difficulty. In the estate by entirety, however, the supreme court has so defined it as to leave no interest in either husband or wife that one can enjoy separate from the other. Indeed, says the court, "there is no separate interest." Chandler v. Cheney, 37 Ind. 397. Considered apart from this provision of the statute, and regarding this estate in the light of the decisions above referred to, it becomes exceedingly difficult to determine the effect of the divorce upon it. The tenants whose joint use and whose joint title, extending through the entire interest conveyed, constitute the distinctive characteristics of the tenancy quoad hoc, may be left as the decree of the divorce found them. Again, it may be said that such a title, created in view of the marriage relation, founded upon it, and determinable when that relation ends by the death of one of the grantees, is determined by a divorce as absolutely as by death.

But death leaves a survivor. Divorce leaves the two, each having under the original conveyance an equal right. The marriage relation, the very ground of a tenancy by entirety, is gone. Does the whole estate thereupon vest in the innocent party? Is the joint holding turned into a tenancy in common? Or does the law leave the divorced husband and wife to quarrel over an interest in land which the law is incapable of giving exclusively to one or dividing between both? Public policy would seem to require that no such anomaly should exist; and that persons who are found by the law to be unfit to live together should have a legal method of settling the controversy which an estate of this nature must, under such circumstances, be sure to kindle.

In this state these questions are not settled. Their settlement belongs more properly to the state court than to this tribunal, nor do we think it necessary to consider the matter here and in this case. It is enough to know what definition of the estate has been given by the supreme court, and that definition makes it a joint estate, not in any manner separable by the act of either joint tenant, which cannot be mortgaged or alienated otherwise than by the joint act of both, and which cannot be seized or sold upon judicial process by the creditors of either. The supreme court declares in express terms that there is no separate interest. Now, if the effect of the divorce is, by a dissolution of the marriage, to destroy the unity of possession, and to turn what was a holding per tout by husband and wife, into a tenancy in common, it is simply by operation of law the creation of a new interest in the bankrupt, and is to all intents and purposes a new acquisition, subsequent to adjudication, which cannot be claimed by the assignee.

If, on the other hand, the decree of a divorce in favor of the wife for the fault of the husband, vests the whole title absolutely in her as if he were dead, still less has this court anything to do with it.

The petition of the assignee is dismissed.

BENSON, (OSBORNE v.) See Case No. 10,596.

BENSON, (SCHOTT v.) See Case No. 12,479.

Case No. 1,329.

BENSUSAN v. MURPHY.

[10 Blatchf. 530;[1] 17 Int. Rev. Rec. 84.]

Circuit Court, S. D. New York. March 14, 1873.

CUSTOMS DUTIES — ACTION TO RECOVER PAYMENT —BOTTLED WINES.

B. imported 444 bottles of wine, containing 83¼ commercial gallons, and of the dutiable value of $96. The 21st section of the act of July 14th, 1870, (16 Stat. 262,) provides, that wines imported in casks, valued at not exceeding 40 cents per gallon, shall pay 25 cents duty per gallon, valued at over 40 cents, and not over $1, shall pay 60 cents, and valued at over $1 shall pay $1, and, in addition thereto, 25 per cent. ad valorem; and that wines imported in bottles, shall pay "the same rate per gallon as wines imported in casks, but all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart, and all bottles containing one pint, or less, shall be held to contain one pint, and shall pay, in addition, three cents for each bottle." The collector exacted a duty on 111 gallons, at $1 per gallon, and a duty of 25 per cent. ad valorem on $96, and a duty of three cents on each bottle. In a suit by B. to recover back an excess of duty, *held*, that the wine, being imported in bottles, was not liable to the 25 per cent. ad valorem duty, but only to the duty per gallon; that, as each bottle contained more than one pint, and not more than one quart, each bottle must be held to contain one quart, and the 444 bottles must be held to contain 111 gallons, for the purpose of arriving at its value per gallon, to ascertain the proper rate of duty per gallon, as well as for the purpose of fixing the number of dutiable gallons; that the value, therefore, was over 40 cents, and not over $1, per gallon, and the proper rate of duty per gallon was 60 cents, on 111 gallons; and that the bottles were each subject to 3 cents duty.

[See Cavaroc v. Collector, Case No. 2,529.]

[At law. Action by Joseph Bensusan, Jr., against Thomas Murphy, collector, to recover back duties paid. Judgment for plaintiff.]

The plaintiff imported from Bordeaux, in France, and entered at the custom house at New York, for consumption, 37 cases of claret wine, in bottles, on the 3d of April, 1871. The invoice presented on entry stated the cost of the wine to be 337 francs and 50 centimes, and the price of the bottles and the amount of charges due to be 166 francs and 50 centimes, and the commissions to be 12 francs and 90 centimes, making the total value 516.90 francs, or $96 in United States coin. The charge of 13 francs for consul's certificate was, also, included in the invoice, but was not stated in the entry. The appraisers returned the invoice to the collector, noting thereon, "wine, in cases, of 12 bottles each, 2¼ gallons to the case, $1—25%—3 cts." The collector caused the entry to be liquidated as follows: 111 gallons of wine, at $1 per gallon, $111; $96, (value claimed,) at 25% ad valorem, $24; 444 bottles, at 3 cents each, $13.32; total duty, $148.32—exacting a duty of $68.40 in excess of the duty estimated on entry, which was paid under protest, before the commencement of this suit, to get the goods. Each case contained 2¼ standard gallons. The plaintiff made protest and appeal, in due time, against the rate and amount of duty, pursuant to the provisions of sections 14 and 15 of the act of June 30th, 1864, (13 Stat. 214, 215.) The secretary of the treasury having affirmed, on said appeal, the decision of the collector, this action was brought within 90 days after such affirmance, against the collector, to recover $68.40, gold, duty claimed to have been illegally exacted. The invoice did not separate the price of the bottles from the charges, but it was admitted, that the dutiable value of the bottles was at the rate of 20 francs per 100, and, for the 444 bottles, 88.80 francs, being $16.51, in coin. It was admitted, that the 37 cases of claret wine, and the bottles containing the same, were liable to duty, as "wines of all kinds, imported in bottles. and not otherwise herein provided for," under section 21 of the Act of July 14th, 1870, (16 Stat. 262.) The protests were as follows: "New York, May 6th, 1871. Sir: I hereby protest against your assessment of duty at $1 per gallon, and 25 per cent. ad valorem, on certain wine in bottles, (not champagne or sparkling,) imported in the .Daniel Webster, from Bordeaux, and entered by the undersigned for consumption, April 3d, 1871, because, (1.) The act of July 14th, 1870, (section 21,) under which duty is assessed, imposes no ad valorem duty on wines in bottles; (2.) Because the quantity of said wine is fixed under said law at three gallons per case, (owing to the size of the bottles,) but, in estimating the value per gallon, you have taken a less quantity than three gallons, as the contents of each case. thereby increasing the value of said wine per gallon, beyond one dollar, and illegally increasing the rate of duty from 60 cents to $1 per gallon, with the further addition, illegally made by you, of 25% ad valorem. We pay the excess exacted under compulsion, solely to get the goods." "New York, May 13th, 1871. Sir: In addition to the objection named in my protest of the 6th inst., against the rate and the amount of duty assessed by you on my entry of wine in bottles. per Daniel Webster, for consumption, dated April 3d, 1871, I protest, also, against the value of the bottles being included in the dutiable value of the wine, as they pay a separate duty as bottles, and against the inclusion of the price of the consular certificate in said dutiable value. I have paid the amount exacted over 60 cents per gallon duty on said wine, under compulsion, to get the goods."

Edward Hartley, for plaintiff.

Noah Davis, Dist. Atty., for defendant.

SHIPMAN, District Judge. The duties on the merchandise in question were levied under the 21st section of the act of July 14th, 1870, (16 Stat. 262,) which, so far as applicable to this class of goods, is as follows: "After the thirty-first day of December,

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

eighteen hundred and seventy, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say: * * * On all wines imported in casks, containing not more than twenty-two per centum of alcohol, and valued at not exceeding forty cents per gallon, twenty-five cents per gallon; valued at over forty cents, and not over one dollar per gallon, sixty cents per gallon; valued at over one dollar per gallon, one dollar per gallon, and, in addition thereto, twenty-five per centum ad valorem. On wines of all kinds, imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks, but all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart, and all bottles containing one pint, or less, shall be held to contain one pint, and shall pay, in addition, three cents for each bottle."

The first question raised by the protest is, whether this wine in bottles is subject to an ad valorem duty. The statute provides, that "wines of all kinds, imported in bottles, and not otherwise herein provided for," shall be subject to "the same rate per gallon as wines imported in casks, but, all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart, and all bottles containing one pint, or less, shall be held to contain one pint, and shall pay, in addition, three cents for each bottle." I think it very clear, that the words, "the same rate per gallon," refer, exclusively, to the specific duty imposed on wine in casks, and do not include the ad valorem duty. The latter can, in no just sense, be regarded as a "rate per gallon." The rate per gallon is specific, and fixed by the clause regulating the duty on wine imported in casks, at twenty-five cents, sixty cents, and one dollar, per gallon, the specific rate to be applied to each gallon to be ascertained by fixing the commercial value of the gallon. The act then adds to all wines imported in casks an ad valorem duty of twenty-five per cent. These specific rates imposed on wines imported in casks are then applied to wines imported in bottles, but the ad valorem duty is not referred to in connection with the latter. If congress had intended to impose on wine imported in bottles both the specific and the ad valorem duties laid on wine imported in casks, they certainly would have so declared in unambiguous terms. That could have been done by simply, in so many words, subjecting wine in bottles to the same rates of duty as wine in casks. I am satisfied, that the words, "the same rate per gallon," were used only with reference to the specific rate applied to each gallon, and are limited, by plain terms, to that, and that, consequently, the wine in question was only liable to the same specific duty on the gallon as it would have been had the importation been in casks instead of bottles. Lawrence v. Caswell, 13 How. [54 U. S.] 488. The exaction, therefore, of the twenty-five per cent. ad valorem was not warranted by the statute, and the plaintiff is entitled to recover it back in this suit.

The remaining question is, whether the rate of duty levied by the collector on each gallon is the one prescribed by the statute. He required the plaintiff to pay one dollar upon each gallon. The plaintiff insists, that sixty cents per gallon was the rate to which this wine was subject. By the statement of facts agreed upon, it is undeniable, that the total value of the wine in question was $96. There were 111 gallons. The value per gallon was, therefore, less than one dollar; and, if this statement is as correct as it is simple, it is obvious, that sixty cents is the rate of duty which the law applies to each gallon, instead of one dollar, applied by the collector. Now, the statement of facts, after giving the total dutiable value of the 37 cases, including the price of the bottles, and the amount of charges, as $96, states, that "the appraisers returned the invoice to the collector, noting thereon, 'wine in cases, of 12 bottles each, 2¼ gallons to the case, $1—25%—3 cts.'" The collector then proceeded to liquidate the entry. In conformity to the statute, he fixed the number of gallons at three in each case of twelve bottles, in lieu of two and a quarter, noted by the appraisers. The appraisers had evidently given the number of standard or commercial gallons, and the number of bottles in each case, in order to enable the collector to fix the number of gallons which they were to be held to contain, under this statute, for the purpose of levying the duty prescribed. The return of the appraisers showed that each bottle contained more than one pint and less than one quart. By the statute, the collector was to hold them as containing one quart each, and he thus fixed the quantity at three gallons for each case, 111 gallons in all. On this quantity he levied a duty of $111, one dollar per gallon. Obviously, he took the value of the commercial or standard gallon, as noted by the appraisers, which was one dollar, and then applied the value of that gallon to the statutory gallon, as arbitrarily fixed by this Act. There is no pretence that there was any reappraisement or revaluation. The whole process was arithmetical. The noting on the invoice, by the appraisers, of "$1," is of no importance. It was erroneous, and in conflict with the other part of their return. It was based upon the value of the commercial or standard gallon, and was arrived at by taking that as the measure of quantity by which the value of the wine per gallon was to be ascertained, for the purpose of levying the duty. But, the duty prescribed by the statute upon each gallon is to be ascertained by arbitrary rule fixed by the law itself. Nothing can be clearer than that the appraisers took the standard or commer-

cial gallon as the rule of determining the quantity. The number of such gallons in the whole importation was 83¼. The value of the whole importation was $96. Therefore, the value of each gallon was over one dollar. But, applying the rule prescribed by the statute, which declares, that "all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart," this importation contains 111 gallons. The collector so held, in fixing the quantity upon which he levied the duty. But, the value of the whole invoice was but $96. The value of the gallon, upon which duty was to be levied, must, therefore, have been less than one dollar, and, consequently, liable to a duty of only sixty cents. It will be noted, that the value of the whole importation is not only fixed, by the agreed statement of facts, at $96, but the collector, in estimating the amount of the ad valorem duty which he levied, took that sum as the basis of his calculation.

It is obvious, that this plain reading of the statute works neither injustice to the government, nor any unequal discrimination between wine imported in casks and that imported in bottles. It is a fact, within the common knowledge of all engaged in this branch of trade, and equally within the knowledge of congress, when it passed this act, that bottles in which wines are imported do not contain exactly a pint or a quart; that what are called "pints," contain less than a pint, and those called "quarts" less than a quart; and, consequently, the statute, arbitrarily and justly, enacted, that, though, in fact, these bottles might contain less than a pint or quart, respectively, still, they should be held, in the eye of the law, for the purpose of levying duty, to severally hold the full measures which their denomination would indicate. Some such rule is necessary, to avoid the useless trouble of gauging the contents of each bottle. Thus, in importations of wine in bottles of this character, the government secures a duty of about twenty-five per cent. beyond what it would receive by way of specific duty on wine in casks. This is equivalent to the ad valorem duty levied on wine in casks, but omitted on wine in bottles, and shows both the equality and harmony of this view of the different clauses of the Act under consideration.

On applying the statute governing this case to the agreed statement of facts submitted, the conclusion is, that the duties levied should have been on the 111 gallons of wine in the 444 bottles, sixty cents per gallon, making $66 60, and three cents each on the bottles, amounting to $13 32, making a total of $79 92, and no more. The excess which the collector levied over this sum, to wit, $68 40, was illegally exacted, and the plaintiff is entitled to recover it back, with costs. Let judgment be entered accordingly.

Case No. 1,330.

BENTALOE v. PRATT.

[Wall. Sr. 58.] [1]

Circuit Court, E. D. Pennsylvania. May 19, 1801.

MARINE INSURANCE—RECOVERY OF AVERAGE LOSS—EVIDENCE—DEVIATION—USAGE.

1. In certain circumstances it is not necessary, in order to recover an average loss, that the plaintiff should produce the invoice, or prove the prime cost of the goods damaged.

2. It is no deviation, to touch and stay at a port out of the course of the voyage if such departure is within the usage of the trade; but whether the deviation, in point of time, or object, or cause, is within the established usage, is matter of fact, and if proved that the deviation was not within the purposes, and for the objects, authorized by the usage, the insured cannot recover.

[Cited in Hostetter v. Gray, 11 Fed. 181; Hostetter v. Park, 137 U. S. 40, 11 Sup. Ct. 4.]

[3. In an action to recover for an average loss for damage by the sea to goods insured, a survey made by the captain at the port of delivery is not an essential piece of evidence to make out the title of the insured to his indemnity, if he could satisfactorily prove the damage without it.]

This was an action on a policy of insurance on goods in the sloop Polly, from the lading at Providence, in Rhode Island, to the unlading at Baltimore, in Maryland. The goods were valued at £3750 in the policy; the whole subscription was 8000 dollars, of which the defendant had subscribed £100: and the action was to recover an average loss on account of fifteen bales of cotton, (being part of twenty-one bales shipped at Providence) alleged to be wet through, and damaged on the voyage by the sea, winds and weather, &c. [Verdict for plaintiff.]

The following points arose in the course of the trial.

1st. The plaintiff in order to prove the average loss on the fifteen bales, gave in evidence, that the whole fifteen, if undamaged would have sold at Baltimore for dollars 6975 02, but in their damaged condition sold for dollars 4545 70, making a loss of dollars 2429 32.

Rawle, in summing up to the jury, objected that the plaintiff ought to have shown the invoice value, or prime cost of the bales at the port of lading, and then by showing what a sound bale would sell for at Baltimore, and what the damaged bale did bring, to take that proportion and apply it to the value in the invoice; for which only the insurer was liable: thus, if the bale was valued in the invoice at 100 dollars, and being sold sound at Baltimore would have brought 200 dollars, but damaged fetched only 100; the difference between sound and unsound at the port of delivery was one-half, or in other words, a loss of half the value. This applied to the invoice in the like proportion, would make the insurer liable on his own subscription, to half the invoice value, viz. 50 dollars on a

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

bale, and on the whole fifteen 750 dollars; whereas, taking the difference in money between the sound and unsound bales at the market, the loss would be 1500 dollars. This, he stated as the rule laid down in Lewis v. Rucker, 2 Burrows, 1167, and was the settled mode of adjusting average losses.

The fact was, that the plaintiff did not, on the trial, produce the invoice, or prove the prime cost of the goods, nor was any account given of it. Rawle therefore contended, that the jury ought not to take as the loss, the difference between what the sound and unsound bales sold for at Baltimore, and charge the defendant in that ratio on his subscription; because that rule might involve the underwriter in the state of the market, with which he had nothing to do, except so far as to indemnify the insured in the proportion which the loss bore to the estimated value in the policy. Now, as the plaintiff has not produced the original invoice, or insured value, the jury cannot take the proportion between the sound and the unsound cotton at Baltimore, say, a fifth, a sixth, or a seventh, and apply it to the value in the policy, and charge an average of a fifth, sixth or seventh on that value; but will be obliged to take the absolute difference in money at the port of delivery, and charge it to the underwriter, which as is shown in Lewis v. Rucker, [supra,] is a most uncertain and unjust rule. In short, he contended that the plaintiff could not recover.

THE COURT, in charging the jury on this point, gave no decided opinion; but merely stated that though this was the proper rule, and easily applied in the case of Lewis v Rucker, because there, each hogshead was separately valued in the policy, yet, as here the whole cargo was valued together, it was impossible, from the face of the policy, to come at the proportion of loss, which each bale bore to the value insured. That to be sure, there must be an invoice, and no doubt a value affixed to each bale; but as this was a cargo valued in lump in the policy at Providence, it was not certain that the invoice value at India, was the one meant to be referred to in case of an average loss; neither did the court, as at present, consider the non-production of the India invoice, as depriving the plaintiff of his right to recover. That the jury had in proof the difference between the sound and unsound bales at the port of delivery; and unless the defendant could show a better rule, the jury might adopt that, or such other as would do justice.

2d. The insurance was at and from Providence in Rhode Island, to Baltimore in Maryland. From the protest of the captain, and other evidence, it appeared, that he sailed from Providence on the voyage, on the 28th July, and touched at Newport, where he remained several days, and then proceeded; after which, and between Newport and Baltimore, the damage happened. It did not appear why the captain put into Newport, and remained there so long. But several witnesses had been examined on commission, who proved, that going into Newport and remaining there, either to take in lading, or on account of being wind bound, or to procure lading, was considered as in the course of the voyage; and it was the general custom, and so understood, that going to Newport was in the course of the voyage, and no deviation.

Rawle contended, that it did not appear for what cause the captain went to Newport; that he remained there eleven days; that none of the witnesses, except one, had said that going into Newport was discretionary and without some cause, and might be without limitation of time. There was here, then, a plain deviation, and that destroys the insurance. That the usage must be general, well known and defined; Park, Ins. 308; and that this departure was not supported by the usage. Park, Ins. 300, 302.

THE COURT, on this part of the case, told the jury, that several witnesses had sworn that touching and staying at Newport was within the course of the voyage, and so understood by underwriters. Whether the right of going there was restricted to particular causes; whether any such cause existed in this case; whether the captain remained there an unreasonable time beyond the customary allowance; and generally, whether the going there and remaining, were within the custom of the trade, were matters of fact. If they found the deviation within the custom and usage, then it would not affect the policy: but if otherwise, then the policy would be avoided, and the insurers discharged.

3d. But the great question which arose in this cause and very much litigated, was, whether the insured could recover for an average loss, on account of damage by the sea to the goods in question, without proof on the part of the assured, that the captain had caused a survey to be made at the port of delivery, before breaking bulk. It was urged by the defendant's counsel, that the underwriters were not answerable, if the damage arose from bad stowage, or insufficient dunnage, or other unworthiness of the ship, or from the carelessness of the mariners. That it was an indisputable rule that the insured could not recover for losses arising from his own act, or the act of his agents, except for barratry. 1 Emerig. Ins. 364, 678, 680. That as damage by sea water, might arise either from the natural perils of the sea, or from the bad stowage, &c. of the cargo, a custom had been established, by which it was necessary for the captain before bulk broke, to call in two or more surveyors, being experienced persons, usually captains of vessels, to examine the condition of the ship, and after making a survey, to certify whether the stowage and dunnage had been good, or if any damage appeared,

to what cause it was owing. They contended that this custom existed in Baltimore, and that as no survey had been made, the insured could not recover. They cited on usages, Park, Ins. 30, 33, 40, 41, 44, 45, 115, 116, 308; 1 Beaw. Lex. Merc. 75; 2 Emerig. Ins. 100, 103; 2 Burrows, 1226; 1 W. Bl. 417.

In order to establish the custom, a great many witnesses swore, that it was the settled and undoubted usage in Baltimore, for the captain to have a survey made previous to unlading; and that according to the received opinion and practice at the insurance offices, and among insurers and insured at Baltimore, insurance for average loss was never paid, nor considered as recoverable, unless a survey had been made by the captain, and was produced as a document against the underwriters. A number of witnesses, and among others, certain ancient and established insurance brokers of Philadelphia, were examined, who proved the same usage and opinion in Philadelphia. It further appeared, that under the colonial government, and since, under the federal government, the court of admiralty in Philadelphia had constantly issued commissions of survey for that port; and the act of congress, (2 Stat. 109,) was cited, authorizing such commissions. In Baltimore, it appeared the practice was, for the captain to procure the survey to be made, and by persons of his own choosing.

On the other hand, many respectable witnesses, merchants, brokers, and others, and particularly the presidents of two insurance companies in Baltimore, were examined by commission on this point. They agreed that there was a practice in that port such as before described, and, that in cases of average loss, the survey was one of the usual documents called for at the offices, in order to charge the underwriter. But they said, that in their opinion, there was no custom or usage which deprived the insured from recovering for a loss of that kind, if it could be otherwise well proved, merely because of an omission in the captain to make a survey before bulk broke. That a survey made was generally a good piece of evidence for the insured, as it was used to prove that the damage arose not from the ship, but from the seas; and so made less proof or none necessary to show that loss had happened by the perils of the sea. Yet it was always their understanding, that if the insured could otherwise sufficiently prove the damage to have happened by the causes insured against, the want of a survey was no legal bar to their recovery.

On the part of the plaintiff it was contended that such an usage was unreasonable; that the insured, in the relation they stood to the underwriter in case of goods freighted, had nothing to do with the captain or ship owner; all they had to do was to prove the loss or damage insured against: if the captain omitted a survey it was nothing to them; and that there was no such general law of insurance as that now set up, (Park, Ins. 112;) that such port customs as these, were not of general notoriety; the underwriter in Philadelphia could have no view to it, even if it existed; and that in fact it seemed no more than a regulation which took place at the offices in adjusting the evidence of losses, and not a custom adopted by any judicial authority. But admitting such a custom might exist to destroy the remedy of the insured, yet, that it was not proved; on the contrary, the evidence, to say no more of it, left it in equilibrio.

THE COURT, in charging the jury, said, that by the general law, a survey, though to many purposes a very useful and proper document, even as between insurer and insured, was not an essential piece of evidence to make out the title of the insured to his indemnity. If he could satisfactorily prove the loss or damage without, that would be sufficient. The question made here, is, whether, by the usage of the place, and established custom, the production of this instrument, as between insurer and insured, is not essential to the plaintiff's recovery on the policy in question. A custom which is to control or model the rules of evidence necessary to establish a title or claim in a court of justice, to something different from the common or general law, may, possibly, be good; we do not now determine that. But it must be observed, that there is something very harsh in a custom or usage which would not admit of those exceptions to the rule, which necessity or accident would allow of according to the common law. What if a survey should be lost, or the captain should, by death or accident, be rendered incapable of making it? But be that as it may, in order to give to such usage the force contended for, against the insured in this instance, it ought to be clearly made out; its existence, its extent, and its notoriety, should be indisputable. If this had been proved, a case might be raised whether this usage did not make part of the contract, and as it were embodied with it by an implied understanding of the parties, who are always supposed to be privy to, and bound by those general usages which belong to the trade on which the policy is made, though not enumerated in the policy. But the usage contended for, namely, that the neglect, omission or refusal of the master to make a survey, bars the insured from recovering his average loss, though he can otherwise sufficiently prove it, is not established by the testimony. The witnesses differ; and upon the whole there is not, in point of fact, any such usage proved. If you are of this opinion, you will pay no respect to the usage as a bar. Still, however, the insured must prove to your satisfaction, that the loss did happen by the perils of the sea, and not from mismanagement in the stowage or dunnage.

Of this, much evidence is laid before you; and on this point the want of a survey which might have proved the damage not to have arisen from the stowage or dunnage, is some evidence of a negative kind, that the damage did arise from that cause; and in this point of view only you are to consider it, and not as a bar.

The jury found for the plaintiff.

BENTLEY, (DOUGHERTY v.) See Case No. 4,024.

Case No. 1,331.

BENTLEY et ux. v. PHELPS.

[2 Woodb. & M. 426.] [1]

Circuit Court, D. Massachusetts. May Term, 1847.

MORTGAGE—WHAT CONSTITUTES—DEED ABSOLUTE ON FACE—EVIDENCE—STATUTE OF FRAUDS.

1. Where a deed is absolute on its face, it is competent to show, in a bill in equity, that it was a mortgage, by proving confessions of the grantee that it was a mortgage, and that a deed of defeasance was to be given and filed with it, so as to constitute the transaction a mortgage; by proving receipts of money subsequently from the grantor and her representatives, for interest, and in amounts corresponding to interest rather than rent; by possession long after the conveyance retained by the grantor; by the relation of debtor and creditor, admitted to have then and long before existed between them; and by the value of the property being larger than the consideration advanced.

[Cited in Almy v. Wilbur, Case No. 256; Jewett v. Cunard, Id. 7,310; Tufts v. Tufts, Id. 14,233. See, also, Hughes v. Edwards, 9 Wheat. (22 U. S.) 489; Sprigg v. Bank of Mt. Pleasant, Case No. 13,257; Chickering v. Hatch, Id. 2,672; Sprigg v. Bank of Mt. Pleasant, 14 Pet. (39 U. S.) 201; Russell v. Southard, 12 How. (53 U. S.) 139; Rhodes v. Farmer, 17 How. (58 U. S.) 464; Wyman v. Babcock, Case No. 18,113; Babcock v. Wyman, 19 How. (60 U. S.) 289; Graham v. Sheken, Case No. 5,675; Amory v. Lawrence, Id. 336; Andrews v. Hyde, Id. 377; Howland v. Blake, Id. 6,792; Dow v. Chamberlain, Id. 4,037; Jones v. Guaranty & Indemnity Co., 101 U. S. 622.]

2. These are each admissible for this purpose, and are not forbidden by the statute of frauds in such a case.

[In equity. Bill by Thomas Bentley and wife against Abner Phelps to have a deed absolute on its face declared a mortgage. Decree for complainants.

This bill was filed in August, 1845, alleging that Hannah Jones, the mother of the wife of the complainant, was, during her life, seized of certain premises in Boston, on Richmond and Ann streets, containing about four hundred square feet of land, with the buildings thereon; that she was indebted to the respondent Phelps, in the sum of $165, and gave a mortgage of these premises to secure it Sept. 22, 1824; that she paid the same, and in January, 1827, borrowed of Phelps $567, to secure which she conveyed to him, in fee and absolutely on the face of the deed, the same premises, but as then designed and agreed, in mortgage, to secure its repayment and interest thereon quarterly; that in pursuance of this agreement and understanding between the parties to that deed, she continued in possession of the premises till her death, in Sept. 1832; that in the mean time she expended a large part of the $567 in repair of the buildings, and paid the interest thereon quarterly, both parties treating the deed, as stipulated, to be a mortgage, and a mere security for the debt; that after her death, in 1832, Hannah McLean, mother of Mrs. Jones, and grandmother of the wife of the complainant, who is daughter of Mrs. Jones, and her sole heir, and a minor then as well as at the time of filing this bill, took charge of the premises as her guardian and administratrix of the estate of Mrs. Jones; that Mrs. McLean continued to treat the premises as under mortgage to Phelps, and he to receive from her interest on the debt and principal, till, on the 23d of July, 1834, only $450 remained due, as stated by Phelps; that she continued to occupy or receive the rents therefor, and make payments of portions of the interest and principal due to Phelps, till 1841, when he excluded her therefrom; and that the wife of the plaintiff, then a minor, and so in 1843, married him, and since that event they have repeatedly demanded of Phelps to account for the rents and profits, and come to a settlement of the mortgage, and pay any balance due to them, or receive any due to him, and reconvey the premises to her as heir of Mrs. Jones. It was further averred, that Phelps refused to consider the transaction as a mortgage, and to come to any settlement thereof, and, after putting to him several interrogatories, the bill concluded with a prayer that, after answering them, he be required to account for his receipts, and reconvey the premises on receiving any balance due, and also pay over the surplus, if any he may have received.

One answer was put in and excepted to for improper matter inserted by the respondent, and, after amendment, the averments in it, which it is material to repeat, were these: That he loaned to Mrs. Jones $165 in Sept. 1824, and took the mortgage first described in the bill; that in 1825 he loaned her $185.61 more, most of which was expended in repairs of the buildings on the premises, then much dilapidated; that she continued in possession thereof till Jan. 29, 1827, when she owed him $367, principal and interest, and proposed to sell and convey to him the premises for $200 more, making in all $567, which last sum he then advanced to her, and took an absolute deed of the premises; that it was then the full value of them, and the note he held against her was given up; that there was no

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

agreement to treat this last deed as a mortgage, nor had Mrs. Jones any expectation it would be, nor had he ever said it was to be so treated; that Mrs. Jones remained in possession under a written lease to pay $55 per year, rent and taxes, but not otherwise; that she never paid him interest after the conveyance in 1827, but small sums as rent between that time and her death in Sept. 1832, which were indorsed on the lease, and amounted in all to $86.19, leaving a balance due for rent of $248.18, beside the taxes; that in Sept. 1832, after her death, finding her mother, Mrs. McLean, in the house, he consented at her request to let her continue to occupy it, on the same terms, and her promise to pay off as much as she could of the balance due from her mother; that Mrs. McLean paid more than the rent for a few years, and in 1841 she had discharged in all $350.29, which, with Mrs. Jones's payments, amounted to $436.48, leaving $374.76 due on the lease, besides interest and taxes; that he then notified her to quit the premises, which she did without complaint; that he never settled with her, and if he told her the balance due to him was $450, which he denies, it was conjectural, and related only to what was due for rent and on the lease, and not to any other debt, as none other existed; that the real sum then due for rent and taxes and interest thereon was $582.80, and has never been paid, nor any statement made by him to Mrs. McLean or others, that the previous deed was a mortgage, or meant to be; that he never promised to reconvey the premises, when the sum named in the last deed and interest thereon were paid; and that the wife of the complainant came of age before her marriage in A. D. 1832, and is admitted to be the heir of Mrs. Jones, and was under the guardianship of Mrs. McLean. The answer was sworn to.

The testimony printed consisted chiefly of the depositions of Mrs. McLean, Samuel Bell, and Mr. Page, with several receipts and cancelled notes. Such portions of them as are important are referred to in the opinion of the court. At the hearing, the respondent by agreement put in a copy of the original mortgage, and of the subsequent absolute deed to him by Mrs. Jones, and the duplicate of the original lease to Mrs. Jones, with several indorsements therein, which are referred to below.

The cause was argued at this term by John A. Bolles, for complainants, and Bradford Sumner, for respondent.

WOODBURY, Circuit Justice, delivered the opinion of the court. He said that the task of the court in settling the leading facts in this case was embarrassing; not so much from the doubt how the balance of the testimony stands on the face of it, as from the great errors in memory, which the collisions of the testimony disclose, if not some more painful conclusions in respect to portions of the answer. As some apology for the respondent, however, the transaction is one obscured by time, a whole generation having passed since the deed in controversy was given; the only witnesses are also very aged, and some of them nearly related to the complainants; and the respondent himself, after twenty years, would naturally rely more on the written papers as to what the transaction really was, than on any obscure or imperfect recollections of any thing differing from them. Under all these considerations, the case is likely to be surrounded with some doubt in respect to such remote facts; and this would be peculiarly so from various circumstances being not reconcilable with the hypothesis assumed on the one side or the other, and there being two or three important and direct contradictions between the answer and the witnesses. But the latter, beside their number, seem the most strongly sustained by some of the written documents. These last are less forgetful than men; less open to improper influences; and if tampered with, less able to conceal it; and the facts compel me to say, that they tend in the main directly to support the positions of the complainants.

An analysis of the evidence will show how this matter really stands. The material facts admitted should be distinguished from those which are controverted, as the former alone possess much weight independent of the others. Those which are material in deciding, whether the deed of 1827 was intended to be a mortgage between Mrs. Jones and Dr. Phelps, and which are admitted on both sides, consist, first, of the continued possession of the premises by Mrs. Jones or others under her, from that time till her death, in 1832; and a like possession by Mrs. McLean, the guardian of her daughter and heir, from that time till 1841. Next, it is the relation of borrower and lender, which had existed between these parties from 1824 up to the date of that deed, if no longer. Finally, it is the exercise of all acts of ownership by Mrs. Jones and the guardian in letting the premises to others, or making any temporary repairs from 1827 to 1841; and the absence of any by the respondent, except the lease to Mrs. Jones for one year at the commencement of A. D. 1827.

The next material facts controverted will next be considered. They are, 1. The value of the property in 1827 as compared with the consideration set up for a sale, whether much more or not. 2. The payment of money to the respondent by Mrs. Jones and Mrs. McLean, and the receipt of it by him during that period, whether as interest on a mortgage or rent on a bona fide lease of what he had bought absolutely. 3. The actual execution of a defeasance to Mrs. Jones in 1827, with a view of making the deed from her a

mortgage. 4. The admissions by the respondent or not, that it was intended to be a mortgage, and was so considered by him, as well as by Mrs. Jones and Mrs. McLean. 5. The continuance of the relation of borrower and lender even in and after 1827. Now, in respect to these controverted facts, there were generally on the side of the respondent no witnesses and no evidence, but his own oath in his answer; and it ought to be added, some prima facie presumption in his favor which arises from the face of the deed and lease, and of a few of the receipts. But it is to be remembered, that the written papers of the grantee belonging to the transaction itself, and more especially the deed, are not in a case like this to possess the controlling influence, which is imparted to them in regard to most other contracts. Because the truth of the face of the deed is the very fact in controversy, and if its face be at all conclusive, no mortgage would in any case be allowed to be proved either by other writings or by parol independent facts in pais in chancery, any more than at law.

It is well settled, however, that in chancery, as this case now is, the parties are allowed to show by parol as well as other writings, notwithstanding the conveyances are absolute on their face, such other facts as may render it probable a mortgage was intended. And hence it follows, that the form of the papers makes only a prima facie case, and is not to stand against other facts, which satisfy the court, that in reality a mortgage between the parties was probably contemplated. The parol evidence is thus allowed, not to show here, that the deed was made absolute by mistake or accident, when it was meant to be conditional; but that it was by design made absolute, while in truth the real transaction as a mortgage was thus intended to be concealed or covered up, or be left to a separate defeasance. And the other party undertakes to show this from separate writings, or from certain independent distinct facts and doings between the grantor and grantee, which courts of chancery will consider and give to them their due weight in conjunction with the written evidence of the deed the other way, and the oath of the party and any thing else corroborative on his part. This course does not conflict with the statute of frauds, when it proves other written papers making the deed or mortgage, or adduces independent facts which show the face of the deed to contain a mistake or a fraud, or not the whole truth.

The first material controverted fact is the value of the premises compared with the debt or sum advanced. The only testimony on this for the respondent is from himself in his answer. It is that the sum due to him was $567, equal to the full value of the premises at that time. There is no other proof, except his oath and the consideration named in the deed, that Mrs. Jones then even owed him so much as $567, by $150 or $200. The previous notes and advances fall short of this consideration to that extent. and no note or receipt, or witness, except as aforesaid, shows any thing either more or less. The bill in this respect, and in one or two others, varies from the proof, though not so as to require amendment. Inclining on the weight of the testimony, however, to hold that the true sum was $567, for the purpose of this inquiry, and to be composed of $367 old debt, and $200 new, there is the positive testimony of two witnesses against his answer as to the value being no greater. They show that this sum was not equal to more than half or one third the value of the premises. Mrs. McLean had bought them ten or twelve years previous, and given $1300 for them. Mrs. Jones had in the year before this conveyance expended on them in repairs $180 more, with money borrowed of Phelps. Before those repairs, Mrs. McLean testifies they were worth $1300, and are now, A. D. 1846, worth $1600 to $2000; and Mr. Bell swears they are now worth $1000. From all this, however meagre, compared with what could be proved on either side, and probably would be, if this was not correct, little doubt exists, that in 1827 the premises were worth from twice to three times the consideration paid; and this fact, therefore, raises a strong presumption in equity that the transaction was a mortgage, and not an absolute sale. One party will not readily be presumed so foolish as to sell outright for half or one third what his property is worth; nor the other so unconscionable as to buy at that depreciation, when other circumstances combine with this to render the sale a mortgage, and thus make both behave naturally and justly.

But there is another piece of testimony still more striking connected with the income derived from this property, and thus showing something as to its true value. Beside the land, which has been made in argument the basis of its value, buildings existed, which were rented by Mrs. Jones for $120 a year once, by Mrs. McLean for $200 once, $175 once, and $150; and by Phelps once at $156. Now the value of this rent would be not merely the four hundred feet of land, but buildings, which, though old, had been well repaired by the money borrowed of Phelps, and rented at the rate of six per cent. on a capital of from $3200 to $2400. This is subject to some deductions for insurance, taxes, &c., but still increases the improbability of an absolute sale for $567, of what cost near twenty years before $1300, and yielded a rent at least equal to six per cent. on more than $2000. On the hypothesis that this was an absolute sale, Mrs. Jones parted with premises for a sum, whose interest was only $34.02, which yielded her an interest or income at that time at least of $150 yearly, or from four to five hundred per cent. more. But supposing it was done in the form of

an absolute sale merely to secure the payment of her debt and interest, and to prevent any creditor of hers from attaching the equity of redemption, as Mrs. McLean testifies Phelps admitted to her, and the transaction becomes more natural and explicable on ordinary principles; and is another piece of corroborative testimony, that the equity of redemption was considered worth something, and the sum loaned by no means equal to the value of the premises; otherwise, a resort to this course to prevent attachment would not have been thought necessary.

The next controverted fact as to the subsequent payments, whether for interest or rent, is very material, because, if actually paid and received as rent, it would indicate that an absolute sale had been intended to be made. Whereas, if the payments were for interest, they would furnish strong evidence that a mortgage was understood to be existing, and meant to exist rather than a sale. The very first payment which appears in the evidence to have been made by Mrs. Jones, was Aug. 6, 1827, or about seven months after the deed was executed, and is stated by Phelps and entered originally on the back of the duplicate lease in his possession, without saying whether it was for interest or rent. I say originally, not merely from the appearances of the paper, the color of the ink, and the punctuation, but the positive evidence of three witnesses, who are experts as to handwriting, and are contradicted by none on the part of the respondent, but are sustained by the appearances on the paper just referred to. Such alterations may have been made at the time and by assent of parties, and different colors in the ink may exist in the same writing, by dipping a pen deeper. Hence I did not and do not now think it expedient to decide such a question without proof dehors. That proof is very direct and strong. The apparent alterations, too, are all in such parts, and such only, as to affect this question in dispute; and however disagreeable it may be to find this matter unexplained, my duty is now merely to follow where the positive evidence requires me to go. This evidence is, that a manifest alteration has since been made in this first written receipt by some person, adding the words "rent" and "lease." So in the next receipt on the 8th of October, neither "rent" nor "interest" was named in that originally, but these witnesses testify that "rent" has since been added. So again in the receipt of Jan. 15, 1828, and July 29th. Again, the receipt on the 29th of April, 1830, was originally "interest to this date," which it is proved has been erased, and "rent three dollars" added. And Oct. 29, 1830, "interest" was in the receipt at first, and has been since erased and "rent" substituted. It is not very probable that these additions and these erasures have been made for any purpose than to prevent the inference, which would arise from them as they stood originally, that the deed and lease had been a mere mortgage in design, to secure the debt and interest. If meaning otherwise, it is probable that the receipts would have been originally in terms for rent, and rent alone; and not as they were, in no case, for rent, but in two of them expressly, ipsissimis verbis, for "interest."

It is not shown, that any person had a motive to make these alterations but the respondent, and the receipts have been in his possession till produced in court. Apparently, and such is the evidence, they are alterations of a subsequent date to the original entry, but in the same handwriting. The court do not decide on the author of them, or the guilt of them, in this collateral inquiry, for it is possible they were afterwards made by consent. But there is no such proof, and it is enough to say here on the proof which exists, that as the receipts appear to have stood originally, they furnished strong evidence that the payments made by Mrs. Jones were as "interest," and were so received by Phelps, and are thus a species of evidence, and written evidence, very decisive that the relation of mortgagor and mortgagee was understood and meant by both parties to continue between them.

Another circumstance connected with these payments by Mrs. Jones, showing them to have been for interest, is that the nominal rent reserved in the lease was $55 per year, whereas the interest on the $567 she is claimed to have owed Phelps in January, 1827, is only $34.02; and on examination it will be found that it was near the amount of interest, and not of the nominal rent, which she paid yearly till the payment stopped in the latter part of 1830. They exceed the amount of interest only small fractions, which were probably added for not being made punctually at the end of each quarter. The difference between that and the nominal rent reserved yearly is about twenty-one dollars, or over one third the whole sum, and is hence the more striking as a payment in reference to interest rather than rent. Beside this, a quarter's interest is eight dollars and a fraction, whereas a quarter's rent would be $13.75; and the last sum is not in one instance out of the eleven payments made by Mrs. Jones the amount paid, or any thing within three to four dollars of it, while in six or seven of the eleven payments, the amount was eight dollars and a fraction, differing only a few cents from a quarter's interest, but falling short of a quarter's rent about five dollars in each of those cases.

Following the payments further after the death of Mrs. Jones, the same evidence exists in some respects that they were made for interest, with some additional corroboration of it, and on the contrary with some counter data. Thus Mrs. McLean within a few days after the death of Mrs. Jones, testifies that she called on Dr. Phelps as to the premises, and he admitted they were held as mere security for the payment of the principal and

such interest as Mrs. Jones had not paid. When these were satisfied, he was willing to reconvey them. He assented to her continuing to occupy them as Mrs. Jones had; and she thereupon did occupy them, and at once commenced making payments on what she considered the mortgage debt. Dr. Phelps, in his answer, denies so much of Mrs. McLean's testimony as relates to there being any mortgage, and insists that Mrs. McLean was to remain there as if under the lease to Mrs. Jones, continued to her, and on her undertaking to pay also the arrears of rent due from Mrs. Jones, and not the arrears of the mortgage. In this conflict of testimony on these points between the respondent and Mrs. McLean, it will be necessary to turn to the written evidence between them as supporting either.

The very first receipt to Mrs. McLean, Sept. 12, 1832, the same month her mother died, is "$14.50 towards the interest." This receipt has been in her possession, and has no appearance of alteration, and is strong evidence of a mortgage. But the next one, Oct. 29, 1832, is for $32.50, "being the last quarter's rent, and the rest on the debt due." This is the first mention of rent originally in a receipt, since the deed was given in A. D. 1827; but this is accompanied by the expression of "debt due." This last expression would be evidence of a mortgage debt being thus recognized, if Dr. Phelps did not insist it referred to the debt due from Mrs. Jones for rent. Mrs. McLean, however, testifies it was the debt due on what she considered as secured by the deed of 1827, and which Phelps told her was meant to be a mortgage. She is fortified in her position not only by the first receipt having been for interest, but by the third receipt, Jan. 19, 1833, which is $7.50, "the interest, and the rest $8 on the debt," the word "interest" not applying to rent, but to interest on the mortgage, and the debt named in connection with it being probably the mortgage debt. The amount paid for interest strengthens this view, as being quarterly it would far exceed the amount of interest on Mrs. Jones's arrears for rent, even as computed by Dr. Phelps at $248.18, principal and taxes, and would approach near to the interest on the original debt of Mrs. Jones for money borrowed, considering that a part of the principal had been discharged by Mrs. McLean. The amount of principal so discharged by her within a year and a few months appears to have exceeded $100, leaving only about $467 debt, the interest on which quarterly would be a fraction over seven dollars. Accordingly, as a remarkable verification of her statements, we find in five or six subsequent cases, that her payments amount to seven dollars each and a fraction, or fifteen dollars and a fraction, apparently to cover in the first instance one quarter's interest on the mortgage debt, and in the second instance, two quarters, but not at all agreeing with the position taken by the respondent as to rent. During 1833 and part of 1834, some of the receipts speak of interest alone, and some of interest and debt, some rent and interest, and some rent alone. But on July 23, 1834, Dr. Phelps gives a receipt in a still more striking form for a certain amount, "being the interest and $14 on the principal, which leaves now due me $450." This indicates in its terms a mortgage debt most strongly, and agrees with what would then be the amount of that debt, reduced as before mentioned, and not with any debt of Mrs. Jones for rent alone.

Furthermore, Mrs. McLean testifies it was given on her request to have a statement of the amount due on the loan to Mrs. Jones, secured by mortgage. Numerous subsequent receipts to Mrs. McLean are all for "interest" or "interest and principal," or "rent and interest," or "principal," or "rent or interest," considering it the same in at least three of the receipts. They continue down to 1839, and as the principal debt had become still further reduced, the quarter's interest is only $6.50, or $6.25, instead of $7 and a fraction, or $8 and a fraction, indicating in this way again, that the payment was not as a mere tenant for a fixed rent as rent, but the payment of interest as a debtor, or for a debt, and hence varying in amount as the principal debt varied. It is also a remarkable circumstance, that not one of all these payments during fourteen years corresponds in amount annually, semi-annually, or quarterly with the nominal rent reserved of $55 per year, or with the $100 per year, nearer its true value as rent, but most of them correspond with the interest on the mortgage, indicating that as the guide and standard in the minds of both parties.

The next controverted fact bearing on the question, whether the deed of January, 1827, was intended to be a mortgage, is the actual execution of a defeasance in writing testified to be admitted by Phelps, to have been made and filed away with the deed, so that in case of his or Mrs. Jones's death, written evidence of the designs of the parties might exist. In relation to this fact, there is on the one side the denial of Phelps under oath, and against it the express testimony of Bell and Mrs. McLean, as to Phelps's positive statements to that effect in detail.

It may be proper to say here, once for all, that since Mrs. McLean's near relationship to the complainants would cause her evidence to be scrutinized more closely, and especially where it was contradicted by other evidence from persons not related to the opposite party nor interested, her evidence might in such case require corroboration from others in order to deserve full credit. But here she is contradicted only by the party in interest, and is fully sustained by another witness. In relation to her and Mr. Bell, as persons advanced in life, and hence excepted to as being more frail in memory, it is certain that as to recent transactions,

such persons notice them less and think of them less, than events in early life. But if, as in this case, they are not deaf so as to prevent hearing, and took a deep concern as in a matter like this, interesting to them and their near friends, and profess to remember it, the confidence due to them is not to be diminished on account of their age, and should in some cases be greater, from their nearer approach to future accountability for false swearing, though not actually in articulis mortis. I am bound then to believe them in this as in other parts of their evidence, where their recollections are distinct and positive, and not impugned by any other witness, but merely by the party in interest, and sustained as they are by most of the receipts and other facts. Carpenter v. Providence Washington Ins. Co., 4 How. [45 U. S.] 185.

It must be considered proved, that this deed, though absolute on its face, was made actually a mortgage by a written defeasance. Whether it was sealed or not, or bore date with the deed, or was formally delivered, is not very material in equity, however it might be in law. See Shapley v. Rangeley, [Case No. 12,707;] Brown v. Brown, [Id. 1,994.] But beside the admissions of Phelps as to the existence of such a defeasance, there are others in respect to the deed in 1827 having been a mortgage, testified to not only by Bell and Mrs. McLean, but by Page. The latter, learning that the respondent had obtained a title to the premises, and wishing to purchase them, called on him for that purpose, after Mrs. Jones's death; Phelps explained that she had been indebted to him, and wanted more money, and he declined letting her have it without an absolute deed, which she gave, but if "they paid the interest promptly, he did not feel that he had any moral right to sell." If they did not, he should, but declined selling then. This not only shows a substantial admission to Page, such as he made again and again to the other two witnesses, that the transaction was a mortgage in a moral or equitable view, but admits that the character of a loan belonged to the money advanced in Jan. 1827, as well as before. All the receipts for interest also indicate this strongly. Again, Phelps was not a person wanting to buy in 1827, any more than in 1824; but when hearing that Mrs. Jones wished to borrow, he called on her to lend to her the money, as Mrs. McLean testifies. So in 1827, his was rather the character of a person willing to lend more, and actually doing it, on having the security for it put in a form more safe and acceptable to him. This fact is usually one of the great touchstones, whether a deed was really meant to be a sale or a mortgage. See 3 Pick. 483; Eaton v. Whiting, Id. 491.

Having gone through with this analysis of the testimony on what is material and controverted, it may be remarked generally, that in chancery money transactions are by means of such evidence considered as mortgages, which are not always so at law. On this see 4 Mason, C. C. 444, [Picquet v. Swan, Case No. 11,133;] Flagg v. Mann, [Id. 4,847;] Shapley v. Rangeley, [Id. 12,707;] Almy v. Wilbur, [Id. 256;] 3 Pick. 490; Jenkins v. Eldredge, [Case No. 7,266;] Kelleran v. Brown, 4 Mass. 444. And furthermore, that the objection of the statute of frauds does not apply to any of this evidence which is in writing, or which goes to prove by parol, either independent facts and not mere contradictions of the deed itself, or loss of papers, or fraud.

Our course is next to review and discriminate what particular facts are admitted or satisfactorily proved, which tend to show that the deed of 1827 was actually intended by the parties to be a mortgage, and which are by adjudged cases deemed competent for that purpose in a court of equity. 1. A defeasance was written and lodged with the deed, in order to evince and secure that effect in case of the death of either party. And the form of an absolute deed was said to be adopted not because the premises had been sold, but because the equity of redemption might be attached by creditors of Mrs. Jones, if it appeared on record as a mortgage. That such evidence is competent in chancery, as tending to show not only the existence of a defeasance but its loss, either by accident or fraud in not producing it, the cases are numerous, and even go to the allowance of proof of a promise to give such a defeasance, and the presumption of fraud or accident if it was not done. 1 Pow. Mortg. 120, note; Joynes v. Statham, 3 Atk. 389; Taylor v. Luther, [Case No. 13,796;] 2 Sumn. 528, [Flagg v. Mann, Case No. 4,847;] 4 Kent, Comm. 143; 1 Paige, 48; 9 Wend. 237; Jenkins v. Eldredge, [Case No. 7,266;] 4 Russ. 425; 4 East, 577, note; 2 Jac. & W. 182. The greatest doubt under this head is in cases generally whether the agreement to reconvey in a certain event was intended to make the transaction a mortgage, and was evidence of its being so; or was a mere special contract to reconvey on condition, and hence not binding unless the condition was strictly performed. If there had been no previous loans between the parties, and the case grew out of a treaty to sell and buy, or the conditional agreement was of subsequent date, the case is usually not a mortgage. [Conway v. Alexander,] 7 Cranch, [11 U. S.] 237. But if these, or other strong facts are the reverse, as here, the inference is in favor of its being a mortgage. 10 Sim. 386; 3 Jur. 1186; 5 Jur. 114; 4 Kent, Comm. 143.

2. The next special fact thus proved or admitted, and very material in this inquiry, is, that the parties stood here in the relation of lender and borrower, both before and at the time of the execution of the deed in 1827. Such a circumstance is deemed very decisive in a court of chancery, that the transaction

was meant to be a mortgage. Flagg v. Mann, [Case No. 4,847;] 1 How. [42 U. S.] 318; 4 Johns. Ch. 167; and other cases in Hunter v. Marlboro, [Case No. 6,908;] Co. Litt. 204, b, and note. Her first application, in 1824, to a broker, and afterwards to Parkman, was not to sell the premises, but mortgage them; and his intention had never been to buy, but to make loan after loan, till beside a mortgage at first for what was then advanced, he proposed not to buy, but to take an absolute deed to secure the whole, making, as he averred, a defeasance back, and lodging it with the deed for her security as to the right of redemption. Morris v. Nixon, 1 How. [42 U. S.] 118. Whenever the deed is in fact security for a debt, courts are inclined to consider it a mortgage. Porter v. Nelson, 4 N. H. 130; Longuet v. Scawen, 1 Ves. Sr. 406; 4 Kent, Comm. 158; 3 Pick. 483, 491. The only doubt as to the force of this point is the surrender to Mrs. Jones of her notes, and the taking of no new one, or a bond, or covenant to pay the money advanced and due. But if a transaction be shown to have been a mortgage, a suit lies for the debt, though there be no note, or bond, or express covenant to pay it. 1 Pow. Mortg. 16, note; Id. 374, note; King v. King, 3 P. Wms. 361. It rests on the whole evidence, showing it to be a mortgage; and if a right to redeem exists, there is a correlative right to enforce payment, and treat the case as a debt thus secured. But if, vice versa, from the nature of the transaction, there is no loan, no debt, no borrowing, then there being no debt, there is no mortgage, and no action lies to recover a debt. [Conway v. Alexander,] 7 Cranch, [11 U. S.] 237. I speak now, of course, of moneyed considerations in deeds and between the parties, and not mortgages to secure against contingencies or liabilities as bail, or surety, or covenantor. Nor do I include what are called Welsh mortgages, because there the mortgagee enters at once and takes the rents instead of interest, and is by agreement or distinct understanding to have no remedy for the principal. 1 Pow. Mortg. 374, note; Patch, Mortg. 22, 29; 3 Atk. 280. But he agrees merely to reconvey on its payment. Coop. 189; 5 Brown, Dec. 275.

It is true likewise, that it must have been a mortgage at first, or ab initio, and not by any subsequent parol agreement. 1 Pow. Mortg. 116, note; Id. 125; Price v. Perrie, Freem. Ch. 258; Copplestone v. Foxwell, Id. 150; Vernon v. Bethell, 2 Eden, 110. This case was of that character, confessedly on both sides at first, in 1824. And if once a mortgage in any way, no subsequent or collateral agreement to prevent a redemption is allowed to bar it; as once a mortgage, it is always a mortgage until a foreclosure, regular and designed as one. 2 Vern. 520; 1 Eden, 59; 7 Ves. 273; 4 Ves. 350. Most of the controverted cases in the books relate to such as where the sale may have been conditional, but not conditional as a mortgage, without raising the question, whether there was any debt. 1 P. Wms. 270; 3 P. Wms. 360; 1 Ves. Sr. 406; 2 Atk. 496; 2 Ball & B. 278. That, however, is not the point here; the sale here being clearly absolute, if it is not a mortgage. In such cases, seldom if ever, would the grantee be compelled to resort to a suit for the debt, as the very transaction usually implies that the land is worth more than the debt, else the form of an absolute sale would not be resorted to, so as to try to prevent a redemption. But if the premises actually prove to be worth less than the real debt, and all the facts indicate the deed to have been a mortgage, and so understood by the grantor as well as the grantee, I see no good reason on principle, except in the case of Welsh mortgages, why the grantor as mortgagor should not be liable to pay any balance not discharged by the value of the land. 1 Pow. Mortg. 373, note; Robinson v. Cropsey, 2 Edw. Ch. 138; 2 Ball & B. 274; Kelleran v. Brown, 4 Mass. 444.

3. The next material fact proved here, and which bears strongly on the question, whether the deed of 1827 was intended as a mortgage or not, is, that the value of the land and buildings was, on all the evidence, double if not treble the consideration or debt due from Mrs. Jones. This has before been illustrated both by the prices given for them, and the opinions of those well acquainted with them, and also the rents actually paid to Mrs. Jones, Mrs. McLean, and in some cases to Dr. Phelps. The law is very clear, for reasons before stated, that such a fact is very decisive to show the transaction must really have been meant not to be an absolute sale. 4 Blackf. 99; Lewis v. Owen, 1 Ired. Eq. 290; Morris v. Nixon, 1 How. [42 U. S.] 118; Hunter v. Marlboro, [Case No. 6,908;] Conway's Ex'rs v. Alexander, 7 Cranch, [11 U. S.] 241; Co. Litt. 204, b, note.

4. Next to this in importance is the fact of the possession retained so long by the grantor and her heir after the sale. Remaining in her one year under a lease would in some degree for that year explain and obviate the inference that it was not a sale, if the lease had been for an amount of rent looking bona fide and real; that is, $150 to $200, the rate it had usually been leased for to others. But it was for only $55 nominally, and only about $34 per year was paid for the first two or three years, and after that still less. This possession was continued likewise for fourteen years by Mrs. Jones and her mother, without any renewal in writing; and the entire control over the premises was thus long exercised by them, and no payment of over $34 a year, being about the amount of interest on the debt and little over half the nominal rent, and only one fifth of the real value of rent. During several years the payments varied but little from the true amount of interest on the original debt. The possession after this formal sale and this payment

of no higher rent than the interest on the original debt, are very decisive evidence that there had been no intention on either side to treat the matter as an outright sale by one and purchase by the other. Nor is there the least danger to the community in such a construction. For it puts the trust estate in the person occupying, and thus the apparent owner, and deceives nobody where the rights all remain in the original parties and their heirs, as here. If third persons acquire interest without notice of secret trusts, that gives rise to different considerations and new equities, especially in respect to personal estate. But as to real estate in this country, where registries exist for notice, they as to third persons are the best guide. 14 Serg. & R. 333; Leland v. The Medora, [Case No. 8,237.]

5. In connection with this is another fact just adverted to, not only that interest on the debt was the amount paid quarterly or yearly, and not so much as the rent named, or one fourth of the real value of the rent, but it was paid and receipted for in writing as "interest" and not as "rent" at all, till after Mrs. Jones's death, and then oftener under the name of "interest" than of "rent." All the evidence on this has been explained at length, and the attempt to obviate the force of it in some degree by alterations proved in such receipts as remained in the respondent's possession from the word "interest" to "rent" in some cases, and in others adding "rent," where the word did not exist before, evinces the importance attached to this written confession of the true relations which existed between the parties. These are pregnant confessions, that the actual transaction originally was considered by both parties as a mortgage. Finch, Prec. 517; 1 Madd. Ch. Pr. 517. They are in writing likewise, and thus obviate any objection as to the statute of frauds. 1 Johns. Ch. 273; 16 Mass. 621; and various cases in Hunter v. Marlboro, [Case No. 6,908.]

6. There are also various confessions of Phelps testified to, and satisfactorily substantiated by the evidence, that the transaction was meant to be a mere security for his debt.

7. Finally, his written memorandum given to Mrs. McLean in 1834 of the whole debt due to him, and which, in the ordinary meaning of the words after the other proof in this case, must be considered as including what remained due on the original consideration of the deed of 1827, indicates the whole affair to have been a mortgage. Nor could this memorandum apply to any other debt accurately, such as the arrears of rent, they being then a sum much less. But it corresponds nearly with the principal of the mortgage debt. So the payments made by Mrs. McLean seem to have been applied to the mortgage debt, and were not on any other claim as now set up, else the mortgage debt in the principal of it would not thus have been reduced about $100. Some blotting of the word "four" before "hundred" in this memorandum, supposed to be made since the paper was filed, led to some discussion and testimony, but it is not deemed by the court so important to a correct decision of the case as to enlarge on it. But that the word was in fact four and not five when filed, all the evidence combines to show, and Mrs. McLean swears it was made so originally by Dr. Phelps himself. Nor is it possible to reconcile the reduced amount paid for "rent or interest," as the principal of the debt was reduced, except that both parties understood the real rent to be paid to be graduated as interest on the original principal, and to fall as that had been in part discharged by Mrs. McLean, and not some other debt or principal for arrears.

Enough of this analysis of the particular facts proved or admitted which are competent, and which in equity entitle the plaintiffs to judgment. Before closing, it may be added, that there is one prominent reason running through the whole transaction, which requires a court of equity to look on it with jealousy, and to protect the wife of the complainant and her mother, in case of doubt, from any imposition or loss. The mother was a widow, the daughter a minor as well as fatherless, and her guardian another widow. They must be unskilled in business compared with the respondent, a man, and familiar with and attentive to it. One strong proof of this is the evidences of payments by Mrs. Jones being all left in his possession, and on his copy of the lease, instead of being, as they should have been, in her custody. He too was a money lender, and Mrs. Jones a borrower; she needy and dependent, and he possessed of considerable wealth. This property, by the evidence worth at least from $1000 to $1500, under these circumstances goes into his hands for the payment or security of only $565. Considering it as being then, on all the facts and law of the case, as security and by way of mortgage after 1827, as it confessedly was before, the decision would still yield to him all his principal and interest, and require from the complainants the full payment of every thing they owed. To do more would evidently violate the original agreement of the parties as proved and admitted, and hence violate the law; and for no purpose, but to give the respondent much more than his debt, and take from some helpless women much more than they owed. Let the deed of 1827 be treated as a mortgage, and an account be taken by a master of what was due to the respondent, deducting rents, and profits and part payments, and allowing interest, permanent repairs, and taxes paid.

[For subsequent opinion denying defendant's petition for a rehearing, see Bentley v. Phelps, Case No. 1,332.]

Case No. 1,332.

BENTLEY et ux. v. PHELPS.

[3 Woodb. & M. 403.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

EQUITY — REHEARING — NEWLY-DISCOVERED EVIDENCE — NEGLIGENCE — OBJECTIONS WAIVED — MORTGAGE—PROOF OF DEFEASANCE.

1. A rehearing should be allowed in equity for reasons sufficient to justify a new trial at common law, but in general only then. If it be asked so as to open the case and offer new evidence to one of several points, the evidence must not have been known and have been neglected to be used.

[Cited in Tufts v. Tufts, Case No. 14,233; Giant Powder Co. v. California Virgovit Powder Co., 5 Fed. 201.]

[See Ready Roofing Co. v. Taylor, Case No. 11,613.]

2. Nor is it sufficient ground for a new hearing, that some of the evidence put in on the other side to that point, was not specially referred to in the opinion of the court, if it was argued by the counsel on both sides and considered by the court.

[Cited in Tufts v. Tufts, Case No. 14,233.]

3. If it be probable that on a new hearing and new evidence, the value of certain property might be shown to be less, and that question is important to one of the points in the case, it will be no ground for a rehearing, if the evidence was not before offered from negligence, and if there are other points which decide the case independent of this one, to which the new testimony relates.

4. In a bill in equity that avers a deed to have been a mortgage, it is not necessary to add that it became so by a defeasance, in order to let in proof of a defeasance, and if this point were doubtful, the objection should have been taken at the hearing, and being omitted, it furnishes no sufficient ground for a rehearing.

[Cited in Tufts v. Tufts, Case No. 14,232.]

[See U. S. v. Moreno, 1 Wall. (68 U. S.) 400.]

[In equity. Bill by Thomas Bentley and wife against Abner Phelps to have a deed, absolute on its face, declared a mortgage. Decree for complainants. Defendant petitions for a rehearing. Denied.]

This was a petition for a rehearing in a bill in equity decided between these parties at the last term of this court. [Bentley v. Phelps, Case No. 1,331.] Reference may be had to the report of that case for the statement of the facts and the opinion of the court thereon.

This petition assigned as grounds for a rehearing, the following: 1. That the deed in the other case between Abner Phelps and Mrs. Jones, mother of Mrs. Bentley, made in January, 1827, was declared by the opinion to be a mortgage, and Phelps ordered to account for rents of the premises, when it ought not to have been so declared. 2. The bill in the case aforesaid does not aver the existence of any defeasance, making said deed a mortgage, when it is absolute on its face, and consequently that evidence in relation to any defeasance should not have been considered by the court. 3. That the evidence offered to show the value of the estate described in the deed of January, 1827, at the time of its conveyance, was indefinite and uncertain, except that of K. Page, and that his showed its value not to exceed the consideration in the deed. 4. That the judge who heard the other cause stated that no testimony as to the value of the premises on the part of Phelps was put in, except what appeared in his own answer, whereas he was corroborated by the testimony of K. Page, (a witness called by the plaintiff.) 5. That the books of the assessors of the city of Boston appraise said premises at a less sum than the consideration of the deed, and can be adduced in evidence, if permitted, on a new hearing.

The respondents, Bentley and wife, appeared and filed an answer to this petition, stating among other things: 1. That the original bill contained an averment that the deed before named was intended to be a mortgage, and that under such allegation the evidence as to the admissions of a defeasance by Phelps was competent, and if not so, the objection should have been taken at the original hearing. 2. That the testimony as to the value of the premises, offered by Bentley and wife, having been sufficient to be considered and argued, it cannot now be objected to for uncertainty, and more especially as Phelps on that point offered no evidence whatever. 3. That the valuation by the assessors is not competent testimony, and if it was, Phelps should have offered it before the former hearing, and because, if newly discovered, and otherwise competent, it is merely cumulative, being on a fact which has already been in issue. 4. That Phelps having delayed for more than two years to offer any evidence in the former case, he ought not to be allowed to submit any on a rehearing. 5. That this motion is made for delay.

The petitioner then filed his affidavit in support of the matter set out in his petition, and among other things, added the names of two of the assessors in A. D. 1826–7, and the belief of the petitioner that one of them would testify to the value of the premises being not over $300, and the rents which could be collected not over $30 a year, and the other to its value at $200, and that Mrs. Jones gave them to understand in the latter year, that the estate had been conveyed to Phelps, and that accordingly the entry was changed on the books from her name to his, and that his impression is they both will testify so, not from positive recollection, but belief derived from books and records and their course of business. He further states in his affidavit several supposed reasons for the low value then, and the rise and the ap-

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

praisal afterwards, which has been as much or more than any witness swore at the former hearing. The respondents, Bentley and wife, put in no affidavit or other testimony as to this petition, except the first answer of Phelps to the original bill, which answer had been withdrawn and another substituted, and in which first answer Phelps stated his knowledge at that time of the low valuation of this property in the assessor's books, and that it was a custom to assess property at only half its real value.

B. Sumner, for Phelps, and J Bolles, for Bentley and wife

The petition was fully heard at this term by WOODBURY, Circuit Justice. The grounds set out in this application for a rehearing, are five in number. They are not sustained by any evidence offered by the petitioner, except his own affidavit. But taking it for granted that his affidavit states the truth, it is necessary to examine how far any good reason is shown there for another hearing of the original cause. I say good reason, for though some cases regard a rehearing as a matter merely of discretion in the court, and not a right of the party,—Daniel v. Mitchell, [Case No. 3,563;] Emerson v. Davies, [Id. 4,437,]—yet I should be sorry to have any suitor go from this tribunal without allowing him as full an opportunity to be heard as the law permits, and while any new and material light is likely to be flung on the controversy. Whether from his affidavit there exists a probability of obtaining more such light here, is the inquiry. If this probability is made out on proper facts and principles, the discretion of the court should be exerted in favor of the application. Hunter v. Marlboro, [Id. 6,908;] Doggett v. Emerson, [Id. 3,961.]

Generally as much must be shown to justify a rehearing in equity, as is necessary to obtain a new trial at common law. Doggett v. Emerson, Emerson v. Davies, and Hunter v. Marlboro, cited above; Baker v. Whiting, [Id. 786.] But, in truth, such is the character of these motions and the range of argument and inquiry indulged in them, that the party making them virtually gets the benefit of a rehearing in the discussion of the application, even if the rehearing be refused. For if the court decide against or in favor of the application, so would they usually on the rehearing. It is only when another motion is to follow a rehearing, and a new trial to be asked on new and different evidence, not all now disclosed, that this result does not in general answer every desirable purpose. I shall, therefore, go more fully into the new testimony, and the reasons which are disclosed on this application.

The first cause assigned for a rehearing is a mere general allegation that the conclusion was erroneous, to which the court before arrived, holding that the deed in controversy was in equity a mortgage and meant to secure a debt between the parties. As no reason is given under this head, why that conclusion was erroneous, and as the court in rendering judgment originally between these parties, specified the facts and numerous precedents and reasons in favor of that conclusion, I must be excused for still abiding by it and not going over them again, unless some particular causes are pointed out under the other heads, rendering it just to tax the opposite side with the trouble, expense and delay of such a rehearing.

The second ground assigned presents only a question of technical pleading. It is, whether, under a general allegation that a deed is a mortgage, a party can prove a defeasance, or numerous confessions of the other side of the existence of a defeasance. It would seem to be one of the first elements of evidence, that all particulars are to be admitted in evidence, which go to sustain a general averment. See Nesmith v. Calvert, [Case No. 10,123;] Brown v. Barrett, [Id. 1,991.] It would seem no more necessary here, after alleging that the deed was a mortgage, to proceed and state further, that it became so by a defeasance, than after alleging that a defendant had committed an assault and battery on the plaintiff, to be obliged to add, it was committed with a blow by one's hand or with a cane before evidence is admissible to prove it was so committed. In the well known case, so like this in this respect, of Morris v. Nixon, 1 How. [42 U. S.] 127, no allegation was made of a defeasance, and none in Flagg v. Mann, [Case No. 4,847.] In others, where a defeasance existed in form, it is sometimes set out distinctly. Jenkins v. Eldridge, [Id. 7,266.] Though in some it is believed to have been considered necessary to make the special averment of it, making it, however, as it used to be, a long allegation of particulars as to the mode of committing a trespass, can do no harm. In chancery, if such an averment was deemed requisite, and by its omission an error in pleading had occurred, and it was pointed out at the hearing, an amendment would usually be allowed on slight terms. See Tufts v. Tufts, [Id. 14,233,] at this term. And when not pointed out, nor objected to at the trial, defects like this are usually regarded as waived or cured. See Garland v. Davis, 4 How. [45 U. S.] 131; 1 Story, 218; [Baker v. Whiting, Case No. 786;] 16 Ves. 348; 2 Ball & B. 457. In no equitable view, therefore, would it furnish any ground for rehearing after the petitioner had argued the case without objecting to it, and after an opinion had been pronounced on the merits between the parties.

The third and fourth grounds assigned for a rehearing relate to a supposed misapprehension about the value of the property, by not considering at all the testimony of Page

as to their value. These grounds might be sufficient, if this testimony had been entirely overlooked at the hearing by the counsel and the court, and the rest of the evidence had been in truth too uncertain for any guide. But this testimony was suggested and fully argued by counsel, and considered by the court. It was not particularized in its written opinion, to be sure, as Page was not a witness called by Phelps to prove the value, but called by the other party and, to appearances, was called by them mainly with a view to show confessions of Phelps, implying that the deed was a mortgage. It is only at the close of his testimony in answer to an interrogatory, that he says anything about the value, and there observes that at auction, he does not think the land would then have brought more than the consideration in the deed, but adds that he himself would have given more for it.

As the other witnesses for Bentley and wife, who were questioned fully as to the value, seemed chiefly relied on concerning this point, and as they agreed in the main, and to a much larger sum, the result of their evidence, and not of Page's, was particularized by the court in its opinion. These, too, were corroborated, also, in their larger estimate by the high rents actually charged at times and collected, and by the high price actually given by Mrs. Jones, or her grantors, for the property originally, by the repairs which had just been made, and the general rise of most real property in a growing city. It was not considered that Page's opinion outweighed both the other witnesses, and all their corroborating circumstances; a rehearing, therefore, on account of Page's evidence not being specified, when it was argued and considered, could not be justifiable. I then suggested and still think that more evidence could easily have been offered concerning the value, if both parties had not supposed it was near what the two principal witnesses as to this testified. The natural inference then was that this might have been the reason why the defendant Phelps then put in as I meant to remark in my opinion, no evidence whatever on this point, except such as existed in his own answer. It now appears by a previous answer of his before filed and withdrawn, that he then knew all about the low assessment, which was in 1827 put on the property for city taxes, and which he now wishes to use as evidence on a rehearing. But he did not then offer even that assessment. Nor does he now plead any excuse by accident or otherwise, for not offering it before. Probably it was because he then knew and stated it was much lower than the true value. The negligence evinced by the delay in this cause would be fatal to a motion, either for a rehearing, or for a new trial on the ground of new testimony discovered. See cases in Fearing v. De Wolf, [Case No. 4,711,] and Aiken v. Bemis, [Id. 109,] 5 Russ. 195; 1 Story, 218, [Baker v. Whiting, Case No. 786;] 16 Ves. 348.

The other new testimony mentioned in the petition would also be objectionable for a rehearing, on the ground that it is merely cumulative, to the same point and fact of value. 1 Story, 230, [Baker v. Whiting, Case No. 786;] 2 Sumn. 335, [Wood v. Mann, Id. 17,-953.] It is charitable to conjecture that this extraordinary omission to offer evidence of this kind, or some other, as to the value, arose partly from another cause than assent to the value as testified to by Mr. Bell and Mrs. McLane, and that cause, an impression that the value in 1827 might not be a very material point. It is undoubted that sometimes more and sometimes less importance is attached to the value in settling the question whether the deed of the property was a mortgage or not. It is very material or not, according as the proof on that shows a great disparity or not, and as there may be several other strong proofs or not, that the deed was a mortgage. But in the present case it must be conceded that the large disparity in value to be inferred from the evidence of Mr. Bell and Mrs. McLane, and also from the large rents sometimes collected, and all the other circumstances before enumerated, made this fact a very strong point for the complainants among several others. Supposing, then, an error was committed concerning the true value, on account of the absence of the city valuations, and supposing they were more than half the true value, notwithstanding the usages referred to by Doctor Phelps in his first answer, and as large, likewise, as they would have been, had Mrs. Jones and her daughter not been the widow and the fatherless orphan, and plunged in poverty and debt so as to be favored by the assessors in a low assessment. Suppose further, that on a rehearing, the case, by still another motion, could after this neglect and delay by Phelps to offer this or other evidence, known to him before, might on heavy terms be allowed to be reopened, or a suplemental bill be filed to reach it, and new testimony as to the value be introduced, which is not cumulative, and enough to satisfy the court the disparity was much smaller than they believed at the hearing. For a rehearing would be of no use, unless the case was allowed also to be reopened for new evidence or a supplemental bill permitted in order to use it. 1 Story, 233, [Baker v. Whiting, Case No. 786;] Amb. 293, 587; 2 Ball & B. 457; 3 Johns. Ch. 124; 5 Mason, 303, [Dexter v. Arnold, Case No. 3,856.]

Yet after all this, the decree must stand. All the other points and grounds to show the deed to have been a mortgage, and several of them dwelt on longer and more decisive than this, would still remain unobviated, unimpaired, and require a judgment again for the original complainants. This is very manifest, and consequently would render a rehearing useless on this point, if

nothing new could be proved on the others. There would still be all the evidence to show a mortgage by Phelps, frequent admissions as to a defeasance, all as to his express and repeated statements it was a mortgage, and should be treated as a mortgage, and even to Page himself, concerning his moral right not to use it otherwise, all as to the relation of creditor and debtor long existing between the parties, to indicate that taking the deed was meant for security, rather than an absolute purchase, all the alterations by some one of a number of the receipts in Phelps's possession to change the aspect of the payments from interest on a debt as if a mortgage, to rent on a lease, all the written evidences delivered by him to Mrs. McLane, indication of an old debt still existing on account of his loans to Mrs. Jones, and, in short, numerous dark clouds which hang over the transaction, against an absolute sale, and in favor of a mortgage. Until Dr. Phelps can discover evidence on his part to put a different face on these points, and he does not pretend it can be done, until he can show that others have been tampering with his papers, and without his sanction making material alterations, and that others have been guilty of exaggeration, equivocation or perjury in their evidence against him, a rehearing would be of no use, and there would seem to be no sufficient justification for the delay and expense attending it. Even if granted, it must be followed by the still further delay and expense of an application to reopen the case for new evidence, and this, after all, to only a single position out of several others, and which others prove very strongly, independent of this one, that the deed to him was meant to be considered a mortgage.

One other consideration, and I have done. As the case now stands, the consequences of that decision do not seem so severe on Dr. Phelps as to require any stretch of interference or sympathy to grant any unusual indulgence. He is entitled to what is right, however, and shall receive it, so far as he can on the evidence. He will now be allowed to receive all his debt, with interest on the whole to this time, and due charges for repairs, taxes and proper expenses, and the only privation which he must suffer by treating the case as proved to be a mortgage, is, that the orphan daughter of his widowed debtor, instead of himself, will be permitted to receive any benefit from the greater value of the property now, than the amount which is justly due to him. It will be seen that in these remarks I have covered the fifth ground assigned for a rehearing, as well as all the other grounds, and that I do not feel justified in granting it on account of either of them. Rehearing disallowed.

BENTLEY, (SMEDBERG v.) See Case No. 12,964.

Case No. 1,333.

In re BENTON et al.

[16 N. B. R. 75;[1] 3 Wkly. Notes, Cas. 547.]

Circuit Court, E. D. Pennsylvania. March 27, 1877.

BANKRUPTCY—JUDGMENT AGAINST BANKRUPT—COLLUSION.

Where one of the members of an insolvent firm, with knowledge of such insolvency, carries a message at the request of a creditor, although unwillingly, to an attorney directing him to enter up judgment upon a judgment note which the firm had previously given, *held*, that he thereby procured the entry of such judgment and the issuing of the execution thereon.

In bankruptcy. Petition of creditors for adjudication of [A. Benton & Bro.] debtors as bankrupts. [Granted.] The testimony disclosed the following facts:—In June, 1876, the firm of A. Benton & Bro., becoming embarrassed, borrowed from certain creditors eleven thousand dollars for business purposes, giving therefor a judgment note, which was duly entered of record. The money was made payable in instalments. On July 15, 1876, a joint judgment note for twenty thousand dollars was executed by the Benton Bros. to Judge Waller and Mrs. Elizabeth J. Benton, the wife of one of the parties, for money alleged to be due to them. This note was left by the firm in the hands of Col. Moyer, their counsel, and he being, at the same time, a friend of Judge Waller, the latter requested him to keep it in his fire-proof safe until wanted. On January 25, 1877, the instalments on the eleven thousand dollar judgment not being paid, the plaintiffs therein called a meeting at the office of their attorney, Mr. Burton. At this meeting the Benton Brothers, Col. Moyer, the eleven thousand dollar judgment creditors, and their counsel were present. The meeting adjourned with the understanding that nothing should be done for forty-eight hours, when a statement of the Benton Brothers' real and personal estate would be furnished. After the meeting, Charles Benton repaired to Mrs. Benton's house and asked her to loan the firm some money. This, as she afterwards testified, alarmed her, and she not only refused the request but directed Charles Benton to go to Col. Moyer and tell him to enter up the judgment and issue execution. Charles Benton remonstrated, saying "it would ruin them." He, however, immediately went to Col. Moyer's office and communicated to him Mrs. Benton's message. Col. Moyer, after endorsing the judgment note for twenty thousand dollars, handed it to another attorney to enter up. Execution was placed in the sheriff's hand at 2.38 P. M. Later, on the same day, Col. Moyer called on Mrs. Benton, explained that as he could not act in the matter he had placed the note in the hands of another attorney, and suggested that Mrs. Benton

[1] [Reprinted from 16 N. B. R. 75, by permission.]

write a letter to the other attorney, authorizing him to enter up the judgment note and issue execution thereon, which Mrs. Benton accordingly did. On the next day, the 26th of January, B. F. Fisher, Esq., received by telegram instructions from Judge Waller to proceed on his behalf on the same judgment note. On January 31, 1877, a number of the unsecured creditors of A. Benton & Bro. filed this petition in bankruptcy.

Frank P. Prichard and G. C. Purves, for petitioning creditors, argued that the facts showed a procurement, by the alleged bankrupts, of the entry of judgment and the execution thereon.

J. M. Moyer, for bankrupts.

There was no intention on the part of the Benton Bros. to give preference. Charles Benton went to Mrs. Benton to get additional money and not to procure execution to be issued. The direction to enter judgment and issue execution came from her without any suggestion from the debtors, and in fact they remonstrated against it. That she was the wife of one of the parties is immaterial. She may be a creditor. The question of procurement is one of intention, and the evidence shows no intention on the part of the Benton Bro. to procure this execution to be issued.

CADWALADER, District Judge. To understand the question in this case, it is necessary to ascertain the relations of Mr. Moyer on the 25th of January, 1877. He was, in a general sense, the professional agent, counsel, or attorney of the alleged bankrupts. His peculiar relation to Judge Waller merely required him to hold the judgment note or bond of 15th July, 1876, until instructions from that gentleman. No instructions by Judge Waller to Mr. Moyer, or to any one else, were given until the next day, the 26th. The execution in question under the judgment upon that note or bond was delivered to the sheriff on the afternoon of the 25th. The question is whether the debtors, or either of them, procured, directly or indirectly, the entry of the judgment and issuing of the execution. The occurrences of the 25th were in three successive stages: first, the meeting at Burton's office; secondly, the communications with Mrs. Benton, and the consequent instructions from her to Mr. Moyer; thirdly, the subsequent acts of the parties. The occurrences at Mr. Burton's ought to have apprised Charles Benton, one of the alleged bankrupts, that their ruin was inevitable, and could not be postponed. With a knowledge, as he states, that trouble was coming, he repaired to Mrs. Benton's and asked her for more money. This naturally alarmed her; and according to the evidence she thereupon sent a message by Charles Benton to Mr. Moyer, in form or substance directing him to proceed immediately to enter the judgment and issue execution. Charles Benton remonstrated earnestly, saying that it would ruin them, etc. Nevertheless he accepted the mission to Mr. Moyer, and communicated to him the lady's direction. Mr. Moyer substituted for himself another attorney for the purpose. By the latter gentleman the judgment was at once entered, and an execution thereon was placed in the sheriff's hands. A written direction to the substituted attorney was obtained from her, and Mr. Moyer explained to her his reasons for advising such a course of procedure. All this occurred in the afternoon of the 25th. The execution is inscribed by the sheriff as received in his office at 2.38 o'clock P. M. Mr. Moyer did not see her until a later hour. On the next day another gentleman of the bar received instructions from Judge Waller authorizing proceedings of a like character on his behalf under the same judgment note, or bond. He was from thenceforth a participant in them. Whether, until then, the sheriff could have levied more than Mrs. Benton's portion of the debt, is a question which it is unnecessary to consider now. The proceedings had been consummated, so far as Mrs. Benton's demand was concerned, on the previous day. I am of opinion that the occurrences of that day involved a procurement, by Charles Benton, of the issuing of the execution. This was the tendency and effect of what he did; and beyond this we are not to inquire as to his intentions. The debtors are adjudged bankrupts.

Case No. 1,334.

The BENTON.

[24 Int. Rev. Rec. 30; 3 Mich. Lawy. 128; 2 Cin. Law Bul. 329; 10 Chi. Leg. News, 139; 17 Alb. Law J. 98.]

District Court, E. D. Michigan. Oct. Term, 1877.

MARITIME LIENS—SUPPLIES—LIBEL BY PART OWNER.

Where a firm of material men, composed of three members, libelled a vessel in which two members of the firm owned an interest, it was *held* the suit could not be maintained.

On libel of George W. Turner, voluntary assignee of McDowell, Caul & Brett, for coal furnished the propeller Benton. [Libel dismissed.]

It appeared that the Benton was owned by six persons residing in Ohio and Michigan, two of whom were McDowell and Caul. Some time in July, 1877, McDowell, Caul & Brett made an assignment to Turner for the benefit of their creditors, and he filed these libels for coal furnished the propeller by his assignees, to the amount of about six thousand dollars. McDowell, Caul & Brett were equal partners in the coal business, Brett having no interest in the boat. The answer discloses the fact that McDowell & Caul

were each an owner of a one-twelfth interest in the propeller, and the defense was based wholly upon this ground.

F. W. Clark and Alfred Russell, for libellant.

Wisner & Speed, for claimants.

BROWN, District Judge. It was conceded upon the argument that libellant had no greater rights than his assignors would have had, if the libel had been filed by them. If he is entitled to recover, it must be upon the theory that the firm of McDowell, Caul & Brett had a lien upon the shares of McDowell & Caul, or upon the shares of the other part owners. That a material man can have no lien upon his own ship is too clear for argument. The only case that indicates the possibility of such a lien,—Foster v. The Pilot No. 2, [Case No. 4,980,]—in which seamen, who were also part owners, were permitted to libel their own vessel for wages after sale upon execution against them from a state court, was promptly reversed on appeal, by Mr. Justice Grier, in a clear and forcible opinion,—2 Wall. Jr. 592, [Gallatin v. The Pilot, Id. 5,199,]—though the learned judge refused to decide how far a part owner might have a lien upon the shares of his co-owners for advances made or services performed. Not only is the enforcement of the lien against one's own property open to the objection, that a man cannot sue himself at law, but to the further objection, that he ought not to compel his creditors to pay debts which he has contracted and become himself obligated to pay. Part owners are liable in solido for necessaries, and the claims of the ship's creditors might have been collected from the property of McDowell & Caul, without resorting to the other owners. 1 Pars. Shipp. & Adm. 100. To permit, for example, seamen to libel their own vessel for wages, and thus cut out creditors of an inferior class, or to permit material men to share with their creditors in the distribution of their own property, would be not only encouragement to frauds of the grossest description, but utterly inconsistent with our notions of natural justice. If such a thing were possible, the money thus realized by the part owners could be sued for and recovered by creditors who had failed to collect the whole of their claims from the vessel; a circuity of action we can well afford to avoid. That a material man has no lien upon his own property has been repeatedly decided, not only in admiralty, but in cases under the mechanics' lien laws of the several states. Logan v. The Aeolian, [Case No. 8,465;] Phill. Mech. Liens, § 39; Babb v. Reed, 5 Rawle, 151; Stevenson v. Stonehill, 5 Whart. 301; Peck v. Brummagim, 31 Cal. 440. In the case of The St. Joseph, [Case No. 12,229,] the learned judge of the western district decided that the fact that the libellant was the general agent and superintendent of the line of boats, of which the respondent vessel was one, and held sixty thousand dollars of stock of the company, was sufficient proof of his having given credit to the company and not to the vessel. Did the facts call for it, this case might properly be disposed of upon the same ground. In the absence of the clearest evidence to the contrary, the fact that two libellants were owners in the vessel is sufficient to show they did not rely upon the credit of the vessel.

Has a part owner of a ship a lien upon the shares of his co-owners? In Doddington v. Hallet, 1 Ves. Sr. 497, Lord Hardwicke decided that he had, but the case was overruled by Lord Eldon in Ex parte Young, 2 Ves. & B. 242, and after some conflict of authority in New York, the law of England and the United States is not firmly pronounced against the existence of such lien: 1 Pars. Shipp. & Adm. 114; Patten v. The Randolph, [Case No. 10,837;] Hall v. Hudson, [Id. 5,935;] The Larch, [Id. 8,085,] reversing same case, [Id. 8,086;] Macey v. De Wolf, [Id. 8,933;] Mumford v. Nicoll, 20 Johns. 611; Green v. Briggs, 6 Hare, 395; Lamb v. Durant, 12 Mass. 54; Merrill v. Bartlett, 6 Pick. 46; Braden v. Gardner, 4 Pick. 456; French v. Price, 24 Pick. 14; 1 Pars. Shipp. & Adm. 114. It is too late to say whether the interests of commerce might not be promoted by adhering to the principle laid down in Doddington v. Hallet, [supra;] we have only to administer the law as we find it.

It is probably true that if Brett, the third member of the firm, had furnished the coal upon his own account, he might have sustained a libel, but this fact would not enable libellant's assignors, two of whom were interested in the vessel, to maintain the libel, and to recover the whole amount of their bill. Brett's interest, in any case, would only extend to one-third of this amount. It is scarcely necessary to say that he cannot sue to recover this third. Libellant's only remedy is a personal one, and that in a court of equity. This court has no power to entertain a libel for an account between part owners: Hall v. Hudson, [Case No. 5,935;] The Marengo, [Id. 9,065;] The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; Minturn v. Maynard, 17 How. [58 U. S.] 477; Grant v. Poillon, 20 How. [61 U. S.] 162; Kellum v. Emerson, [Case No. 7,669;] Ward v. Thompson, 22 How. [63 U. S.] 330; 1 Pars. Shipp. & Adm. 116.

A very similar question to the one here involved arose in the case of Thompson v. The Julius D. Morton, 2 Ohio St. 26. Robey and Thompson, plaintiffs, furnished materials and labor in the building, repairing and equipping of a steamboat of which Robey was the owner, and it was held they were not entitled to recover. It is generally true, as stated in The Druid, 1 W. Rob. Adm. 390, that "in all causes of action which may

arise during the ownership of the persons whose ship is proceeded against, I apprehend no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up as in bottomry bonds, by taking a lien upon the vessel. The liability of the ship and the responsibility of the owners, in such cases, are convertible terms; the ship is not liable if the owners are not responsible; and, vice versa, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against." It is conceded that libellant's assignors could not sue the owners of this vessel at common law, since two of their number would be defendants in the same action. While it is true that their rights might be adjusted in equity, and while it is also true that the practice and proceedings of courts of admiralty are in some respects analogous to those of a court of chancery, there is by no means the same flexibility of remedy. In suits in admiralty the legal title only is regarded, and even in libels for possession the equitable owner cannot recover as against the legal title. Part owners cannot, by proceedings in rem, obtain a settlement of their mutual accounts, unless there be a surplus after the payment of all other claims against the ship, when the court, having jurisdiction of the principal case and possession of the proceeds, will direct the remnants to be paid over to the party entitled thereto, and for that purpose may order an account to be stated. The L. B. Goldsmith, [Case No. 8,152.] The libel must be dismissed.

Case No. 1,335.

BENTON v. WHITNEY.

[Crabbe, 417.] [1]

District Court, E. D. Pennsylvania. March 27, 1841.

SEAMEN—WAGES—FORFEITURE—ASSAULT—WEAPON—BURDEN OF PROOF.

1. In an action by a seaman for his wages, where the owner or master endeavors to deprive him of them by an allegation of misconduct, the respondent will be held to strict proof, and be required to make out a clear case.

2. In an action by a seaman against his officer for assault and battery, the libellant must make out a clear case, by credible and consistent proof.

3. The weapon used by an officer for punishing a seaman is always a subject of consideration and weight with the court.

[See Jarvis v. The Clairborne, Case No. 7,225; Schelter v. York, Id. 12,446.]

In admiralty. This was a libel [by James S. Benton against John Whitney] for assault and battery. [Libel dismissed.]

It appeared that the vessel of which the respondent was master, and on board of which the alleged assault and battery took place, had been twelve days in port before this suit was brought, or any complaint made by the libellant of ill usage. The master refused to pay the libellant's wages on the ground of his misconduct, upon which a suit was commenced for the wages, and this libel filed for the assault and battery. On the hearing of the case for the wages a decree was given for the libellant, the court not thinking that sufficient cause was shown either to forfeit or reduce the amount claimed. In support of this charge of assault and battery two witnesses were examined; they gave very different and, on some points, contradictory accounts of the affair, and, at worst, it seemed to have been one of those sudden affrays, provoked by some impertinent language used by the libellant in reply to an order, which frequently occur on board of vessels. No serious injury was done to the libellant.

H. Hubbell, for libellant.

Austin, for respondent.

HOPKINSON, District Judge, delivered the following opinion:

In an action by a mariner for his wages, in which he seeks for nothing but a remuneration for his labor, and the owner or master of the vessel endeavors to deprive him of it by an allegation of a forfeiture, or to make deductions by charges of misconduct, I hold the respondent to strict proof, and require of him to show clearly, a good and sufficient cause for the defence. I will not defeat such a claim, and take from the man his hard earnings for services which have been rendered and received, for unimportant acts of disobedience, or rude and impertinent language, unless it be of a very gross character or dangerous to the discipline of the ship, and subordination of her crew; faults which such men as seamen commit without any serious design of insubordination or insult, but which masters and mates, not unfrequently as rough as their men, are fond of calling mutiny, to resist a demand for wages. We do not look for the manners of a drawing-room on board of a ship, nor should we punish as an assault and battery those violations of the pride or person of a sailor, which in another class of men must be repressed or they would lead to mortal consequences. While, therefore, in a suit brought by a sailor for his wages, I would make every reasonable presumption to protect him from loss, on the other hand, if he brings his officers here for an assault upon him, to which he is frequently instigated by bad advisers on shore, I reverse the proceeding, and require him to make out a clear case by credible and consistent proof. I throw the burden on him, with no disposition to favor frivolous complaints, or encourage such litigation. It is not enough to show on the part of the officer, coarse and threatening language, it is the idiom of the sea, "signifying nothing;" nor even a rash and perhaps unnecessary blow, for if such occurrences are

[1] [Reported by William H. Crabbe, Esq.]

to be the grounds of these suits, a vessel will seldom come into port, without furnishing more or less of them. Officers will be under such an apprehension of them, that they will be unable to maintain that discipline, which is essential to the safety of all. But when I can see there has been a deliberate design to oppress a seaman, an assault upon him to gratify some personal ill will, or indulge a vindictive temper; or where there has been a wanton and tyrannical abuse of power; or if a serious injury has been inflicted by the violence of passion, however sudden, in such cases, redress for the wrong will always be found in this court, so far as I am capable of affording it. Obedience and submission are the duty of a sailor on his voyage, and the law rewards him for them, by an ample protection against wrong, when he reaches his port, and comes within the power of the law. The weapon used by an officer for punishing a seaman is always a subject of consideration and weight with the court.

Actions for assault and battery were first brought in this court, since I came upon the bench. They were formerly prosecuted in common law courts of the state, where the delay in obtaining a trial, the difficulty of having witnesses at the trial, and the heavy expense, were sufficient discouragements to prevent frivolous and vexatious suits. But the speedy trial to be had here, with little or no advance of money, where something may be gained and nothing lost, for the plaintiff cannot pay the legal costs if he is unsuccessful, has been a great encouragement to trifling complaints, and experimental suits, which are determined in a few days. He may therefore venture on any chance, however desperate; he may get something; he can lose nothing. I desire to discountenance such experiments, but will freely open the door, to correct every serious abuse of the power given to the officers of a vessel to preserve her necessary discipline, and not for the indulgence of a cruel and vindictive temper, or the outbreaks of unrestrained and violent passions. In this case I do not think that the libellant has given sufficient evidence to support his complaint. Let the libel be dismissed.

BENZ, (UNITED STATES v.) See Case No. 14,576.

BENZON, (UNITED STATES v.) See Case No. 14,577.

Case No. 1,336.

BERDAN FIRE-ARMS MANUF'G CO. v. REMINGTON et al.

[3 O. G. (1873,) 688.]

Circuit Court, N. D. New York.

PATENTS FOR INVENTIONS — PATENTABILITY — IMPROVEMENT INTRODUCED BY WORKMEN WITHOUT INVENTOR'S KNOWLEDGE — REISSUE.

1. An improvement which becomes necessary in the manufacture of a patented implement in order to overcome a difficulty growing out of a departure from the form of the model, and which is introduced into it by the workmen without the knowledge of the patentee, cannot be appropriated by him as his invention.

[See Whiting v. Graves, Case No. 17,577.]

2. If such an improvement is embodied by the assignees of the patentee in a reissue, they cannot recover upon it against others who use it.

3. When in the manufacture of Berdan's fire-arm the hinge of the breech-piece was raised so high as to bring its upper surface above the line of the bore, and thus interfere with the insertion of the cartridge, it is questionable whether it is a patentable invention to cut away the obstructing portion of the hinge, and thus give that part of it a curved surface.

[In equity. Bill by the Berdan Fire-Arms Manufacturing Company against E. Remington & Sons. Dismissed.]

H. M. Ruggles, for complainant.

Geo. Gifford, for defendants.

WOODRUFF, Circuit Judge. I have very grave doubts whether the so-called device described in and covered by the reissued patent upon which this suit is brought is patentable. The manner of constructing and securing the breech-piece for a breech-loading gun, which formed the subject of the original patent to Hiram Berdan, was, so far as appears in this case, an original invention. In procuring reissues of that patent the plaintiff, his assignees, have sought to secure to themselves a monopoly of a curved surface on the hinge of the breech-piece, which was no feature of the invention in what were its distinguishing features, but which was an obvious mechanical necessity incidental to the application of Berdan's device, or to the application of any similar device, whenever the hinge-pin is placed so high as to raise the surface of the hinge above the line of the barrel. Cutting away an obstruction to the introduction of the cartridge did not require invention—it was inevitable. But my conclusion in this case does not rest upon the doubt so expressed. I find as a fact established by the evidence that Berdan was not the inventor of the curve in the hinge, which is the subject of the patent sued upon.

His invention neither contained nor contemplated this feature in the breech-piece. He did not contemplate placing the hinge-pin so high as to render the curve necessary, nor did he give to the mechanics who, under his partial supervision, constructed the model of his actual invention, or the drawings from which his first gun was made, any instruction or suggestion embracing such a curve. The making of the curve in the hinge, when that gun was in fact constructed, resulted from a departure from Berdan's model by the workmen themselves, not by design, but through inadvertence. When the parts of the gun were completed and put together the workmen found that either by a departure in the working drawings (made by one of them) from the model, or by a departure in the gun from the working drawings, the hinge-pin

was raised so high as to interfere with the insertion of the gun-barrel, and also to interfere with the insertion of the cartridge, and they, therefore, and as a matter of judgment, cut it away. They did it not to obviate a difficulty necessarily incident to the use of Berdan's invention, but a difficulty created by the workmen themselves through an inadvertent error and departure from Berdan's contemplated position of the hinge-pin. In short, he contemplated raising the hinge-pin as high as, with the hinge in the ordinary or straight-surface form, was conveniently practicable, and they made under his direction both model and drawing of his invention in that form; but when they made a gun they placed the pin so high as to create the obstruction above referred to, and they cut it away to cure the apparent defect. In this Berdan was not consulted. He was not present when its necessity in that gun was discovered, nor was he present when it was done. Berdan did not invent it. If anything in the nature of invention pertains to it, that was done or made by the workmen without his knowledge. The bill herein must be dismissed with costs.

[NOTE. The original patent was granted to H. Berdan, January 9, 1866, (patent No. 51,991;) reissued September 15, 1868, (No. 3,118.)]

BERDIN, (LEHMAN v.) See Case No. 8,215.

Case No. 1,337.

BERG v. THISTLE.

[3 App. Com'r Pat. 395.]

Circuit Court, District of Columbia. Oct. 16, 1860.

PATENTS FOR INVENTIONS — CONCEALMENT OF INVENTION—LACHES —EVIDENCE — ADMISSIONS OF PARTY.

[1. Where an inventor conceals his invention from the public for a number of years, and during the period of concealment another inventor makes and patents the same invention, the prior inventor, by reason of his laches, forfeits his right to a patent in favor of the patentee.]

[2. Where a person who had contracted to purchase the invention from the patentee went to the prior inventor, on hearing of the controversy, frankly avowed his business, and inquired for the truth of the matter, the deliberate claim of the prior inventor that he discovered the invention six years before will be taken in evidence as a truthful admission against his interest, showing laches.]

[Appeal from the commissioner of patents, upon an interference declared. Reversed.]

MERRICK, Circuit Judge. In this case which is an appeal upon an interference declared with the patent of appellant upon an application of appellee for a patent for a certain improvement in wardrobe bedsteads, there appears no question as to the complete identity of the patentable matter covered by the claims of the respective parties. Nor is there any doubt upon the evidence that the appellee is the prior inventor of the improvement in question. But the point of objection taken is that the office erred in deciding that an abandonment by the act of the party must involve a public use of the invention abandoned, and cannot properly be urged against a single silent concealed use by the inventor, particularly when the use did not expose, as in this case, the precise character of the mechanism claimed, but only made the result visible. There can be no doubt that where a party has made an invention, and buried the secret in his own bosom, he may, after the lapse of years, came forward, and, upon making his secret known by an application for a patent, obtain the monopoly from government, as the price of the revelation of his secret. But in the mean-time if another equally ingenious has made the same invention, and has applied for and obtained a patent, and the public has thereby become possessed of the discovery, when the first inventor afterwards applies for a patent, he will be met with the inquiry whether he has used due diligence in communicating his discovery, and for the obvious reason that if, after one patent has issued, another should be issued, the monopoly which the law limits to 14 years will be protracted beyond that period by the time elapsed between the date of the first and second patent, and the public be unduly deprived of the privilege of the invention, and for this reason, and in order to stimulate inventors to alacrity and good faith towards the public, the law, in such case, wisely ordains that the first inventor shall forfeit his claims.

In this view of the law, it makes no difference whether the first inventor has made known or has concealed his invention. His laches is the same in either case, and is to be measured by the age of his discovery. The doctrine of abandonment by suffering the invention to go into public use for more than two years is wholly distinct from this doctrine of forfeiture in favor of a junior discoverer who is a prior patentee. The views which have heretofore been expressed by Judge Morsell in Ellithorpe v. Robertson, [Case No. 4,409,] by Judge Dunlop in Belson v. Spear, [Spear v. Belson, Id. 13,223,] and by myself in Sturtevant v. Greenough, [Id. 13,579,] (all in third volume of Patent Office Appeals,) and above all the language used by the supreme court of the United States in Kendall v. Winsor, 21 How. [62 U. S.] 328, 329, leave no room to doubt that the office has erred in the principle of law which must control this case. It is equally certain that the testimony when measured by correct legal rules reveals a state of facts to which the principle of law I have announced is applicable.

Two witnesses whose veracity has received no legal impeachment swear that the appellee unequivocally stated to them that he had invented the improvement six, seven, or eight years ago. The statements of these witnesses have been assailed because, as it is said, they went to the appellee as emissaries of the appellant, and that he, knowing or

suspecting them to be such, was under no obligation to speak truth to them, and is not to be held to what he averred to those witnesses. If a party knows that witnesses have been sent to extract evidence from him, it is a natural presumption that he is on his guard against them, and will make no admission to them, voluntarily calculated to prejudice his own cause unless the matter stated by him is true.

But, whatever cloud may be thrown on one of these witnesses because he went as a spy upon the appellee, the like excuse does not hold as to the other. The depositions show that he is a respectable merchant; that he was in treaty with the appellant to purchase his invention; that, hearing of the controversy, he went to the appellee, and frankly avowed his business, told him he desired to know from his own lips the truth of the matter;—and being so warned, and having every motive to tell the truth which could operate upon a fair and just minded man, the appellee deliberately claimed that he had discovered the improvement six years before. The party who talked with him had a right to believe that he spoke the truth. A court ought to presume that he spoke truth, under such circumstances. If he told a deliberate lie, as he now avers by his counsel, he has only himself to blame that an ingenious sifting of circumstantial evidence is not now made for the purpose of establishing his turpitude in that transaction, and he must abide the consequences of a prevarication which has failed to bring with it the reward he anticipated. Already are the records of patent litigation too deeply tinged with fraud and falsehood, and by my judgment in this case I am unwilling to give any encouragement to such crimes.

For these reasons, I think the conclusions of fact arrived at are equally erroneous * * * with the deduction of law announced in the office decision. Now, therefore, I hereby certify to the Honorable Philip F. Thomas, commissioner of patents, that having assigned time and place for hearing said appeal, and both parties having been heard by counsel, I have considered the reasons of appeal, and the office response thereto, with the testimony in the case, and, being of opinion that there is error in the decision of the office, the same is reversed, and a patent finally refused to the applicant, in the premises.

Case No. 1,338.

In re BERGEN.

[2 Hughes, 513;[1] 4 Am. Law T. 39.]

Circuit Court, D. North Carolina. 1870.

COURTS—FEDERAL—FOLLOWING STATE PRACTICE—ARREST FOR DEBT—POWER OF JUDGE.

1. Title 9, c. 1, subsecs. 149, 150, and 157 of the Code of Civil Procedure of North Carolina, and the act of congress of March 2, 1867, conforming the proceedings of United States courts in cases of arrest on mesne process to those prescribed by law in the several states, construed together, and they were *held* not to authorize the arrest of a non-resident party defendant on the mere affidavit of plaintiff in cases where the cause of action is for an injury to the person or character; authority for the arrest must be given by the judge, in whose discretion alone it lies to fix the amount of security to be required of the plaintiff, and the amount and character of defendant's bail.

[See U. S. v. Tetlow, Case No. 16,456.]

2. A judge of a United States court has no power or jurisdiction to authorize the arrest of a citizen for any breach of the peace or violation of the laws of a state.

[See U. S. v. Barney, Case No. 14,524.]

On habeas corpus.

BOND, Circuit Judge. It appears from the return of the marshal in this case, that he holds the prisoner, Bergen, in custody by virtue of three writs of capias ad respondendum, issued out of the circuit court of the United States for the district of North Carolina in trespass for assault and battery, and false imprisonment of the plaintiff.

Chapter 1, tit. 9, subsec. 149, of the Code of Civil Procedure of North Carolina, provides that a defendant may be arrested in an action for the recovery of damages on a cause of action not arising out of contract * * * when the action is for an injury to person or character. Section 150 of the same chapter provides that "an order for the arrest of the defendant must be obtained from the court in which the action is brought or from the judge thereof;" and section 157 provides that the order may be made when it shall appear to the court or judge thereof by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists and the case is one of those mentioned in section 149. The act of congress approved March 2d, 1867, [14 Stat. 543, c. 180,] requires the courts of the United States to conform their proceedings in all cases of arrest upon mesne process to the mode of practice prescribed by law in the several states.

It is clear from these provisions of the Code of North Carolina, that the plaintiff in an action is not given an absolute right to the arrest of a defendant. The laws of the state have been careful of the liberty of the citizen, and have placed the power to arrest in the discretion of a judge or of a court. The language of the Code is permissive only. The words are not that he shall make the order when the plaintiff has made the required affidavit, but that the order may be made. Before such order can be issued there must have been an exercise of the judicial mind. In these cases no such order has been asked or granted. The suit is commenced by the issuing of the capias by the plaintiff, or by the clerk at their suggestion. There has been no exercise of judicial discretion. No summons was issued to commence the action as in ordinary practice, but upon the making of what was con-

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

sidered by the plaintiff a sufficient affidavit the summons was altered into a capias ad respondendum, and the defendant arrested. To do this is not within the power of the plaintiff. The act of ordering the arrest of the party is a judicial and not clerical act, as is further shown by section 152 of the Code, which provides that the judge before making the order shall require the plaintiff to furnish security to pay all damages sustained by defendant.

What amount of security the plaintiff shall give, and the amount and character of bail of defendant, are matters for the exercise of this discretion. The law, by making it necessary that the judge should decide whether to make an order of arrest or not, what security the plaintiff, and bail the defendant, should give, has endeavored to guard this power of imprisonment by every precaution for the protection of the liberty of the citizen. The Code has not left the power to an angry plaintiff, in case of simple assault and battery, to fix his damages at any exorbitant sum he pleases, in order that the clerk, under the old practice, shall require bail in double that sum, so that the defendant might be imprisoned because he could not give it. This would be the consequence were the proceedings in these cases sustained. There has been no judicial act fixing the amount of the plaintiffs' security for the damages sustained by the defendant, provided the plaintiffs fail in their suit.

While the bail required of the defendant, under the practice prevailing before the adoption of the Code in 1868, is fixed at twenty-eight thousand dollars, it has been suggested by counsel that it would be a great inconvenience if parties were required to follow the judges about the circuit to obtain such orders of arrest. But the inconvenience to a defendant, who perhaps (as in this case) is a non-resident of North Carolina, who is arrested away from friends and bail, upon charge of assault and battery, is equally great. The provisions of the Code of North Carolina referred to above are taken from the Code of New York, and I am strengthened in the view I have taken by the remarks of the court in the case of Knickerbocker Life Ins. Co. v Ecclesine, the language of which I have adopted chiefly. 6 Abb. Pr. [N. S.] 23. It appears to me clearly, that the writs of capias in these cases have issued without legal warrant, and that there is no sufficient order of arrest to detain defendant. But the marshal also returns that he holds the defendant by virtue of the following warrant:

"United States of America, District of North Carolina. To the Marshal of said District, Greeting: Whereas, it appears to me upon the oath and examination of D. W. Weeden, Geo. S. Rogers, Thomas E. Evans, J. H. Murray, and others, citizens of the United States, that B. G. Bergen, late of said district, is an evil-disposed person, that he habitually goes about armed with pistols, swords, and other unlawful and dangerous weapons, and violently seizes without any lawful warrant or authority peaceful and law-abiding citizens of the United States, at and in said district, and threatens with curses and oaths to persist in such unlawful proceedings. And, whereas, it further appears to me upon such oath and examination, that the said B. G. Bergen, in said district, on or about the 1st day of August, A. D. 1870, did, the said Geo. S. Rogers, J. H. Murray, D. W. Weeden, Wm. Patton, and others, beat, hang, imprison, manacle, maltreat, and injure them, and threaten to repeat such injuries and take the lives of them, the said D. W. Weeden, J. H. Murray, Geo. S. Rogers, Wm. Patton, and others, against the constitution and laws of the United States. Now, therefore, you are hereby commanded in the name of the United States, to take the body of said B. G. Bergen, and bring him before me, wherever I may be in said district, to answer a charge against him of the United States for the matters and things so alleged against him, and be dealt with according to law. Given under my hand and seal, at chambers, in Raleigh, the 26th day of August, A. D. 1870. George W. Brooks, Judge of the District Court of the United States, for the District of North Carolina."

I regret exceedingly that at the hearing of this case I had not the benefit of the advice and counsel of the distinguished judge of the district court. I have been unable, however, to learn from the remarks of counsel, or to find from my investigation since, the jurisdiction in the court of the United States to admit of this arrest. It has long been determined that these courts are of limited jurisdiction, and that they do not exercise common law jurisdiction in criminal cases. Nothing can be punished by them not made criminal by statute, and even in cases where government is the party aggrieved, the common law offence is only cognizable in the state courts.

The offence charged in this warrant, however grievous, is a violation of the peace of North Carolina. There could be no indictment framed under any act of congress which has been brought to my notice to punish the offence charged, and it will hardly be contended that the courts of the United States may issue warrants to prevent offences that they are powerless to punish. If this case, presented in the warrant set out, be within the jurisdiction of the district court, there can hardly be conceived a case of wrong-doing which is not within that jurisdiction. The warrant states that the conduct of petitioner recited therein was in violation of the constitution of the United States, and at bar the first section of the fourteenth amendment is alluded to as the particular section violated.

The petitioner was an officer of the militia of North Carolina when he made the arrest complained of. The law of North Carolina

authorizes the governor of the state, when in his judgment any part of the state was in insurrection, to call out the militia and to suppress it by force. The governor had by proclamation declared the particular locality in which the affiants resided in a state of insurrection, and had sent the petitioner with troops to suppress it. Now, so far as the courts of the United States were concerned, and with submission, they and all other courts were bound to abide by the judgment of the governor in this respect, because he was the only person in the state authorized by law to determine the fact whether there was an insurrection or not, and when he proceeded to enforce the law of the state in obedience to military power granted him against persons in insurrection in the state, he was enforcing no law which abridged the privileges or immunities of citizens, because it is not the privilege of a citizen to be engaged in an insurrection. Nor was such proceeding one which deprived any person of life or liberty, without due process of law, because in time of insurrection, when the civil power appeals to force to support its authority, the sword is due process of law. The supreme bench of the state has held the militia law constitutional, and I agree with the judges in their opinion.

The parties arrested deny their participation in the insurrection, and we may assume their innocence, but the fact does not give the United States courts jurisdiction to inquire into the case. Innocent parties are daily arrested by due process of law, and if that gave the courts of the United States power to issue writs of habeas corpus to inquire into the justice or injustice of their arrest, every criminal case in the state would be tried first on habeas corpus. I have little doubt from the facts stated, that the affiants were treated with great harshness, if not cruelty, by the petitioner. For this he is answerable in the tribunals of the state. The courts of the United States, while they have carefully maintained their own powers, have been scrupulously careful not to encroach upon the powers of the state courts. The jealousy which existed between them at the origin of the government has served to guard each from conflict with the other. I am extremely sorry to differ from my learned associate, whose opinion I highly respect, but I am of opinion that this case was out of the jurisdiction of the court, and I have discharged the party.

Case No. 1,339.

BERGEN et al. v. The TAMINEND.

[40 Hunt, Mer. Mag. (1859,) 708.]

District Court, S. D. New York.

SHIPPING—CHARTER PARTY—RIGHT OF POSSESSION.

[In admiralty. Libel by Garret T. Bergen and Stanley against the steamboat Taminend for possession. Dismissed.]

This was a libel for possession. On the 3rd of July, 1858, the owners chartered the boat to the libelants for a term ending October 5, 1858. The charter money was to be paid in installments, and the charterers were to give the owners collateral security. They failed however to pay the charter money as agreed. The collaterals proved worthless and the charterers insolvent. Thereupon on August 11, 1858, the libelant, Bergen, surrendered possession of the boat to the agent of the owners, and Stanley, the other libelant also left her. This libel was filed on August 21, to recover the possession of the boat. Issue was not joined in the cause until after the period of the charter had expired.

BETTS, District Judge. Held, that the occupancy of the steamboat having been voluntarily surrendered by the charterers to the owners, their right to reclaim possession of her was lost. Libel dismissed with costs.

Case No. 1,340.

BERGEN v. WILLIAMS.

[4 McLean, 125.][1]

Circuit Court, D. Michigan. June Term, 1846.

INDEMNITY —JUDGMENT ON BOND — CONCLUSIVENESS—SET-OFF BY SURETY—PLEAS.

1. A judgment being entered, on the penalty of a bond, to save harmless the creditors of a certain firm, by paying the amount due, or to become due, may be enforced by sci. fa. on the judgment, to show cause why execution should not issue, etc.

2. A judgment against the late firm is conclusive as to the amount due.

[See Drummond v. Prestman, 12 Wheat. (25 U. S.) 515.]

3. A set off of notes subsequently acquired by the surety in the bond, can not be pleaded as an offset against the creditors' demand.

[See Wright v. Rogers, Case No. 18,090.]

4. Nor is a plea of nil debet admissible after the creditors have obtained judgment against the late firm. The condition of the bond was, that the obligors should pay the creditors, and not one of the late firm.

[See Corser v. Craig, Case No. 3,255; Armstrong v. Carson, Id. 543.]

5. Under the plea of nul tiel record, the judgment only is put in issue.

[Cited in Glenn v. McAllister's Ex'rs, 46 Fed. 885. See, also, Armstrong v. Carson, Case No. 543; Jacquette v. Hugunon, Id. 7,169.]

[At law. Scire facias by James M. Bergen against G. D. Williams on judgment for breach of the conditions of a bond. Defendant pleads nil debet and nul tiel record. Plaintiff demurs to both pleas. Demurrers sustained.

Messrs. Fraser and Davidson, for plaintiff.
Mr. Douglass, for defendant.

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

OPINION OF THE COURT. This is a proceeding by scire facias, to obtain execution for further breaches in debt on a bond.

At June term, 1841, a judgment was entered in favor of Bergen, against Williams, for twenty thousand dollars, and an award of execution for $977 14, the amount ascertained to be equitably due to Bergen when the judgment was rendered. The judgment was entered for the penalty of the bond, which was given on the 9th of August, 1830, jointly, by Williams and William Stevens, "conditioned that Stevens should pay, discharge, and liquidate, all the debts, engagements and liabilities, of every kind, and all the demands, of whatsoever nature, contracted by the firm of Bergen and Stevens, then due or thereafter to become due, against the said firm, without recourse to the plaintiff, and should well and truly save harmless and keep indemnified the said Bergen and his representatives therefrom," etc.

In the sci. fa. it is averred that at the time the bond was executed, the co-partnership of Bergen and Stevens was indebted to ——, in ——, a certain sum, on which suit was instituted and judgment recovered, stating the amount of the judgment for ——, which remains in full force, etc. The defendant pleads a set-off, that at the time of suing out the scire facias, the plaintiff was indebted to him in the amount of certain promissory notes, made by the plaintiff, payable to different individuals, by whom they were indorsed to defendant. The defendant also pleaded that the partnership of Bergen and Stevens was not, at the time the penal bond was executed, indebted in the said sums demanded by the plaintiff, etc. Both of these pleas were demurred to, and joinder.

The demurrer raises the question whether, on a sci. fa. to obtain execution for further breaches of the condition of a bond, judgment having been entered for the penalty, the defendant can set off a demand against the plaintiff. In answer to the objection that the sci. fa. is an action upon the judgment, and that in an action upon a judgment, no defense can be set up which might have been pleaded to the original action. Also, that the notes set forth in the plea and notice of set-off having matured since the judgment for the penalty, the defendant is prevented from using them as a set-off by the statute, "which provides that no demand shall be set off unless it existed at the time of the commencement of the suit." Rev. St. p. 447, § 4. The defendant's counsel contends that the sci. fa. for further breaches, is to all intents and purposes, and within the meaning of the statute above cited, an original action. Whether this procedure for the purposes of set off, may be considered as an original action under the statute, is not necessarily a question in this case. There is a question behind that, which is decisive of the plea or notice.

As stated in the scire facias, this proceeding is had at the instance of certain judgment creditors of the firm of Bergen and Stevens. The name of Bergen is used as a trustee; but the suit is for the benefit of the above creditors. The condition of the bond is, that the defendant shall pay those creditors, so as to save harmless the said Bergen, not only from the debt, but from all costs and charges. An attempt, then, to plead offset against Bergen, arising on promissory notes acquired since the original judgment, is in direct conflict with the condition of the bond. The condition is, to pay the creditors, and not Bergen; and the creditors prosecute this suit for their benefit. This interest of the creditors, arising under the original judgment, would be recognized and enforced, if necessary, by a court of chancery. And a court of law will also protect and enforce their rights, in the name of Bergen. The issue is between the creditors and the defendant, and as they have reduced their claims to judgment, an offset against them could not be allowed, at least so far as Stevens is concerned, with whom the defendant Williams is jointly liable. It need not now be said, whether Williams, being a stranger to the judgment in favor of the creditors, might not be allowed to set up a defense, which would not be proper for Stevens, who was a party to the judgment, because no such question is raised. Under the plea of nul tiel record, the record of the judgment only can be examined. If the defendant had notice, and judgment for the amount stated was rendered, no other question can be considered under that plea.

The plea that the co-partnership of Bergen and Stevens did not owe at the time the bond was executed, is subject to two objections: 1. The bond obligated the defendant, jointly with Stevens, not only to pay the debts of the firm, then due, but also those that should thereafter become due. 2. Nil debet cannot be pleaded to a judgment. The judgment closes the controversy, and it is indisputable, so long as it remains in force.

The demurrers to both pleas are sustained. On motion and affidavit of defendant, the order for execution was set aside, and leave to plead, granted.

[For subsequent scire facias proceeding on same judgment, see Berger v. Williams, Case No. 1,341.]

BERGER, (NORWALK LOCK CO. v.) See Case No. 10,355.

Case No. 1,341.

BERGER v. WILLIAMS.

[4 McLean, 577.][1]

Circuit Court, D. Michigan. June Term, 1849.

INDEMNITY—JUDGMENT ON BOND—DEFENSES OF SURETY—PLEADING—ALLEGATION OF BREACH OF TERMS OF BOND.

1. A judgment against the principal is prima facie evidence against the surety.

2. The surety may show fraud and collusion, that the debt has been paid or that there was a clerical mistake in entering the judgment.

[Cited in The Garland, 16 Fed. 287.]

[See McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 220.]

3. A breach alleged in the terms of the bond is sufficient.

[At law. Scire facias by James M. Berger against G. D. Williams on judgment for breach of bond. Defendant demurs. Demurrer overruled.]

Mr. Fraser, for plaintiff.

Mr. Douglass, for defendant.

OPINION OF THE COURT. Berger and one Stevens being in partnership, Stevens purchased the stock on hand and gave bond, with Williams security, in the penalty of twenty thousand dollars, "conditioned to discharge and pay all the debts and engagements of every kind due by the said firm, and to which it might be liable, be the same of whatever nature." Judgment for the penalty was recovered on this bond, and a sci. fa. in the name of the plaintiff alleges a breach, etc., and to recover a debt recovered by Chauncey Moss, against the late firm, in the state of New York. The defendant demurs to the sufficiency of the breach, on the ground that setting forth the judgment is not sufficient. That the consideration or cause of action, on which the judgment was rendered should have been averred.

A suit between the same parties on the same judgment, by a prior sci. fa., for the benefit of a creditor, was before this court at the June term, 1846. [Bergen v. Williams, Case No. 1,340.] The present sci. fa. has been issued at the instance of a different creditor and involves questions not before the court in the former suit.

Is the judgment rendered against the late firm, in the state of New York, evidence in the case? We think it is, though it may not be conclusive evidence. The defendant is not a stranger to the judgment, though he is not a party to it. He has covenanted to pay this debt jointly with Stevens, if it were a genuine debt, for which the late firm of Berger & Stevens were liable. The judgment establishes this liability, unless fraud be shown. And this the surety may show. And further he may show a mistake in the amount of the judgment. The evidence of indebtment is merged in the judgment. In [Drummond v. Prestman,] 12 Wheat. [25 U. S.] 515, it was held, that a judgment was prima facie, though not conclusive evidence against a guarantor. He may show a clerical mistake in the calculation of the judgment, or that it was obtained through collusion and fraud. Whether the judgment is final or conclusive is the only question in the case.

Lord Hardwicke, in Greerside v. Benson, 3 Atk. 252, held, that such a judgment is conclusive against the surety. The same doctrine was held 1 Ohio, 446; Heard v. Giles, 20 Pick. 53; 10 Barn. & C. 317. An entry in a book against the interest of a party, is evidence against a third person. The case of Moss v. McCullough, 5 Hill, 132, is relied on by the defendant, as showing that such judgment is not evidence, etc. In that case the superior court held a judgment against the principal was conclusive against the surety. And that was a point before the court. A new trial was granted. But that decision is in conflict, it would seem, with the case of Slee v. Bloom, 20 Johns. 669. The reasoning of Judge Cowen beyond the case can not be considered as authority, any more than his notes on Phillips' evidence. In Douglass v. Howland, 24 Wend. 58. Cowen founds the decision on the authority of the two cases of Beall v. Beck, 3 Har. & McH. 242, and M'Kellar v. Bowell, 4 Hawks, 34. The first of the above two cases is most unsatisfactory. Suit was brought against the surety of a deputy sheriff collector. On the trial the collector was offered as a witness, and objected to, and the court being divided, as to the admission of the witness, the evidence was not permitted to go to the jury. This, I suppose, must have been a mistake of the reporter. The objections to the admission of the evidence fail where the court are divided, and as a matter of course, the evidence goes to the jury. On an appeal the judgment was affirmed. No argument of counsel, or opinion of the court is published. In Jacobs v. Hill, 2 Leigh, 393, confession of judgment by the principal, a sheriff, is evidence against the surety, overruling the case of Munford.

We think on reason and authority the law is clear, that a judgment against the principal is prima facie evidence against the surety. To avoid its effect, the surety may show collusion and fraud, that the demand has been paid, or that there is a clerical mistake in entering up the judgment. We think, also, that the breach to which an objection has been made is sufficient. The breach is alleged in the terms of the condition of the bond. The demurrer is overruled. On motion and affidavit of defendant, execution is set aside, and leave given him to plead.

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

Case No. 1,342.

In re BERGERON.

[12 N. B. R. 385;[1] 2 Cent. Law J. 507; 1 N. Y. Wkly. Dig. 178.]

District Court, E. D. Michigan. July 12, 1875.

INVOLUNTARY BANKRUPTCY — SETTING ASIDE ADJUDICATION—RIGHTS OF ATTACHING CREDITOR—NUMBER AND VALUE OF PETITIONING CREDITORS.

1. An attaching creditor may move to set aside an adjudication of bankruptcy, though no party to the bankrupt proceedings.

[Cited in Re Hatje, Case No. 6,215; Re Williams, Id. 17,706; Re Scrafford, Id. 12,557; Re Jonas, Id. 7,442; Re Austin, Id. 662; Allen v. Thompson, 10 Fed. 124.]

2. Though the aggregate of the debts of the petitioners, whose debts exceed two hundred and fifty dollars in amount, does not equal one-third of the aggregate of all debts exceeding two hundred and fifty dollars, still the petition should be sustained, if the aggregate of all the petitioners' debts equal one-third of the aggregate of all the debts provable against the estate.

[Cited in Re McAdam, Case No. 8,654; Re Lloyd, Id. 8,429. See, also, In re Broich, Id. 1,921.]

In bankruptcy. Petition of Doggett, Bassett & Hills, of Chicago, to set aside adjudication in bankruptcy [against John B. Bergeron. Denied.]

The petition sets forth that petitioners were creditors of Bergeron upon an open account for merchandise to the amount of fourteen hundred and twenty dollars and forty-six cents. That on the 28th of January, 1875, they commenced suit against the bankrupt in the circuit court for the county of Calhoun, by attachment, and that the suit is still pending; that on the 31st day of March certain creditors of the bankrupt filed a petition upon which Bergeron was adjudicated a bankrupt by default. They further allege that the proceeding was not taken by creditors who constituted one-fourth in number of the creditors of the said Bergeron, nor was the aggregate of their debts one-third of the debts provable against him under the bankrupt act. They further set forth that only two petitioners whose debts exceed two hundred and fifty dollars were parties to the petition, and that their debts in the aggregate did not equal one-third of the entire amount of debts which exceeded the sum of two hundred and fifty dollars. They further allege that they have acquired rights by virtue of their attachment in the state court, which will be destroyed by the bankruptcy proceedings, and pray that the order of adjudication may be set aside, for the reason that a sufficiency of creditors did not join in the petition.

Mr. Romeyn, for petitioners.

C. I. Walker, for assignees.

BROWN, District Judge. Upon the argument of this case I intimated a doubt whether a creditor who had obtained a preference by attachment, and was no party to the bankruptcy proceedings, stood in a position to set aside an adjudication, even though it had been improperly and irregularly entered. The first reported case I have found is that of Brewster v. Shelton, 24 Conn. 140. Under the laws of that state, an attachment-creditor filed a petition in the probate court for the appointment of a trustee of the debtor, pursuant to the provisions of the statute, and it was held that other attaching creditors were so far interested in the subject-matter before the court, that they had a right to be heard in opposition to the proceedings. The effect of the application being to dissolve their liens acquired by the attachment, the court held they were entitled to appear and protect such liens, and to show that the proceedings were commenced and carried on with a fraudulent design, to injure them and the other creditors of the insolvent. The question first arose under the new bankrupt law in the Case of Walker, [Case No. 17,061,] where the district court of Massachusetts entertained a petition to vacate an adjudication upon a voluntary petition for want of jurisdiction, averring that the bankrupt had not resided in the district, as required by law. No objection, however, was made to this mode of review.

The question was first distinctly presented in the case of Fogerty v. Gerrity, [Case No. 4,895,] where it was held that as all creditors are parties to, and bound by the proceedings in bankruptcy, an adjudication which was not made and carried on within the proper jurisdiction, should be set aside and vacated upon the petition of an attaching creditor. In such a case, however, I apprehend that the adjudication would be void, even in a collateral proceeding. Objection being taken that the creditor had no right to institute these proceedings, it was held that consent could not confer jurisdiction, and that he might attack it directly, as well as take advantage of it collaterally. In the case of Karr v. Whittaker, [Id. 7,613,] the court held that there was no party to a creditors' petition except the petitioning creditors and the bankrupt; that a party to whom the bankrupt had made a fraudulent preference, and who had been enjoined from disposing of the property of the bankrupt, had no right to contest or to vacate the adjudication, that being a matter in which he could have no interest. It was claimed in this case, that the adjudication had been procured fraudulently, that there had been no publication, and that before adjudication the bankrupt had died. A similar view of the law was taken by the district court of southern New York in the Case of the Boston, Hartford & Erie Railroad Company, [Id. 1,679,] in which a creditor who had filed a petition in another district asked leave to defend against another petition filed in the southern district of New York. The court held that he had

[1] [Reprinted from 12 N. B. R. 385, by permission.]

no concern in the matter before adjudication. On appeal to the circuit court, however, Judge Woodruff reversed this ruling and entertained the petition. 6 N. B. R. 209, [In re Boston, H. & E. R. Co., Case No. 1,677,] The recognized ability and learning of Judge Woodruff entitles this opinion to great weight. It was subsequently followed by Judge Blatchford, in the Case of Derby, [Id. 3,815,] and is recognized as the law of that circuit. In this case, an infant had been adjudicated a bankrupt, and the court granted the petition of the mortgagee to set aside the adjudication upon that ground.

A different view was taken of the law by the late Judge Hall, of the northern district of New York, in the Case of Bush, [Case No. 2,222,] quoting and following the opinion of Judge Blatchford in the case which was subsequently reversed by the circuit court.

It will thus be seen that the weight of authority is decidedly in favor of entertaining jurisdiction of such petitions, and upon mature reflection I am satisfied that it is founded upon the better reason. Although the proceedings between the petitioning creditors and the bankrupt until the adjudication are in a measure interpartes, still, as such adjudication operates ipso facto, to dissolve all attachments issued within four months before the commencement of the proceedings, I think that an attaching creditor is entitled to interpose and protect his interest. It would be a singular anomaly if a lien, obtained by his diligence, could be set aside by proceedings to which he could not make himself a party. Although the finding of the court as to the sufficiency of creditors in number and amount would be binding in any collateral proceeding, still it is a quasi jurisdictional allegation, and if the attention of the court is called to the want of a proper number of petitioners, I think the adjudication should be opened.

Upon the facts of this case, however, disclosed in the petition, I am satisfied the adjudication should not be set aside. The act requires that proceedings shall be instituted by creditors who shall constitute one-fourth in number, and the aggregate of whose debts, provable under the act, amounts to at least one-third of the debts so provable. The same section further provides that in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. It has already been held by this court, in the Case of Hadley, [Case No. 5,894,] contrary to the view taken by the district court for the southern district of New York, in Re Hymes, [Id. 6,986,] that in computing, the amount of creditors who should join, as contradistinguished from the number, creditors whose claims are less than two hundred and fifty dollars, should be reckoned. It appears by the petition in this case that there are five creditors whose debts exceed two hundred and fifty dollars, two of whom have joined in this petition. So far as the number is concerned, then, there is no doubt of their sufficiency. The aggregate of the bankrupt's debt as disclosed by the petition of Doggett, Bassett & Hills, is four thousand eight hundred and ten dollars and twenty-six cents. The aggregate of the debts of the petitioning creditors is sixteen hundred and seventy-one dollars and ninety-seven cents, three times which would be five thousand and fifteen dollars and ninety-one cents. More than one-third of the aggregate of the bankrupt's debts are therefore represented in the creditors' petition, although the debts of three petitioning creditors are each less than two hundred and fifty dollars in amount.

The petition must therefore be denied.

Case No. 1,343.

BERLIN et al. v. JONES.

[1 Woods, 638.][1]

Circuit Court, S. D. Alabama. Dec. Term, 1871.

CIRCUIT COURT—JURISDICTION—AVERMENT OF DIVERSE CITIZENSHIP.

An averment in a declaration that a party defendant is a citizen of the southern district of Alabama is equivalent to an averment that he is a citizen of the state of Alabama, and is a sufficient averment of the latter fact.

[See Gassies v. Ballon, 6 Pet. (31 U. S.) 761.]

[At law. Action by Berlin & Son against Jones. Defendant demurs to declaration. Demurrer overruled.]

John P. Southworth, for plaintiffs.

Peter Hamilton, for defendant.

WOODS, Circuit Judge. The ground of demurrer is that it does not appear from the declaration that the court has jurisdiction of the matters and things therein complained of. The reason why it does not appear that the court has jurisdiction defendant's brief alleges to be: because the defendant is not averred to be a citizen of the state of Alabama, but of the southern district of Alabama. The judicial act, [Sept. 24, 1789,] § 11, (1 Stat. 78,) provides that "the circuit courts shall have original cognizance of all suits of a civil nature * * * when the suit is between a citizen of the state where the suit is brought and a citizen of another state." The citizenship of plaintiffs in the state of New York is distinctly averred, and the question presented is, whether it is sufficiently averred that defendant is a citizen of the state of Alabama.

When the jurisdiction depends upon the character of the parties, it must be positively averred upon the record. Bingham v. Cabbot, 3 Dall. [3 U. S.] 382; Abercrombie v. Dupuis, 1 Cranch, [5 U. S.] 343; Wood v. Wagnon, 2 Cranch, [6 U. S.] 9; Capron v.

[1][Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Van Noorden, Id. 126; Brown v. Keene, 8 Pet. [33 U. S.] 112; Jackson v. Ashton, Id. 148; Michaelson v. Denison, [Case No. 9,523.] In the case [Bingham v. Cabbot] in 3 Dall. [3 U. S.] 382, there was no averment whatever as to the citizenship of the defendant, and on that ground judgment was reversed. In Abercrombie v. Dupuis, [supra,] the plaintiff was averred to reside in the state of Kentucky, and the defendant was called "Charles Abercrombie, of the district of Georgia," there being no averment either that the plaintiff was a citizen of Kentucky, or the defendant of Georgia. In Wood v. Wagnon, [supra,] the plaintiff is described as a citizen of Pennsylvania, and the defendant as "James Wood of the state of Georgia." In both the cases last named the objection was taken that it did not appear that the plaintiff and defendant were citizens of different states, and upon that ground the judgment was reversed upon the authority of Bingham v. Cabbot, supra. In Michaelson v. Denison, [supra,] the plaintiff was described as Charles Michaelson of Bass End in the island of St. Croix, a foreign subject, viz., a subject of the king of Sweden. Livingston, [Circuit Justice,] said: "By the constitution of the United States the judicial power may extend to cases between citizens of a state and foreign subjects, but congress in the provision of the judicial act under that clause has restricted it to cases in which an "alien" is a party. He must be stated to be an alien in express terms. The court will take nothing by implication. Besides it is a non sequitur that because a man is a subject of a foreign power he is an alien; he may be at the same time a naturalized citizen of this state."

In Brown v. Keene, 8 Pet. [33 U. S.] 112, the petition averred that the plaintiff, Richard R. Keene, was a citizen of the state of Maryland, and that the defendant, Brown, was a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The judgment was reversed because the petition did not positively aver that the defendant was a citizen of the state of Louisiana, but in the alternative that he was a citizen or resident, and because consistently with this averment he might be either. The decisions of this court, Marshall, [Chief Justice,] goes on to say, require that the averment of jurisdiction should be positive, that the declaration should state expressly the fact on which the jurisdiction depends.

It will be observed in these cases the judgments were reversed.

1. Because there was no averment whatever touching the citizenship of the plaintiff or of the defendant, or

2. Because the averment of the declaration as to one of the parties was, that he was of a named state, without distinctly alleging citizenship therein, or

3. That the fact of citizenship was stated in the alternative, or

4. That a party plaintiff was averred to be a foreign subject when the jurisdiction of the court extended only to aliens.

It seems clear that the case at bar is not to be controlled by either of the cases cited. Here citizenship is distinctly averred, but it is alleged to be citizenship in the southern district of Alabama, and not of the state of Alabama, and the precise question presented is whether under the rules of pleading, an averment that a party is a citizen of the southern district of Alabama is a sufficient averment of his citizenship in the state of Alabama?

It is a rule of pleading that it is not necessary to state matter of which the court takes judicial notice. Therefore, it is unnecessary to state matter of law, whether of the common law or public statute law. By a public act the court knows judicially that the southern district of Alabama is in the state of Alabama. What the court notices judicially is taken for granted, or as if set out at length in the pleading. So that this pleading must be considered precisely as if the averment objected to was that the defendant is a citizen of the southern district of Alabama, which is part of the state of Alabama. Taking the averment as it stands in the declaration, in connection with the other fact which the court assumes judicially to be the fact, I think the citizenship of the defendant in the state of Alabama, is sufficiently averred. I am strengthened in this view by the remarks of Marshall, C. J., in the case of Jackson v. Ashton, supra. In that case the citizenship of the plaintiff was well averred; the only question was, whether that of the defendant as a citizen of Pennsylvania was also well averred? He was described simply as William E. Ashton, of the city of Philadelphia. The chief justice said: "The only difficulty which could arise as to the dismissal of the bill presents itself upon the statement that 'the defendant is of Philadelphia.' This it might be answered shows that he is a citizen of Pennsylvania. If this question were new, the court might decide otherwise; but the decision of the court in the cases which have heretofore been before it has been expressed upon the point, and the bill must be dismissed for want of jurisdiction." I think the fair inference from this language is that if the averment had been that the defendant was a citizen of Philadelphia, the court would have held the averment good, taking judicial notice of the fact that Philadelphia was in the state of Pennsylvania. One thing is clear, that the court thought that the decisions on this question had already been pushed too far. We are asked to go a step beyond any decision heretofore made, and say that the averment that a party is a citizen of the southern district of Alabama, is not a sufficient averment that he is a citizen of the state of Alabama.

In some of the cases which I have examined, the party is alleged to be a citizen

of the district of Georgia, for instance. No objection seems to have been taken to this form of averment, but it was considered good both by court and counsel. The citizenship of defendant in the state of Alabama is, I think, sufficiently averred, and plea that he was not a citizen of Alabama would be a good traverse to the averment of the declaration. Demurrer overruled.

BERLIN, (MILLER v.) See Case No. 9,562.

Case No. 1,344.

The BERMUDA.

[10 Ben. 693.] [1]

District Court, E. D. New York. Dec. Term, 1879.[2]

COLLISION IN NORTH RIVER—STEAMSHIP AND LIGHTER—CROSSING COURSES.

1. Where a steam-lighter, bound from Hoboken, N. J., around the Battery to the East river, and a steamship, which had come round the Battery into the North river and was making for her berth at pier 10, against the tide, came in collision, whereby the lighter was sunk, and her owner libelled the steamship, alleging various faults of navigation: *Held*, that only one of the faults charged, that of porting her helm, could have interfered with an effort on the part of the lighter to avoid the steamship;

[See note at end of case.]

2. That the steamship did not port her helm, but kept her course, as she was bound to do under rule 18, and having stopped and backed when danger appeared, and let go her anchor, was not in fault for the collision;

[See note at end of case.]

3. That the lighter, having attempted to cross the bows of the steamship, was in fault, and the libel must be dismissed.

[See note at end of case.]

[In admiralty. Libel against the steamship Bermuda for damages from collision. Dismissed. Libellant subsequently appealed. Affirmed. The Bermuda, 11 Fed. 913.]

Owen & Gray, for libellant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, District Judge. This action is brought to recover the sum of $10,000, being the damages arising from a collision between the steam-lighter Nichols and the steamship Bermuda in the North river, on the 7th day of December, 1878. The libel avers that the place of the collision was a little below pier 1; that the tide was strong ebb and the wind S. W.; that the lighter was bound from Hoboken to Newtown creek; that the steamship, when first seen by those on the lighter, was heading up the North river, and if she had kept the course she was then on or had put her helm to starboard she would have passed the lighter on her starboard hand in perfect safety; that, as soon as the steamship was discovered, two signals of the lighter's whistle were sounded as a warning to the steamship that the lighter intended to pass the steamship on her starboard hand; that instead of answering the signal the steamship paid no attention thereto, but put her helm to port, and by so doing threw herself toward the course which the lighter was pursuing; that, upon receiving no response from the steamship, and immediately upon seeing her aforesaid change of course, the lighter's helm was put hard-a-starboard, her engine was stopped and backed and everything was done to avoid collision. Four faults on the part of the steamship are charged, viz: that she had no proper lookout; that she paid no attention to the signal of the lighter, but instead thereof put her helm to port; that she was going at too great a rate of speed in a crowded harbor; and that she did not stop and back.

The account of the accident given by the steamship in her answer, is that the steamship having rounded the Battery at half speed, was proceeding slowly against the strong ebb-tide to her berth at pier 10 in the North river; that the steam lighter was observed on the port bow of the steamship, distant therefrom twelve or fifteen hundred feet, coming down the river on a course that involved no risk of collision; that a large double-decked barge was passing down the river between the lighter and the steamship, and in passing, shut off the lighter from the view of those on the steamship for a short time; that when the lighter again came in view, by the stern of the barge, being then about five hundred feet distant and about three points on the port bow of the steamship, she was heading almost directly for the steamship, indicating, thereby, that she had swung off her course under a starboard helm; that, although signalled from the steamship by a single blast of her whistle, to pass down on the port side of the steamship, she paid no attention thereto, but continued to swing as though under a starboard helm, taking a course crossing the bows of the steamship, whereupon, the steamship at once backed her engines at full speed, and it being impossible to get sternway in so short a distance, the port anchor was let go, but the lighter, still under a starboard helm, came down upon the bows of the steamship, and thus caused the damage complained of. Various faults are charged by the steamer upon the lighter as the cause of the collision; (1), her departure from the course she was on when first discovered by the steamship and adopting a course crossing the bows of the steamship; (2), her failure to have a proper lookout; (3), her failure to heed the signal of the steamship, but continuing in spite thereof under a starboard helm; (4), her proceeding

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

[2] [Affirmed by the circuit court in The Bermuda, 11 Fed. 913.]

at too great a rate of speed; (5), her not stopping and backing; (6), not taking the necessary precautions to avoid collision with the steamship.

In regard to these pleadings it is to be remarked that the libel is vague and unsatisfactory. It gives no courses, and the facts are so stated as to leave it uncertain what rule of navigation was applicable to the respective vessels. It would seem from the libel that the vessels were on courses substantially parallel, the lighter coming down the river between the steamship and the New York shore, and that the collision was caused by a porting of the helm of the steamship, which threw her towards the course which the lighter was pursuing. But no such case is shown by the evidence. The case for which the libellant contends upon the evidence is that the two vessels were on crossing courses. "The lighter (it is said) was crossing the river, and when discovered by the steamship, had reached the intersecting point of the courses."

Assuming that the evidence will permit the libellant to claim that the lighter was upon a course crossing the course of the steamship, instead of being substantially parallel to that of the steamship and outside of her, it cannot be denied that in such case it was the duty of the lighter to keep out of the way of the steamship, inasmuch as she had the steamship upon her starboard side and was subject to sailing rule 18, (old article 14.) In order to recover, therefore, upon the case as it is claimed to be by the libellant, it must appear that the lighter was prevented from avoiding the steamship by some fault committed by the steamship which rendered it impossible for the lighter to keep out of her way.

Of the faults charged in the libel against the steamship, but one, viz: that of porting her helm, could, under the circumstances claimed by the libellant, interfere with the effort of the lighter to avoid the steamship. It was no fault in the steamship not to starboard her helm, for her duty, under such circumstances, was to keep her course, and when it became evident that the lighter would fail in her effort to cross ahead of the steamship, stop her way as much as possible. As to a porting of the helm, no witness is called who testifies that the helm of the steamship was ported. Every witness from the steamship who speaks on the subject, including the man at the wheel of the steamship, says that the helm was not ported, and there is no testimony sufficient to controvert the statement. It is quite likely that after the engine of the steamship had been reversed, the bow of the steamship swung somewhat to east, but that arose from the action of the screw and was no fault. As regards stopping, it is proved that the steamship made every effort to stop her way as soon as it became evident that the lighter was likely to fail in her effort to cross the bows of the steamship. Upon the proofs, therefore, it is impossible to hold that the collision was caused by a fault of the steamship. The fault that caused the collision was that of the lighter in attempting to cross the bows of the steamship instead of passing under her stern.

The libel must therefore be dismissed, and with costs.

[NOTE. On libellant's appeal this judgment was affirmed by the circuit court on substantially the same grounds. In reference to the contention that the Bermuda should have starboarded her helm, the court, by Blatchford, Circuit Judge, remarked that it was not clear that that would have avoided the collision, but, even "if it would, the failure to adopt the maneuver was, at most, an error of judgment, in the peril caused by the negligent action of the O. T. Nichols, and not a fault." The Bermuda, 11 Fed. 913.]

Case No. 1,345.

The BERMUDA.

[23 Leg. Int. 116;[1] 6 Phila. 187.]

District Court, E. D. Pennsylvania. March 31, 1866.

PRIZE—SPOLIATION OF PAPERS—FALSIFIED DESTINATION—PRESUMPTION OF HOSTILE OWNERSHIP.

1. Either spoliation of papers, or falsified destination suffices to induce a legal presumption of hostile ownership.

2. Further proof refused where the destination had been falsified, and papers were, under an apprehension of capture, destroyed in pursuance of previous instructions to do so.

In admiralty. This was the last of the contested prize cases in this district. All the decrees appealed from were affirmed by the supreme court. In this case, the vessel, and the munitions of war composing part of her cargo, were long since condemned. These decrees of condemnation have recently been affirmed. [The Bermuda, 3 Wall. (70 U. S.) 514.] The following opinion of the district court applies to the residue of the cargo [condemned.]

CADWALADER, District Judge. In this case the only question requiring serious consideration was whether further proof should be allowed. This question was more or less complicated with that of the ultimate destination of the cargo. The affirmance of the decrees condemning the vessel, and the munitions of war which composed part of her cargo, has enabled me to give, without the least difficulty, a decision as to the residue of the cargo consisting of general merchandize. I suspended the final disposition of this part of the case until the decision of the supreme court upon the appeal of the claimant of the cannon, because, had further proof been allowed on his part, such proof might possibly have been likewise receivable as to

[1] [Reprinted from 23 Leg. Int. 116, by permission.]

the rest of the cargo. According to my own strong conviction, further proof was altogether inadmissible. But the cannons were, according to his affidavit, to have been landed, at all events, either at Bermuda or at Nassau, and to have been disposed of on his own account at one of those places, without even a contingent ulterior destination. If this had been true, the rest of the cargo must also, according to the plan of the voyage, have been landed at one of those places, because the cannons were below it, forming part of the ballast of the vessel. They could not have been reached until the merchandize generally had been discharged. I did not consider his affidavit, in this respect, credible. I thought there was no doubt whatever that the destination of the vessel was controlled by those who would certainly have determined it for a blockaded port, if there had been a reasonable probability of running the blockade. If his affidavit were disregarded, the proofs were conclusive that the whole of the cargo was absolutely destined for a blockaded port, either directly or by transhipment. It was at least, clearly shown by these proofs that those who controlled the navigation of the vessel could, if they chose, prevent the landing of any part of the cargo at any intermediate place. The only possibility of doubt which I thought conceivable in the mind of any person has been removed by the affirmance of my decree which was founded on the disallowance of further proof on the part of this claimant. Informally he and others had really perhaps been afforded every advantage which could have been derived by them under an express allowance of such proof. During the late hostilities, reasons arising from their peculiar character had induced this court to receive provisionally in the progress of prize cases, almost all evidence which would have been admissable as further proof, except, perhaps, in a very extraordinary case, requiring plenary proofs. Of this practice of the court, parties had in this case availed themselves, and had thus received a benefit to which they were not, in ordinary strictness, entitled. They probably could not have offered any additional evidence under a formal order allowing further proof. To retain the case in this court, seemed, therefore, as to the general merchandize, preferable to a decree of condemnation which would unnecessarily have increased the number of appeals.

The opinion of the supreme court would, I think, require of this court a decree condemning the whole cargo independently of any question of its actual ownership. Such a decree would be conformable to established rules of prize law upon those questions of destination with intended breach of blockade, &c., which the case involves. But the decree may be pronounced, not less properly, upon the question of hostile ownership alone. In the opinion of the supreme court, the destruction of the papers relating to the cargo was an unusually aggravated "spoliation," warranting "the most unfavorable inferences as to ownership." The result must of course be condemnation unless further proof can be allowed. To allow it in such a case would set a trap for the conscience of claimants, tempting them to commit perjury, if not inviting its commission. Further proof is not allowable where, as in the present case, the letters of advice and proprietary documents of a cargo have been destroyed under previous orders to do so rather than to let them be seen by captors or boarders. Such was the plain import of the instructions given to the navigator of this vessel by the persons to whom the absolute control of all the shipments had been confided. That these were persons of well known relations hostile to the United States, might alone suffice to exclude any exception or qualification of the rule against allowing further proof in the case of spoliation of papers under such instructions. The only rational exception from such a rule is in cases of well founded apprehension, by persons truly neutral, of danger of illegal detention or capture. If such cases occurred in the wars of the French revolution, it is to be remembered that, so far as proprietary rights of neutrals were concerned, the commissioned belligerents, French and English, who then swarmed the seas, were scarcely less dangerous than pirates. Like danger, though less in degree, may have been reasonably apprehended in some previous European wars. There certainly was no reason for apprehension of any such danger on the voyage in question. In cases of spoliation of papers, the legal presumption against their destroyer is founded in a rule of common sense. The rule is not by any means peculiar to prize courts. Its application is familiar in courts of equity which administer in this respect the doctrines of general jurisprudence. If the proprietary documents had been preserved they would unquestionably have shown hostile ownership. Direct proof to this effect as to part of the cargo has been furnished by existing papers accidentally discovered in unloading the vessel. As to the rest of the cargo, a moral, not less than a legal inference to the same effect arises from the destruction of the papers. The moral presumption from the previous orders to destroy them is indeed too strong to be rebuttable.

If this were less clear, condemnation must inevitably result from the wilful falsification of the destination of the cargo. From this the presumption of hostile ownership is, in a case like the present, conclusive. Here likewise, the rule is to disallow further proof. Should the case of any one consignee or shipper be distinguishable, in any respect, under this head, from the general case of the others, there could be no such special difference in his favor as to screen the goods which he claims. If the falsification by those to whom any such party entrusted the goods was un-

authorized by him, the law affords him a civil remedy against them to recover an indemnity. But the existence of such a recourse cannot exempt the goods from confiscability. The rule that a person is liable for the wrongful acts of his agents applies, under this head, in the administration of prize law. The principle was applied in this case by the supreme court, citing The Ranger, 6 C. Rob. Adm. 126, which was a case of transportation of goods contraband of war. To the same effect is the case of The Mars, Id. 87, 88, where the goods were not precisely of this kind, and the decision was upon the ground of a false destination. In a third case, (Phoenix Ins. Co. v. Pratt, 2 Bin. 308,) there was no question of either false destination or contraband property of any kind. A neutral who was, for the voyage, the general agent for a cargo principally of neutral ownership, was alleged to have covered in his own name, by false papers, other goods of hostile ownership in the same vessel. The opinion of the court was that the whole property of the principal on board of the vessel was liable to condemnation, if such an agent attempted to deceive a belligerent by thus covering property of his enemy. Such an act, when perpetrated by the master so as to involve a forfeiture of the vessel, or of goods on board, is within the definition of barratry. See Earle v. Rowcroft, 8 East, 126. In the present case, those who concocted the falsifications were, so far as they may not themselves have owned the cargo, general agents and managers, in respect of it, for all who were concerned in the voyage. I do not, however, perceive in the case any reason to justify a view so little unfavorable to any one of those on whose behalf the cargo was claimed.

For these reasons, and others which might be stated, the residue of the cargo is condemned. The case does not require the repetition of a remark frequently made, in different forms, in prize courts, that the criterion of hostile ownership is not the same in them as it might be in ordinary tribunals upon a mere question of proprietary right between private persons. A party might be able, in a court of common law, to maintain an action of replevin, or of trover, against a person who, nevertheless, having the commercial control and disposal of the subject of the action, would be deemed the owner in a prize court. A sufficient test of ownership in a prize court is that the goods, on reaching their destination, would have been disposed of, or held, for the profit of persons of hostile residence. Applying this test there can be no doubt that this cargo should be condemned. The previous reasons are, however, perhaps, of more simple application to the case.

BERNAL, (UNITED STATES v.) See Cases Nos. 14,578–14,583.

Case No. 1,346.

BERNARD et al. v. ASHLEY et al.

ASHLEY et al. v. BERNARD et al.

[Hempst. 665.][1]

Circuit Court, D. Arkansas. April Term, 1853.[2]

PUBLIC LANDS — PRE-EMPTION CLAIMS—VACATING PATENTS—ACTS OF GOVERNMENT AGENTS.

1. It is competent for the government to sanction the widest departure from its regulations relative to the public lands, or waive any irregularity in the acts of its agents, and which will be binding as against itself, but cannot affect rights which have vested in others.

[See note at end of case.]

2. Pre-emption claims rejected, patents ordered to be vacated, and title quieted.

[See note at end of case.]

[In equity. Bill by Elizabeth J. Bernard, Mary A. Bernard, Corine Bernard, and Thomas Bernard, (heirs of Thomas Bernard, deceased,) by William Cannon, their next friend, against Mary W. W. Ashley, (executrix of Chester Ashley, deceased,) William E. Ashley, and Henry C. Ashley, (heirs of Chester Ashley, deceased,) and Silas Craig, to vacate patents to land. Cross-bill by defendants against original complainants. Decree for defendants to original bill. Original complainants subsequently appealed to the supreme court. Affirmed in Barnard v. Ashley, 18 How. (59 U. S.) 43.]

Albert Pike, for complainants.

J. M. Curran and F. W. Trapnall, for defendants.

RINGO, District Judge, having been of counsel, and being also interested in the suit, did not sit.

DANIEL, Circuit Justice. The original bill is brought to vacate patents to four quarter sections of land granted to defendant Craig, and in which Ashley and Craig were jointly interested, and one patent granted to William Nooner, who conveyed the land in that patent to Ashley. The allegations on which the prayer of the original bill is founded, are, that Bernard and the several persons under whom he derives title had, under the act of congress of June 19th, 1834, [4 Stat. 678, c. 54,] a valid right of pre-emption to the several parcels of land above mentioned, which right had been established to the satisfaction of the government, and patents issued in conformity therewith; that under an act of congress, approved on the 2d of March, 1831, [4 Stat. 473,] vesting in the territory of Arkansas ten sections of the public unappropriated lands, for the purposes in that act specified, the governor of the territory, John Pope, selected and conveyed to the defendants, Ashley and Craig, for a price stipulated between them, the lands comprised in the several sections set forth in and

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [Affirmed by the supreme court in Barnard v. Ashley, 18 How. (59 U. S.) 43.]

claimed by the bill, and that in accordance with such selection, transfer, and conveyance patents, anterior in date to those held by the complainants, had been granted to the defendants for the lands in question; that the acts of the territorial governor and of the defendants were irregular and in contravention of the general and established system and policy of the government relative to the disposition of the public lands; and although the irregularities in the proceedings of the territorial governor had, by subsequent act of congress, been cured, and those proceedings ratified, so far as the rights of the government were involved, yet the intervening and vested rights of pre-emption in the complainant or his vendors could not be affected by such ratification, but remained in full force. In the answers to the original bill, Craig disclaims all title to the south-east fractional quarter of section twenty-two in township eighteen, south of range one west, but both Craig and Ashley insist upon the validity of the acts of the territorial governor, as sanctioned and confirmed by the government of the United States; they expressly deny all foundation for any right of pre-emption on the part of the complainants to any of the lands in question, aver that the representations by the complainants and their vendors, under which their claim had been urged, were false and fraudulent as respects both the government and the complainants, and insist upon their elder patent. The cross-bill of Ashley reiterates the statement in his answer to the original bill, as to the foundation of his title to the several sections, with the exception of the south-east fractional quarter of section twenty-two. To this last quarter section, he sets out a title derived from William Nooner, who had obtained a patent for it in virtue of a donation warrant under authority of an act of congress. In his cross-bill, Ashley denies all right of pre-emption in Bernard or his vendors, and prays that the junior patent to Bernard may be vacated as fraudulent and illegal. In the joint cross-bill of Craig and Ashley, the right and title of these complainants, derived from their contracts with and conveyances from the territorial governor, and from the acts of congress in relation thereto, and under the elder patent granted them, are set forth and insisted on. The bill further denies all right of pre-emption in the defendants, prays a vacation of the junior patent, and an account of the rents and profits of the land held and cultivated by Bernard, in opposition to the complainants, from the period of Bernard's adversary occupation.

It has been strenuously urged in argument, that the contract of the defendants in the original bill and complainants in the cross-bill with the territorial governor, and his selections and conveyances in execution of those contracts, were illegal, and therefore could form no just foundation for the patents issued in pursuance thereof. This proposition could derive force only from the supposition that the alleged right of pre-emption intervening between the grant by congress to the territory and the act by the same body in ratification of the proceedings by the governor, constituted a vested interest which could not be affected by any subsequent acts of the body having the title to and possession of the subject it had undertaken to dispose of. This position involves a delicate and difficult question as to the extent of the political power over subjects within its appropriate province, which the court would reluctantly determine. But there can be no serious doubt that if such vested interest had not certainly grown up, the government would have the right and the power, as against itself, to waive any irregularity, however palpable, which should appear in the acts of its own agents. There can be no question, certainly, that the government could sanction the widest departure from the regulations it had laid down in relation to the sale of the public lands. This same power would equally apply to any supposed or real omission in the transmission or deposit of any document in any of the land-offices, especially if shown to have been the consequence of accident, misapprehension, or of delay necessarily incident to pressure of business. But is any speculation of this character rendered necessary by the evidence in this case? Is there shown by that evidence either the origin or maturity of any legal or equitable right on the part of the complainants in the original bill, defendants in the cross-bills, which has been impaired by either the contracts or by the proceedings in execution of those contracts with the governor? In other words, have they proved that they are or ever were entitled to a pre-emption to the lands in question, within the just intent and meaning of the law? And here it should be noted as a circumstance by no means unimportant in this inquiry, that the holders of the elder patent were purchasers for value under a contract open and public, and recorded both in the state and national archives, and which therefore might be regarded as notice to all the world,—a title which public policy and private security would dictate should not be displaced but in obedience to the clearest and strongest demands of justice. There is nothing obscure or equivocal, as to the commencement of this title, in the modes by which it was matured, or the agents concerned in its concoction, and it has been sanctioned by the legislative body which possessed the undoubted authority to dispose of the rights and interests of the government.

In turning to the character of the evidence on which the claim of the complainants in the original bill is founded, it is seen to consist mainly in the statements of those who had a direct interest in setting up that claim. It is mostly ex parte, and obtained from

persons manifestly ignorant and in a situation in society peculiarly liable to influence from others. But these are not the only circumstances calculated to impair the testimony adduced in support of the pre-emption. That evidence was explicitly contradicted by the statements of witnesses whose intelligence and necessary knowledge of the subjects of controversy and familiarity with the matters as to which they have deposed should give, it is thought, to their statements a decided preponderance. A detailed analysis of the evidence on the one side or the other, or any minute comment upon its separate portions, is not deemed necessary in this place; nor would this be practicable within the time now at the command of the court. But the examination of that evidence has led the court to these conclusions:—

1. That the claim to the pre-emption alleged in the original bill is altogether pretended and without just foundation.

2. That this claim, therefore, could interpose no valid objection to the contracts between the defendants in the original bill and the territorial governor; nor in any respect impair the authority of congress to cure any irregularities in these contracts or in their execution; even conceding that such irregularities had in fact existed.

3. That the junior patents granted to the complainant in the original bill or to his vendors, are illegal, fraudulent, and void as it respects the defendants in that bill and all persons claiming under them, and such patents should therefore be vacated.

4. That the right and title of the heirs of Chester Ashley as derived from William Nooner to the south-east fractional quarter, section twenty-two, mentioned in the bill, should be confirmed and quieted as against the complainants in the original bill, and all persons claiming under them in virtue of a pre-emption.

5. That the right, title, and estate of the complainants in the second cross-bill, and the elder patent granted them in virtue of the contracts and proceedings therein set forth, should be and are hereby established, confirmed, and quieted as against the defendants in said bill, and as against all others claiming from or under them.

6. That an account of the rents and profits of the several portions of land embraced within the patents to the defendants in the original bill or to their vendors, so far as the same now are, or since the sale and selection and conveyance by the territorial governor have been held, occupied, and cultivated by the said Bernard, or for his benefit, or for the benefit of his heirs, should be taken before and stated by a commissioner of this court, excluding however such parts of the said land as have been sold and conveyed by the said Ashley and Craig from the dates of any conveyances or alienations made by them to others.

7. That the complainants in the original bill and the defendants in the said cross-bills pay the costs incident to each of those suits. Decree accordingly.

NOTE, [from original report.] The complainants in the original bill appealed from the decree to the supreme court, where the case was argued at the December term, 1855, by Albert Pike for the appellants, and A. H. Lawrence for the appellees; and is reported in 18 How. [59 U. S.] 43. The decree was affirmed.

Mr. Justice CATRON delivered the opinion of the court.

The proceedings in the court below consisted of a bill filed by Bernard against Ashley and Craig, praying that certain patents for lands issued to the defendants might be decreed to be cancelled, upon the ground of a violation of pre-emption rights on the part of the complainant, to the following tracts, namely, north-east quarter and south-west fractional quarter of section twenty-seven; south-east fractional quarter of section twenty-eight, township eighteen south, range one west; south-west fractional quarter of section fifteen, township nineteen south, range one west; south-east quarter of section twenty-two, township eighteen south, range one west; and a cross-bill on part of Ashley to be quieted in his title to the south-east quarter of section twenty-two, against the right set up by Bernard to that tract, under a junior patent therefor, upon the ground that Bernard had no right to this tract, and that the patent was issued to him improperly. The title of Ashley and Craig (the appellees) to the first four tracts is derived from a sale to them of the land in controversy by the governor of Arkansas, in consequence of a selection made by him of the land under certain provisions of the acts of congress of 2d March, 1831, and 4th July, 1832, (4 Stat. 473, 563,) upon which selection and sale patents were issued by the United States. The title to the south-east quarter of section twenty-two, township eighteen south, range one west, is derived from the location of what is called a "lovely donation claim" on this quarter section, by virtue of the provisions of the eighth section of the acts of 24th May, 1828, (4 Stat. 306, [c. 108.]) and 6th January, 1829, (Id. 329, [c. 2, § 2.]) According to the conceded facts, it is insisted, on part of Ashley and Craig, that the register and receiver having, on due proof and examination, rejected Bernard's claims to a preference of entry of the four quarter sections, he is thereby concluded from setting them up in a court of equity, because the register and receiver acted in a judicial capacity, and their judgment, being subject to no appeal, is conclusive of the claim. And the cases of Wilcox v. Jackson, [13 Pet. (38 U. S.) 511,] and Lytle v. Arkansas, [9 How. (50 U. S.) 333,] are relied on to maintain this position.

In cases arising under the pre-emption laws of 29th May, 1830, [4 Stat. 418, c. 180,] and of 19th June, 1834, [4 Stat. 678,] the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the commissioner of the general land-office," and, if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on ex parte affidavits which were impeached, and the land claimed by another, founded on an opposing entry, the course pursued at the general land-office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to

call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the general land-office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And, on this return, the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, § 1, [5 Stat. 107, c. 352,] which provides: "That, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States." The necessity of "supervision and control," vested in the commissioner, acting under the direction of the president, is too manifest to require comment, further than to say, that the facts found in this record show that nothing is more easily done than, apparently, to establish, by ex parte affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety. The case relied on, of Wilcox v. Jackson, 13 Pet. [38 U. S.] 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the commissioner had no power of supervision, such as was given to him by the act of July 4, 1836, after the cause was in court. In the next case, [Lytle v. Arkansas,] (9 How. [50 U. S.] 333,) all the controverted facts on which both sides relied had transpired, and were concluded, before the act of July 4, 1836, was passed; and therefore its construction, as regards the commissioner's powers, under the act of 1836, was not involved. Whereas, in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the commissioner. In Lytle's Case, [9 How. (50 U. S.) 333,] we declared that the occupant was wrongfully deprived of his lawful right of entry under the pre-emption laws, and the title set up under the selection of the governor of Arkansas was decreed to Cloyes, the claimant,—this court holding his claim to the land to have been a legal right, by virtue of the occupancy and cultivation, subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase-money. There the facts were examined to ascertain which party had the better right, and, following out that precedent, we must do so here. Governor Pope was authorized to select lands equal to ten sections in the territory of Arkansas, in tracts not less than a quarter section each, and to sell the same for the purpose of raising a fund to erect public buildings in the territory. The three first-named quarter sections lie in township eighteen, the survey of which was made and returned to the local land-office, and approved June 4, 1834, when the lands therein were subject to entry by the governor. He made his final amended selections of the three tracts in township eighteen, June 6, 1834. The bill claims title to these tracts under the occupant law of June 19, 1834. As Governor Pope's assignees, Craig and Ashley had a vested right when the act of June 19th was passed; it did not operate on these lands, which were appropriated to the use of the United States; and patents for them were properly awarded to the purchasers from the governor. The condition of the south-west quarter of section fifteen, township nineteen, differs from the preceding lands in this: The township survey of number nineteen was found to be inaccurate when first returned to the land-office at Little Rock, and a resurvey was ordered as to some of the section lines, which were not finally adjusted till the 19th of July, 1834. Governor Pope had selected the south-west quarter of section fifteen, on the 29th May preceding, relying on the inaccurate survey; and it is insisted for Bernard's heirs, that the selection was invalid, as it could not be made of unsurveyed lands; and that township number nineteen could not be legally recognized as surveyed, until the survey was settled and adopted by the surveyor general of the district. Our opinion is, that the selection could only take effect from the 19th of July, 1834, when the township survey was sanctioned, and became a record in the district land-office. As the occupant law passed June 19th, 1834, Bernard's assignor, Richmond, could lawfully enter the quarter section, if he had occupied the same as required by law; that is to say, if he was in possession when the act was passed, and cultivated any part of the land in the year 1833.

The bill alleges that Richmond occupied the quarter section June 19, 1834; that he had cultivated the same in 1833, and made due proof of his right of pre-emption. It is further alleged, that on the 20th day of January, 1834, some five months before the occupant law was passed, Bernard purchased from Richmond the quarter section in dispute, and took his title bond for a conveyance when Richmond should obtain a patent for the land, and by force of this bond the bill prays to have the patent to Craig and Ashley adjudged to have been for Bernard's benefit, and that the land be decreed to Bernard's heirs.

The act of 1844 [1834] revived the act of 29th May, 1830, [4 Stat. 418,] "to grant pre-emption rights to settlers." That act provides, (section 3,) "that all assignments and transfers of rights of pre-emption given by this act, prior to the issuing of patents, shall be null and void." The act of January 23, 1832, [4 Stat. 496, c. 9,] allowed a transfer of the certificate of purchase; here, however, the assignment was made in January, 1834, when no law allowing of a preference of entry existed; but, as no reliance seems to have been placed in the pleadings on this ground of defence, we will not rest our decree on it. As respects Richmond's occupation according to the act of 1834, John Monholland, Edward Doughty, and Daniel Kuger, each swear, in similar language, "that Richmond, in the year 1833, cultivated part of the south-west fractional quarter, section fifteen, in township nineteen south, range one west of the principal meridian, and raised a corn crop on the same in that year, (1833,) and was in possession of the same on the 19th day of June, 1834." Kuger says, Richmond had his dwelling-house on the quarter section, and resided there on the 19th of June, 1834. Jacob Silor, examined on part of the respondents Ashley and Craig, states, that he resided on Grand lake, quite near the quarter section in dispute, since 1830. He says: "In February, 1833, when I arrived on the aforesaid lake, there was a turnip patch on the south-west fractional quarter of fractional section fifteen, in township nineteen south of range one west, claimed by one Edward Doughty; which, I believe, he abandoned in consequence of the location of the ten-section claim on the land.

After Doughty left the aforesaid fractional quarter, William Richmond, in December, 1833, built a cabin where the turnip patch claimed by the said Edward Doughty was made, and planted some eschallots. The aforesaid William Richmond lived in the same township, on the Mississippi river, on the lands owned by Mr. Cummins or Mr. Shaw, on the 19th of June, 1834; and never did live on section fifteen, from the time I went on the lake to the present day." Benjamin Taylor deposes, that he settled with his negroes on township eighteen, in February, 1834; that in the spring of that year he examined, with care, the several tracts of land of Ashley and Craig, with a view to purchase them; and being asked what the situation of the south-west quarter of section fifteen was, when he examined it, answers, that "there was a small burn of cane, perhaps twenty yards square, uninclosed, without the appearance of ever having been cultivated, and no house was thereon." We suppose that it had been burnt up by fire in the woods, or removed during the winter of 1833-34. We hold the truth to be, that Richmond built a cabin in 1833, and in January, 1834, sold out his improvements to Bernard and removed away, and resided elsewhere in June, 1834; and, consequently, was not entitled to a preference of entry.

The next subject of controversy is the south-east quarter of section twenty-two, township eighteen. Ashley, by cross-bill, prayed to have his title quieted to this quarter section against Bernard's heirs, and the circuit court granted him the relief he asked. The half of section twenty-two was entered by Ashley, on a floating warrant, known as a Lovely claim. By the act of January 6, 1829, [4 Stat. 329, c. 2, § 1,] no one was permitted to enter the improvement of an actual settler in the territory, by virtue of such floating warrant; and it is alleged that Bernard was such an actual settler, and had an improvement on the south-east quarter of section twenty-two, township eighteen, before Ashley entered it. The cross-bill alleges that Bernard had improvements on section twenty-three, but that they did not extend to the south-east quarter of section twenty-two previous to the 4th of June, 1834, when Ashley entered the land. It was shortly before that time that Martin had corrected the eastern boundary of section twenty-two, locating it about one hundred yards further west, and which was adopted as the true line at the land-office. In suppport of the bill Benjamin Taylor deposes, as already stated, that he removed to the immediate neighborhood of the lands in dispute in February, 1834, when he examined the half section 22, with a view to purchase it from Ashley. He states that Thomas Bernard cultivated the south-west quarter of fractional section twenty-three, in 1834; but that his cultivation and improvement did not extend to the south half of section twenty-two, nor had any other person residence or cultivation thereon. Philip Booth states that Bernard showed him (Booth) an improvement on the south-east quarter of section twenty-two early in 1834; thinks it was an extension of his farm of two or three acres. It had been cleared the year before, but there was no cultivation. The witness does not recollect whether the clearing extended beyond the old line or the new one. Silas Craig, who was a competent witness for Ashley in this separate proceeding, deposes that he was with Martin, the surveyor, when the lines were run and adjusted, late in February, 1834; that the new and proper line bounding the section east is about one hundred yards west of the first line, which was rejected by the surveyor general; that when he was at the south-east corner of the section, he examined Bernard's improvement, and ascertained that it did not extend west to the new line at any place. He seems to have made it his business to see if the improvement of Bernard extended to the south-east quarter in dispute. Romulus Payne was called on to prove the value of mesne profits and improvements; he says that Bernard commenced the cultivation on the south-east quarter of section twenty-two, in 1837. John Monholland, Edward Doughty, and several other witnesses, swear on behalf of the defendants to the cross-bill, in general terms, that Bernard had possession of the south-east quarter of section twenty-two, on the 19th of June, 1834, and that he had an improvement on part of it in 1833. Bernard, in proving up his pre-emption right, swore that he was cultivating the quarter section in 1833, and in possession on the 19th of June, 1834. And this affidavit is indorsed by two witnesses. Harrison and Butler, who merely say that they have heard Bernard's affidavit read, and that it is true. So, likewise, Jacob Silor indorsed Wm. Richmond's affidavit, made before a justice of the peace, and intended to secure a preference of entry for Bernard in Richmond's name, and which was declared sufficient by the register and receiver; and yet when Silor was re-examined as a witness in this cause, he conclusively proved that Richmond left the land, and resided elsewhere when the occupant law of June 15, 1834, was passed. The ex parte affidavits of Butler and Harrison, and those of Monholland and Doughty, were obviously written out for them to swear to as matter of form, but made with so little knowledge on the part of the witnesses, of the section lines, and the number of quarter sections on which they deposed improvements existed in 1833 and 1834, as to be of little value. And the same may be safely said of other witnesses whose affidavits were taken without cross-examintaion. It is most obvious that these loose affidavits obtained by the interested party have been made, as to the improvement being on the quarter section claimed, on the information of him who sought the preference of entry; the witnesses not knowing, of their own knowledge, where the true section line was, over which they swear Bernard's improvement extended in the year 1833. When the last examination was had before the register and receiver in 1837, Bernard's own witnesses, Philip Booth and John F. Harrison, swore the facts to be, that Bernard had "deadened the timber and cleared away the cane," on a part of south-east quarter of section twenty-two; that he fenced it early in 1834, and made a crop of corn on it that year, and was in possession June 19th, 1834. Booth, in a subsequent affidavit, contradicts his first statement. That there was no cultivation on the quarter section in 1833 we think is satisfactorily established; nor had Bernard any right to enter it. And such was the final opinion of the register and receiver, which the commissioner of the general land-office reversed, and ordered a patent to issue to Bernard.

The circuit court were obviously of opinion, as appears from the decree it made, that Craig and Taylor's evidence established the fact that Bernard had no part of the quarter section in possession in 1833 or 1834, and hence decreed for the complainants in the cross-bill. And, in the doubtful state of the evidence, we are not prepared to say that this court can hold otherwise, and therefore affirm the decree, and order the cause to be remanded for further proceedings, as respects the profits and improvements.

BERNARD, (BALDWIN v.) See Case No. 797.

Case No. 1,347.

BERNARD v. HERBERT.

[3 Cranch, C. C. 346.] [1]

Circuit Court, District of Columbia. Nov. Term, 1828.

DETINUE—WHEN LIES.

Detinue will lie for a slave, although the defendant obtained the possession tortiously.

At law. Detinue for a slave. Mr. Wise, for the defendant, prayed the court to instruct the jury, that if the defendant obtained possession of the slave tortiously, the plaintiff cannot recover in this cause; and cited Selw. N. P.

Mr. Neale, for the plaintiff, was stopped by THE COURT, who said that the plaintiff might waive the trespass, and refuse to give the instruction.

Case No. 1,348.

BERNARD v. McKENNA.

[4 Cranch, C. C. 130.] [1]

Circuit Court, District of Columbia. April Term, 1831.

DETINUE—SCIRE FACIAS AGAINST BAIL—PLEA IN BAR.

In a scire facias against bail in detinue, upon a recognizance by which the bail undertook that his principal, if cast in the suit, should restore to the plaintiff the slave detained, if to be had; "if not to be had, that he would pay and satisfy the price of her, and such damages as should be adjudged to the said plaintiff, or render his, the said defendant's body to prison in execution for the same, or that he the said" (bail) "will do it for him," it is a good plea in bar, that no ca. sa. had been issued against the principal.

[Cited in Maynadier v. Duff, Case No. 9,349.]

At law. Scire facias [by Mary A. T. Bernard] against [James L. McKenna, special] bail in detinue [of William Herbert. Judgment for defendant.]

The scire facias stated that the plaintiff in November, 1828, by the judgment of the circuit court of the District of Columbia [Bernard v. Herbert, Case No. 1,347] for the county of Alexandria, "recovered against William Herbert, a negro woman named Caroline, of the value of $300, if she could be had; but if not, then the value aforesaid of her the said Caroline, together with her" (the plaintiff's) "damages amounting to $75, as by a jury assessed, also $66.75, which to the said Mary Ann T. Bernard, were adjudged as well the said negro Caroline on her value, as for her damages for the unlawful detention of the same, as also for her costs about her suit in that behalf expended, whereof the said W. Herbert is convicted, as appears to us of record; and although judgment is thereupon given, yet execution of the said judgment still remains to be made and executed; and whereas James L. McKenna, heretofore, to wit, on the 27th day of November, 1827, personally appeared in open court and became pledge and bail for the said defendant, that in case he should be cast in the said suit, the said defendant shall restore to the said plaintiff, the said negro girl slave named Caroline, if to be had; if not to be had, that he will pay and satisfy the price of her, and such damages as should be adjudged to the said plaintiff, or render his the said defendant's body to prison, in execution for the same, or that he the said James L. McKenna would do it for him. Nevertheless, the said W. Herbert has not restored the said negro girl named Caroline, nor paid to the said plaintiff the value aforesaid of the same nor the damages aforesaid assessed, nor the costs of suit aforesaid, nor surrendered his body to prison in execution for the same, as we have, by the suggestion of the said plaintiff, M. A. T. B., in our said court before us understood; wherefore the said M. A. T. B. hath besought us to grant her a proper remedy in this behalf, and we being willing that what is right and just in this behalf should be done, we do therefore command you, &c., to make known, &c., to the said James L. McKenna to be and appear, &c., to show cause, &c., why the said M. A. T. B. should not have her execution against him for her judgment aforesaid, according to the form and effect of the recognizance aforesaid," &c.

To this scire facias, the bail pleads, 1. Nul tiel record. 2. That the said M. A. T. B. ought not to have or maintain her aforesaid scire facias thereof against him, because he says that on and before the appearance day of the scire facias in this cause issued, the said W. Herbert, the defendant in the said action, was and had been a lunatic, and this he is ready to verify; wherefore he prays judgment if the said M. A. T. B. ought further to have or maintain her aforesaid action against him, &c. 3. Because he says that after the said recovery of the said judgment, as in the said scire facias mentioned, and before the issuing of the said scire facias, there was no writ of capias ad satisfaciendum duly sued out or prosecuted out of the said circuit court of the United States for the county of Alexandria, in the District of Columbia, against the said W. Herbert, upon the said judgment, and duly returned in the said court, as, according to law, before the commencement of this suit there ought to have been; and this the said James L. McKenna, is ready to verify, &c. To the two last pleas there was a general demurrer and joinder.

This cause was argued by Mr. Neale and Mr. Taylor, for the plaintiff; and by Mr. Hodgson, for the defendant, who cited Tidd, Pr. 1044, 1147; Barcock v. Tompson, Style, 324; 3 Tuck. Bl. Comm. 46; Rob. Forms, 71; 8 Vin. Abr. 40; Keilw. 64; Laws Va. 1792, p. 294.

Mr. Neale and Mr. Taylor cited 3 Petersd. Abr. 134, 167; Laws Va. 1826, §§ 5, 7; Laws

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

Va. Dec. 10, 1793, p. 305, § 48; Hen. Va. Just. 137; Laws Va. Dec. 27, 1792, p. 291; 2 Bac. Abr. "Execution," A, (Wilson's Ed.;) Laws Va. Dec. 12, 1792, p. 78, § 26; and Laws Va. Dec. 19, 1792, § 40, p. 113.

CRANCH, Chief Judge, delivered the opinion of the court, (THRUSTON, Circuit Judge, absent, but understood as assenting,) after stating the pleadings.

No exception is taken to the writ of scire facias, and the only question is as to the validity of the second and third pleas. The plea of lunacy is clearly bad; for the lunacy of the principal, after the bail was fixed, cannot be reason why the plaintiff should not have execution against the bail.

The question upon the demurrer to the third plea, is one of more difficulty. At common law, the bail in all civil causes of arrest, was only bound to produce the body of the principal to answer the judgment; and, according to the English practice in detinue, I presume there must have been a judgment against the principal for the alternative value, and a ca. sa. issued thereon and returned non est inventus, in order to charge the bail. It is not, however, necessary in a scire facias against the bail, in ordinary cases, to aver the issuing and return of the ca. sa. against the principal; it is sufficient to set forth the judgment, the recognizance of bail, and the breach of the condition of the recognizance, by averring that the principal had not paid the judgment nor rendered his body in execution. The want of a ca. sa. must be pleaded to the bail. At common law, we apprehend, no distringas could issue against the bail in detinue, as it might against the principal; for the body of the principal is only delivered to the bail for safe keeping so that it may be had upon the execution. We can find in the books no execution against the bail in detinue, nor any dictum, that the obligation of the bail in detinue differed from the obligation of bail in debt; we conclude, therefore, that, as the law is in England, it would be a good plea to a scire facias against bail in detinue, to say that no ca. sa. was issued and returned against the principal before issuing the scire facias against the bail.

The bail, in debt, may discharge himself by paying the debt, or surrendering the body of the principal in execution. He has his option of one of two things; and if he does either he discharges his obligation. So in detinue the bail has the option of three things; to deliver the specific chattel sued for; to pay the alternative value; or to render the body of the principal in execution. If he does either he is discharged. The surrender of the body of the principal in either case is sufficient. But, in debt, the plaintiff must first have a ca. sa. returned against the principal before he can charge the bail. A fieri facias returned nulla bona is not sufficient. It must be a ca. sa. So, in detinue, we see no reason why a distringas against the principal returned nulla bona should be sufficient to authorize the plaintiff to obtain execution against the bail. The judgment upon the scire facias would not confine the plaintiff to execution by way of distringas against the bail; but would be in general terms, that the plaintiff should have execution of the judgment against the bail; and the plaintiff might, thereupon, obtain either a distringas, (if distringas will lie against the bail in detinue,) or fieri facias, or ca. sa. But it will hardly be contended that he should have a ca. sa. against the bail before he has had his ca. sa. against the principal. It is said, (but it does not appear in this record,) that the plaintiff obtained a distringas against the principal, which was returned nulla bona before the issuing of the scire facias, and that the distringas, as to the specific thing, has not been superseded; and that, as the act of Virginia of December 12, 1792, (section 26, p. 78,) provides "that the bail-piece shall be so changed as to subject the bail to the restitution of the thing, whether animate or inanimate, sued for, or the alternative value, as the court may adjudge; the plaintiff may now have his execution, by way of distringas against the bail.

Suppose, then, the court, in this state of the cause, should award a distringas, against the bail, and should, afterwards, "for good cause shown, direct it to be superseded so far as relates to the specific thing, and to be executed for the alternative price or value only," according to the act of Virginia of 10th December, 1793, (section 48, p. 305;) would this be just when, if the same thing had been done in regard to the distringas against the principal, the alternative value might have been recovered against him?

But, in the present case the bail-piece was "not so changed as to subject the bail to the restitution of the thing or alternative value, as the court should adjudge." The recognizance of bail set forth in this scire facias leaves the option with the bail, in the same manner as in the recognizance of bail in debt. The only difference is, that, in the present case, the option is of three things, and in debt it is only of two. It is not left to the court to adjudge to which the bail should be subject; the restitution of the thing; or the payment of the value; or the surrender of the principal, as the act of assembly provides. And if it were so left to the court to adjudge, we should doubt whether the bail could be liable until the court should have adjudged to which branch of the alternative the bail should be subject. The bail is only a substitute for the gaoler, unless the court should have adjudged him liable for the restitution of the thing sued for.

The court, however, must decide this case upon the recognizance of bail as set forth in the scire facias; and that recognizance, in our opinion, gives the option to the bail, to discharge himself, by the surrender of the principal, exactly as in the case of bail in debt; we

therefore think that the third plea is good, and that the judgment on the demurrer to that plea must be for the defendant.

BERNARD, (MERRICK v.) See Case No. 9,464.

BERNARD, (RATEAU v.) See Case No. 11,579.

BERNARD, (UNITED STATES v.) See Case No. 14,584.

Case No. 1,349.

BERNHARD et al. v. CREENE et al.

[3 Sawy. 230.][1]

District Court, D. Oregon. Dec. 12, 1874.

ADMIRALTY JURISDICTION — TORTS ON THE HIGH SEAS — WHEN JURISDICTION WILL BE DECLINED —WHEN NOT.

1. The district courts of the United States, as courts of admiralty, have jurisdiction of torts committed on the high seas, without reference to the nationality of the vessel on which they are committed, or that of the parties to them.

[Cited in The Noddleburn, 28 Fed. 857; Nonce v. Richmond & D. R. Co., 33 Fed. 435; The City of Carlisle, 39 Fed. 815.]

[See, also, Thomassen v. Whitwell, Case No. 13,928.]

2. Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice would be as well done by remitting the parties to their home forum.

[Cited in The Noddleburn, 28 Fed. 857; The City of Carlisle, 39 Fed. 815. See, also, The Carolina, 14 Fed. 424; The Montapedia, Id. 427.]

3. But where the suit is between foreigners, who are subjects of different governments, and therefore have no common home forum, the jurisdiction will not be declined.

[Cited in The Belgenland, 114 U. S. 369, 5 Sup. Ct. 867; The Noddleburn, 28 Fed. 857; The City of Carlisle, 39 Fed. 815; The Topsy, 44 Fed. 633.]

[In admiralty. Libel by Otto Bernhard and others against Francis Creene and others for torts committed on the high seas. Defendants except. Exceptions overruled.]

John H. Woodward, for libellants.

William H. Effinger, for defendants.

DEADY, District Judge. The libellants, Otto Bernhard, a subject of the emperor of Germany, Morino Henrico and Morris Rolock, subjects of the king of the Austrias, and Clement d' Baudillion, a subject of the republic of France, bring this suit against the defendants, Francis Creene and David Jenkins, British subjects, and master and mate of the British ship City Camp, for alleged beatings and cruelty committed by them upon the libellants during the voyage from Montevideo to this port. It is alleged in the libel that the libellants shipped on the City Camp at Montevideo about July 29, 1874, for a voyage to the port of Portland, Oregon, where they arrived in due time, and where the said vessel and the libellants and defendants now are.

The defendants except to the libel, and allege it ought not to be maintained for the following reasons: 1. The vessel is a British ship, and the libellants are foreigners, and not citizens of the United States or residents thereof. 2. The alleged wrongs occurred on the high seas, and beyond the jurisdiction of this court. 3. The libellants, prior to the bringing of this suit, voluntarily left the vessel, and "have refused to do any service therein;" and 4. "Defendants are not liable to any suit or demand of the libellants, save and except in the courts and tribunals of Great Britain."

At the same time the vice-consul of her Britannic majesty, at the port of Portland, filed a protest against the jurisdiction of this court for substantially the following reasons: 1. The vessel is a British ship, and the defendants are British subjects, and the alleged wrongs having occurred on the high seas and "beyond the local jurisdiction of the courts of admiralty of the United States, ought of right to be tried in the courts of her Britannic majesty." 2. The detention of the defendants may result in the detention of the vessel and serious injury to her owners, who are British subjects. 3. The vice-consul has, "at the instance and upon the information and examination of libellants and others of the crew of said vessel," entered upon the examination of this matter, and "has initiated and set on foot already, steps to convene a consular court of inquiry into the various matters and things in said libel alleged;" and that the trial of this cause in this court "might, and would call in question the official actions of a British consular court in regard to British subjects, and that such court, for any such official actions, is alone responsible to its own government."

The libellants answer the protest of the vice-consul, denying his right to interfere in their behalf; that they desired to submit the matter in controversy to any consular court; that any such court had been convened or taken any action in the premises, or was competent to give the relief sought; and as to the rest of the allegations in the protest they aver a want of knowledge in the premises, but supposing them to be true, say they are immaterial, and constitute no defense to this suit.

The case was heard on the exceptions and protest. The former are in the nature of special demurrers and set up no new fact. The additional facts set up in the protest, so far as they are denied or qualified by the answer thereto, are not before the court. The exceptions and protest occupy substantially the same ground, and the questions arising upon them will be considered together.

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

Two questions arise in the case and were argued by counsel: 1. Has this court jurisdiction of a tort committed upon the high seas? 2. Is this a case for the exercise of such jurisdiction, notwithstanding the protest of her Britannic majesty's vice-consul.

The jurisdiction of this court in cases arising ex delicto, depends upon locality—the place where the cause of action arises. Its jurisdiction in this respect extends to the high seas, without reference to the nationality of the vessel on board of which the tort may have been committed or that of the parties to it.

The constitution provides, (article 3, § 2,) that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction;" and section 9 of the judiciary act [Sept. 24, 1789] (1 Stat. 76) [c. 20] provided that "the district courts * * * shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction * * * within their respective districts, as well as upon the high seas."

" 'Cases of maritime jurisdiction' must include all maritime contracts, torts and injuries, which are in the understanding of the common law as well as the admiralty, 'causae civiles et maritimae.'" De Lovio v. Boit, [Case No. 3 776.]

"Admiralty jurisdiction in cases of tort depends entirely upon locality. * * * That torts committed upon the high seas are within the jurisdiction of admiralty is certain." 2 Pars. Shipp. & Adm. 247.

In cases of tort, jurisdiction "is exclusively dependent upon the locality of the act. Maritime torts are such as are committed on the high seas." Thomas v. Lane, [Case No. 13,902.]

"Cases of tort on the high seas, super altum mare, have always been held, even in England, to be within the jurisdiction of the admiralty." Ben. Adm. § 308. "Cases of assault and battery, imprisonment, or other personal injury or ill usage, arising between master or officers on the one hand, and seamen or passengers on the other, are clearly within the admiralty and maritime jurisdiction." Id. § 309.

In general, an action in personam for an injury to person or personal property is transitory, and may be maintained in the courts of any country where the parties may happen to be, unless the law of such country otherwise provides. There is nothing in the fact that the wrong was committed without the territorial limits of the sovereignty to which the court belongs, or in the alienage of the parties, which, of itself, prevents the court from taking jurisdiction.

Congress has given this court jurisdiction of "all cases of admiralty and maritime jurisdiction," whether arising within the territorial limits of this district or "upon the high seas." That includes this case. It is a cause civil and maritime, and arose "upon the high seas." There is no intimation in the act granting the jurisdiction that the parties to the case must be American citizens. Neither is any such limitation of the jurisdiction suggested by any of the authorities cited.

The case of U. S. v. Kessler, [Case No. 15,528,] cited by counsel for defendant upon this question, is not in point. That was an indictment for robbery and piracy upon the high seas committed on board a foreign vessel. The court held, that under the act of congress defining and providing for the punishment of such offenses, it had not jurisdiction when the offense was committed on board a foreign vessel. Now the judiciary act (supra) does not confer jurisdiction upon the district courts of all crimes committed upon the high seas, as in the case of causes civil and maritime, but only of such as shall be cognizable under the authority of the United States; or in other words, of only such crimes as congress shall define and provide for the punishment of.

There is no doubt of the jurisdiction of the court. Is there anything in the circumstances of the case which should induce the court to decline the jurisdiction? In Pars. Shipp. & Adm. 226, the rule is stated as follows: "In this country it seems to be settled, after some controversy, that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their home forum.

In The Russia, [Case No. 12,168,] the court took jurisdiction of a libel for collision in the harbor of New York, between an Austrian and a British ship. In the course of the opinion, Blatchford, J., said, "The principle upon which the court of admiralty proceeds in determining, in any case, whether to exercise such jurisdiction or not, is to inquire whether the rights of the parties will best be promoted by retaining and disposing of the case, or by remitting it to a foreign tribunal." 194 Shawls, [Id. 10,521.] I am not aware that jurisdiction in case of collision, has ever been declined by any court of admiralty, either in the United States or Great Britain, because the two colliding vessels were the property of foreign subjects."

In The Jupiter, [Case No. 7,585,] the court took jurisdiction of a libel for collision upon the high seas between two foreign vessels, whose owners were subjects of foreign governments and residents of foreign countries.

Admitting for the present, the proposition of counsel for defendants, that the libellants must be regarded as British subjects because they shipped as seamen on a British vessel, what is there in the circumstances of this case, which requires the court to decline the jurisdiction? The libellants have performed their contract with the ship and been dis-

charged from it. The voyage so far as they are concerned, is at an end. It neither began nor ended in a British port.

On the voyage, the defendants were guilty as alleged, of gross personal wrongs to the libellants. To decline the jurisdiction and require the libellants to follow the defendants to a British port, would be a mockery of justice. The voyage of the libellants terminated at this port by the contract of the parties. Where the voyage is broken up or at an end, a court of admiralty never declines to exercise jurisdiction in a suit by the seamen for wages earned or wrongs suffered during the same.

But these libellants are not British subjects in fact, nor is there any reason or rule of law which requires this court to so regard them in this suit. In The Two Friends, 1 C. Rob. Adm. 271, which was a suit against an American ship and cargo for salvage, Sir William Scott denied that British subjects who had shipped on this vessel in an American port for the voyage to England, were to be regarded as American seamen.

As to the protest of the vice-consul, I do not find in it any sufficient reason for declining the jurisdiction. He is not the representative of the libellants, nor authorized to speak for their governments, because they are not British subjects. Practically they are residents of and domiciled in this country. They came here from the Argentine republic on a voyage which, as to them, terminated here. The parties cannot be remitted to a home forum, for being subjects of different governments there is no such tribunal. The forum which is common to them both by the jus gentium is any court of admiralty within the reach of whose process they may both be found. Such is this court.

Neither is the probable detention of the vessel any reason why this court should decline to do justice to these suitors. If the owners have committed their vessel to the care of a master and mate who are detained in foreign ports to answer for injuries done to third persons, it is their misfortune—it may be their fault—certainly it is no fault of these libellants, and they ought not to suffer for it or be delayed or hindered on account of it, in seeking redress for their alleged wrongs.

The court which the consul is about to organize, to inquire into these matters, has not yet been organized, and if it was a case of concurrent jurisdiction, the jurisdiction of this court having first attached would be thenceforth exclusive. But this consular court, or rather "naval court," as it is called in the regulations, has no jurisdiction over this claim of the libellants or power to give them relief. It is a court or board of inquiry, convened for the purpose of ascertaining whether certain crimes against British law have been committed on the vessel, and if so, send the accused parties, with the witnesses, home for trial. Suppose this naval court find that the defendants were guilty of an aggravated assault or assaults upon the libellants, and is able to send them home for trial, how does that affect the claim of the libellants? The defendants may be required to answer both civiliter and criminaliter for acts injurious to others. In the one case, the proceeding is a civil suit by the party injured for damages for the injury. In the other, it is a prosecution by the public to punish the party for the commission of an offense against society. The trial of this suit in this court in no way "calls in question the official action" of such naval court, even if it had already taken action in the premises. For the purpose of which it will inquire into the conduct of the defendants towards these libellants, this court has no right to take cognizance of the matter. On the other hand, concerning the redress sought to be obtained by this suit against the defendants on account of such conduct, that tribunal has neither duty nor authority.

In Patch v. Marshall, [Case No. 10,793,] the court took jurisdiction of a libel for a tort by a seaman against the master of a British vessel, notwithstanding the protest of the British consul: "That an investigation of some of the alleged causes of damages must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government." In passing upon this point, the court, Curtis, Circuit Justice, says: "It is true this court should not call in question a British consul for his official acts respecting the crew of a British vessel in a foreign port. * * * But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen, by imprisonment in a foreign jail, is not to be here investigated.

Upon the whole, I think this is a very clear case in favor of exercising the jurisdiction. In the language of Patch v. Marshall, supra, "to require these libellants to follow these defendants over the world, until they can find them in a British port would practically deprive them of all remedy. I do not think any considerations of public convenience, or the comity extended by the courts of admiralty of one country to those of another, have any applicability to such a case."

The protest and exceptions are overruled.

BERNICE, The SARAH. See Case No. 12,343.

Case No. 1,350.

In re BERNSTEIN.

[2 Ben. 44;[1] 1 N. B. R. 199; Bankr. Reg. Supp. 43; 6 Int. Rev. Rec. 222; 1 Am. Law T. Rep. Bankr. 45; 34 How. Pr. 289.]

District Court, S. D. New York. Dec. Term, 1867.

INVOLUNTARY BANKRUPTCY — LIEN OF JUDGMENT ENTERED BEFORE THE BANKRUPTCY PROCEEDINGS.

1. Where, before proceedings were taken in involuntary bankruptcy, a judgment was entered against the bankrupt in a state court, by default, on which an execution was issued and a levy made, and the bankrupt unsuccessfully endeavored to have the judgment, execution, and levy set aside, and the sheriff then advertised the property for sale, but was stopped by an injunction from the bankruptcy court, which injunction was, on a representation that the goods were perishable, modified so as to allow the sheriff to sell, directing him to hold the proceeds subject to the order of this court, and the sheriff sold them, and an application was then made to dissolve the injunction, there being no impeachment of the bona fides of the judgment, execution, and levy: *Held*, that the lien of the levy was preserved by the bankruptcy act and should be respected by this court.

[Cited in Re Wright, Case No. 18,065; Re Dey, Id. 3,870; Hudson v. Schwab, Id. 6,835.]

[See Barnes v. Billington, Case No. 1,015; In re Wilbur, Id. 17,633; Goddard v. Weaver, Id. 5,495; Webster v. Woolbridge, Id. 17,340; Witt v. Hereth, Id. 17,921.]

2. That the sheriff should be directed to apply the proceeds of the property in his hands to the satisfaction of the execution, paying the overplus to the bankrupt's assignee, or, if there was no assignee, to the clerk of the court.

[Cited in Thames v. Miller, Case No. 13,860; Re Hufnagel, Id. 6,837.]

[3. Cited in Re Wright, Case No. 18,065; Re Mallory, Id. 8,991; Re Brinkman, Id. 1,884; Hudson v. Schwab, Id. 6,835, to the point that the district court, sitting as a court of bankruptcy, has power to enjoin a sheriff of a state court from proceeding to sell property on which he has levied under an execution issued out of a state court before proceedings in bankruptcy were commenced.]

In bankruptcy. The firm of Wilmerding, Hoguet & Co. obtained a judgment against [Henry Bernstein] the bankrupt, on the 21st of October, 1868, for $2,930.30, in a suit in the supreme court of New York, for a money demand on contract, founded on two promissory notes made by him, and on a sale and delivery of goods to him. The suit was commenced on the 25th of September, 1867, and the judgment was obtained in due course, by default, after personal service of a summons. On the same day on which the judgment was obtained, an execution was issued thereupon to the sheriff of the city and county of New York, and he made a levy thereunder on a stock of goods in the store of the bankrupt in the city of New York. The goods were advertised for sale by the sheriff for the 28th of October, 1867, but the sale was stayed by the state court, and a motion was made by the bankrupt in that court to set aside the judgment, execution, and levy, but the motion was denied. On the commencement of the suit in the state court, an attachment was issued in it, under which the same stock of goods above mentioned had been attached. A motion was made by the bankrupt in the state court to dissolve that attachment, which motion was heard at the same time with the other motion before mentioned, and was also denied. After the denial of these motions, the sheriff advertised the goods for sale for the 22d of November, 1867. On the 21st of November, 1867, the petition in this matter, praying for an adjudication of bankruptcy, was filed, and this court, under the fortieth section of the bankruptcy act, [March 2, 1867; 14 Stat. 536,] at the time it made an order to show cause why the prayer of the petition should not be granted, issued an injunction restraining the sheriff from selling the goods under the execution on the levy made thereunder. There was afterwards an adjudication of bankruptcy in this matter. On a representation that the goods levied on were of a perishable character, and were deteriorating in value, this court made an order modifying the injunction so as to permit the sheriff to sell the goods under the execution, and directing the sheriff to hold the proceeds until the further order of this court concerning the same. The plaintiffs in the judgment now moved the court to dissolve the injunction wholly, and to allow the proceeds of the sale to be applied in paying the judgment and the costs and the charges and fees of the sheriff.

D. McAdam, for bankrupt.

D. McMahon, for creditors and sheriff.

BLATCHFORD, District Judge. There is nothing shown to impeach the bona fides of the judgment, execution, and levy. No collusion in regard to them appears, and the bankrupt resisted them to his utmost. The lien of a levy made under an execution issued on a final judgment, such as is that in the present case, provided such lien attached before the commencement of the proceedings in bankruptcy, is preserved by the bankruptcy act, and is to be respected by this court, whether this court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer, who is executing the state process, to do so. In this case, the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantage can result from requiring the money to be paid into this court, with a view to its application by this court in satisfaction of the lien on the property. An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the dis-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 45, contains only a partial report.]

charge of the amount which he is required by the execution to make, including his charges and fees thereon, and directing him to pay the overplus, if any, to the assignee of the bankrupt, if there be one, and, if there be none, then to the clerk of this court, to the credit of the bankrupt's estate.

BERREYESA, (UNITED STATES v.) See Cases Nos. 14,585 and 14,586.

Case No. 1,351.

In re BERRIAN et al.

[6 Ben. 297;[1] 7 West. Jur. 192; 5 Chi. Leg. News, 197.]

District Court, S. D. New York. Jan. Term, 1873.

BANKRUPTCY — PARTNERSHIP —DIVIDEND — SEPARATE ESTATE—JOINT JUDGMENT—INTEREST.

1. A debt, founded on a judgment against the two members of a firm jointly, in a suit on a partnership note, does not entitle the creditor to dividends out of the separate estate of each member of the firm, on an equal footing with the separate creditors of each member.

2. Where the separate estate of one of the partners was more than sufficient to pay the separate debts of such partner, with interest added up to the day of the adjudication, but there was not sufficient to pay the creditors of the firm: *Held*, that the separate creditors were not entitled, as against the joint creditors, to be paid interest on their debts for the period subsequent to the adjudication.

[In bankruptcy. In the matter of John M. Berrian and Cornelius A. Berrian, copartners. Application by James G. King's Sons to be paid out of the separate estates of the partners on an equal footing with the separate creditors. Denied. Also heard on application of separate creditors for payment of interest on their claims. Denied.]

A firm, composed of John M. Berrian and Cornelius A. Berrian, having been adjudged bankrupts, the firm of James G. King's Sons, as creditors, filed a proof of debt, showing a claim on a judgment for $2,532.44, entered against both debtors jointly, on a partnership note. There was a separate estate of John M. Berrian, amounting to $1,065.22, and separate debts were proved against him, amounting to $526.72. There was also a separate estate of Cornelius A. Berrian, amounting to $1,065.22, and separate debts were proved against him, amounting to $1,605.21. The amount of the claims proved against the joint estate was $49,712.10. James G. King's Sons claimed to be paid a dividend out of the separate estates of the members of the firm. The register certified the question to the court, with his opinion that they were not entitled to such dividend.

J. L. Bishop, for creditors.

F. N. Bangs, for assignee.

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

BLATCHFORD, District Judge. James G. King's Sons are not entitled to dividends out of the separate estate of each bankrupt, on an equal footing with the separate creditors of each bankrupt.

The separate creditors having claimed to be paid interest subsequent to the adjudication, the case was again brought before the court on the following agreed statement of facts, with the certificate of the register that, in his opinion, the separate creditors were not entitled to such interest.

"Claims against the separate estate of the bankrupt John M. Berrian, including computation of interest up to the date of the adjudication only, have been proved.

"At the meeting of creditors held November 12th, 1872, it appears, by the assignee's account, that he has collected sufficient money to pay all the debts proved against the separate estate of John M. Berrian, after payment of costs, fees and expenses, and leave a surplus.

"Joint creditors of the bankrupts have proved claims against the joint estate of the bankrupts to the amount of $49,712.10, and upwards, which the surplus arising from John M. Berrian's separate estate is not sufficient to pay.

"The separate creditors of John M. Berrian claim that, before the surplus of his separate estate is applied to the payment of joint debts, the interest on the separate debts of John M. Berrian shall be computed from the day of adjudication, and the surplus applied to the payment of such interest.

"The assignee claims that the surplus is to be applied to the payment of joint debts, and not to the payment of interest which has accrued since the adjudication, on the separate debts of John M. Berrian."

BLATCHFORD, District Judge. The 36th section of the bankruptcy act, [March 2, 1867; 14 Stat. 535,] in saying that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors, and that, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors, follows the language of the Massachusetts insolvent law, under which (Gen. St. Mass. 1838, c. 163, § 21) it was held, in Thomas v. Minot, 10 Gray, 263, that, where a partnership and its members are in insolvency under one commission, or one adjudication in the same proceeding, and the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved, as they stood at the time of liquidation recognized by the statute (which, in that case, was the day of the first publication of notice), without computing interest thereon after that time, the surplus of such separate estate, over such debts, is-

to be added to the partnership estate, and applied to the payment of joint debts, before paying such interest on the separate debts. The rule laid down in that case was established in 1857, and ought to be followed, under the like provision in the bankruptcy act, as being substantially a construction of the provision, which accompanied its enactment.

Case No. 1,352.

Case of BERRY.

[Cited in U. S. v. Woods, Case No. 16,760. Nowhere reported; opinion not now accessible.]

Case No. 1,353.

Ex parte BERRY.

[3 App. Com'r Pat. 295.]

Circuit Court, District of Columbia. April 2, 1860.

PATENTS FOR INVENTIONS—NOVELTY—SEWING MACHINES—ANTI-FRICTION SURFACES FOR THREAD.

[Where the use of jewels or their equivalents for anti-friction surfaces in thread winding machines was known to the prior art, a combination of jewels or their equivalents with the needle and bed-plate of a sewing machine, for the purpose of preventing the wearing of the thread, is not patentable.]

Appeal from the commissioner of patents.

[Application by Robert M. Berry for letters patent for an improvement in sewing machines. The commissioner of patents denied the application. The applicant appeals. Affirmed.]

MORSELL, Circuit Judge. In his specification he says: "What I claim is the anti-friction surface, b & c, together with the thread, a, when arranged to work in combination with the eye pointed needle, d, bed-plate, e, whereby the thread, a, is better preserved when being used for sewing by machinery as set forth." The commissioner adopts for his opinion the report of the examiners, dated 25th of January, 1860, which is in these words: "As first presented the claim in this case was to the insertion of jewels or their equivalents within the apertures through which the thread passes in sewing machines. The office, pointing to a thread winding machine and to one for trebling single strands of thread, in which the device occurs, refused to allow the claim on the ground that there was nothing patentable in the special application of it to sewing machines. Recognizing the validity of this view of the case on the part of the office upon the data adduced by it, applicant cancelled his specification and claim and filed new ones. The office, however, refused to allow the new claim in view of the same references, and as we think correctly, for although, upon its face, it is seemingly modified and restricted to a combination of parts, it is really, as before, a broad claim to the use of such a device in sewing machines, as will be apparent when we state that the several parts with which it is associated are common to nearly all sewing machines. Considered thus, the conclusion reached by the examiner, as it seems to us, is inevitable, that the claim involves nothing more than a double use because the object sought to be accomplished by the employment of the device, in both the reference is identical with the object of applicant, to wit: to diminish the abrasion of the thread which metallic surfaces offer or produce. We recommend accordingly the final refusal of a patent. Adopted by the commissioner and patent refused on the 27 of January, 1860." To this decision Berry filed his reason of appeal: "That the reason given by the office as the ground of rejection is 'a double use,' whereas the claim is for a combination, and unless the combination be old, which the office has failed to show, there can be no double use, which will be shown at the proper time."

The commissioner in his report, in reply to the reasons of appeal, in substance says: "The appellant contends in the reasons of appeal, that, inasmuch as the claim is for a combination, the double use is improperly alleged by the office. The claim now insisted upon is for the combination of the anti-friction surfaces with a sewing machine, although its verbiage is limited to a recital of details. Now the whole object of the invention is to prevent the wear, by the friction of the thread, of those parts of the machine over which it is constantly moving whilst the machine is in operation, and this is the precise object of the same device in the patents upon which the claim is rejected. Nor can it for a moment be regarded as a new invention, to apply to a sewing machine thread guide, the very thread guide used in the references to prevent friction and augment durability. The delicate journals of the watch are jewelled, and certainly it would not be for a moment regarded as patentable to apply the same device for the same purpose to the journals of a musical instrument or the mariner's compass. A combination claim, to be valid, must involve a legitimate combination in each member to the general invention covered by the entire combination. Now what combination can possibly be found to conform to this fundamental requirement in any other parts of the machine of the appellant than the thread and the jewelled guide? And it is manifest that this identical combination exists precisely in the references, and also effects in all three machines the same result, and the same result only. Now where a result is produced by the same means in different machines, and when the same means and result contribute nothing more to one machine than the other, the office has known no other proper treatment of a claim formed in either than to regard them as a double use, &c."

This appears to be the state of the case presented from the papers and documents laid before me by the commissioner on the day and place appointed for the hearing said case, at which time, also, the appellant appeared by his attorney, and having filed his argument, submitted the said case for consideration. The views as expressed in the opinion and report of the commissioner in answer to the reasons of appeal, I think, are able and just, and but little, if anything, remains for me to add. The appellant relies principally upon what he claims as a combination of the needle, the bed and the jewel, and supposes he is sustained by the authorities referred to by him. I have examined them with care, but have failed to discover their applicability to this case. Without stating them in detail, it may be generally said that the question in some of them is: Where a patent is for a new combination for existing machinery or machines, and patentee claims for the combination only, in a suit for a violation of his patent right, he can only recover for a violation of all the parts, not for one part only; and in others where different parts brought together form a whole materially different from any before, and the valuable new given end is attained, and other cases in which the question decided was to the proper construction of the terms used in the specifications. I cannot perceive how the principles of those decisions can support the appellant's claim: the thing to be maintained is an anti-friction surface by substituting a jewel for glass which is equally capable of doing the same thing. According to the rule of law the combination cannot be considered a legitimate one, the constituent parts of which should be a coactive, not a dead, part, such as the bedplate must be considered. In the case of Barrett v. Hall [Case No. 1,047] it is said by the judge: "The connection of a thousand dead parts in one machine having but one single operation can never be considered a combination."

Then with respect to the jewel, though it may be in one respect superior to glass, cannot per se be considered a sufficient improvement—the only thing new would be the substitution of a different metal (material) from that heretofore used in connection with the arrangements; the improvement or novelty would consist in the superiority of the material. But that difference is formal and destitute of ingenuity or invention, as decided by the supreme court in the case of Hotchkiss v. Greenwood, 11 How. [52 U. S.] 264.

The case, then, before me is nothing more, according to the principles of patent law, than the double use of an old contrivance with no new effect or result, and not patentable.

The decision of the commissioner is therefore hereby affirmed.

Case No. 1,354.

In re BERRY.

[2 Cranch, C. C. 13.] [1]

Circuit Court, District of Columbia. Nov. Term, 1810.

UNITED STATES COURTS — DISTRICT OF COLUMBIA —JURISDICTION—FERRIES.

This court sitting in Alexandria, has only the powers of a county court of Virginia in relation to ferries.

[Petition by Thomas Berry for a ferry from Alexandria, Hunting Creek Warehouse, to Addison's, in Maryland.]

The petitioner had a right to keep a ferry from Addison's, in Maryland, to Alexandria. See the act of Virginia of 26th December, 1792, p. 227, § 11, and [Act March 3, 1801,] 2 Stat. 115, [§ 1.]

THE COURT, (THRUSTON, Circuit Judge, absent,) refused.

1. Because they had no right to appropriate a public landing to the purposes of a ferry.

2. Because the old ferry from Hunting Creek to Addison's having been disused for more than two years and six months, had been discontinued under the act of Virginia, and the court had no right to grant a new ferry; having only the powers of a county court of Virginia in this respect.

Case No. 1,355.

BERRY v. DINSMORE.

[Cited in Muser v. American Exp. Co., 1 Fed. 383. Nowhere reported; opinion not now accessible.]

Case No. 1,356.

BERRY v. FLETCHER et al.

[1 Dill. 66.] [2]

Circuit Court, D. Missouri. 1870.

WITNESS — EVIDENCE — COMPETENCY OF PARTY— WHEN COMPELLABLE TO TESTIFY—STATE LAW.

Where by the laws of a state parties are both competent and compellable to testify, the same rule, under the legislation of congress, applies to civil actions in the federal courts sitting therein; and one of the parties may in such an action be compelled to testify at the instance of the adverse party.

Mr. Glover, for plaintiff.

Mr. Noble, for defendants.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

PER CURIAM. Trespass for injuries to the person and property of the plaintiff. The plaintiff's counsel called, and asked to have

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

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

sworn, as a witness. one of the defendants; to which the defendants' counsel objected on the ground that one party could not compel an adverse party to testify. It was conceded by counsel that under the laws of the state of Missouri parties were both competent and compellable to testify in actions like the present. The court held, referring to the judiciary act [of September 24, 1789, (1 Stat. 92,)] § 34, the act of July 6, 1862, (12 Stat. 588, § 1,) and the act of July 2, 1864, (13 Stat. 351, § 3,) and of March 3, 1865, (13 Stat. 533,) that the objection was not well taken, and the defendant was sworn as a witness at the plaintiff's instance. See Rison v. Cribbs, [Case No. 11,860.]

NOTE. [from original report.] In Tenny v. Collins, [Case No. 13,833,] it was held by the U. S. district court, eastern district of Missouri, that upon a motion to set aside the discharge granted to a bankrupt, the wife of the bankrupt cannot be required to testify as a witness against her husband. Respecting the point, Treat, District Judge, remarks: "The plaintiffs also summoned the wife of the bankrupt, who was sworn as a witness, and were proceeding to examine her in relation to the conveyance, in 1866, of land held in her name by herself and husband, to her father in payment of other debts, and as a security for debts upon which he was jointly liable with the bankrupt. Objections were interposed, that while the bankrupt act provided for the examination of the wife of the bankrupt before the register for the purpose of ascertaining the condition of his estate, it did not alter the common rule, that the wife could not be a witness for or against the husband, in a motion to set aside the discharge. The objection was sustained by the court.

Case No. 1,357.

BERRY v. FLETCHER et al.

[1 Dill. 67.][1]

Circuit Court, D. Missouri. 1870.

TRESPASS—JOINT AND SEVERAL TRESPASSERS—LIABILITY—EXEMPLARY AND COMPENSATORY DAMAGES.

1. All who instigate, promote, or co-operate in the commission of a trespass, or aid, abet, or encourage its commission, are guilty.

2. But the mere presence of persons at the commission of a trespass which they did not advise or abet, and in which they did not participate and had no interest, will not make them trespassers.

3. Where the defendants are sued jointly in trespass, the jury must find a single verdict, and assess damages jointly against such as are proved guilty of the same trespass.

4. In trespass against several, the jury should estimate damages according to the most culpable of the joint trespassers.

5. All damages are referred by the law either to compensation or punishment. Compensation is to make the party injured whole. Exemplary damages are given, not to compensate the plaintiff, but to punish the defendant.

6. Circumstances stated which will authorize the jury to give exemplary damages.

[Cited in Home Ins. Co. v. Stanchfield, Case No. 6,660.]

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

At law. This was an action of trespass brought by the plaintiff, the editor and proprietor of a newspaper in the town of Richmond, in Missouri, against Thomas C. Fletcher, late governor of that state, and also against Montgomery, a colonel commissioned by Governor Fletcher under the act of the state legislature, authorizing the organization and employment of the state militia to aid in the execution of civil process, and against certain other persons, citizens of the town of Lexington. Demurrers to certain special pleas, justifying the acts complained of under the above-mentioned act of the legislature, were sustained, as by the state practice adopted in this court the matters pleaded in justification were admissible under the general issue. The nature of the action, the issues, and other necessary facts, appear in the charge of the court. On the trial, no attempt was made to justify the alleged trespasses.

Mr. Glover, for plaintiff.

Mr. Musser, for Montgomery.

Mr. Noble, for Fletcher and other defendants.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

DILLON, Circuit Judge, in summing up to the jury, said, the other judges concurring:

1. As to the pleadings and issues. This is an action of trespass brought by the plaintiff, now a citizen of Kansas, for injuries alleged to have been done by the defendants, to his person and property. The first count in the declaration alleges that the defendants assaulted, beat, and imprisoned the plaintiff, carried him from Richmond to Lexington, in this state, imprisoned him for four days, and by putting him in fear of his life compelled him to sign a false and scandalous paper, against his will, &c. The second account alleges that the defendants destroyed and damaged the printing press, furniture, type, cases, and fixtures of the plaintiff's printing office, and also a large quantity of printed forms, and blanks, the property of the plaintiff, and belonging to him as assistant United States assessor. The defendants plead not guilty, and the burden is upon the plaintiff to establish to your satisfaction, by the evidence, the trespasses, or some of them, alleged in the declaration.

2. As to the defendant, Montgomery. The court will first instruct you with reference to the defendant, Bacon Montgomery. Evidence in the case has been laid before you tending to show that Montgomery was in command at Lexington, of certain men enrolled and called into service under the state law, as militia; that certain persons from Richmond called upon him, making complaints against the plaintiff, and exhibiting an article in the plaintiff's newspaper, accompanied with oral statements concerning the plaintiff, and that Montgomery thereup-

on issued an order to a detachment of his men, to proceed to Richmond and arrest the plaintiff, and to injure or destroy his printing press, and to bring the plaintiff before him at Lexington. If you find that such an order was issued by Montgomery, and that the plaintiff was arrested and seized, forcibly carried to Lexington, deprived of his liberty by force and against his will, this sustains the first count in the declaration, and the plaintiff is entitled to a verdict against Montgomery, for his damages, by reason of these unlawful acts. If, pursuant to such order, you find that the plaintiff's printing press, and the other property mentioned in the second count of the declaration, was injured or destroyed, the defendant, Montgomery, is also liable for the damages thus proved to have been occasioned. It is proper to be added that the defendant, Montgomery, has given no evidence to justify in law his causing the plaintiff to be arrested and imprisoned, or his property to be injured, and hence, if you find that he caused the plaintiff to be arrested and imprisoned, or his property to be injured, as alleged in the declaration, the plaintiff will be entitled to recover. The rule by which you are to ascertain, or measure, the plaintiff's damages, will be hereafter stated.

3. As to the other defendants. You must also consider the case of the other defendants, and determine whether they, or any of them, are liable for, or in respect of, the trespasses mentioned in the declaration. All of these defendants may be liable, or part of them only may be liable, or none of them; and, therefore, it is necessary that you consider the case of each defendant separately in determining whether he is, or is not, guilty of the injuries for which the plaintiff sues. You will bear in mind that the court is now speaking of the defendants other than Montgomery; and that you may the better apprehend the controverted question between these defendants and the plaintiff, the court will state the claims of the respective parties in this regard, and the law applicable thereto. It is claimed by the plaintiff that the defendants, other than Montgomery, were present when the latter issued his order to arrest the plaintiff, and to injure his press and printing office, or were present after his arrest, and while he was in confinement under such arrest, and that they were instigators, promoters, co-operators with Montgomery, in the commission of the trespass complained of in the declaration; that they consulted with Montgomery in respect thereto, and advised and encouraged him to issue the order to arrest the plaintiff and injure his property, or that pending his arrest, they advised and encouraged its continuance, and the perpetration of the other wrongs to his person, complained of. If you find such to be the facts, then the defendant or defendants who thus participated in the wrongs ordered and done by Montgomery (if you find that he committed the trespasses complained of) are guilty with the said Montgomery, and you should find accordingly. On the other hand, it is claimed by the defendants, other than Montgomery, that they did not instigate, promote, or co-operate with Montgomery, or consult with him, or advise and encourage him to commit any of the grievances for which the plaintiff sues; that if present, they were there for a lawful purpose, and were spectators, and in no way participators in what Montgomery did, or ordered to be done; that Montgomery was acting in a military capacity, and that what he did and ordered was done as such officer, out of his own head, without consulting with the defendants, or being advised and encouraged by them in the matter. If you find such to be the facts, then the defendant or defendants, thus free from any participation in the trespasses complained of, cannot be held guilty of such trespasses, and are entitled to a verdict in their favor.

4. As to trespasses by several and liability therefor. The defendants are sued jointly for the same alleged trespasses. As before stated there are two counts in the declaration, the first for injuries to the plaintiff's person, the second for injuries to his property. If you find for the plaintiff, you must find a single verdict and assess damages jointly against such of the defendants as you find guilty. You cannot find that part of the defendants are guilty alone, under the 1st count, and the others alone guilty under the other count, and then bring in a joint verdict against all. But you may find all of the defendants, or part of them, guilty under both counts, or under either, provided all returned guilty are found guilty of the same and not different trespasses. In short, those of the defendants (if any) whom you find guilty, must be found guilty of those trespasses only which they committed jointly, and the damages must be assessed with sole reference to such acts. But, in respect of a trespass committed jointly by several persons, the jury may estimate the damages according to the most culpable; for this is the damage sustained by the plaintiff, for in cases of trespass there can be no apportionment of damages. 2 Starkie, Ev. 807; 2 Hil. Torts, p. 464, § 25, and cases there cited.

5. As to damages. If under the evidence and the foregoing instructions, you find the defendants, or any of them, guilty, it will then be your duty to fix the amount of damages to which, as against such, the plaintiff is entitled. This makes it necessary for the court to instruct you with reference to the rules adopted by the law to guide and govern juries in measuring and ascertaining such damages. Damages are of two kinds: 1st. Actual damages. 2d. Exemplary or vindictive damages. The plaintiff claims to recover both. Actual damages are such as will compensate the plaintiff for actual injuries

sustained, and those injuries which naturally flow from the wrongs and trespasses proved, including injuries done to the printing press, office, and property, mentioned in the declaration. For such actual injuries, if proved, and to the extent proved, the plaintiff is entitled to such sum as will fully compensate him therefor, and he is entitled to no more, unless he has made out a case for exemplary damages. All rules of damages are referred by the law to one of two heads, either compensation or punishment. Compensation is to make the party injured whole. Exemplary damages is something beyond this, and inflicted with a view not to compensate the plaintiff, but to punish the defendant. The circumstances which will authorize the infliction by the jury of exemplary damages, have been very correctly stated by the supreme court of Missouri, and as this is a trial in that state for a transaction originating therein, this court will adopt the language of that court on this subject. It says: "To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, or else the amount sought to be recovered should be confined to compensation." Kennedy v. North Missouri R. Co., 36 Mo. 351.

It is claimed by the plaintiff, but denied by the defendant, that this is a case for exemplary damages Under the rules given, this is a matter which the law confides to the sound judgment of the jury, and they will inquire and decide whether, considering all the circumstances in evidence, the case is one in which, in addition to compensating the plaintiff, the defendants should also be punished in damages, for example's sake. If you decide not to give vindictive damages, then the amount of actual damages you will fix from the evidence before you. If you decide to go beyond the limits of compensation to the plaintiff, and enter into the field of exemplary damages, then it is your duty to look at all the circumstances under which the defendants acted, at those which are claimed to aggravate, and at those which are claimed to mitigate the acts complained of; to put yourselves in the situation of the parties. Sedately consider these, and thus ascertain the exact and real nature and circumstances of the transaction, and let this guide you in the amount of damages to be assessed. The amount of exemplary damages the law leaves to the jury, not to be fixed arbitrarily, but by the deliberate and temperate exercise of common sense and sound judgment. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony.

The court having thus mapped out the path of your duty, makes no doubt that you will pursue the investigations to which it conducts you, with freedom from passion or prejudice, and with a recognized and pronounced impartiality which will be alike creditable to you and honorable to the administration of justice.

NOTE, [from original report.] On the conclusion of the plaintiff's evidence the court instructed the jury that there was no evidence whatever, proper for them to consider to connect the defendant, Fletcher, with the trespasses sued for, and the jury as to him, returned a verdict of not guilty. The other defendants submitted evidence to the jury, and they returned a verdict of guilty against the defendant, Montgomery, giving only actual damages, and of not guilty as to the others.

BERRY, (GOODYEAR v.) See Case No. 5,556.

BERRY, (HARRIS v.) See Case No. 6,115.

Case No. 1,358.

BERRY v. MOBILE LIFE INS. CO.

[1 Tex. Law J. (1878,) 157.]

Circuit Court, W. D. Texas.

INSURANCE—CONDITIONS OF POLICY—PRELIMINARY PROOFS OF DEATH—WAIVER — CONSTITUTIONAL LAW — DISCRIMINATION AGAINST FOREIGN INSURANCE COMPANIES—LIFE INSURANCE NOT COMMERCE.

[1. The giving of preliminary proofs of death, though, by the terms of a policy of life insurance, a condition precedent to recovery, is not a "condition" of the policy, within the meaning of a provision that no waiver of the conditions shall be valid unless made at the head office, and signed by an officer of the company.]

[2. An offer by a life insurance company to compromise a suit is a waiver of the provision of the policy requiring preliminary proofs of death.]

[3. A corporation created under the laws of a state is not a citizen thereof, within the meaning of Const. U. S. art. 4, § 2, providing that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" and a state law imposing a special rate of interest upon judgments against foreign corporations is valid under that section.]

[4. The issuing of a policy of life insurance is not "commerce," within the meaning of the provision of the federal constitution giving congress power to regulate commerce among the states.]

[See Severn v. Queen, 2 Can. Sup. Ct. 90, for a definition of the words "trade or commerce."]

[At law. Action upon a policy of life insurance by Elizabeth M. Berry, for herself and as guardian ad litem of Belle Berry, against the Mobile Life Insurance Company. The cause was removed to this court from the district court of Dallas county. Verdict for plaintiff. Motion for new trial denied.]

Robertsons & Herndon, for plaintiff.

Chilton & Chilton, for defendant.

DUVAL, District Judge, (charging the jury.) This suit was commenced in the district court of Dallas county on the 27th day

of September, 1875, and in accordance with an act of congress regulating the subject, was removed into this court and filed here on the 11th day of October, 1876. The action was brought by Elizabeth M. Berry, for herself, as the wife of John Riley Berry, deceased, and as next friend and guardian ad litem of her minor daughter, Belle Berry. It appears from the evidence before you, that on the 10th day of August, 1874, the defendant made and delivered a policy of insurance on the life of said John Riley Berry, in favor of him, and for the benefit of plaintiffs; and for the consideration therein expressed, promised and agreed to pay said plaintiffs, on the conditions and agreements therein expressed, $2,500, lawful money of the United States, in sixty days after due notice and satisfactory proofs of death of said John Riley Berry. It is averred by plaintiffs that said John Riley Berry did keep and perform all things and conditions devolving upon him by the terms and provisions of said policy, and that he departed this life at the city of Galveston, in this state, on the 16th day of July, 1875. The plaintiffs, therefore, bring this suit to recover the amount alleged to be legally due them on the said policy.

In the contract arising on this policy, there are "certain conditions and agreements," numbered from one to eight inclusive, being, 1st. As to statements made on the application for the policy. 2d. As to payments of premium to be made by the assured. 3d. As to residence and travel of the assured. 4th. As to his occupation or business. 5th. As to violation of conditions, or in case the assured shall die by his own hand, etc. 6th. As to assignment of the policy. 7th. As to first payment and power of agents to waive foregoing conditions, etc., and 8th. As to non-forfeiture of the policy after two or more full annual premiums have been paid, etc.

It is expressly stipulated and agreed between the parties to the said contract, that these "conditions and agreements" must be complied with by the assured, and "that any alteration or waiver of the conditions of this policy, unless made at the head office and signed by an officer of said company, shall not be considered as valid." Therefore, so far as these conditions and agreements are concerned, I can say to the jury that no agent of the company would have the authority to waive them, unless done in the manner and at the place prescribed. But I have to instruct the jury that this does not apply to the giving notice and furnishing satisfactory proofs to the defendant of the death of the deceased. These are called in law "preliminary proofs," and though they are conditions precedent to a right of action or recovery, yet they do not constitute the essence of the contract between the parties, and therefore form no part of any of the conditions and agreements mentioned in said policy, and which an agent is forbidden to alter or waive, and which cannot be waived unless made at the head office and signed by an officer of the company. While these preliminary proofs are conditions precedent, yet being made for the benefit of the insurer, such insurer may waive them, either expressly or impliedly, and if they are so waived, this, in effect, strikes them out of the contract. Any agent of the company who is authorized to receive premiums, solicit policies and deliver the same, and who is held out to the public as a general agent for parties to deal with, and is apparently acting within the scope of his authority in waiving preliminary proofs, may make such waiver by words or acts, or by both, so as to bind the company. If the company, through such an agent, examines into the loss and expresses satisfaction, and says or does such things as show a recognition of its liability for the loss, or if it offers to settle or compromise the amount agreed to be paid by the policy, these are grounds which the law recognizes as sufficient to show a waiver by the company of preliminary proofs of death. If, therefore, the jury believe from the evidence in this case, that the defendant, through any of its agents thereunto authorized, did, by words or acts, waive such preliminary proofs of the death of John Riley Berry, expressed or by implication, on the first ground stated, prior to the institution of this suit on the 27th day of September, 1875, then a right of action accrued to plaintiffs, and they had a right to file their suit without waiting for the sixty days to expire, and proof of death in that case would be unnecessary.

I further instruct the jury, that if they believe, from the evidence, that the defendant, through its authorized agent or attorney, after the institution of this suit, made an offer to settle or compromise with plaintiffs, or either of them, by the payment of any sum of money in the settlement of the policy sued on, this would amount, in law, to a waiver of all preliminary proofs. It would admit the loss and that satisfactory proofs thereof had been furnished the company.

Under the foregoing instructions the jury will return a verdict for the plaintiffs or defendants. If you should find for the plaintiffs, your verdict should allow the $2,500 agreed to be paid by the policy, and you are authorized to add to that amount, by way of damages, interest not exceeding 12 per cent. per annum from the date when the liability accrued, or, as counsel for plaintiffs consented you might do, from and after the expiration of sixty days after the death of John Riley Berry. If your verdict should be for the plaintiffs you may also find such reasonable attorney's fee for the prosecution of this cause for the plaintiffs as you may believe is warranted by the testimony on that subject, not exceeding five hundred dollars. If you find for the plaintiffs you will state in your verdict how much you find for principal and interest, as due to plaintiffs on the

policy, and how much you find, if anything, as a reasonable attorney's fee for bringing and prosecuting this action in behalf of plaintiffs.

Verdict for plaintiff.

On motion for a new trial the following opinion was delivered:

DUVAL, District Judge. In this case a new trial has been moved for on several grounds, only one of which will be noticed, because the others were discussed and ruled upon during and preceding the trial.

It is alleged that the court erred in allowing the jury to find for the plaintiffs 12 per cent. on the amount sued for under the policy of insurance, and attorney's fees, as provided for by a statute of the state of Texas in cases of this character, because the said statute is unconstitutional and void, for imposing onerous terms and liabilities upon a life insurance company of another state, when none such were imposed upon a like company chartered by this state and under like circumstances. The objection is based upon the idea that corporations are citizens of the state creating them, and that to discriminate against them or impose penalties or conditions upon them by another state to which her own corporations of a like character were not made subject would be in violation of that clause of the constitution of the United States (article 4, § 2) which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," as well as of that other clause which declares that congress shall have power "to regulate commerce with foreign nations and among the several states." Now, I think it has been well settled, that while, for certain jurisdictional purposes, a corporation is considered "a citizen" of the state creating it, yet it is not regarded as having the rights of actual citizens anywhere else. It is a creature of the local law. It is not compelled to do business outside of the state creating it, and if it does so it must be subject to such terms and conditions as the state in which it acts may think proper to impose upon it.

It has also been settled that the issuing of an insurance policy is not a transaction of commerce, within the meaning of the constitutional clause referred to, even though the parties be domiciled in different states. See Paul v. Virginia, 8 Wall. [75 U. S.] 168; Germania Fire Ins. Co. v. Francis, 11 Wall. [78 U. S.] 210; 47 Ind. 236; 7 Mich. 238, opinion by Judge Cooley.

A foreign corporation (as I understand the law to be in the United States) is not a citizen of the state creating it, except in a qualified sense, and it cannot transact business in another state except on such conditions, terms and liabilities as that state may, by its law, think proper to subject it to. The motion for a new trial is refused.

Case No. 1,358a.

BERRY v. The MONTEZUMA.

[N. Y. Eve. Post, March 6, 1856.]

District Court, S. D. New York.

ADMIRALTY—PLEADING—ADMISSIONS OF ANSWER—SEAMAN'S WAGES—TIME OF SERVICE.

[Libellant in a suit for seaman's wages is entitled to use an admission of the answer as to the date of his service without being bound by the allegation of the answer as to the time when his service began.]

[In admiralty. Libel for seaman's wages by James Berry against the schooner Montezuma.]

W. J. Haskett, for libellant.

D. McMahon, for claimant.

Before BETTS, District Judge.

The libel seeks to recover $66.50, a balance of wages due him for service on the schooner from February 1 to July 2, 1855, at $18 per month. The whole wages amounted to $91.20, against which the libellant credits payments to $24.70. The answer admits the rate of wages and service on board, ending July 2, but denies that it began before the 6th of February, and sums up the amount earned at $87.60, on which it claims payment to $51.87, leaving a balance of $35.73, to which tender, with $11.35 costs, was made to the libellant, and duly paid into court.

Held, that the libellant proved satisfactorily that he entered on board the vessel as early as the 1st of February, 1855, and is entitled to use the admission of the answer that he continued with the vessel to July 2, without being bound by the assertion of the answer that his service did not begin till February 6. The two facts are independent of each other, and the owner of the vessel is not entitled to have his admission of one qualify or make evidence his assertion of the other. The claimant fails to prove the credits he sets up, and the libellant is entitled to judgment for the apparent balance of $66.50 and costs. But it is ordered that he may have, if asked for, a reference to a commissioner to state the account, and may offer further proofs of payments. The reference being for his favor alone, it must be at his expense exclusively.

BERRY, (NEVETT v.) See Case No. 10,135.

Case No. 1,359.

BERRY v. SMITH.

[3 Wash. C. C. 60.][1]

Circuit Court, D. Pennsylvania. April Term, 1811.

WRITS — CONFLICTING EXECUTIONS — PRIORITY — INSTRUCTION NOT TO LEVY.

1. It is not upon the supposition of fraud, from the length of time to which indulgence has been

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

granted by the plaintiff, in an execution to the defendant, that a subsequent execution, levied, has been preferred to a prior execution; proceedings under which, have been suspended by such indulgence. The true reason for the preference given to the subsequent execution levied, is; the end of the execution is to obtain satisfaction of the debt, and when delivered to the officer, it is his duty to proceed immediately for the purpose of obtaining satisfaction. The delivery of the execution, changes the property, and vests it in the sheriff; and his possession is notice to all the world.

[Cited in Bayard v. Bayard, Case No. 1,129.]

2. If the plaintiff, in an execution, orders the sheriff not to levy, the purpose of the delivery of the execution is defeated, and no change of property takes place.

[Cited in Howes v. Cameron, 23 Fed. 326.]

3. It is not necessary that the officer remove the property, or that he sell it before a reasonable time; but, if by order of the plaintiff, the property is left with the defendant, the execution has no operation.

4. There is no difference between a suspension of an execution one day, or for one month or more; the order for any suspension, deprives the act of the officer of all its force, until countermanded; and a second execution, levied in the mean time, if pursued, will take preference of the first. Aliter, if the second execution issues after the continuance of the order to the officer not to proceed.

At law. Case agreed. Judgment was entered in favour of the plaintiff, in the supreme court of Pennsylvania; and a fieri facias issued on the 1st of January 1811, and was delivered to the sheriff on the same day about twelve o'clock, with direction not to levy it, till further instructions. On the same day, the plaintiff's counsel called at the house of the defendant, to inform him of the issuing of the execution, and to request his taking immediate measures to discharge it. The defendant was not at home. The next day, the plaintiff's counsel called again, between one and two, and found the defendant at dinner. He then called him to the door, and informed him of the issuing of the fieri facias, said there was no desire to break him up, or to distress, if it could be avoided, consistently with the plaintiff's safety—that the execution was delivered to the sheriff, which would secure the property, and that the defendant must immediately see the plaintiff's agent, Mr. N., and make some arrangement with him, to prevent further proceedings under the execution. On the 3d of January, as the plaintiff's counsel did not hear from the defendant, or Mr. N., he directed the sheriff to proceed to make his levy; and accordingly, the sheriff went to the house of the defendant with the execution, and levied the same, but did not then remove the goods, and left them with the defendant, according to the directions of the plaintiff, till further orders, endorsed on the writ. On the 4th of January 1811, two judgments were entered in the circuit court of the United States, at the suit of Harold and Prosser, against the defendant, and two fieri facias were issued to the marshal. About one o'clock, on the same day, the marshal, by virtue of said executions, levied on, and seized the goods of the defendant, then being in his house; and no sheriff, or sheriff's officer being there, he removed the said goods without interruption or claims, (but that the defendant informed the marshal, when he was about levying the said fieri facias, that the sheriff had been there.) Neither the plaintiff, nor his counsel, nor agent, knew of the issuing of the said fieri facias, or of the levy or removal of the goods, by virtue of them, until after it was done. The above case was agreed, upon a rule to show cause why the plaintiff should not have his executions satisfied, out of the moneys paid into court by the marshal; and the question for the opinion of the court was, whether the plaintiff in the suit in the state court, or those in the circuit court of the United States, are entitled to a preference of payment, out of the sales of the goods, so as aforesaid taken in execution.

Hopkinson, for plaintiff, cited [Levy v. Wallis,] 4 Dall. [4 U. S.] 167; [Water v. McClellan,] Id. 208; Id. 358, [U. S. v. Conyngham, Case No. 14,850;] Browne. (Pa.) Append. 26; [Hooton v. Will,] 1 Dall. [1 U. S.] 187, [450;] Cowp. 177; 3 Burrows, 962, 1243.

Hallowell, for Harold and Prosser, cited Barnes v. Billington, [Case No. 1,015,] in this court; Welch v. Murray, [4 Yeates, 197;] Hurst v. Hurst, [Case No. 6,931,] in this court; 7 Term R. 20; Skin. 257; 2 Vern. 218; 1 Sell. Pr. 526; 1 Term R. 729.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

In most of the cases to be found in the books where the execution first delivered has been postponed, as against purchasers and posterior executions, in consequence of delay in the due execution of the writ, the time has been so long as to warrant a presumption of a design to protect the property; which, in contemplation of law, amounts to a fraud, however innocent and even praiseworthy, on the ground of benevolence, the motive might be which induced it. For this reason, therefore, we frequently meet with expressions, in the opinions delivered in those cases, which lead to the conclusion, that the mere circumstance of time furnishes the principle which is to determine the question of fraud. This is a case in which this supposed principle must be examined, and its soundness decided upon; for, the vigilance of the creditor under the second execution, has been so great, as to leave the first creditor only three days and a little more, for the exercise of his intended indulgence to the debtor.

In the cases reported in the books, the delay has varied from six days, to one and two years;—in this, it was shorter than the shortest of those periods, and if time be sufficient to govern the principle of decision, the court would look in vain to the light which these

cases have shed on the subject, to enable us to distinguish the substantial difference, between a delay of three, and a delay of six days; for, it must be remarked, that in the cases referred to, the delay was produced by the order or consent of the creditor; and in all of them the motive was honest, though the intended effect was protection to the property, for a longer or a shorter time. If the principle is to be collected from the mere circumstance of time, it is a phantom whose shape will vary according to the different visions of the judges who examine it, and in reality, will exist only to perplex, and to render the law uncertain. Rejecting, therefore, the expressions of judges, which, unless they are understood in reference to the cases before them, are loose, and altogether unsatisfactory; let us see what is the solid and material principle, which has governed their decisions. It seems to the court, to be this;—that the end and object of an execution is, to obtain satisfaction of the debt for which it issued, and being delivered to the proper officer, it gives to the creditor a priority; because, the law points out to that officer his duty, which is to execute it without delay. In doing this, the property of the debtor is changed, and vests in the officer, for all the purposes of that execution. The change of possession, gives notice to all the world, of the real situation of the debtor, in relation to the property so seized, and prevents them from being deceived by the appearance of wealth, to which the debtor has no just pretensions. If the execution is delivered to the officer, with orders not to levy it at all, or until further orders, the purpose of the delivery is not answered, and all the legal consequences of the measure, in respect to creditors and purchasers, who would otherwise have been affected by it, are defeated. If the officer is ordered to levy on, but to leave the property with the owner, until he shall be otherwise directed, the party undoes, by such an order, all that the officer does by the seizure;—it works no change of the property;—it is no levy in respect to third persons. It is not necessary that the officer should remove the property, or even sell it immediately, if this be done in a reasonable time. But, he has effected nothing, if, by the plaintiff's order, he leave the property with the debtor, to exercise every act of ownership over it, which he could have done before the seizure.

It will be perceived, that in laying down this principle, the court makes no distinction between a suspension for one day, or one or more months. The order of suspension deprives the act of the officer, in pursuance of it, of all its force and effect, until it is restored by a countermand; and if, in the mean time, a second execution is taken out and levied, the former must be postponed;—not so, if the second execution issues subsequent to such countermand; and upon this distinction, the decision of the case of Huber v. Schnell, [1 Browne, 15,] in the common pleas of this state, seems to be entirely correct.

The court is, for these reasons, of opinion, that Harold and Prosser are entitled to a preference of payment out of the sales of the property taken in execution.

BERRY, (THOMPSON v.) See Case No. 13,943.

BERRY, (WILSON v.) See Case No. 17,791.

Case No. 1,360.

In re BERRYMAN et al.

[2 Hask. 293.] [1]

District Court, D. Maine. Dec. Term, 1878.

PARTNERSHIP — LIABILITY OF MARRIED WOMEN—AGENCY OF HUSBAND — LIABILITY AFTER EXPIRATION OF PARTNERSHIP TERM—BANKRUPTCY.

1. A married woman, who authorizes her husband to sign her name to articles of copartnership between herself and others, is bound thereby.

2. When such articles limit the copartnership to one year, meantime giving the husband authority to act for his wife, a continuance of the business thereafter by the husband, in the name of his wife, with one of the copartners, as a new firm, without the knowledge or authority of the wife, will not make [her] a copartner in the new firm.

3. A person not actually a copartner cannot be adjudged bankrupt upon petition of a pretended copartner.

In bankruptcy. [In the matter of John Berryman & Co.] Petition of [John Berryman] one member of a collapsed firm, that the firm and copartners be adjudged bankrupt. The other alleged copartner [Sarah A. Hall] appeared, and by answer denied the copartnership; the cause was heard upon petition, answer, and proof. [Petition dismissed, as to Sarah A. Hall.]

Josiah H. Drummond, for petitioner.

Charles E. Clifford and William H. Clifford, for respondents.

FOX, District Judge. John Berryman, of Buxton, in this district, has filed his petition praying that he and the firm of John Berryman & Co. may be adjudged bankrupt. The petitioner alleges that said firm is composed of himself and Sarah A. Hall, wife of John W. Hall, of Boston. Notice was given of the petition to Sarah A. Hall, and she has appeared and filed a written denial of the copartnership; and the question now presented for decision is, whether she was a member of the firm of John Berryman & Co., and liable to be adjudged a bankrupt on that account.

It appears from all the evidence in the case that John W. Hall, prior to 1872, purchased a woolen mill at West Buxton, and took a deed in the name of his wife, Sarah

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

A. Hall, as he was then in bankruptcy, and had not obtained his discharge.

In 1872, Mr. Hall, being desirous that the mill should be occupied, entered into an arrangement with Berryman and one T. O. Boody to form a copartnership in the woolen business. On account of Hall's insolvency, and the title to the mill being in Mrs. Hall, the articles were drawn, creating a partnership between Mrs. Hall and Berryman and Boody, and were taken to Boston for execution by Mrs. Hall. She declined to sign them, and they were signed by her husband with her name, and sent to Berryman. The authority of the husband thus to execute this instrument in her behalf is now denied by both Mr. and Mrs. Hall; but, from his affidavit given in a previous stage of the cause, I am of opinion that she did verbally assent to her husband so doing, and that her name, in her presence, and with her knowledge, was by him subscribed to the articles, so that she is fully bound thereby, to the same extent as if executed by her personally. This being, therefore, her contract, we must from its terms ascertain the extent and duration of her liability thereby incurred.

It creates a copartnership between Mrs. Hall, Berryman, and Boody, for the manufacture of goods, under the style of John Berryman & Co., to continue one year from May 25, 1872, unless sooner terminated by mutual consent, or death of either party. It provides for a capital of $2,000, of which Mrs. Hall and Berryman were each to furnish one-half, the goods manufactured to be their joint property, they receiving interest at rate of 7 3-10 on capital. Mrs. Hall "was not to render any personal services for the company, but was to be represented in the transaction of the business of said copartnership by John W. Hall as her agent; and, acting in all respects as her agent and attorney relating to said company and copartnership business, and in behalf of said Sarah A. Hall, and in her stead, he was to act as the agent and attorney of the copartship in making purchases and disposing of the products of the mill, and to be the financial agent and treasurer of the copartnership." Mrs. Hall was to be accountable for the faithful discharge of his duties by J. W. Hall; the mill was occupied by the company; Berryman, Boody, and J. W. Hall were each to receive $1.75 per day for their personal services, and, after payment of expenses and interest, Mrs. Hall was to receive for the use of the mill, &c., 57½ per cent. of the balance; Berryman, 22½ per cent.; and Boody 20 per cent.

The business was carried on under this agreement until Dec. 8, 1873, when Boody withdrew, transferring to Mrs. Hall and Berryman all his interest in the copartnership effects, and receiving therefor an obligation of indemnity against all partnership liabilities, signed by Berryman, and which purported to be signed by Mrs. Hall, and was witnessed by her husband, it being a sealed instrument.

It appears, that J. W. Hall furnished to the copartnership the $1,000 of capital which by the articles were to be furnished by Mrs. Hall; she personally had nothing whatever to do with the business of John Berryman & Co. after May 25, 1872; received nothing for the rent of the mill, or from the business in any way whatever; but, all that was done in her behalf was done by her husband, without any other authority to act for her, than was conferred upon him by the articles of copartnership.

There is no evidence that Mrs. Hall authorized her husband to execute in her behalf the bond of indemnity to Boody, or that she was informed or assented to his withdrawal from the firm. The only act of Mrs. Hall relative to the copartnership or its affairs, in any way, was her authorizing her husband to sign her name to the articles of May 25th; and after that, it does not appear that she took any part in the matter, but has been an entire stranger to all that has been done by her husband in her name.

The copartnership was limited to one year, and during that time, by the very terms of the articles, J. W. Hall was her agent, "with full authority to represent her in the transaction of the business of said copartnership, and to act as her agent and attorney in all matters relating thereto." This authority, which was conferred upon him, was limited in its duration, and terminated with the expiration of the year; and, as between the copartners, their relations as copartners then ceased, unless the partnership was continued by some agreement between them, express or implied.

If John W. Hall had been a member of the firm, instead of his wife, his conduct, after the expiration of the year, would have required the court to find that the copartnership was still existing and remained as before; but, after the expiration of the year, John W. Hall had not, by the terms of the articles of copartnership, any authority in his wife's behalf to further continue and extend this relation. His authority as her agent was restricted to the period of the original agreement; and beyond that time he was wholly without authority to represent her in forming any new contract for the continuance of the firm; and the other members, having knowledge of this limitation of his authority, are bound thereby, and cannot rightfully insist on any further power or authority in his wife's behalf than the instrument conferred upon him.

It may be said that the business was continued as before, after the year expired, until the eighth of December, 1873; and it is very true that J. W. Hall, by his actions, did all that he could do to thus prolong the existence of the firm; but, it nowhere appears that, while thus acting, he had the least authority

to bind his wife as her agent; nor can I find any evidence to charge her with knowledge of her husband's proceedings in the business. The goods were manufactured in Maine. She then resided in Massachusetts; and there is no testimony that she was in any way cognizant that the business was continued after May 25, 1873, as it had been previously conducted.

Conceding that the partnership continued beyond the year, the business being carried on as before, without change of any kind, still, it is clear that by the withdrawal of Boody from the firm on the eighth day of December, 1873, the firm of J. Berryman & Co., as it had previously existed, was at an end. Boody had then a right to withdraw at any time, as the year had expired; and by so doing, with or without the assent of his associates, the partnership was dissolved, and the other partners were no longer copartners, but tenants in common merely; and some further agreement between them would be requisite to create the relation of copartnership.

In the present case, there is an entire absence of testimony to establish the assent of Mrs. Hall to the creation of a new copartnership between herself and Berryman, under the style of J. W. Berryman & Co.; and, upon the clearest principles of law, she can not in any way be considered as having entered into such a copartnership.

It can not be pretended that a single word can be found in the articles of May twenty-third, conferring on J. W. Hall authority to constitute her a member of any new firm, or to continue the old firm beyond the year. She had agreed to become a member of the firm as composed of the three persons named in the articles; but, nowhere does she assent to be bound by her attorney's attempt to create a new partnership between herself and one member alone of the old firm.

It is argued that the old firm still continued after December 8, 1873, because no notice was given of the dissolution; but, this is not an accurate statement of the condition of the parties. The firm was in fact dissolved by the withdrawal of Boody; but, notwithstanding such was the consequence of his withdrawal, the law of partnership provides that, as to those who have dealt with a firm knowing its members, the copartnership, after it is dissolved, shall be deemed to continue until knowledge of the change is in some way brought home to such parties. It is merely an application of the doctrine of estoppel as to one class of creditors, who have, in ignorance of any change, continued their dealings on the faith of all continuing as copartners who were so originally; but, quoad the individual members of the firm and the world at large, the firm is no longer in existence when one member has withdrawn, and the firm is thereby dissolved; and, as such member can no longer be held chargeable with debts contracted after such dissolution by one or more of the members of the firm continuing to carry on the business under the firm name, he is not liable to be adjudged bankrupt as a member of the firm, if those continuing the business become bankrupt. It may be that, by his neglect to notify the old creditors, a special liability has been incurred by him to those who may have continued their dealings in ignorance of any change; but such a liability is not a ground for proceedings in bankruptcy against such a party, as a general copartner in the new business.

Petition dismissed as to Sarah A. Hall.

Case No. 1,360a.

In re BERTHOUD.

District Court, S. D. New York.

[Nowhere reported, opinion not now accessible.]

Case No. 1,361.

BERTONNEAU v. BOARD OF DIRECTORS OF CITY SCHOOLS et al.

[3 Woods, 177.][1]

Circuit Court, D. Louisiana. Nov. Term, 1878.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES—SEPARATION OF WHITE AND COLORED CHILDREN IN SCHOOLS—FEDERAL COURTS—JURISDICTION—VIOLATION OF STATE LAWS BY STATE OFFICERS.

1. Where the officers of a city or state provide public schools of equal excellence for all children between certain ages, but do not allow children of colored parents to attend the same schools with children of white parents: *Held*, that the rights of the former under the constitution and laws of the United States were not thereby impaired.

[Cited in Claybrook v. City of Owensboro, 16 Fed. 302.]

2. The federal courts have no jurisdiction, irrespective of the citizenship of the parties, of suits respecting violations of a state law or constitution by the officers of a state, which do not impair rights granted or secured by the constitution or laws of the United States.

[Cited in Claybrook v. City of Owensboro, 16 Fed. 305.]

In equity. The bill was filed [by Arnold Bertonneau] against the board of directors of city schools of the city of New Orleans, a corporation created by the state of Louisiana, Wm. O. Rogers, chief superintendent of the public schools of New Orleans, and George H. Gordon, principal teacher of the school known as the Fillmore school, in the third district of the city of New Orleans. [Heard on demurrer to bill. Demurrer sustained.]

The complainant and all the defendants were alleged to be citizens of the state of Louisiana. The bill averred in substance that the complainant was a person of African descent, the father of two legitimate male children, aged respectively nine and seven years; that he resided with his children at No. 367

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

North Rampart street, in the city of New Orleans, and was a property holder and tax payer in said city; that the nearest public school to complainant's place of residence was on Bagatelle street, in the third district, distant about three blocks; that about November 13, 1877, complainant applied to defendant Gordon, the principal teacher of said school, to admit the complainant's said children as pupils therein, which he declined to do on the ground that they were of African descent, and alleging that his instructions from defendant William O. Rogers, chief superintendent of public schools, forbade him to receive children of African descent into said schools; that on July 3, 1877, the defendants, "the board of directors of city schools," adopted and published a preamble and resolution in the following words: "Whereas, this board, in the performance of its paramount duty, which is to give the best education possible within the means at its disposal, to the whole population, without regard to race, color or previous condition, is assured that this end can be best attained by educating the different races in separate schools; therefore, Resolved, that the committee on teachers, aided and assisted by the superintendent, be authorized and instructed to take such steps during vacation as may be necessary to carry this object into effect." The bill claimed that this preamble and resolution were in violation of the second clause of section 1 of article 14 of the amendments to the constitution of the United States, which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, * * nor deny to any person within its jurisdiction the equal protection of the laws," and of that provision of the statutes of the United States which declares that "any person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects to, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress:" Rev. St. § 1979. The bill further charged that the said preamble and resolution were in violation of article 135 of the constitution of the state of Louisiana, which declares, "The general assembly shall establish at least one free public school in each parish throughout the state, and shall provide for its support by taxation or otherwise. All the children of this state between the ages of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the state in common, without distinction of race, color or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the state of Louisiana."

The bill further charged that said action of the board of directors of the city schools, and of the other defendants, subjected the complainant to the deprivation of his right as a citizen of the United States and of the state of Louisiana, of having his children schooled and educated in and at said public school, which was established and sustained by the state of Louisiana, and in which schoolable children of white parents were admitted and educated, and degraded him and his family by the denial of their equality in the public schools with children of other citizens of the state. The prayer of the bill was for a decree declaring the preamble and resolution above recited, and the actings and doings of said defendants above set forth, to be in violation of the constitution and laws of the United States, and that said defendants be enjoined and prohibited from enforcing said preamble and resolution, or any other ordinance to the same effect, and that defendants be required to admit the said children of complainant to said public school, or any other public school sustained or established by and under the constitution and laws of the state of Louisiana, as pupils, to be educated therein just as the children of white parents are admitted and educated therein. To this bill the defendants filed a demurrer, on the ground that it contained no matter of equity whereof the court could take jurisdiction under the constitution and laws of the United States, or whereon the court could ground any decree or give complainant any relief against the defendants.

John Ray, for complainant.

Edgar Farrar, Asst. City Atty., for defendants.

WOODS, Circuit Judge. There is no complaint in the bill that complainant's children are excluded from the public schools of the state on account of their race and color or for any other reason. Nor is there any averment that the public schools which are open to complainant's children are in any respect whatever inferior to the schools where the children of the white race are educated. The grievance, and the sole grievance, set out in the bill is that complainant's children, being of African descent, are not allowed to attend the same public schools as those in which children of white parents are educated. Is this a deprivation of a right granted by the constitution of the United States? The complainant says that the action of the defendants deprives him and his children of the equal protection of the laws, and therefore impairs a right granted to him and them by the fourteenth amendment to the constitution of the United States, and the act of congress passed to secure the same. Is there any denial of equal rights in the resolution of the board of directors of the city schools, or in the action of the subordinate officers of the

schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights. These views have been held by the supreme court of Ohio, in respect to a law under which colored children were not admitted as a matter of right into the schools for white children. State v. McCann, 21 Ohio St. 199. See, also, State v. Duffy, 7 Nev. 342, where substantially the same doctrine is held. See, also, the concurring opinion of Mr. Justice Clifford, in Hall v. De Cuir, 95 U. S. 485. In the state of Georgia there is a law forbidding the intermarriage of white persons and persons of African descent. It was held by Erskine, District Judge, of the United States court, that this law was not obnoxious to the fourteenth amendment to the constitution. In re Hobbs, [Case No. 6,550.] The argument in support of this decision is that the law applies with equal force to persons of both races. Its prohibition applies alike to black and white, and the penalty for disobedience falls with equal severity on both. These authorities, it seems to me, fully sustain the views above announced by this court. But complainant contends that by the constitution of the state of Louisiana separate schools for white and colored children are prohibited, that the actings and doings of defendants set out in the bill are in violation of the plaintiff's right under the constitution of the state, and are a denial to plaintiff of the equal protection of the laws of the state, and that the board of the city schools and the other defendants in the bill, in this matter represent the state; that their acts are the acts of the state, and, consequently, that the clause of the fourteenth amendment to the constitution of the United States, which declares "No state shall deny to any person within its jurisdiction the equal protection of the laws," applies to this case.

Whether the board of directors of city schools, Rogers, the chief superintendent of schools, and Gordon, the principal of the Fillmore school, are the state of Louisiana, or represent the state of Louisiana, so that their acts are to be considered the acts of the state, it is unnecessary now to decide. Conceding for the present that their acts are the acts of the state, does it follow that this court can take cognizance of their doings, under that clause of the constitution relied on? If I am not in error in holding that the requiring of white and colored children to attend separate schools, even when such schools are supported at the public cost, does not deprive either class of their equal rights, it would follow that as between citizens of the same state this court has no jurisdiction of the case presented by the bill. If I am right in the view presented the claim of complainant amounts to this, that this court, without regard to the citizenship of the parties, has authority to inquire into every violation of a state law or state constitution by the officers of the state. This court does not sit to supervise the conduct of state officers unless it impairs some right granted by the constitution of the United States, or unless the citizenship of the parties to the suit gives the court jurisdiction. Generally we are authorized to enforce or administer the state laws only when there is a controversy between citizens of different states. As the bill does not present the case of an impairment of a right granted by the constitution of the United States, and as all the parties to it are citizens of the state of Louisiana it does not disclose any case of which this court can take jurisdiction. The demurrer must therefore be maintained.

BERTRAM, The, (DILL v.) See Case No. 3,910.

Case No. 1,362.

BERTRAM et al. v. LYON.

[1 McAll. 53.] [1]

Circuit Court, D. California. July Term, 1855.[2]

SALE—VALIDITY—LACK OF SUBJECT-MATTER—MISTAKE IN DESCRIPTION—WARRANTY.

1. When the substance of a thing sold, is not in existence at the time of sale, such sale is void.

[See note at end of case.]

2. A mistake without bad faith, made in the description of the brand on flour barrels does not so essentially change the substance of the flour as to render void the sale. Where the sale note described the flour as "Haxall," whereas it was branded "Gallego," the sale was not avoided.

[See note at end of case.]

3. But the description amounted to a warranty, for breach of which, damages, if proved, could be recovered.

[See note at end of case.]

At law. This action is brought by vendor against vendee, to recover the purchase-mon-

[1] [Reported by Cutler McAllister, Esq.]

[2] [Affirmed by the supreme court in Lyon v. Bertram, 20 How. (61 U. S.) 149.]

ey for two thousand barrels of flour sold. A special verdict has been agreed upon by the parties. [Judgment for plaintiff.]

[Defendants subsequently appealed to the supreme court, which affirmed the judgment in Lyon v. Bertram, 20 How. (61 U. S.) 149.]

The answer of defendant consists of six different pleas. The first is the statute of limitations; the sixth is a denial of the allegation in the complaint, which avers an assignment of Flint, Peabody & Co. to the present plaintiffs. These two pleas are disposed of by the special verdict agreed on, and the court is remitted to the issues raised by the four intermediate pleas. All these resolve themselves into a general denial of the allegations of the complaint, setting up a contract of sale.

On the argument, it was contended by the counsel for the defendant, that the description in the contract, that the flour sold was "Haxall," when it turned out to be "Gallego," rendered the contract void upon the legal principle, which requires that, to constitute a contract, there should be a grantor, a grantee, and a thing granted. That this case comes within the operation of the rule, that where parties contract in relation to a thing which at the time of the execution of the contract they believed to be in existence, and which it is ascertained had no existence at the time, the whole contract is void, inasmuch as the consent of the parties had never met on the subject-matter of the contract, it not having been in existence.

John K. Hackett, for plaintiffs.
Saunders & Hepburn, for defendant.

McALLISTER, Circuit Judge. In this case, it appears by the facts patent on the face of the agreed verdict, that the assignors of plaintiffs were owners of a cargo of flour, consisting of two thousand barrels, branded as "Gallego," "being at the time on board the ship 'Ork,' lying in this harbor, composing the entire cargo of said ship, and inspecting superfine 1771; bad, 229 barrels." That as such owners, they entered into a written contract with defendant, by which they sold to him "the cargo of Haxall flour now on board the ship lying in the harbor (of San Francisco), being about two thousand barrels," on the terms mentioned in the contract. Among those terms was, that one price was to be paid for "superfine," another for bad flour.

It is contended by defendant, that the brand of the flour being described in the contract as "Haxall," whereas, in fact, it was branded "Gallego," the whole contract was void. To sustain this position, a decision from the supreme court of this state has been cited.

In the case of Flint v. Lyon, 4 Cal. 17, that court say, in reference to this very contract, "How, then, stands the case? The contract was founded in mistake; both parties supposing they were contracting concerning a certain article which had no existence, consequently the contract was void for want of substance of the thing contracted for." If the flour sold had no existence at the time of the contract, it is certainly true that no contract could have been made in relation to that the substance of which was not. It would come within the operation of the elementary principles of law, that in order to constitute a valid contract, there must not only be parties capable of contracting, but a thing in existence, the subject-matter of the contract in regard to which there had been an "aggregatio mentium." This rule is practically illustrated in Leach v. Mullett, 14 E. C. L. 233, where, by mistake, a house was sold at auction and so described that it did not refer to the house the parties intended to buy and sell, but to another house not in the contemplation of either party. Here was a clear mistake as to the substance of the thing intended to be sold. There are various cases where the article contracted for is of a different species from that treated for. Thus, where an article was sold as "indigo," which was not indigo, but a fraudulent compound made to resemble it; or where a stone was sold as a "Bezar" stone, when in fact it was not such a stone; and various other cases. But in all such, the contract has been deemed void, in the absence of fraud, in a court of common law, by reason of the want of a subject-matter. It has been, where the substance of the thing was not in esse at the time of the contract, or the description so materially wrong, that the substance of the thing must be essentially changed in order to answer the description in the contract.

Does this case come within the foregoing rule? The special verdict finds the subject-matter of the contract to have been "a cargo of flour at the time on board the ship 'Ork,' lying in the harbor of San Francisco, being about two thousand barrels." In the contract, the flour is represented to be "Haxall," whereas it was branded "Gallego" flour; and the question is, did these two thousand barrels of flour, the cargo of the ship "Ork," cease to exist in substance, or, to use the language of the authorities, to have "a potential existence," because the brand upon them was different from that described in the contract? In other words, was this description of the brand a representation or warranty? or, was the brand so essential an element of the flour, that the latter ceased to exist in substance when the former was erroneously described so as to be made incapable of being the subject-matter of a contract? In cases in which executed contracts, such as the one in controversy, have come under consideration, where there had been through mere misapprehension a wrong description of the article sold, the question arose, whether the description amounted or not to a warranty. Thus, in Shepherd v. Kain, 7 E. C. L. 82,

where a ship was described as a "copper-fastened vessel," it appeared, in fact, that she was only partially copper-fastened. The court say, "Here the ship was not a copper-fastened ship at all." Still, so far from considering that the ship ceased to exist, and the contract void for that reason, the court upheld it as a contract with warranty; consequently, in an action for breach of warranty. damages were assessed against the defendant.

In Seixas v. Woods, 2 Caines, 48, an action was brought for selling peachum-wood represented to be brazilette, the former worth hardly anything, the latter of considerable value. Peachum-wood and brazilette-wood constituted the same substance, although different in name and value. Still, the negotiation in relation to it was not treated as a void contract. The only question was, whether there being no express warranty, the law would annex to the contract, under the circumstances, an implied one.

Further references to authorities are unnecessary; but if they are needed, it is only necessary to refer to the decision of the supreme court of this state which has been relied on by defendant. It is true, as stated, that the court in that case declared the contract in this, "to be void for want of the substance of the thing contracted for," ([Flint v. Lyon,] 4 Cal. 21,) but in the same opinion they take a different view of the sale-note, and recognized it as a contract containing a warranty. They declare, that the use of the word "Haxall" in the sale or note amounted to a warrranty that the flour was "Haxall." Now, it is impossible to come to a conclusion in this case that there was a warranty, and at same time consider that there was no contract. Id. 20. If the contract was void for one purpose, it was for all; and if null as to one party, was so as to both. The warranty was created by the contract. The latter is the principal, the warranty the incident. If the one had no vitality, the other could have had no existence. The fair inference, then, is,—whatever comments were made by the supreme court of this state in the case cited, upon the character of this contract,—the court recognized a legal contract which, by its terms, fixed upon one party the obligations and conferred upon the other the rights arising out of a warranty of the article sold. So far as the contract is recognized as a subsisting one by the supreme court of this state, this court is prepared to go.

It is a contract which by its terms passed a title to the property to the defendant; and whether the description inserted in the sale-note amounted to a warranty; and. if it does, whether the only remedy for any loss which may have accrued to defendant (if any such has accrued), is to be found in an action for breach of warranty,—are questions it is unnecessary to decide in this case.

The complainants predicate the cause of action upon the allegation of a sale of a certain cargo of flour, and allege the assumpsit of the defendant to arise out of such sale. The question submitted by the special verdict is, whether upon the whole matter found, the defendant did promise and undertake as alleged.

Now, with the views entertained by the court, the allegations in the complaint are sustained by the proofs. The insertion by mistake of the word "Haxall," did not annul the contract. At the utmost, it amounted to a warranty that the flour should be of that brand. If the pleadings had been so shaped in this case, and the evidence so marshaled, as to have enabled the court to look into the case as one in which a recoupment was asked in the nature of damages for breach of a warrranty, the court may have gone into the investigation. But there is no plea stating special damages, nor any evidence stating the amount. Had the pleadings in this case raised the question of the right of defendant to avail of a breach of warranty, the court could have considered it, but the facts as disclosed in the special verdict give no data by which to assess damages. But if the contract is valid, and assuming the pleadings to be such as would authorize defendant to give evidence of his loss by a breach of warranty, the measure of damages would be the difference in value between "Gallego" flour at the time of sale, and "Haxall" flour as it was represented to be in the sale-note. Now, the statement as to value in the agreed verdict is as follows: "In the opinion of some experts, there existed no difference in the quality or price of flour branded and known as 'Gallego' and 'Haxall,' each inspecting superfine; but in the opinion of other experts, there was a difference, some preferring 'Haxall' and some 'Gallego.'" This evidence certainly would not authorize the assessment of damages in an action for the breach of the warranty, nor prove any damages were the defendant attempting to set them up by way of defense in this action.

What, then, is the aspect of this case? The written document relied on by the plaintiffs, the court considers to be a contract. It is an entire and executed one. It transferred the cargo of the ship "Ork," which by its very terms is sold to defendant, who, in his note of 25th January, 1853, in which he directs a delivery of fifty barrels, writes of the latter as being "out of the lot purchased from ship 'Ork;'" and the contract speaks of the delivery, and stipulates, that at the expiration of a certain number of days, if the cargo be not previously delivered, the defendant may land all that remains, should he so elect; provided he pays the storage and drayage expenses. The title to the flour became vested, and he has already received a part of it.

Whether the defendant had a right, on discovering as he did, after the second delivery order, that the flour was "Gallego," to rescind the contract, has not been argued,

and cannot legitimately arise in this case, as at that time having received and appropriated a portion of the flour, he was not in a position to place the adverse party in statu quo in the event of a rescission of the contract.

A judgment must be entered for the plaintiffs.

If the court has erred in foregoing views, the amount involved will fortunately enable the defendant to have any such error corrected by a higher tribunal.

[NOTE. This judgment was affirmed on writ of error by the supreme court in Lyon v. Bertram, 20 How. (61 U. S.) 150. Mr. Justice Campbell, in delivering the opinion, said: "It is evident, from the verdict, that the error in the description of the cargo did not bear on the substance, or on any substantial quality of the subject of the sale. The subject of the sale was a cargo of flour, of about 2,000 barrels, on board of a vessel lying at a wharf in the city, of a quality to be ascertained by an inspection; and from that inspection, and not from the brand, the price was to be ascertained. * * * The case clearly does not belong to that class in which the subject-matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements. The brand on the exterior of the barrels of flour was certainly not of the substance of the contract. * * * The defendant does not resist the fulfillment of his agreement for any fraud; nor does the verdict impute any mala fides to the plaintiffs. * * * It may be admitted that the description of the flour as 'Haxall' imported a warranty that it was manufactured at mills which used that brand, and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand, * * * but it cannot be admitted that the purchaser was entitled to abandon this contract."]

BERTRAND, (READ v.) See Cases Nos. 11,601-11,603.

BERTRAUD, (CALKINS v.) See Case No. 2,317.

Case No. 1,363.

BESTOR v. SARDO.

[2 Cranch, C. C. 260.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

EVIDENCE—ABSENT WITNESS—AGREEMENT TO ADMIT TESTIMONY.

If, upon a motion for the continuance of a cause upon affidavit that a material witness is absent, the opposite party, to prevent the continuance, admits that the absent witness would, if present, testify as stated in the affidavit, he is not thereby precluded from offering evidence at the trial to disprove or explain away the force of the testimony which he has admitted that the absent witness would give.

At law. Replevin. Avowry for rent arrear. Upon the plaintiff's affidavit for the continuance of the case to the next term, on account of the absence of a witness who, he stated, would testify that the plaintiff did not get full possession of the house until some time after the rent was to commence. The defendant, in order to prevent the continuance, admitted that the absent witness would, if present, testify as stated in the affidavit.

At the trial, Mr. Ashton, for the defendant, offered evidence to prove that the plaintiff was permitted to occupy the house for some time before the commencement of the term, and in consideration thereof permitted the defendant to occupy two rooms in the house, for some time after the rent began to accrue.

To the admission of this evidence, Mr. Law, for the plaintiff, objected, because, as he contended, the defendant's counsel had admitted the fact which the absent witness would testify.

THE COURT, however, (nem. con.,) said that the spirit of the act of Maryland, 1787, c. 9, [2 Maxcy's Laws Md. 29,] respecting continuances, was, that the party applying for the continuance should have the same benefit only which he would have had if the witness were present; and permitted the defendant's counsel to offer evidence to explain the fact of the possession being withheld of a portion of the premises.

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

BETHEL, The, (BOARDMAN v.). See Case No. 1,585.

BETHEL v. The EUPHRASIA. See Case No. 4,545.

BETHEL v. The MILLINOCKET. See Case No. 9,609.

BETSEY, The, v. DUNCAN. See Case No. 1,367.

BETSEY, The, (HOLLINGSWORTH v.) See Case No. 6,612.

BETSEY, The, (The MONTGOMERY v.) See Case No. 9,734.

BETSINA, The, (TUNNO v.) See Case No. 14,236.

Case No. 1,364.

The BETSY.

[2 Gall. 377.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

PRIZE.—NEUTRAL GOODS—FRAUD BY NEUTRAL—CONCEALMENT OF ENEMIES' GOODS.

1. Where a captured cargo belonged, one half to a neutral, and the other half to an enemy, and there were papers on board, from which the enemy's interest might be discovered, it was held, that the share of the neutral should not be subjected to confiscation, in consequence of his having persisted in a claim for the whole made by his agent, nor of his having sworn falsely, that he was solely interested; such affidavit not having been employed for any fraudulent purpose in the cause, and not having been filed, until after an order for further proof had passed, as to one moiety, and a decree of con-

[1] [Reported by John Gallison, Esq.]

demnation had by consent been entered against the other moiety.

[Cited in U. S. v. One Hundred Barrels of Cement, Case No. 15,945.]

2. If a neutral fraudulently attempt to cover and claim an enemy's interest in a prize court, he will not be permitted to introduce further proof, to show his own neutral interest in the same property.

See The St. Nicholas, 1 Wheat. [14 U. S.] 417; The Fortuna, 3 Wheat. [16 U. S.] 236.

[Cited in the Cuba, Case No. 3,457; The Lilla, Id. 8,348; U. S. v. The Lilla, Id. 15,600; U. S. v. One Hundred Barrels of Cement, Id. 15,945.]

3. A court of prize will never busy itself in unravelling a web of fraud, to aid a party who has sought to impose upon it.

[Cited in The Bothnea, Case No. 1,686; The Lilla, Id. 8,348; U. S. v. One Hundred Barrels of Cement, Id. 15,945.]

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Proceedings to condemn as prize the Betsy and cargo, (Stoughton, Spanish consul, claimant for Maury & Co.) The district court condemned the whole cargo, (nowhere reported.) Maury & Co. appeal as to a moiety thereof. Reversed.]

The Betsy, a British vessel chartered by Maury and Co. of Malaga, was captured on a voyage from Malaga to St. Petersburg. No invoice was found on board. The bill of lading expressed the cargo to be shipped by Maury and Co., consigned to order, without declaring on whose account and risk. The master, in his answers to the standing interrogatories, affirmed the cargo to be, as he believed, the sole property of Maury and Co., excepting some few articles, which belonged to himself. He further stated, that he was to deliver the cargo at St. Petersburg to any person who should produce a bill of lading. From a letter on board, written by Maury and Co. to Amberger and Co. of St. Petersburg, and dated April, 1813, it appeared, that the cargo was "on joint account with a London house;" and there was also a memorandum, apparently written by the captain, in the words following:—"Instruction.—That any merchants at St. Petersburg, producing me the bill of lading for the cargo now on board, shipped by Maury and Co. of Malaga, which I left in the hands of Mr. Osman, signed on the back Maury and Co., with other directions from the house in London, will be entitled to have the cargo delivered to them."

The whole cargo was claimed, as the property of Maury and Co. by the Spanish consul, before any knowledge on his part of the interest of the British house. Upon the evidence of the papers on board, and the preparatory examinations, the district court, in October, 1813, decreed condemnation of one moiety of the cargo, as enemies' property, [nowhere reported.] As to the other moiety further proof was ordered. In September, 1814, a pro forma condemnation was decreed, as to the moiety ordered for further proof, [nowhere reported,] and an appeal was thereupon interposed to this court, the claim to the other moiety having been abandoned by the counsel for the claimants.

In January, 1814, Maury and Co. wrote to the consul, stating themselves to be the sole owners of the cargo, and transmitting an invoice supported by an affidavit of one of the firm, expressly declaring the property to be exclusively in them. This paper was not produced in court, until after the claim as to the condemned moiety had been abandoned, nor was any use made of it on the part of the claimants.

The evidence taken under the order for further proof was now produced. It consisted of sundry letters between Maury and Co. and Reeves and Co. of London, which disclosed the whole history of the transaction, and clearly proved the Spanish and the British houses to have been, from the outset, equally interested in the adventure.

Blake, Dist. Atty., for the captors.

1. There is no evidence of the neutrality of any part of the cargo. The further proof now introduced might be sufficient for that purpose, were not its credit entirely destroyed by the fraudulent conduct of the claimants. Maury and Co., having been informed that the whole had been claimed on their behalf, and supposing, no doubt, that no proof of British interest had appeared, declare, under the solemnity of an oath, that the whole belonged to them. This affidavit they send to the Spanish consul, supposing him ignorant of the transaction, in order that it may be palmed upon the court. The credit of the further proof rests entirely upon Maury's oath, and he is not to be believed after such prevarication.

2. Here has obviously been an attempt to cover enemies' property. It is a duty to have on board papers showing distinctly to whom the property belongs. There was no document on board, from which the interest of the English house could be discovered. There was, it is true, a sealed letter stating the fact, and there was a short memorandum, which contained some hint of it. But these formed no part of the ship's papers, nor were they intended to be mixed with them, but to be kept in the captain's pocket. It was by accident only, that they came into the hands of the captors. Such attempted concealment, on the part of the neutral, involves the confiscation of his own property. He is not permitted, after a detection, to say, "I did indeed attempt to cover the whole, but so much is really my property." The Eenrom, 2 C. Rob. Adm. 1. The captain has asserted the whole of the property to belong to Maury and Co. He must be supposed to know, for he is bound to know to whom the property belongs. There must always be some person on board, who is acquainted with the truth of the transaction, and, there being no super-

cargo, that person must, in this case, be presumed to be the captain. His knowledge may also be inferred from the memorandum, which has been read. That the false swearing of the captain involves the property under his charge appears from the case of The Shepherdess, 5 C. Rob. Adm. 262.

3. Admitting that Stoughton's claim alone would lead to no penal effect, yet there is here a complete ratification on the part of Maury and Co., and the case is, therefore, to be viewed in the same light, as if the claim had been made by themselves. "Omnis ratihabitio retrotrahitur." The letter from Maury and Co. to Stoughton thanks him for his interference, and forwards the affidavit, evidently with an intent that it should be used in support of the claim. If, then, the claim is to be considered as the claim of the principal, the property must be condemned upon the principles of the cases cited. The neutral, having falsely claimed the whole, is not allowed to abandon a part, and claim the residue.

Prescott and W. Sullivan, for the claimants.

The papers, from which it has been attempted to infer fraud and falsehood on the part of the claimants, were filed while the counsel were ignorant of the real state of the transaction, and merely to comply with a suggestion from the court below, that some proof should be furnished of property in the neutral claimants. They were not papers found in the vessel, nor regularly admissible in the cause. No use has in fact been made of them. They were not filed until after the order for further proof had passed, and then only de bene esse, and as matter of form. They are entirely superseded by the further proof now received, and should, therefore, be taken out of the cause. The case then presents a fair commercial transaction, the origin and all the circumstances of which are disclosed to the court.

(STORY, Circuit Justice. The letter and affidavit having been on file, the captors have a right to use them, subject, however, to any explanation, which the other party may offer.)

It is clearly proved, that, in the origin of the transaction, one half of the cargo belonged to the neutral. The only question then is, whether the neutral has forfeited his right by any misconduct? This question may be considered, 1. As to the effect of the papers found on board. 2. As to the effect of the papers since introduced into the cause.

1. The penalty of confiscation is confined to cases, where there is nothing on board, which can lead the court to a knowledge of the enemy's interest. Such was the case of The Eenrom. But in the case before the court, no paper on board is contradicted by evidence now introduced. The form of the bill of lading is far from being an uncommon one. It might be explained from the invoice. It is said, indeed, that no invoice was found on board. If so, the reason is obvious. The selection of the consignee at St. Petersburg being left to the London house, the invoice was sent to them, together with the bill of lading, which the master left in the hands of one of the house of Maury and Co. For the same reason the cargo was addressed to order generally.

(STORY, Circuit Justice. Was it not the duty of the neutral to put on board such evidence, as would enable the master to state the enemy's interest?)

A mere negligence or omission will not subject the neutral to the severe penalty of confiscation. Where he deliberately attempts to cover enemies' property, and there is nothing on board, by which the enemy's interest could be detected, he is not allowed to offer evidence in contradiction to the original documents. He cannot show, that the character given to the whole was false only as to a part. But this is not the present case. There was here no designed concealment. There were reasons sufficient for not instructing the master as to the property in the cargo. He was a stranger. It could not be presumed, that he was to be examined. He had, besides, no other connexion with the cargo, than to carry it to St. Petersburg, and there deliver it to persons pointed out. No injury has been done to the cruiser, for in fact no cruiser ever relies upon the information of the captain. Had the captors examined, the letter of the 27th of January could not fail to disclose to them the real nature of the transaction, and the enemy's interest in a part of the cargo. The existence of such a letter on board, which there does not appear to have been any attempt to conceal, is the strongest possible evidence, that no fraud was intended. There were, therefore, documents on board, which fully disclosed, that a part of the cargo belonged to a British owner. In the captain's memorandum, no attempt is made to keep out of sight the London house.

2. Has any thing been done by the neutral since the sailing of the vessel from Malaga, which can subject the cargo to forfeiture? No irregularity committed out of court can be a cause of confiscation. The reason for this penalty, generally, is, that the papers are such as to deceive and mislead the cruiser. If, on production of further proof, there be an irregularity, or even an attempt at fraud, still, if enough appears to show the property to be as claimed, confiscation will not follow. Now, the declaration of one of the partners attached to the invoice, is no part of the documentary evidence. Indeed it is not evidence of any sort, being only the voluntary declaration of the party.

(STORY, Circuit Justice. If this paper be

admissible at all, it must be as an affidavit supplementary to the claim; for though an agent may claim, yet if sufficient time intervene, the principal must support it by his affidavit.)

Had this paper been found on board, the consequences must have been highly penal. But, in the manner in which it has been now produced, it can have no influence on the cause.

(STORY, Circuit Justice. The only question of difficulty in this case is, whether, it appearing to the court, that the neutral has a right, this false declaration shall induce the court to shut out the evidence? Had this declaration appeared among the ship's papers upon the original hearing, further proof would, no doubt, be refused. It is well settled, that the neutral shall not be permitted to introduce evidence to show a right to part, after having fraudulently attempted to obtain the whole. But, if the evidence is introduced, and the right of the neutral appears, can a false declaration of this nature defeat its effect?)

Prescott. The court attends to no irregularity or iniquity, but such as relates to the cause. It is not the making of the invoice in Malaga, or swearing falsely to it there, that could induce confiscation, but the effect and use of it here, to deceive and impose upon the court. But in fact no use whatever has been made of it, and it is, therefore, to be entirely disregarded.

STORY, Circuit Justice. This is the case of a British ship, captured on a voyage from Malaga to St. Petersburg. One half of the cargo has been condemned as enemies' property; and the other moiety was ordered for further proof in the district court, having been claimed in behalf of Messrs. Maury and Co. of Malaga. The further proof has now come in, and the cause is to be decided upon its merits. The preparatory examinations asserted the whole property to belong to Messrs. Maury and Co.; but there was a letter on board, which clearly narrowed their title to a moiety. The whole cargo was, notwithstanding, claimed by their agent, and that claim, as to one moiety, was not abandoned until the appeal to this court at October term, 1813. In January, 1814, an invoice of the property, with an accompanying letter and affidavit, was forwarded by Messrs. Maury and Co. to their agent in the United States, and at May term, 1814, these papers were regularly filed in the cause. In that affidavit, invoice and letter, the whole property is explicitly asserted to belong to Messrs. Maury and Co., and not the slightest intimation is given of any hostile interest. Indeed, Messrs. Maury and Co. appear at that time to have been ignorant, that their counsel had abandoned the claim of one moiety, as utterly indefensible.

The further proof, which has been brought in at this term, under an order made in the district court, shows incontrovertibly, that Messrs. Maury and Co. were not owners of more than one moiety of the cargo, and that the other moiety belonged to Messrs. Reeves, Bell and Co. of London. This proof would, in ordinary cases, have been deemed entirely satisfactory; and the only difficulty arises from the gross falsity and fraud of the invoice and affidavit originally furnished by Messrs. Maury and Co. respecting their proprietary interest. "Falsus in uno, falsus in omnibus," is a maxim of sound morals, as well as of distributive justice. If these fraudulent papers had been originally produced before the order for further proof, the court would have felt itself bound to deny it; for it will never trust a person with an order for further proof, who has already shown, that he is not only capable of abusing, but has been detected in an attempt to abuse it. And if these papers had been inserted in the cause with a view to support the claim to the whole property, I should have held the party bound by his misconduct. A court of prize will never busy itself in unravelling a web of fraud, to aid the party, who has sought to impose upon it. If he knowingly assert and persist in a fraudulent claim, it will affect with forfeiture the whole of his property, which is engaged in the transaction. The Eenrom, 2 C. Rob. Adm. 1; The Graaff Bernstorf, 3 C. Rob. Adm. 109; The St. Nicholas, 1 Wheat. [14 U. S.] 417. There can be no doubt, that the present claimants intended to defraud the captors of their lawful rights, and to withdraw hostile property from confiscation. That they have failed in the attempt is not owing to any repentance or good will on their part.

Still however, in point of fact, this dishonorable contrivance was not actually used to the prejudice of the cause. The good sense and intelligence of counsel had induced them, before the arrival of these papers, to consent to an affirmance of the decree of condemnation of one moiety of the property, and thereby prevented the claimants from committing themselves. Until the papers were actually used, there was a locus paenitentiae. In order to entitle the court to pronounce confiscation upon the moiety now claimed, by way of penalty for the fraud, there should be a combination of intention and act. In this case, the claimants have not, if I may use the expression, been caught in delicto. The only possible effect, therefore, that could be attributed to their misconduct, would be to throw a shade of doubt and suspicion over the further proof now offered to the court. On examining it, however, I cannot but feel a strong impression, that it contains the real, undisguised transactions between the parties; and as it stands completely corroborated by the original documentary evidence, I shall not hes-

itate to give it entire credit, especially as it is vouched by the American consul.

I decree restoration of the moiety now claimed by Messrs. Maury and Co., upon the payment of the full costs and expenses of the captors.

Case No. 1,365.

The BETSY.

[1 Mason, 354.] [1]

Circuit Court, D. Massachusetts. May Term, 1818.

CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURE—ACT OF 1799—PLEADING — FOREIGN VESSELS AND GOODS.

1. A libel for a statute forfeiture should substantially agree with the terms of the statute, otherwise it is bad.

2. In a libel on the 50th section of the revenue act of the 2d of March, 1799, c. 128, [1 Story's Laws, 617; 1 Stat. 665, c. 22,] it is not necessary to allege the goods to be of foreign growth or manufacture.

[Cited in Jackson v. U. S., Case No. 7,149.]

3. The 27th section of the revenue act of the 2d of March, 1799, c. 128, [1 Stat. 648, c. 22,] comprehends foreign as well as American vessels, bound to the United States.

4. Condemnation on the facts.

[Followed in The Abby, Case No. 14. Distinguished in The Active, Id. 33.]

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel against the schooner Betsy, (Drinkwater, claimant.) A decree of forfeiture was entered, (nowhere reported.) Claimant appeals. Affirmed.]

This was a case of seizure for the violation of the 27th and 28th sections of the revenue collection act of the 2d of March, 1799, c. 128. The libel of information charged, that on the 10th day of September, 1817, a certain ship or vessel, whose name was as yet unknown, laden with a cargo, consisting of various articles of goods, wares, and merchandises, "of foreign growth and manufacture, which were liable to the payment of duties on importation into the United States," the said vessel being then and there bound to the United States from a foreign port, did arrive within four leagues of a district of the United States; and that, after her arrival as aforesaid, on the same day, and before the said ship had come to the proper place for the discharge of her cargo, or any part thereof, a part of the cargo of the said vessel, to wit, forty-two pipes of rum, a quantity of logwood, and various other articles, were, without any unavoidable accident, necessity, or distress of weather, unladen out of said vessel; and being so unladen, were afterwards, on the same day, without any unavoidable accident, necessity, or distress of weather, on the high seas, and "within four leagues of a collection district of the United States," put and received forthwith into the said schooner Betsy, contrary to the form of the statute, &c.

The claim contained a general denial of the forfeiture. At the hearing in the district court of Massachusetts, a decree of condemnation was pronounced; from which decree an appeal was taken to this court.

The cause was argued by J. T. Austin, for the claimant, and by G. Blake, Dist. Atty., for the United States; but as it turned principally on matter of fact, it is unnecessary to report it at large.

STORY, Circuit Justice. The libel in this case does not exactly conform to the language of the sections of the statute, on which it is founded. To bring the case within the statute, the unlading must be within the limits of a district of the United States, or within four leagues of the coast of the United States. The allegation propounds in one place, that the arrival of the ship was within four leagues of a district of the United States; and in another place, that the receiving into the Betsy was within four leagues of a collection district of the United States. The limits of a district, and of the coast of the United States are not, or at least may not be, coincident. Many of the districts of the United States include bays and other waters of the sea. But the coast of the United States, as used in this statute, is properly the shore of the sea, littus maris, or the costera maris of our ancient juridical writers. Spell. Glos. 192. I shall, however, allow this inaccuracy to be amended, at the same time suggesting, that the libel is, in some respects, more special than the statute requires. It does not seem necessary to assert, that the goods are of foreign growth or manufacture, or liable to the payment of duties. The statute only requires, that they should have been brought from a foreign port. And in some cases it may be perilous to tie up the allegation within narrower limits, than the law itself has prescribed.

Upon the first examination of this case, a doubt occurred to my mind, whether the 27th section of the act applied to any foreign vessel in the predicament of that before the court. The doubt arose in this way. The 23d section of the act declares, that no goods, wares, or merchandise shall be brought into the United States from any foreign port or place in any ship or vessel, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, unless the master, &c. shall have on board a manifest, the form of which is prescribed by the same section; and it then provides, that if merchandise shall be imported by citizens or inhabitants of the United States in vessels, other than of the United States, the manifests shall be in a similar form, except

[1] [Reported by William P. Mason, Esq.]

as to the description of the vessel. The 25th section requires the master of any ship or vessel, belonging to a citizen or citizens of the United States, laden with goods aforesaid, and bound to a port or place in the United States, on his arrival within four leagues of the coast thereof, or within any of the bays, &c. thereof, upon demand to produce such manifest, &c. to such officer of the customs, as shall first come on board his vessel for his inspection. The 26th section declares, that if any master of any ship or vessel, "laden as aforesaid," and bound to any port or place in the United States, shall not, upon his arrival within four leagues of the coast thereof, or within the limits of any district thereof, &c. produce such manifest to the proper officer upon demand, &c. he shall forfeit five hundred dollars. Then comes the 27th section, which among other things declares, that "if after the arrival of any ship or vessel, so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coast thereof, any part of the cargo of such ship or vessel shall be unladen for any purpose whatever from out of such ship or vessel, before such ship or vessel shall come to the proper place for the discharge of the cargo," &c. &c. the goods, &c. so unladen and unshipped shall be forfeited, except in the case of some unavoidable accident, necessity, or distress of weather. And the 28th section declares, that if any goods so unladen from on board such ship or vessel, shall be put or received into any other ship or vessel, or boat, except in the case of such accident, necessity, or distress as aforesaid, the ship, boat, or vessel, in which they shall be so put, shall be forfeited. Unless, therefore, there be an unlawful unlading within the 27th section, no forfeiture can be inflicted under the 28th section. The question then is, what ship or vessel is within the 27th section, the descriptive words being any ship or vessel, "so laden with goods as aforesaid." It is very clear, that the preceding sections had principally, if not altogether, in view American ships, or foreign ships having on board goods on American account. And the doubt was, whether the words of reference, "so laden with goods as aforesaid," did not limit the description to vessels within the purview of those sections. On farther consideration, however, I am satisfied, that the doubt cannot be sustained. The words in the 27th section are, "any ship or vessel," dropping the additional description in the 23d, 24th, and 25th sections, "belonging in whole or in part to a citizen or citizens;" which omission would seem to indicate some change of intention. And the words "so laden with goods as aforesaid," must be construed, as the words "laden with goods as aforesaid," in the 25th section. And it is clear that, in that section, they must be interpreted to mean the goods specified in the 24th section; that is to say, goods imported or brought from any foreign port or place. So that the 27th section in fact should read, "If after the arrival of any ship or vessel, laden with goods, brought from any foreign port or place, and bound to the United States, within the limits of any district of the United States, or within four leagues of the coast thereof, any part of the cargo shall be unladen," &c. The language is here sufficiently broad to comprehend any vessel, of any description whatever, foreign or American, bound to the United States. And the policy of the act equally applies to all vessels; and indeed more strongly to foreign vessels; since frauds committed by them in evasion of the revenue laws are less easily detected, than like frauds are under the regulations applicable to American vessels. It is farther proper to be considered, that foreign vessels with goods on board, imported by citizens of the United States, are within the express purview of the 23d section, and therefore of the 27th section; and it cannot be presumed, that the legislature could have contemplated a discrimination, which should include them, while it excluded foreign vessels laden on foreign account from the grasp of the 27th section. The language of the statute, therefore, being sufficiently comprehensive, and the mischief being the same, I cannot attempt to sustain an exception, not warranted by the terms or the spirit of the statute.

Having disposed of this preliminary point, we may now advance to the objections, which have been urged on behalf of the claimant.

The first objection is, that the ship was not bound to the United States. It turns out in evidence, that she was a Spanish ship, not originally bound to the United States, but captured by a privateer, under the flag of the government of Buenos Ayres. She came to an anchor in Huzzy's sound, within a district of the United States. Her prize-master was a citizen of the United States, belonging to Portland; and the unlading was with the assent of the prize-master, in concert with some inhabitants of Portland, after her departure from the port, where she had anchored, for the obvious purpose of having the cargo imported into the United States, and yet avoiding the expense of alien duties. I cannot under such circumstances doubt, that her destination was really, after capture, for the United States; and that her arrival off Portland was voluntary, and with an intent, per fas aut nefas, to dispose of the cargo in the United States.

A second objection is, that the unlading was not within four leagues of the coast of the United States; and a third, that the unlading was from necessity. There is nothing in the facts of the case, that affords a shadow of ground to sustain either of these objections. The whole enterprise of the prize

crew was to smuggle, or at least to land the cargo in the United States, in such manner as should best comport with their own interests; and it was executed without the slightest regard to our laws, any farther than as those laws might afford them plausible pretences or excuses more effectually to cover their own designs.

These objections failing, the Betsy must be condemned; for there can be no doubt, that her owner and master acted with a full knowledge of all the facts, and co-operated in the original design, by receiving the goods on board immediately from the ship. Decree affirmed with costs.

Case No. 1,366.

The BETSY and RHODA.

[2 Ware, (Dav. 112,) 117;[1] 3 N. Y. Leg. Obs. 215.]

District Court, D. Maine. Nov. 9, 1840.

SEAMEN — WAGES — PAYMENT — ACCEPTANCE OF PROMISSORY NOTE—COMMON-LAW RULE — LAW OF MAINE—ADMIRALTY.

1. By the common law, a simple contract debt is not extinguished by the creditor's taking a new security for it, unless the security be of a higher nature, as an instrument under seal, or unless it be agreed to be received in satisfaction of the debt.

2. But by the law of Maine, if a negotiable security be given for a preëxisting simple contract debt, the legal presumption is, that it is received in payment, and that it is an extinguishment of the original cause of action; but this presumption is liable to be controlled by proof to the contrary.

3. The presumption of the local law will not be enforced by the admiralty, against a seaman who receives of the owners their negotiable note for his wages.

4. Such a note will not be held to be an extinguishment of the claim for wages, nor of the lien of the seaman against the ship, unless it is distinctly stated to him at the time that such will be the effect, and the note is accompanied by some additional security or advantage to the seaman as a compensation for his renouncing his lien on the vessel.

[Cited in The Eclipse, Case No. 4,268; The Helen M. Pierce, Id. 6,332.]

[5. Cited in McCarty v. The City of New Bedford, 4 Fed. 828, to the point that seamen, in matters respecting their wages, have a right to sue and be sued in admiralty.]

In admiralty. This was a libel in rem, for wages. The libellant shipped, Oct. 9, 1839, for a coasting voyage, along the coast of the United States, as mate, for twelve dollars a month. In the prosecution of the voyage, the vessel went to Savannah, and was there employed as a lighter on the river for a considerable time, when she returned to Portland. The libellant claimed a balance of $46.10 due. After his discharge he called on the owners for his pay, but they, not being ready to pay, offered him their promissory note for the amount, payable in twenty days. This offer was made in the office of the counsel of the owners. He objected to receiving it and stated as a reason, his apprehension that it might put at hazard his right to proceed against the vessel. It was not stated to him that it would or would not be a waiver of his lien on the ship. But he was persuaded to take the note upon the representation that he would get his pay sooner on the note than he would by a libel against the ship. When he called for his pay at the maturity of the note, the owners gave him in exchange for it an order on their counsel. That not being accepted, he returned it, and took back the note, and filed a libel against the ship. The note was brought into court and offered to be surrendered. The defense was, that by consenting to take the note the lien was discharged. [Decree for libellant.]

Mr. Haines, for libellant.
Mr. Bradford, for respondents.

WARE, District Judge. It is not denied that the services, for which wages are claimed, have been performed, and that the balance demanded by the libellant remains due and unpaid. The only question is, whether by consenting to take the promissory note of the owners for the sum due, he has or has not lost his right of proceeding against the vessel; notwithstanding the note is brought into court and offered to be surrendered to the makers.

By the maritime law, the ship is hypothecated to the seamen for their wages, and so long as the debt remains due in the quality of wages, the lien against the vessel continues in force. If the lien is lost, it must be because the acceptance of the note operated as payment or as a legal extinguishment of the claim for wages for which it was given. By the common law, a debt due on simple contract is not discharged by the creditor's accepting another obligation of the same nature for the same consideration. Johnson v. Johnson, 11 Mass. 359. The new title is not considered as an extinguishment of the old debt, but is treated as a merely collateral and additional security.

The same principle prevailed in the civil law. A creditor, by taking a new obligation for a debt, did not extinguish the old title. The original obligation remained in force, and the second was held to be merely an accessory, which of course became extinct when the principal was satisfied. The new title was never held to supersede the original cause of action, unless such was clearly proved to have been the intention of the parties. When this was the case, there was constituted what was technically called a novation. The old debt was transferred to the

[1] [Reported by Hon. Ashur Ware, District Judge.]

new obligation, and the original cause of action was extinguished, and all the accessory and collateral securities attached to it were abandoned. 2 Warkoenig, Jus Romanum Privatum, § 525. By the constitution of Justinian, a novation could never be inferred from presumptive evidence; it could stand only on the express agreement of the parties. Code 3, 42, 8; Inst. 3, 29, 3. The rigor of this constitution has not been followed, generally, by those nations which have adopted the Roman law as the basis of their jurisprudence. A novation may be inferred from circumstances, but they must be clear, urgent, and conclusive, such as leave no doubt of the intention of the parties. Gaill, Practicarum Observationum, lib. 2, Ob. 30, § 3; Voet, Ad. Pand. 46, 2; 3 Vinnius, Comm. in Instit. lib. 3, 30, 3, § 7; 7 Toullier, Droit Civil, No. 276.

This rule of jurisprudence, which equally prevails in the common law and civil law, is founded on this plain and reasonable principle, that no one ought, on slight circumstances, to be presumed to renounce any of his rights. When a new security is taken for an old debt, the natural and legal presumption is, that it is taken as collateral, unless it is expressly agreed, or is clearly to be inferred from the circumstances, to have been the intention of the parties to cancel and annul the original cause of action, and substitute the new title in its place.

If the present case is to be decided upon these principles, it is clear that the defense cannot prevail. It is manifest from the evidence, that the libellant did not actually consent to renounce his right of proceeding against the vessel, because he objected to taking the note upon the very ground that it might endanger this right.

It is true that, by the local law of this state, the acceptance of a negotiable security for a pre-existing debt, by simple contract is generally held to be payment, and an extinguishment of the original cause of action. Thacher v. Dinsmore, 5 Mass. 299; Chapman v. Durant, 10 Mass. 47; Whitcomb v. Williams, 4 Pick. 228; Wood v. Bodwell, 12 Pick. 268, 270; Varner v. Nobleborough, 2 Greenl. 121; Descadillas v. Harris, 8 Greenl. 298. The reason assigned for this departure from the principles of the common law is, that the debtor might otherwise be put to inconvenience, and possibly be compelled to pay the debt twice, as he could not successfully defend himself against an action on the note in the hands of an innocent indorsee, by showing that the debt, for which it was given, had been otherwise satisfied. The law, therefore, raises a presumption against the creditor, who has taken such security, that he has renounced his right of action on the original contract. This, however, is only a presumption, which may be overcome by proof to the contrary; but the burden of proving this is thrown on the creditor. Maneely v. McGee, 6 Mass. 143; Johnson v. Johnson, 11 Mass. 359. This is not only an innovation on the common law; it is also a departure from the general law merchant. That puts upon the debtor the burden of proving that the note was intended by the parties as a satisfaction of the debt. Roades v. Barnes, 1 Burrows, 9; Sheehy v. Mandeville, 6 Cranch, [10 U. S.] 253; Clark v. Young, 1 Cranch, [5 U. S.] 181; Drake v. Mitchell, 3 East, 251; Peter v. Beverly, 10 Pet. [35 U. S.] 567, 568; Wallace v. Agry, [Case No. 17,096.] Like the common and civil law, it adheres to the natural presumption, that when two securities are given for the same debt, both titles are intended to be valid and binding until the contrary is proved, though but one satisfaction can be demanded.

Admitting, then, that this case is to be governed by the local law, it is still, on the most rigorous interpretation of the rule, an open question upon the evidence, whether the note was received in satisfaction of the wages, or not. The testimony on this point is not of a very conclusive character. The libellant consented to take the note, on the assurance that he would obtain his money on the note sooner than he could get it by a libel against the vessel. And he took it with an uncertainty in his own mind, whether he would thereby lose his remedy against the vessel. That uncertainty was not removed by the owners, although it is manifest that they acted under the impression that such would be the effect, and the business was transacted in the presence and under the advice of their counsel. It may be conceded, that if this had been a transaction between merchant and merchant, the presumption of the local law ought, upon this evidence, to prevail. They would be dealing on equal terms, and neither party would be under any obligation to communicate what both are presumed to know; for, ordinarily, every man is presumed to know the legal consequences of his own acts. But this was between the merchant owners and a seaman. In the admiralty, seamen are always treated as a favored class of suitors, and entitled to a large and liberal protection as being, in a qualified sense, the wards of the court. From their open and unsuspicious character, their inexperience in business, as well as their usual state of destitution and notorious improvidence, they are extremely liable to be overreached, by the superior knowledge and foresight of those with whom they deal, and drawn into unequal bargains. And especially does their poverty, with their habitual recklessness of the future, place them in a state of dependence, which subjects them very much to the power and influence of their employers. They in all respects stand on unequal ground, with unequal advantages, in treating with the merchant owners, a class of men, who, by their education, habits, and

course of life, are as remarkable for their shrewdness and quick perception of their interest, and the systematic steadiness with which it is pursued, as seamen are for the reverse. A court of admiralty will, therefore, interpose to protect them from the consequences of their own heedlessness and ignorance, upon the same principles that courts of equity protect, against their improvident bargains, young heirs dealing with their expectancies, or wards and cestui que trusts dealing with their guardians and trustees. It habitually looks with jealousy upon the contracts and dealings of owners with them, when there is any departure from the ordinary terms of the contract, or the usual course of dealing; and if it appears that from their improvidence or necessities, they have been induced to waive any of their rights, without an adequate compensation, the court will set aside the most express stipulations as inequitable. The Juliana, 2 Dod. 504. Harden v. Gorden, [Case No. 6,047;] The Minerva, 1 Hagg. Adm. 355; Brown v. Lull, [Case No. 2,018;] 3 Kent, Comm. 193.

Upon these principles, how stands the defense of this cause? The libellant was persuaded to accept for his wages a promissory note, on the representation that he would thereby obtain the money without the expense and trouble of a suit, and sooner than he could get it by a libel against the vessel; and for these considerations the owners now contend that he renounced his lien on the ship, to which a seaman always looks as his best security.

Now, in the first place, it is to be observed that the first part of this representation turns out, as the present suit shows, to be a failure by a breach of contract, on the part of the owners themselves. The second part, to wit, that he would obtain his wages sooner through the note than he could get them by a libel against the vessel, was untrue in point of fact, even on the supposition that the note had been paid at maturity. The note could not be demanded until after the expiration of twenty days. But a libel for wages, when the parties are all present and there is no defense, is never permitted to remain in this court for half that time. To a seaman, the delay is, in many cases, equivalent to the denial of justice. His daily bread is earned by his daily labor, and that is of course upon the water. He is unfitted by his tastes and his habits for the common occupation of a laborer on land. It would be difficult for him to find employment if he sought it, and not easy for him to perform the service, if the employment was found. He usually has not the means to pay his expenses ashore for any length of time, and if he had, it would be better for him to abandon a moderate claim, than to await the distant result of a suit, in its slow progress through the forms of the ordinary courts of justice. In all maritime countries, therefore, seamen are privileged to go into their own peculiar courts, whose course and forms of proceedings, are adapted to the direct and guileless character of the suitors, and the simplicity of their causes; where the proceedings are prompt, and justice is administered without delay. "Velo levato—sine strepitu forensi." Kurik. Quaest. Illust. Quaest. 37, Locc. De Jure Mar. lib. 3, c. 10. In the admiralty, causes for substraction of wages are always summary, without the prolix formalities and delays of plenary causes. The considerations, therefore, for which the libellant was induced to waive his lien on the vessel, if such be the legal effect of the act, have either failed in point of fact, or were founded in error and mistake.

But further; he never did, in point of fact, consent to waive his remedy against the vessel. A doubt, it is true, arose in his mind, whether such might not be the legal consequence of his accepting the note, but unless this was the necessary result in law, he did not make it so by his consent. If, then, it is to be adjudged that the lien is lost, it must be simply by force of the presumption of the local law, against the rule of the common law, and the general law merchant; and equally in opposition to the principles of the civil law and the natural presumptions arising out of the contract itself. For when a creditor takes a new security, the natural presumption is, that it is taken as subsidiary to the original obligation, unless it be a security of a higher nature. But in the present case, it was of an inferior nature, or rather, it was a renunciation of the better part of his actual security, without any compensatory advantage. For the owners were equally liable on the contract for wages, as upon the note, and for these also he had a remedy against the master and the vessel, in addition to the personal liability of the owners.

It is not necessary for me to consider how far a court of common law would feel itself bound to enforce against a seaman in this case the rule of the local law. A court of admiralty, it is certain, will, in some cases, give a remedy where a court of common law would not. By its constitution, it is required to decide ex aequo et bono, and its practice shows that it is not, in the administration of justice, tied down to the dry, and sometimes harsh rules of the common law. Within the limits of its jurisdiction, it acts upon the liberal and enlarged principles of a court of equity; and especially it does so in dealing with the contracts between seamen and shipowners. Brown v. Lull, [supra;] The Minerva, 1 Hagg. Adm. 347; The Fortitudo, 2 Dod. 58, 72; The Bellona, [Case No. 4,406.] It goes as far in extending its protection to the weaker party in these cases, as a court of equity does in any case, unless it be where a party is strictly a ward of the court, and it acts in the character of a guardian. It applies the same protective principles that a court of general equity jurisdiction does

where the parties stand to each other in fiduciary relations, as that of attorney and client, beneficiary and trustee, or principal and agent, and will not allow an owner to derive any benefit from a surprise he has practiced upon the inexperience or ignorance of a seaman, or an advantage he has taken of his necessities.

In this view of the habits and the course of a court of admiralty, I do not feel myself authorized to say that the libellant, in taking the note, waived his privilege against the ship. He acted under a species of constraint. He was indigent, and needed prompt payment. He was entitled to it without delay, and he consented to receive the note upon the assurance that it was his most expeditious mode of obtaining it. The most that can be said is, that it may have suspended his rights of suing out process until the note arrived at maturity, or until he surrendered it to the makers. To have given to the act the effect of a waiver of his privilege, and an extinction of the lien, it should in the first place have been distinctly stated to him that such would be the result; and as at present advised, my own opinion is, that the note should also have been accompanied with some other security, in addition to the personal liability of the owners, as an equivalent and a compensation for the discharge of the lien.

This, it appears to me, is the judgment which the court is required to pronounce on this transaction; and my mind is fortified in this conclusion, by the judgment pronounced by the circuit court, in the case of Brown v. Lull, before referred to. The court there stated, with great clearness and force, the reasons for watching with jealousy any innovation upon the usual form of the mariners' contract, and the conclusion from the whole is, that "whenever any stipulation is found in the shipping articles, which derogates from the rights and privileges of seamen, courts of admiralty hold it void, as founded on imposition or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur;—first, that the nature and operation of the clause is fully explained to them; and secondly, that an additional compensation is allowed, entirely adequate to the new restriction and rules imposed upon them thereby."

The same reasons of natural justice and public policy, upon which these principles are founded, apply, with equal force, to any adjustment or settlement of the wages after they are earned, by which they are not actually paid. The wages, while they remain due in that quality, are a privileged debt; and a seaman ought not to be presumed to waive any privilege attached to his demand, unless the legal effect of the settlement is fully explained to him at the time, and some advantage or security is allowed in compensation for that which he renounces. My opinion therefore is, that the lien is not lost.

Case No. 1,367.

The BETSY v. DUNCAN.

[2 Wash. C. C. 272.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

SEAMEN—MARINERS' WAGES—TEMPORARY ABSENCE FROM VESSEL.

The seaman left the vessel at the Lazaretto, and after her arrival at Philadelphia he went on board, and did work by order of the mate. The captain afterwards promised to pay him his wages. It did not appear that an entry of desertion at the Lazaretto was made in the log-book, and no good cause for the non-payment of the wages being shown, they were ordered to be paid.

[Cited in The Sarah Jane, Case No. 12,348.]

[Appeal from the district court of the United States for the district of Pennsylvania.

[In admiralty. Libel for seaman's wages by Duncan against the brig Betsy. A decree was entered for the libellant. Respondent appeals. Affirmed.]

This was an appeal from the district court. The libel states, that the libellant shipped on board of this brig at Liverpool in 1807, on a voyage from thence to Philadelphia, and thence to Hayti. On her arrival at Philadelphia, the crew were all discharged, and the voyage changed. The libellant went into another vessel to Port-au-Prince, where the Betsy afterwards arrived, and the captain of her seized the libellant, and obliged him to serve on board the Betsy to Philadelphia, where he was discharged. He claims sixty dollars for his wages from Port-au-Prince to Philadelphia.

The captain, in his answer, admits the contract, but denies that he discharged the crew at Philadelphia, but stated that the libellant deserted her there; denies that the voyage was changed; admits that he seized the libellant in Hayti, and that he served as a common seaman back; but that at the Lazaretto he deserted the vessel and never returned to her again. The desertion of the libellant at the Lazaretto, and that he never returned there, is proved by Campbell, one of the mariners on the inward voyage. The pilot proves the desertion, and that he never heard of his return to the vessel; but he left her at the Lazaretto. William Brown, one of the mariners, states, that at the Lazaretto, the captain threw overboard the libellant's bed, &c.; that he went on shore, and the vessel set sail and left him; at Philadelphia he came on board, and did work, as ordered by the mate, till discharged. William Raison, who was employed at Philadelphia in discharging the vessel, proves, that the libellant came on board, and went to work by orders of the mate and captain; that the captain promised to discharge him the next day, and to pay him his wages.

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

WASHINGTON, Circuit Justice. It is unnecessary to give any opinion as to the original contract to go from Philadelphia to Hayti, which, being prohibited by the laws of the United States, seems to be relied upon by the captain, as a reason for not paying the wages claimed by the libellant. That contract was put an end to at Philadelphia, if the statement made by the libellant be true, and if not so, still it was not unlawful for the libellant to enter on board this vessel at Hayti, as a mariner, on a voyage to Philadelphia. The question is, did he forfeit his right to wages, by desertion, before the voyage was finished? The affirmative of this fact is stated by one witness, positively, and another speaks only of his going on shore, but does not represent it as a desertion; nor does he know whether he returned again or not. Two other witnesses prove that he came on board at Philadelphia, did work by orders of the mate, and one proves that the captain promised to pay him his wages. It does not appear that the captain made any entry on his log-book, that the libellant had deserted or left the vessel without leave; and as a good cause should be assigned and proved for not paying his wages, we must, upon the evidence in the cause, say that the libellant is entitled to recover them.

The sentence below must be affirmed, and the clerk is to ascertain the wages due, conformably to the agreement of the parties.

BETSY, The, (POWELL v.) See Case No. 11,355.

BETSY, The, (WILLIAMSON v.) See Case No. 17,750.

BETTELY, (PRENTICE v.) See Case No. 11,381.

Case No. 1,368.

BETTES v. DANA.

[2 Sumn. 383.] [1]

Circuit Court, D. Massachusetts. May Term, 1836.

EQUITY—BILL OF REVIVOR—PARTIES.

1. Upon a bill of revivor, the sole questions before the court are, the competency of the parties, and the correctness of the frame of the bill to revive.

2. General objections to the original bill, grounded on its not showing a proper case for the interference of a court of equity, should be reserved till after the revivor of the bill.

3. The administratrix of the defendant, in the original bill, and his infant son and sole heir, are proper parties against whom a bill of revivor may be exhibited.

In equity. Bill by Caroline M. Bettes, a citizen of the state of Maine, [against Francis W. Dana, to quiet complainant's title to certain lands. Upon the death of defendant, complainant exhibited a bill of revivor against Ann F. Dana and Charles F. Dana. Heard on demurrer to the bill of revivor. Bill revived. Heard also on a general demurrer to the bill. Demurrer sustained in part.]

The bill stated, that on November 8th, 1833, Henry H. Fuller was seized in fee of a certain piece of land in Boston, subject to a mortgage made by said Fuller to Francis W. Dana, for $10,000; and to Samuel H. Mann, for $3,000; that Fuller conveyed the land in question to Mann, subject to the foregoing mortgages; that the said Dana, the present defendant, encouraged and advised Mann to make the purchase, and assured him that the title of Fuller was good, and clear of all incumbrances, except the mortgage to Dana, and fraudulently concealed from Mann certain attachments made by him, the said Dana, upon the estate; that Mann was wholly ignorant of these attachments, and afterwards paid to Dana the sum of $10,000 due on mortgage; that, February 26th, 1834, in consideration of $8,250, he conveyed the northerly half of the land to William Hilliard, who subsequently conveyed his interest to Charles C. Little; that Hilliard and Little, at the time of their respective purchases, were wholly ignorant of the attachments by Dana; that Little, May 8th, 1835, conveyed the said land to the complainant, to secure a note for $7,295 49, who thereupon became seized thereof in fee and in mortgage; that the said note and mortgage remain to this day unsatisfied; and that the complainant, at the time of the conveyance to her by Little, was ignorant of the attachments made by Dana. The bill further stated the attachments by Dana, and the final execution and levies upon the land; but that the said Dana knowing that he had no valid title, having received formal possession, immediately left the land, and hath not since entered; but he still persists in asserting a title under the levies, whereby the complainant's title is, in the opinion of many persons, rendered doubtful, and she is prevented from disposing of her said mortgage for a full price, and raising the money secured thereby. That Dana declines to try his title by a suit at law, and the complainant cannot sue, because the said Dana is not in possession of the premises, and because without the aid of a court of equity she may be unable to prove the alleged frauds. The bill concludes with a prayer, that the said Dana may be restrained by injunction from conveying the said premises; that the said levies may be declared fraudulent and void as to the complainant; that the said Dana may be compelled to release to the complainant, or to the said Little, all his claim to the said land, and all his title acquired by the said levies, with warranty against all claiming under him; also, that the complainant may be quieted in her title, and for further relief.

[1] [Reported by Hon. Charles Sumner.]

Before the coming in of an answer, Francis W. Dana, the defendant, died, leaving a widow, Ann F. Dana, who was appointed administratrix, and one child, Charles F. Dana, an infant and sole heir. Against these persons a bill of revivor was exhibited, wherein it was alleged, that the said Ann was bound to admit assets, or exhibit an account of the estate and the disposition thereof, and praying that the said Ann and Charles might show cause, why the suit should not be revived, and they be held to answer the original bill.

A demurrer was now put in to the bill of revivor by the said Ann F. Dana and Charles F. Dana, the latter appearing by his guardian, ad litem, Samuel Dana, duly appointed by the court. The causes assigned for the demurrer were: 1st. that the bill did not open any case for discovery or relief; and did not show, that any discovery can be made by the present defendants, which can be available to the complainant; 2d. that the complainant has shown no title or interest in the subject-matter of the suit, which gives her any right to the discovery or relief prayed for, nor any damage sustained by reason of the matter complained of; 3d. that Charles C. Little should have been a party to the bill, and that the said Little, according to the statement of the bill, and not the complainant, has such title in the lands aforesaid as would entitle him to the relief prayed for; 4th. that there is an adequate remedy at law; concluding with the general allegation of other good causes.

The cause was shortly argued on the demurrer by Dexter and Gardiner for the defendants, and by Fletcher for the plaintiff.

STORY, Circuit Justice. It seems to me clear, that the demurrer must be overruled. The causes assigned for the demurrer, though in form addressed to the bill of revivor, are all in fact addressed to the original bill. Nothing can be more clear, than, that upon a bill to revive, the sole questions before the court are the competency of the parties, and the correctness of the frame of the bill to revive. The present demurrer admits that Ann F. Dana is the administratrix of Francis W. Dana, the original defendant, and that Charles F. Dana is the infant son and sole heir of the deceased. The bill is proper against each of them, for they are both proper parties to meet the exigency of the original bill. The objections now raised on the demurrer, if they can be raised at all, are properly matters to be objected to in the frame of the original bill after it is revived. I will not enter upon any decision of them in this interlocutory proceeding, although I confess, that, supposing the allegations of the bill to be true, there can be little doubt, that the bill in its substance, however defective in its form, contains sufficient matter to sustain the jurisdiction of this court as a court of equity. Whether Charles C. Little ought to be a party, I do not decide, because it is not proper in the present stage of the cause; though it is difficult to see, upon the actual frame of the bill, what decree is, or can be sought against him.

Let an order be entered, that the bill do stand revived; and that the administratrix, and the infant do answer the bill, as they shall be advised. A guardian ad litem has, I believe, been appointed for the infant.

After the revivor, a general demurrer was put in to the original bill, containing, in substance, the same causes, which had been originally assigned against the bill of revivor; and they were again spoken to by the same counsel on each side.

STORY, Circuit Justice. Upon farther consideration I am well satisfied, that the case stated in the bill is sufficient to sustain the jurisdiction of the court, and properly cognizable and remedial in equity. I have, therefore, no difficulty in overruling the demurrer, as to all the causes assigned in it, except that, as to the want of parties. It appears to me, that, upon the frame of the bill, Charles C. Little is a necessary party, he having a subsisting interest in the estate, as the immediate mortgagor, from whom the plaintiff derives her title as mortgagee, and having an equal interest with the plaintiff, to litigate the validity of the attachment made by the intestate, Dana. The demurrer, therefore, must be allowed, so far as it insists upon Charles C. Little being a party, and overruled as to the other causes.

BETTILLINI, (UNITED STATES v.) See Case No. 14,587.

Case No. 1,369.

BETTINGER v. RIDGWAY.

[4 Cranch, C. C. 340.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

COURTS—DISTRICT OF COLUMBIA—JUSTICE OF THE PEACE.

In the administration of the estate of a deceased person, in Washington county, D. C., a judgment of a justice of the peace is not on a par with the judgments of a court of record; and is not entitled to priority of payment out of the assets.

This was an appeal from the orphans' court for the county of Washington, which had decided that the judgment of a justice of the peace is entitled to priority of payment, and is upon a par with the judgments of a court of record.

By the Maryland law of 1798, c. 101, subc.

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

8, § 17, [2 Maxcy's Laws Md. 478,] "judgments and decrees against deceased shall be wholly discharged before any part of other claims, * * *. But no executor or administrator shall be bound to discover what judgments have been passed against the deceased, unless in the high court of chancery or the general court of the shire, or the court of the county where the deceased last resided." Id. c. 101, subc. 9, § 1: "The voucher, or proof, of a judgment or decree, shall be a short copy thereof, under seal, attested by the clerk or register of the court where it was obtained, who shall certify that there is no entry or proceeding in the court to show that the said judgment or decree hath been satisfied."

The difficulty which an administrator must have in ascertaining what judgments have been rendered before justices of the peace, (of which there is no record, technically speaking,) and of which, the justices in Maryland, in 1798, did not keep dockets, so as to avoid a devastavit, and such judgments being only prima facie evidence of debt, liable to be disputed upon the plea of nil debit, affords strong ground to believe that the legislature did not contemplate such judgments when they were passing the testamentary act of 1798. This belief is corroborated by the nature of the voucher which the plaintiff must produce to the orphans' court, and which it is impossible to procure of a justice's judgment.

For these reasons, THE COURT is of opinion (nem. con.) that the sentence of the orphans' court should be reversed.

Case No. 1,370.

BETTON v. VALENTINE.

[1 Curt. 168.] [1]

Circuit Court, D. Rhode Island. June Term, 1852.

INSOLVENCY—RHODE ISLAND LAW—ASSIGNEE UNDER LAW OF ANOTHER STATE—POWER TO AVOID CONVEYANCE.

The assignee of an insolvent debtor, appointed under the laws of the state of Massachusetts, does not so far represent creditors in the state of Rhode Island as to be able to avoid a conveyance of personal property in the latter state, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

[Cited in Booth v. Clark, 17 How. (58 U. S.) 337; Re Bugbee, Case No. 2,115; Young v. Ridenbaugh, Id. 18,173; Olney v. Tanner, 10 Fed. 104; Re Werner, Case No. 17,416.]

[At law. Action of trover by George C. Betton, assignee in insolvency of Macy, against David M. Valentine. Verdict was given for defendant.] This was a motion by the plaintiff for a new trial. [Motion overruled, and judgment for defendant.]

The facts appear in the opinion of the court.

Mr. Betton, pro se.

Mr. Jenckes, for defendant.

CURTIS, Circuit Justice. The plaintiff brought an action of trover against the defendant, to recover damages for the conversion of a quantity of merchandise in a shop in the city of Providence. He proved that the goods had belonged to one Macy, who, on his own petition, was decreed to be an insolvent debtor, under the laws of the state of Massachusetts, and that the plaintiff, having been duly appointed his assignee, the commissioner of insolvency, having jurisdiction of the matter under the laws of that state, pursuant to the authority conferred upon him by those laws, conveyed to the plaintiff, as assignee for the benefit of creditors, all the estate, both real and personal, of the insolvent. On the part of the defendant it appeared that at the time when the plaintiff demanded the goods, he was in possession of them, claiming under a mortgage made in the city of Providence, by Macy, before filing his petition for the benefits of the insolvent law, to a trustee, conditioned for the security of three several debts, alleged to be due to the defendant and two other persons. The plaintiff averred this mortgage was fraudulent as against creditors, and so, invalid as against him, and the first question is, whether the plaintiff, as assignee in insolvency under the laws of Massachusetts, has such a title to these goods in Rhode Island, as will enable him to avoid a conveyance fraudulent as against creditors, and thus maintain this action.

It is a question of much interest and of more than ordinary importance. In the absence of a bankrupt law of the United States, many of the states have enacted insolvent laws for their own citizens, and the effect of those laws upon the property of the insolvents in other states is of much moment.

The 13 Eliz. c. 5, has been re-enacted by the legislature of Rhode Island, almost in the very words of that statute. Dig. 222. By force of this statute a conveyance of goods, made with intent to delay, hinder, or defraud creditors, is declared void as against those who, by such conveyance, might be hindered, delayed, or defrauded; that is, void as against creditors. As between the parties, the conveyance is valid, and effectual to pass the property. It is only as the representative of creditors, and by virtue of their rights, that the plaintiff can avoid this deed, and the question is, whether, in the state of Rhode Island, and in respect to personal property within that state, the plaintiff does thus represent creditors, and is clothed with their rights, so as to be able to avoid a deed, for a fraud on the creditors of the insolvent debtor.

This is a trial at the common law, and the rules of decision in this court are the laws of the state of Rhode Island, there being nothing in the constitution, treaties, or statutes

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

of the United States affecting the question; which is therefore to be determined here, upon the same principles as would govern the highest court of Rhode Island, sitting to administer the common and statute law of that state. Section 34 of the judiciary act [of September 24, 1789, (1 Stat. 92.)]

I mention this, because it seemed to be assumed in argument, that this court might allow some greater effect to the laws of Massachusetts, than a court of the state of Rhode Island could. But the only difference is, that this court is bound to take official notice and to have judicial knowledge of what the laws of Massachusetts are, while a court of the state must have such laws exhibited and proved to them; but, when shown, their effect upon this question, in one tribunal, should be precisely the same as in the other.

I proceed, therefore, to examine this interesting question, first premising, that I am not aware that it has ever been touched upon by the supreme court of Rhode Island, or that there is any thing peculiar in the legislation or customary law of this state bearing upon it. It must therefore be discussed upon those principles of general jurisprudence which may be found applicable to it.

It is known that great diversities of opinion have existed and do still exist, respecting the effect to be allowed to assignments by force of foreign bankrupt and insolvent laws. On the one side, it is the settled law of England that the assignment of a bankrupt's effects, under the bankrupt law of a foreign country, passes all his movable property and debts to the assignees, whose title is recognized as paramount. Solomons v. Ross, 1 H. Bl. 132, note; Ex parte Blakes, 1 Cox, Ch. 398; Hunter v. Potts, 4 term R. 182; Sill v. Worswick, 1 H. Bl. 691-694; Phillips v. Hunter, 2 H. Bl. 402; Quelin v. Moisson, 1 Knapp, 265, note; Selkrig v. Davis, 2 Rose, 291; Alivon v. Furnival, 1 Cromp. M. & R. 277.

This doctrine has been admitted to be one of universal obligation, and maintained with much learning and ability by Hon. Chancellor Kent, in Holmes v. Remsen, 4 Johns. Ch. 485. But at a later period, and after a wide survey of the decisions, he says, "The weight of American authority is decidedly the other way, and it may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the lex loci rei sitae prevails over the law of the domicil with regard to the rule of preferences in the case of insolvent's estates." 2 Kent, Comm. 406.

An elaborate examination of the American decisions on this subject is not necessary; but it will be useful to show how far they have advanced in the direction of the question now to be determined, and to ascertain what principles they have settled. They have involved the rights of creditors, seeking payment by means of remedies afforded lege rei sitae, in conflict with the rights of the foreign assignees; and their general result may be stated to be, that the assignee, under a foreign system of bankrupt law, takes no title, which can prevail against the remedies afforded to creditors of the bankrupt, by the law of the place where the property or the chose in action of the bankrupt is attached, or levied on. The cases of Blake v. Williams, 6 Pick. 286; Milne v. Moreton, 6 Bin. 353; Saunders v. Williams, 5 N. H. 213; Lord v. The Watchman, [Case No. 17,251;] Abraham v. Plestoro, 3 Wend. 538, contain elaborate descriptions of the principles and authorities bearing on that question.

In arriving at this result some courts have gone further than others in respect to the effect to be allowed to such an assignment. Some have rested upon the ground that the creditors who are citizens of their own states cannot be deprived of the remedies secured to them by their own laws; that the comity of nations does not require what is so inconsistent with the interest and policy of another state. Merrick's Estate, 2 Ashm. 485, 5 Watts & S. 20; Lowry v. Hall, 2 Watts & S. 129; Mulliken v. Aughinbaugh, 1 Penn. & W. 117. This class of cases, while it postpones the rights of foreign assignees to those of domestic creditors seeking the benefit of their own laws, admits that such assignees have a title. By some extension of the same doctrine it is made applicable in behalf of foreigners suing in the courts of the state, as in the case of Abraham v. Plestoro, 3 Wend. 538, while other courts, and among them the supreme court of the United States, have asserted the broad doctrine that a foreign involuntary assignment cannot pass the property which is not of the country in which such bankrupt law prevails. Thus Mr. Chief Justice Marshall, delivering the opinion of the court in Harrison v. Sterry, 5 Cranch, [9 U. S.] 302, says: "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two-thirds of the funds are liable to the attaching creditors, according to the legal preference obtained by their attachments." And although the court were here only examining the point as between the assignee and attaching creditors, yet the ground on which the rights of the latter are vested, is a denial of all operation of the bankrupt law of England to pass property in the United States. See, also, Ogden v. Saunders, 12 Wheat. [25 U. S.] 262, 363, 364.

Having thus ascertained the doctrines of the American courts, it will be useful to consider what principles are maintained by the English courts as essential to the title of a foreign assignee, and how far those principles are admitted in our jurisprudence. Such an examination will lead at once to a determination of the question at bar.

The main principles upon which the English courts rest these titles are—

First. That principle of general jurispru-

dence, that personal property is deemed, by fiction of law, to be situated in the country in which the bankrupt has his domicil, and to follow the person of the owner. The application of this rule to the title of assignees in bankruptcy, is necessarily denied by the American cases, for if admitted, it makes the title of the assignee paramount to all rights of creditors. Every case, therefore, in which the right of an attaching creditor has been maintained is inconsistent with the application of this principle to such titles.

Second. The owner has a disposing power over his own property, wherever it may be situated, and the assignment of a bankrupt's effects may be considered as his own act, as it is in the execution of laws by which he is bound, and he voluntarily committed the act, which authorized the making of it. Goodwin v. Jones, 3 Mass. 517; 1 H. Bl. 437–439, note; 8 East, 314, 316, note.

If this position is admitted to be sound, it only places the assignee in bankruptcy in the same condition as an assignee under a voluntary assignment by the debtor. It refers the creation of the title to the disposing power of the owner, and consequently admits that no title passes which the owner could not convey. This, I understand, to be the extent of the English doctrine. Thus, in the leading case of Phillips v. Hunter, 2 H. Bl. 402, 403, the court say: "It is a proposition not to be disputed, that, previous to the bankruptcy, the bankrupts themselves might have transferred this property, though abroad, as absolutely as if it had been in their own tangible possession in this country; and it seems that the assignees, under their commission, were entitled, by the operation of law, to do with it after the bankruptcy, what the bankrupts themselves might have done." So in Hunter v. Potts, 4 Term R. 192, the court said: "The only question is whether the property in that island passed by the assignment, in the same manner as if the bankrupt had assigned it by his own voluntary act. And that it did so pass cannot be doubted, unless there was some positive law of that country to prevent it." See, also, Sill v. Worswick, 1 H. Bl. 690, 691; Holmes v. Remsen, 4 Johns. Ch. 470.

It is as the representative of the bankrupt, as possessing his title, under a transfer from him by virtue of his disposing power, that the title of the foreign assignee has been maintained. As the representative of creditors merely, as clothed with their peculiar rights, I am not aware that any court, with an exception presently to be noticed, has ever recognized a foreign assignee in bankruptcy or insolvency; and there seem to me to be insuperable difficulties in the way of doing so. Standing merely as the representative of creditors, appointed under the law of a foreign state, upon what principle of international jurisprudence is he to be distinguished from a foreign administrator, whose title is acknowledged nowhere, under the common law? He derives his authority from no principle of general jurisprudence, as he does when considered as representing the owner under the jus disponendi, but solely from the operation of a foreign local law, which not merely clothes him with the rights of creditors, but creates and regulates those rights.

Systems of bankrupt and insolvent law necessarily define the rights and powers of the assignee as against all third persons, and generally contain many provisions which, though deemed necessary to the policy of the system, are in themselves arbitrary, and find no place in general jurisprudence. Payments and transfers made by the bankrupt, or insolvent, within certain periods of time, or with certain intents, are declared void; and the title of the assignee dates from some act of the bankrupt, or of a public officer. These are rights in behalf of creditors, and as their representative, with which the assignee is clothed by the law under which he is appointed. They can have no place in any other system of law, and an attempt to enforce them in a foreign country would be universally allowed to be futile. But with what propriety can a foreign assignee be admitted to stand as the representative of creditors, when he is not allowed to bring with him the rights which really constitute that office, and for the enforcement of which he was appointed? And what consistency is there in holding that the foreign law cannot create or regulate the peculiar rights of creditors, which must depend solely on the law rei sitae, but that it may create an office and appoint a person to represent and enforce the rights which the law rei sitae, confers? That would be to prohibit the assignee from doing that which alone he was appointed to do, and permit him to do that which he was not appointed to do.

Such a result is inconsistent with sound reason, and would be likely to be productive of no small confusion and inconvenience in practice. It is held in Massachusetts, Butler v. Hildreth, 5 Metc. 49, that an assignee may affirm a sale, fraudulent and void as to creditors; and if he has power to avoid such a sale, it would be difficult to maintain that he has not also power to affirm it, and recover the consideration. Who is to be bound by such affirmance? Suppose he recovers the consideration from the fraudulent grantee, are the creditors in Rhode Island precluded from avoiding the sale? If they are, then the statute law of Rhode Island, which in express terms gives them the right to avoid it, is superseded and silenced by the law of another state. If they are not precluded, then it is clear the assignee does not represent them, and if not, how can he avoid the sale?

Besides, a bankrupt or insolvent law, viewed as operating on the rights of creditors, is a system of remedy. It takes out of the hands of the creditors the ordinary reme-

dial processes, and suspends the ordinary rights, which by law belong to creditors, and substitutes, in their place, a new and comprehensive remedy designed for the common benefit of all. The rights with which the assignee is clothed, as the representative of creditors, are to render this great and common remedy effectual. A law which gives the assignee power to represent the creditors is therefore, strictly, a law of remedy, and upon no sound principle can be permitted to operate beyond the territory subject to that law.

In coming to the conclusion that a foreign assignee in bankruptcy or insolvency cannot so far represent creditors, as to avoid a transfer good as against the insolvent and his representatives, but invalid as against creditors by the law of the place where the transfer was made and the property situated, I should have felt very little difficulty, if it were not for the decision of a highly respectable court, in the case of Hooper v. Tuckerman, 3 Sandf. 311. It was there decided that assignees, appointed under the laws of Massachusetts, as the plaintiff in this case was, might maintain a bill to set aside a conveyance made by the insolvents, and good as against them, but invalid as against creditors by the law of New York. The distinction relied on by the court, to take the case out of the operation of previous decisions in the courts of that state, was, that the debtors were deemed to be insolvent, and their property went into the custody of the law, and assignees were appointed in consequence of a petition voluntarily filed by themselves. That there is any real difference, in point of legal principle, between filing a petition and doing any other act of bankruptcy, to which the law has attached the same consequences, it does not seem to me easy to perceive. It has already been stated that the English doctrine is, that the act of bankruptcy being voluntary, the property of the bankrupt must be deemed to pass to the assignee with the consent of the bankrupt. But however this may be, the bankrupt's consent can be of no importance except in connection with his jus disponendi, and as affecting the title which he is presumed to, or does, create. His act, whether really voluntary, or only presumed to be so, can affect no title good as against himself, nor create rights in creditors, nor confer upon a third person power to represent them. And, therefore, I am unable to perceive the soundness of this distinction, or to concur in the opinion which seems to rest upon it.

While, therefore, I am not prepared to held that it is definitively settled by the supreme court of the United States that a foreign bankrupt or insolvent law can have no extraterritorial operation upon property, I am of opinion that the plaintiff in this case, merely as the representative of creditors, has no title, in Rhode Island, to property there, of which the insolvent, before filing his petition, made a transfer, good as against himself, and invalid as against creditors, by the statute law of that state.

The motion for a new trial is overruled, and there must be judgment on the verdict.

Case No. 1,371.

In re BETTS.

[4 Dill. 93;[1] 15 N. B. R. 536; 7 Reporter, 522; 4 Cent. Law J. 558; 24 Pittsb. Law J. 195.]

Circuit Court, E. D. Missouri. March Term, 1877.

BANKRUPTCY—HOMESTEAD—JURISDICTION OF THE BANKRUPTCY COURT—STATUTE OF FRAUDS.

1. Where a sale is made, under deed of trust, of a bankrupt's property on which he resides, and the proceeds are insufficient to satisfy the debt thereby secured, so that the right of homestead is cut off, the bankruptcy court has jurisdiction to order the bankrupt to deliver possession of the property to the purchaser, without driving the latter to a suit in ejectment.

2. In equity, a mortgage or deed of trust is only a lien on the land, and an agreement to extend the time of payment of a debt so secured is not within the statute of frauds, and need not, therefore, be in writing.

[In bankruptcy. In the matter of Betts.] This was an appeal from a decision of the United States district court for the eastern district of Missouri, sustaining a demurrer to the bankrupt's answer to a petition of Calvin F. Burnes for an order on the bankrupt to deliver possession of certain property. [Reversed.]

The facts are stated in the opinion of the court, orally pronounced, as given below.

William R. Walker, for petitioner.

M. Kinealy, for respondent.

DILLON, Circuit Judge. The material facts in this case are briefly these:

Some years ago, about the year 1870, the bankrupt, Betts, purchased a house and lot in this city, 2929 Olive street, of the petitioner, Calvin F. Burnes, and secured a portion of the purchase money by deed of trust, with power of sale by a trustee, on default of payment. The interest was payable at the end of each period of six months. In 1876 Betts was adjudicated a bankrupt, this mortgage debt to Burnes remaining unpaid. Burnes came into the court of bankruptcy, proved his debt as a secured claim, and afterwards applied to the district court, without any express notice to the bankrupt, and on the record here, I may say, without any notice (as the demurrer admits the allegation of the bankrupt in this behalf) of his intention to apply for an order permitting the trustee to sell the property; and such an order was passed by the district court. Thereupon the trustee advertised the property for sale under the deed of trust, and it was sold and purchased by the beneficiary, Burnes, for the

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Reporter, 522, contains only a partial report.]

sum of five thousand dollars. The sale was reported to the bankruptcy court; the assignee being advised of it, and consenting to its confirmation, it was confirmed, and the trustee and assignee, by the direction of the district court, joined in executing a deed under the trustee's sale, to the beneficiary, for the property.

The property was occupied by the defendant as a homestead. Afterwards, the defendant remaining in possession, and refusing to deliver possession to the purchaser, Mr. Burnes, the latter filed his petition in the district court in the bankruptcy proceeding, setting forth the facts which I have stated, and asking that an order issue from that court to the bankrupt to deliver the property to him, or to appear and show cause why he should not be thus ordered. Thereupon, the order to show cause was served on the bankrupt, and he appeared in the district court and filed an answer to the effect: First. Denying the jurisdiction of the district court in the matter, alleging that this property was his homestead, and therefore it was exempt under the bankrupt act, [March 2, 1867, 14 Stat. 517, c. 176;] that this property was not an asset of the estate that passed to the assignee in bankruptcy, and that the district court as a court in bankruptcy had nothing to do with it, and had no power to make an order in respect of it. Second. The answer in substance is this: "I executed my note payable with interest semi-annually, at the end of each six months; and that subsequently Mr. Burnes, the beneficiary, and myself made this arrangement, viz: Mr. Burnes says, 'If you will pay the interest in advance on this loan, I will agree to extend the principal of the debt that long,' and he agreed to it;" and then he alleges that he has paid the interest in advance on this debt, and had before this sale paid it in advance down to and beyond the first day of November, 1877, whereby the principal sum of that debt was extended to that time, and therefore the debt was not due at the time when the trustee undertook to exercise the power of sale in this case. He does not allege that that agreement was in writing.

The petitioner, Burnes, filed a demurrer to that answer; and that demurrer was, pro forma, sustained by the district court, and an order entered on the bankrupt to surrender possession of the property to the petitioner, Burnes.

From that order the bankrupt brings the case into the circuit court for revision.

The first question is whether, in a case like this, the bankruptcy court has any jurisdiction to make an order of this kind. If, as in many of the states—for example, the state of Kansas, and perhaps many other states—the homestead law exempted the entire property occupied as a homestead from sale on execution, or from liability to pay the general debts, I should very much incline to think it would follow that the bankruptcy court would have nothing to do with it, because the bankrupt law in that event exempts that property from all liability to pay the debts; exempts it in express terms from the property which passes by virtue of the assignment to the assignee; and I think I so held in one case in Kansas, to which counsel referred.

But counsel agree that the homestead act in Missouri is different. There is not unlimited exemption of the homestead in this state, but there is exempt in the city of St. Louis a homestead not exceeding in value $3,000; so that, if this property had been worth $15,000, and the debt was $8,000, and it was sold for the sum of $15,000, the first $8,000 would go to the mortgagee, the bankrupt debtor would be entitled to the $3,000 as homestead exemption, and the remainder would be a fund for the benefit of creditors.

It is quite evident that here was an estate which came into the possession of the assignee in bankruptcy. Now, how is the bankruptcy court to pay the debtor unless the bankruptcy court can take possession? The effect of bankruptcy is in reality an execution for the benefit of creditors generally. Unless the bankruptcy court can take possession of that property and sell it, how can it be determined, except by agreement of parties, whether there is anything in the homestead property which belongs to the general estate?

I am of the opinion, therefore, that the bankruptcy court had jurisdiction to inquire into this matter, these parties having gone in there, although Mr. Burnes may not have been obliged to go in and prove up his debt. He has contested the matter in the district court, and submitted to its jurisdiction. The district court had power to take just such proceedings as it did in this matter; and having the power to order this sale, and the sale having been made and confirmed by it, I think, on reflection, the district court is not so shorn of power as to be unable to make that jurisdiction effective; and if the bankrupt should refuse, on a proper sale being made, to deliver possession, I think the court could order it, and would not be obliged to drive the purchaser to an action of ejectment, or to a new suit. That question has heretofore been before me, and I had some doubt about it; but I believe I decided it in the same way, and it came before Mr. Justice MILLER, and it was stated by counsel and TREAT, District Judge, that he ruled the point in the same way.

Now, as to the next question: if, after this debt was created and the mortgage recorded, and the transaction consummated, at a distinctly subsequent period, the parties agree, as is alleged in the answer that they did agree, to this effect, viz.: the creditor saying, "If you will pay me interest in advance I will extend the principal of the debt," and it was accordingly paid and he received the

money, under that agreement the debt would be extended; but if the debt was not due at the time when this power of sale was exercised, nothing would pass by the sale. The power of sale must be strictly exercised, and unless it has arisen, nothing will pass by it. The only point really argued before me in avoidance of this was, it ought to appear here in the answer of the bankrupt that this agreement was in writing, because, the counsel says, "Here is a deed of trust on real estate, and any agreement of that kind that has reference to real estate is within the statute of frauds, and must be evidenced by writing." I know there is one good answer to that—perhaps two. That agreement is set up here, and admitted by demurrer; but, whether that is so or not, the view of the modern law is that a mortgage is, in realty—at least in the view of a court of equity—nothing but a lien; that the creditor here has nothing but a lien on this property for the security of his debt; [the benefit of the estate is in the mortgagor.][2] The main thing here is the debt.

I do not think it is necessary that an agreement to extend a debt should be in writing. If this was verbal, and the creditor received the interest in advance down to November, 1877, this debt was not due. If it was not due, the trustee had no power of sale, and the order of the district court that the trustee might sell, made when the bankrupt had no notice of it, would not conclude him.

It is true for some purposes a bankruptcy proceeding is a unit, and for some purposes a bankrupt may be considered as always being in court; and, accordingly, the supreme court of the United States, in the case decided only a few days ago, on the point as to the jurisdiction of the district court, as well as on the point I am now considering, in the case of Conro v. Crane, [94 U. S. 441,] say: "It must now be considered as settled that appeals do not lie to this court from the decisions of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. At the present term, in Wiswall v. Campbell, [93 U. S. 347,] we held that 'a proceeding in bankruptcy, from its commencement to its close, upon a final settlement of the estate, is but one suit. The several motions made and acts done in the bankruptcy court in the progress of the cause are * * * but a part of the suit in bankruptcy, from which they cannot be separated.' And again: 'Every person submitting himself to the jurisdiction of the bankruptcy court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding.'"

In Sandusky v. First Nat. Bank, 23 Wall. [90 U. S.] 293, the court decided: "Any order made in the progress of the cause may be subsequently set aside and vacated upon the proper showing made, provided rights have not become vested under it which will be disturbed by its vacation." In that case the assignee in bankruptcy sold certain property to one man, and the sale being reported to the district court it was confirmed; and when the assignee demanded the money, $40,000, the purchase price, the purchaser would not pay it. He reported this fact to the district court, and stated further, "Parties offer me $40,500 for this property;" and the district court said, "You may make a sale of it to them," and ordered the sale made and the property delivered to them. A month afterwards the first purchaser went into the bankruptcy court, and asked an order to set aside the sale as against the persons in possession. The district court refused to do it. An appeal was taken to the circuit court, or a petition for review filed. The circuit court reversed the order of the district court, and ordered the property to be given to the first purchaser, and the district court to pay the money to the second purchasers. That was the case which was taken to the supreme court of the United States, and it dismissed the case for want of jurisdiction, holding that the judgment of the circuit court, whether right or wrong, was conclusive, and that no appeal lay.

This shows a case where there were two purchasers in the bankruptcy court contesting for the property, and that court allowed it to be contested in the bankruptcy proceedings, instead of remitting the parties to independent actions. That has a bearing, in relation to the first point, as to the jurisdiction of the court. It has some bearing also on the question that may arise in reference to the second point. I am of opinion, therefore, that the return to the order to show cause—so far as the second branch of that defence is concerned—assuming the facts to be true, as the demurrer admits, is a good ground of defence, and that the demurrer ought, as to that point, to have been overruled.

The question on going back will be: Should the district court, sitting as a court of bankruptcy, entertain this proceeding? I think it has jurisdiction to do it, in its discretion; and if a traverse is made there—if it is denied any such agreement was made, and proofs have to be taken—then the district court, sitting in bankruptcy, may hear and determine that, or it may say, "we will leave the parties to their ordinary remedies." Because, as we have seen, if the district court takes cognizance of the case as part of the bankruptcy proceedings, its action may be reviewed by the circuit court. But that is the end of it, no matter if the property may be worth a million of dollars; whereas, if the district court drives the party to an ordinary suit, the appellate court is open. He can bring it in the federal court, and if it amounts to more than $5,000, he can go through all

[2] [From 15 N. B. R. 536.]

the stages of regular litigation to the supreme court.

Judgment below, which is understood to have been pro forma, is reversed, and process will issue to the district court to proceed in such manner as it may be advised. Reversed.

Case No. 1,372.

BETTS v. DREW et al.

[8 Am. Law Rec. 338; 12 Chi. Leg. News, 65.]

Circuit Court, N. D. Illinois. Nov. Term, 1879.

MORTGAGES—TRANSFER OF MORTGAGED PROPERTY —TRANSFEREE.

1. Philpot, mortgagor of certain lands, conveyed them to Drew. The deed recited that Drew "assumes and agrees to pay, as part of the purchase money therefor," the mortgage debt. Drew paid four annual installments of interest. In May, 1877, Jenkins, assignee of Philpot, executed to Drew a full release from any liability under the clause cited. Bill to foreclose was filed in November, 1877, asking for a deficiency decree against Drew. *Held*, that the assuming grantee of mortgaged lands is liable to the mortgagee, both in equity and at law.

2. Semble, that the liability assumed cannot be released without the consent of the mortgagee, after his acceptance of the new debtor, and such acceptance may be presumed from the receipt of interest payments from the assuming grantee.

[In equity. Bill by C. Wyllys Betts, as trustee, against Charles W. Drew and others, to foreclose a mortgage. Decree for complainant.]

There was no formal opinion delivered in this case, but the conclusions reached by Mr. Justice HARLAN, are contained in a letter addressed by him to counsel, and from that letter we have extracted what is now given as the opinion.

Mattocks & Mason, for complainant.
Miller & Frost, for defendant Drew.

HARLAN, Circuit Justice. Upon the controlling questions in the case, my conclusions are:

1. In Noonan v. Lee, 2 Black, [67 U. S.] 509, and Orchard v. Hughes, 1 Wall. [68 U. S.] 77, it was held that a circuit court of the United States could not, in the absence of a rule of the supreme court authorizing it, render a personal decree, in a foreclosure suit, against a mortgagor, for the balance of the mortgage debt remaining after exhausting the proceeds of the sale of the mortgaged premises. At the same term during which the decision in Orchard v. Hughes was announced, the 92d rule in equity was adopted. That rule does not, in terms, restrict the complainant to a deficiency decree against the mortgagor. It provides, generally, that "in suits in equity for the foreclosure of mortgages * * * a decree may be rendered for any balance due to the complainant over and above the proceeds of the sale or sales." In foreclosing suits, the immediate grantee of the mortgagor, and, indeed, all subsequent grantees of the mortgaged premises, are proper, if not always absolutely necessary, parties. If, on a foreclosure suit, any defendant has become liable to the complainant for the mortgage debt, I am unable to perceive why a personal deficiency decree may not be taken against that defendant. If the purpose of the supreme court had been to restrict the complainant to the decree against the mortgagor, that purpose, it seems to me, would have been declared in express words. The object of the rule was to avoid multiplicity of suits and circuity of action. That object is subserved by so construing the rule as to autnorize, in all foreclosure suits, a personal decree against any defendant who has become liable to the complainant for the mortgage debt.

2. Was not Drew personally liable to the holder of the mortgage debt? He accepted a conveyance of the mortgaged premises, subject to the trust deed and note, described in the pleadings, "which said note, with all interest, the said Charles W. Drew assumes and agrees to pay as part of the purchase money therefor." Instead of Drew paying the entire purchase money to Philpot, and immediately thereafter receiving from the latter a sum sufficient to meet the mortgaged debt, the parties, in effect, stipulated that Drew's assumption and agreement to pay that debt should be equivalent to the payment of an equal amount to Philpot as purchase money due on his sale to Drew. It was, in effect, a deposit with Drew of money originally belonging to Philpot, to be paid over to the latter's creditor; that is, to the holder of the mortgage debt. Drew thus received money which, by agreement between Drew and Philpot, was set apart and appropriated for the payment of a specific debt—the debt due to the mortgagee. I am satisfied that, both upon principle and authority, the holder of that mortgage debt could enforce Drew's liability to the mortgagee, either in an action at law, or by a personal deficiency decree in a suit for foreclosure.

3. I am of opinion that the release executed in May, 1877, by the assignee in bankruptcy of Philpot, is of no validity as against the claim of the complainant. If the assignee could, under any circumstances, legally execute such an instrument, he could only do so under the authority or by the direction of the court. It does not appear that any such authority was conferred, or any such direction given. Long prior to May, 1877, the mortgagee was advised of Drew's assumption of, and agreement to pay, the mortgage debt. That he approved and accepted the terms of that arrangement is shown by the fact that he collected from Drew the interest for the years 1873 to 1876 inclusive. After such approval and acceptance, it was not in the power of the assignee, without the consent of the mortgagee, to discharge Drew from responsibility

to the mortgagee for the mortgage debt. About this, however, there may be some question, and it is only necessary to say that the direction of the court was requisite to authorize the assignee to release Drew from responsibility upon his assumption and agreement to pay the mortgage debt. To release Drew in that respect was, in effect, to give away a portion of the assets of the bankrupt, without any consideration so far as the record shows. The assignee clearly transcended his authority.

My desire has been to prepare an opinion, reviewing the authorities and discussing fully the interesting questions presented in this case. But my duties here seem to render such a course impracticable, and I am compelled to restrict myself to a mere statement of the conclusion reached after a careful examination of the adjudged cases, including some not cited by counsel.

Counsel will prepare, and have the clerk enter, a decree against Drew for the deficiency which exists after applying the proceeds of sale of mortgaged premises, with costs, to complainants. In case counsel cannot agree as to what decree should be entered, in view of what is herein said, the decree prepared may be sent to me.

Case No. 1,373.

BETTS v. FRANKLIN FIRE INS CO.

[Taney, 171.][1]

Circuit Court, D. Maryland. Nov. Term, 1851.

FIRE INSURANCE—DUTY OF INSURED — DELIVERY OF PROOFS—FRAUD—MISTAKE—ERRONEOUS AFFIDAVIT—GOOD FAITH.

1. In an action on a policy of insurance, to recover for a loss of goods, sustained by fire: *held*, that the plaintiff was not entitled to recover, if he designedly, and with a fraudulent intent, withheld or delayed to deliver to the defendant, the necessary information, invoices, documents and proofs, or any of them.

2. Nor was he entitled to recover, if he was wilfully guilty of false swearing in his affidavit furnished to the defendant, or presented the affidavit of any other person, or made any statement to the defendant, knowing it to be false.

3. But that the omission to furnish the defendant with such information and documents, or delay in presenting them, or any of them, was no bar to the plaintiff's recovery, if such omission or delay were occasioned by loss of the papers, or by oversight, mistake or accident, and without fraudulent intention.

4. Nor was any error of fact contained in the plaintiff's affidavit, or in any other affidavit furnished by him, a bar to his recovery, if he acted in good faith, and believed the said affidavits, or other papers, to be true, when he furnished them to the defendant.

At law. This was an action instituted by the plaintiff [Royston Betts against the Franklin Fire Insurance Company of Philadelphia] on a policy of insurance on goods, to recover for damages sustained by fire. The defendant's prayers, to which allusion is made in the instructions given by the court, are not to be found among the papers to the cause. [Judgment for plaintiff.]

C. F. Mayer, J. Nelson, and W. J. Ward, for plaintiff.

R. Johnson, St. George W. Teackle, Dobbins & Talbott, for defendant.

TANEY, Circuit Justice. The first and second instructions prayed for, were admitted by the plaintiff to be correct, and were given to the jury. The third, fourth and fifth are refused, and the court instruct the jury—

1. That the plaintiff is not entitled to recover, if he designedly, and with a fraudulent intent, withheld or delayed to deliver to the defendant, the information, invoices, documents and proofs, or any of them, mentioned in the defendant's prayers.

2. Nor is he entitled to recover, if he was wilfully guilty of false swearing in his affidavit furnished to the defendant, or presented the affidavit of any other person, or made any statement to the defendant, knowing it to be false.

3. But the omission to furnish the defendant with the information and documents above mentioned, or delay in presenting them, or any of them, is no bar to the plaintiff's recovery, if the jury find that such omission or delay was occasioned by the loss of the papers, and by oversight, mistake or accident, and without any fraudulent intention.

4. Nor is any error of fact contained in the plaintiff's affidavit, or in any other affidavit, furnished by him (if any such error is contained in them), any bar to the plaintiff's recovery, if he acted in good faith, and believed the said affidavits, or other papers, to be true, when he furnished them to the defendant.

Verdict and judgment for the plaintiff.

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

BETTS, (GIBSON v.) See Case No. 5,390.

Case No. 1,374.

BETTS et al. v. GOODWIN et al.

[43 Hunt, Mer. Mag. (1860,) 70.]

District Court, S. D. New York.

ADMIRALTY—JURISDICTION—CONTRACT OF TOWAGE.

[A towage contract, requiring the tow to extend far enough out on the high seas to enable the vessel to clear the shore, is a maritime contract, and, as such, is within the jurisdiction of the federal court, although the service did not in fact extend beyond the district in which it originated.]

[In admiralty. Libel by Benjamin F. Betts and others, owners of the C. Durant, against Eben Goodwin and others, for breach of a contract of towage. Decree for libellants.]

Before BETTS, District Judge.

This was a cross action tried with the preceding, [Goodwin v. The C. Durant, Case No. 5,552,] brought by the owners of the C. Durant to recover $30 for towing the vessel to sea.

HELD BY THE COURT: That the court has jurisdiction of the action. The terminus of the service in fact happened within the exterior boundaries of the state, but the contract was indefinite as to distance, and required that the steamer should tow the bark far enough out on the high seas to enable her to clear herself from the shore, and was accordingly in principle not confined to a place within the state. Its meaning, as well as its terms, looked to placing the bark fully and effectually at sea. It was, therefore, a maritime contract. The merits of the controversy as to the damage to the bark were decided in the previous case.

Decree, therefore, for libellants for $30, with interest from the commencement of the action, the day of the contract not having been proved.

BETTY CARTHCART, The, (MOODIE v.) See Case No. 9,742.

Case No. 1,375.

BETTY v. DENEALE.

[2 Cranch, C. C. 156.][1]

Circuit Court, District of Columbia. Nov. Term, 1818.

SLAVERY—DEED OF MANUMISSION—DATE.

A deed of manumission, when acknowledged and recorded, relates to the time of its execution.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the deed of manumission, in this case, when it was acknowledged and recorded according to law, related back to the time of its execution.

BEVAN, (UNITED STATES v.) See Case No. 14,588.

BEVANS, (MONTGOMERY v.) See Case No. 9,735.

BEVANS, (UNITED STATES v.) See Case No. 14,589.

Case No. 1,376.

BEVERLEY v. BEVERLEY.

[2 Cranch, C. C. 470.][1]

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

NEGOTIABLE INSTRUMENTS—DEMAND AT PLACE OF PAYMENT—ACTION AGAINST MAKER.

When a place of payment is inserted in the body of a promissory note, it is not necessary, in an action by the payee against the maker, to prove a demand of payment at the place named in the note.

At law. Debt upon a promissory note made by the defendant, [Peter R. Beverley,] to the order of the plaintiff, [James B. Beverley,] for $150.33, at ninety days, dated at Alexandria, D. C., August 21, 1822, payable in the Union Bank of Georgetown. The declaration, which was in debt, after setting out the note, avers that the defendant did not, ninety days after the date of the note, pay to the order of the plaintiff, in the Union Bank of Georgetown, the said sum of $150.33, wherein action accrued to the plaintiff to demand and have of the defendant the said sum of $150.33; yet, though often requested, the defendant hath not paid the same, nor any part of it to the plaintiff, etc., but refuses, etc., to the damage of the plaintiff, $100, etc. Judgment was confessed by the defendant, with leave to move the court to strike it out. [Motion to strike out the judgment overruled.]

C. C. Lee, for the defendant, now moved to strike it out, contending, that when a place of payment is inserted in the body of the note, a demand of payment at that place is necessary, in order to put the maker in default, and give the plaintiff a right of action. The declaration avers that the defendant promised to pay in the Union Bank, but does not aver that payment was ever demanded in that bank. Poth. Obl. 139; Chit. Bills, (Am. Ed.) 321; Sanderson v. Bowes, 14 East, 500; Borrodaile v. Middleton, 2 Camp. 53; Bowes v. Howe, 5 Taunt. 30, 35; Com. Dig. tit. "Condition," G. 9, pl. 4; 1 Saund. 32; Morton v. Lamb, 7 Term R. 125; Roche v. Campbell, 3 Camp. 247; Nicholls v. Bowes, 2 Camp. 498; Foden v. Sharp, 4 Johns. 183; Lang v. Brailsford, 1 Bay, 222.

Mr. Mason, contra.

When shall the demand be made, at or in the bank? The plaintiff was not obliged to demand payment the moment the note was payable. He may yet demand it there. If the plaintiff's cause of action does not accrue until the plaintiff shall have so demanded payment, the statute of limitations has not yet begun to run upon this note. Judge Dade, in Virginia, decided that such a demand was not necessary to charge the maker, who is liable everywhere, and at all times, within the time of limitation.

THE COURT overruled Mr. Lee's motion, and refused to set aside the judgment.

See Ruggles v. Patten, 8 Mass. 480; Herring v. Sanger, 3 Johns. Cas. 71; Woodbridge v. Brigham, 12 Mass. 403; Berkshire Bank v. Jones, 6 Mass. 524; 1 Saund. 33; Carter v. Ring, 3 Camp. 459; Capp v. Lancaster, Cro. Eliz. 548; Co. Litt. 210b; Com. Dig. tit. "Condition," G, 9.

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

Case No. 1,377.

BEVERLY v. DAVIDSON COUNTY.

[2 Flip. 507.][1]

Circuit Court, M. D. Tennessee. Oct. Term, 1879.

FEDERAL COURTS—SUITS INVOLVING INSTRUMENTS NOT NEGOTIABLE BY LAW MERCHANT — ACT OF MARCH 3, 1875.

An instrument not a promissory note, not negotiable by the law merchant, even if placed upon that footing by a local statute, is not within the exception of section 1, Act March 3, 1875, [18 Stat. 470,] authorizing suits in the United States circuit courts by assignees of "promissory notes negotiable by the law merchant," irrespectively of the citizenship of the assignors.

At law. This was an act of assumpsit by [Robert D. Beverly] a citizen of Virginia, as the indorsee of certain Davidson county warrants, drawn by the county judge upon the county trustee, in favor of Samuel Donelson, clerk of the criminal court of said county, without the addition of the words, "or order," or, "or bearer," and indorsed by the payee.

R. McP. Smith, for plaintiff, said:

County warrants payable to a party or order, or to a party or bearer, are negotiable promissory notes. Story, Prom. Notes, § 16; Miller v. Thomson, 3 Man. & G. 576; Lyell v. Supervisors of Lapeer Co., [Case No. 8,618;] Fairchild v. Ogdensburgh, etc., R. Co., 15 N. Y. 337; Bull v. Sims, 23 N. Y. 570; Campbell v. Polk Co., 3 Iowa, 469; Steel v. Davis Co., 2 G. Green, 469; Hasey v. White Pigeon Beet Sugar Co., 1 Doug. (Mich.) 193; Crawford Co. v. Wilson, 2 Eng. [7 Ark.] 214; Justices v. Orr, 12 Ga. 137; Kelley v. Mayor, etc., of Brooklyn, 4 Hill, 263. True, these warrants lack the negotiable words; but they are supplied by our Code, § 1957: "Every bill, bond, or note for money, whether sealed or not, and whether expressed to be payable to order, or for value received, or not, shall be negotiable in the same manner as promissory notes."

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it." Walker v. Whitehead, 16 Wall. [83 U. S.] 317.

Guild & Dodd and Thos. H. Malone, for defendant.

BAXTER, Circuit Judge. Plaintiff's declaration presents a question of jurisdiction which must be met and disposed of at the threshold. He sues on what is familiarly known as a "county warrant;" insists that it is negotiable, and that as assignee thereof, he can, under the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts," etc., maintain his action in this court. His position is correct, provided he can bring his case within the purview of that act. But this is the point in regard to which we think he fails.

The negotiability of written promises to pay money, has been greatly extended by state legislation. The statute of Tennessee may be cited as an example. Here, "bills, bonds and notes for money, whether expressed to be payable to order or bearer, or not," are made negotiable "in the same manner as promissory notes." But the act of 1875 does not profess to confer jurisdiction on the federal courts in favor of assignees of negotiable paper generally, but in favor of assignees of promissory notes negotiable by the law merchant. This law merchant is a distinct branch of jurisprudence as well defined and understood as the law of descent. It prevails in this and in every other enlightened commercial country. In restricting the jurisdiction to assignees of notes negotiable by the law merchant, we must assume that congress intended to convey the meaning which the language of the act clearly imparts. It is not necessary, therefore, that I should pass on the question whether the warrant which is the foundation of this suit, is or is not negotiable under the Tennessee statute, and we purposely decline to express any opinion on that point. But we have no hesitation in holding that it is not negotiable by the law merchant. It follows that this court is without jurisdiction and plaintiff's suit will be dismissed.

NOTE, [from original report.] The supreme court of the state, a few days after this opinion was announced, held at Knoxville, in the case of Camp v. Knox Co., that county warrants, like the one sued on in this case, were not negotiable. See 3 Lea, 199.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

BEVERLY, (DAVIS v.) See Case No. 3,627.

Case No. 1,378.

BEVERLY v. HENDERSON.

[Cited in Denny v. Henderson, [Case No. 3,806.] Nowhere reported; opinion not now accessible.]

BEVERLY RUBBER CO., (GOODYEAR v.) See Case No. 5,557.

Case No. 1,379.

BEVIN v. EAST HAMILTON BELL CO.

[9 Blatchf. 50; 5 Fish. Pat. Cas. 23.][1]

Circuit Court, D. Connecticut. Sept. 19, 1871.

PATENTS FOR INVENTIONS—ABANDONMENT—WHAT CONSTITUTES—SUCCESSIVE APPLICATIONS — CONTINUITY—QUESTION OF FACT — WITHDRAWAL OF APPLICATION.

1. Where the undisputed acts of an inventor furnish evidence of the abandonment of his in-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus is from 5 Fish. Pat. Cas. 23; opinion from 9 Blatchf. 50.]

vention, his testimony upon the trial that he never did intend to abandon it is entitled to very little consideration.

2. In applying the language of courts, attention must be paid to the facts with which they are dealing. This is especially true when citing their opinions in patent causes.

3. An application can disclose nothing to the public, nor give the public notice of any definite intention of the inventor, while that application, and the most important papers in which the invention is described, are not in the patent office, but are in the inventor's possession.

4. Where an inventor, after the rejection of his application, did nothing to amend or reverse the judgment of the patent office for ten years: *Held*, that this delay could not be excused by the plea that, as the rejection was wrongfully made, the delay was the fault of the commissioner, and not of the inventor.

[Distinguished in Colgate v. W. U. Tel. Co., Case No. 2,995.]

5. Where an inventor filed his application in 1852, which was acted on without delay, and rejected for a simple and intelligible reason, but instead of taking any steps to reverse the action of the office, the applicant withdrew all his papers, including the application itself, except a single drawing, and then, for ten years, permitted his invention to go into notorious public use; *Held*, that the application was abandoned.

[Cited in Manning v. Cape Ann Isinglass & Glue Co., Case No. 9,041; Perkins v. Nashua Card & Glazed Paper Co., 2 Fed. 453.]

6. In January, 1852, B. applied for a patent. His application was rejected in April, 1852. He did not appeal or apply for a re-examination. In May, 1852, he took from the patent office his application, and all the papers connected with it, except one drawing, but made no formal withdrawal. The papers so withdrawn were never returned. From May, 1852, until April, 1862, he had no communication with the patent office, and took no steps towards obtaining a patent. During that interval, his invention went into extensive use, with his knowledge, and without his objection. In April, 1862, he filed a new application for a patent for the invention, and paid a new fee. The new application made no reference to the application of 1852. The fee paid to the patent office in 1852 was not withdrawn: *Held*, that the application of 1852 had been abandoned, and that a patent granted in 1869, on the application of 1862, was void, because of the public use of the invention, for nearly ten years before 1862, with the permission of the inventor.

[Cited in Colgate v. W. U. Tel. Co., Case No. 2,995; Manning v. Cape Ann Isinglass & Glue Co., Id. 9,041; Perkins v. Nashau Card & Glazed Paper Co., 2 Fed. 453.]

7. The continuity of two successive applications for a patent for the same invention is a question of fact, and not of law, and is to be determined by evidence.

[Cited in Weston v. White, Case No. 17,459; Colgate v. W. U. Tel. Co., Id. 2,995; Kittle v. Hall, 29 Fed. 514.]

8. A technical withdrawal of the first application is not necessary to interrupt the continuity between it and a succeeding one. It may be in fact, though not in form, withdrawn.

[Cited in Weston v. White, Case No. 17,459; Kittle v. Hall, 29 Fed. 514.]

[In equity. Bill by Abner G. Bevin against the East Hampton Bell Company for infringement of letters patent. Bill dismissed.]

W. Edgar Simonds, for plaintiff.

John S. Beach, for defendants.

Before WOODRUFF, Circuit Judge, and SHIPMAN, District Judge.

SHIPMAN, District Judge. This is a bill in equity, praying for an injunction and an account, and is founded upon a patent issued to the plaintiff, May 4th, 1869. The alleged invention is called, in the patent, an "improvement in metallurgic furnaces." The device is a simple one and need not be described here. It is sufficient to say, that it required inventive thought to originate it, and that it is a useful improvement. That the plaintiff was the original and first inventor may, also, be conceded. The defense, as set up in the defendant's answer, rests upon the following grounds: (1.) That the invention "was in public use, with the knowledge and consent of the inventor, for more than two years prior to his application for the said letters patent." (2.) "That the plaintiff, since his application for said letters patent, and before the issuing of the same, and during the period of seven years which elapsed between said application and the obtaining of said letters patent, knowingly permitted his alleged invention to become public property, and abandoned the same to the public."

There is very little dispute between the parties about the facts. In January, 1852, the plaintiff applied for a patent, and, in April of the same year, his application was rejected. From this rejection no appeal was taken, or re-examination applied for. In May next following, the plaintiff took his application, and all the papers connected with it, except one drawing, from the patent office, but no formal withdrawal appears to have been made. The papers thus withdrawn from the office were never returned. From May 28th, 1852, till April 28th, 1862, the plaintiff had no communication with the patent office, and the only evidence which that office contained, during these ten years, of his alleged invention, was the drawing, and the entries on the file wrapper of the date of filing the petition and other papers, the rejection of the application, and the delivery of the papers, on the order of the plaintiff, to his brother, May 28th, 1852.

At the time his application was rejected, in April, 1852, the office referred the plaintiff to "Wyman on Ventilation," as containing evidence that his invention had been anticipated and antedated. The plaintiff, in his testimony, states what he subsequently did in reference to securing a patent under this application, as follows: "I consulted Mr. Barnes," (his attorney through whom he had made his application.) "Mr. Barnes said to me, that I had paid in thirty dollars in gold, that I could, if I wished to abandon it, draw back twenty dollars from the government, but his advice was to let it lie and think of it, and, perhaps, I might think it best to take it up some other time, and I might see some others, perhaps some one in Washington, who would be able to go and explain

the matter, and see more particularly about the reasons; and, in the course of two or three years, or a year or two, my brother saw Mr. Truman Smith, a member of congress. Mr. Smith said he would undertake to obtain the rejected patent, but he thought I had better make some little alterations, and, in looking at the thing, I did not see how I could, and never did make any alterations, and so it run along till 1862, I think it was, when I became acquainted with Munn & Co., of New York, who said they would undertake to obtain it for me and made application." "The patent was rejected," (the application of 1852,) "because it was supposed to be anticipated by 'Wyman on Ventilation.' Mr. Barnes said that he had never seen the book, and could not find it in Middletown, and thought that perhaps I might find it in Hartford or New Haven. I could not find it in Hartford, and I went to New Haven, probably in the course of a year or two after the rejection. I consulted Professor Olmsted, of Yale College. He said, (after looking at the book,) that he did not think it ought to have been rejected on that account." No other or further steps were taken by the plaintiff, or any one on his behalf, towards obtaining a patent for this invention, till April, 1862.

In the mean time, the plaintiff, who resided in the village of East Hampton, Connecticut, where most of the sleigh bells used in this country were, and still are, made, erected, in 1852, a furnace embodying his invention. The same year Buell & Veazy erected one, and, in 1853, another. In 1853, one was built by J. S. Hall & Co. The defendants built theirs. In 1856, 1857 and 1860, three others were erected. All these furnaces embraced the alleged invention of the plaintiff, were situated in the village where he constantly resided, and have been openly in use down to the present time, in the same business as that in which the plaintiff has been engaged. The fact that these furnaces were all erected upon the same plan as that described in the plaintiff's patent, and used for the same purpose, was known to him from the time each was built, down to the date of his patent, in 1869. During all this time, the plaintiff made no objection to this open and continued use of his invention by his neighbors and competitors in business, with all of whom he appears to have been on friendly terms. It is true, he gave them no express permission. The only references ever made to the subject, so far as the evidence discloses, are those testified to by the plaintiff. He says: "I don't know that I ever objected. Mr. Abell, (of the East Hampton Bell Co.,) came to me, when they were about to build theirs, and asked me if he could see our furnace and chimney. I told him he could, but I could give him no license to build one like it, for I had applied for a patent and might some time obtain it. About the same time, J. G. Hinckley" (who had constructed the plaintiff's) "was about to build one for J. S. Hall & Co., and he came to see me and said he had heard something about my applying for a patent. I told him I had, and could give him no license to build one." Hinckley also testifies, that he built many of the chimneys already referred to, and that he had conversations with the plaintiff about them on various occasions, but that he never asked his permission to build any of them. This embraces the whole history of this invention and the dealings of the plaintiff and others with it down to April, 1862, when he filed another application for a patent.

In April, 1862, the plaintiff filed the new application, paying the fee of fifteen dollars, as prescribed by the act of 1861, [12 Stat. 248, § 10,] then in force, that act requiring that sum to be paid on filing an original application. In this new application, no reference was made to that of 1852, nor to the payment of the fee required by the former act, nor to any circumstance connected with it. Indeed, the fact that any prior application had been made, seems to have been studiously ignored. This application of 1862 was filed April 28th, and rejected May 10th in the same year. The specification and one drawing which had been used on that application appear to have been taken from the office, and were returned by the plaintiff's agents, Munn & Co., March 17th, 1863. No further communication with the office was had by the plaintiff, or his agents, till April 5th, 1869, when a re-examination was applied for. In regard to the course of the plaintiff after the rejection of May, 1862, he testifies as follows: "After that I went to Washington myself, and saw Mr. Smith there then. He was not a member of congress at that time. He thought it would cost considerable, and I concluded that I would think of it, and see what the prospect was of its value, and I neglected to employ him, or any one else, to make further application, until 1868, I think it was," (it was, in fact, in March, 1869,) "when I employed Theodore G. Ellis, and he obtained the patent in controversy." During the period which elapsed between the rejection of the application in May, 1862, and the application for a re-examination in 1869, four or five other furnaces were erected in the same village, all embodying the plaintiff's invention. They were all built, and put into use, with the knowledge of the plaintiff, and continued in use, without objection on his part, till his patent was finally issued.

As to the means employed by the plaintiff to prevent his invention from being known and used between 1852 and 1869, he says: "The first five or six years after I built this chimney, I put up a notice on the door, 'No admittance without permission;' but, of course, all the workmen knew it, and I think it wore out after five or six years, and that was the only measure I took to keep people from coming into the shop and looking around."

The plaintiff never withdrew the twenty

dollars paid to the patent office at the time of his first application. He also testified that he never intended to withdraw that application or abandon his invention. There is some evidence, also, that, during the erection and use of the chimneys referred to, they were sometimes spoken of as "Bevin's chimneys."

We have thus given, in detail, the whole evidence which the plaintiff has offered to meet the issues of more than two years' use before the application of 1862, and of abandonment of the invention after that and before the patent issued.

There is no evidence that we deem satisfactory, which would warrant us in concluding that these defendants knew or supposed that the plaintiff claimed this form of furnace as his exclusive property, or that he intended to secure a patent therefor, until near the time when the patent was granted. Even after this suit was commenced, and down to the time of filing the answer, they were ignorant of the application of 1852, as well they might be, for the application of 1862 purports, on its face, to be an original and independent one, and there was nothing in the proceedings of the patent office or the plaintiff, in connection with that application, which hinted at a prior one. The drawing to which the new specification referred was not the old one, but a new and different one; and, in the oath of the plaintiff, made on the 26th of March, 1869, and filed in support of the re-examination then asked for, he refers to his invention as one "for which he made application for letters patent of the United States, on or about the 28th day of April, 1862, and which was once rejected, May 10th, 1862." In the application on his behalf, by his attorneys, for a re-examination, dated April 5th, 1869, they refer to his rejected application, and state: "The first rejection was dated May 10th, 1862." Indeed, so completely was the application of 1852 ignored, in all those proceedings, that it would be difficult for us to repress the suspicion that concealment of that fact was intended, if there existed any adequate motive for such a course.

The first question which obviously arises on these facts is, whether the plaintiff must be deemed to have abandoned his application of 1852. His testimony on the trial, that he never did intend to abandon it, is entitled to very little consideration, in view of his acts. His undisputed acts were, certainly, very cogent evidence of abandonment. He withdrew his application, and all the papers connected with it, from the office, May 28th, 1852, and never, from that day to this, furnished the office with any evidence whatever that he intended to pursue that application. It is true, that he made no technical withdrawal; but he took away all the papers except one drawing, and never returned them, or made any allusion to them, in his subsequent transactions with the office. The only evidence of his intentions, or invention, which the patent office contained, for ten years, was a single drawing, which had been filed in support of an application soon rejected, and which had been left behind when all the other papers were withdrawn. In the mean time, his invention went into open and notorious use, in his own neighborhood and under his own eyes, and so continued for ten years, without one word of precaution or remonstrance on his part, either communicated to the public directly, or through the patent office constructively. His remark to one or two persons, in casual conversations, that he had applied for a patent and might some day obtain one, and, therefore, could give no license to use his invention, is of little importance, in view of the other facts in the case. No one asked his permission or license. He forbid no one the use of his alleged invention. His notice, on the door of his factory, that no one could enter without permission, is of still less consequence, as evidence of his intention to pursue a claim for a patent. Such notices are common on the doors of manufactories. They are as often put up to keep out idlers, as to conceal unpatented inventions. Besides, this notice was effaced by time long before he renewed his application, and, if its presence on his door, while it lasted, was evidence of his intention to obtain a patent for something within, its subsequent absence, for years, was evidence that he had abandoned that intention. But, while it was there it had no effect to conceal the invention, or notify the public against its use, for it was in daily and public operation throughout the village. During all this time, the plaintiff took no steps to secure a patent. He knew the ground on which the office rejected his application, and ascertained from Professor Olmsted that, in the opinion of the latter, the reason given by the office for the rejection was not sound. This was within a year or two after the rejection of May, 1852. Here the matter slept. No fact is given in the evidence, nor is any reason suggested, by which we can account for the plaintiff's long continued inaction, if he intended to pursue his claim. His device was a simple one. His application had been rejected for a simple reason. No considerable expense or trouble was required to endeavor to revise and reverse the decision of the office. The common plea of poverty is not set up. The plaintiff was, during all these ten years, prosecuting a successful business. This is clearly inferred from the fact that establishments of the same character as his were going into operation every year, and are still pursuing the same business. The plaintiff was misled by no suggestion of discouragement or difficulty in his path. The remark of Mr. Smith, that it would "cost considerable," was not made till after the rejection of 1862, and, if it had been, there is no pretence that the plaintiff was not able to defray the necessary cost of any legitimate effort to secure a patent. In

view of all the evidence on this point, it is impossible to resist the conclusion, that the plaintiff wholly abandoned his first application, gave up all idea of obtaining a patent under it, and, for that reason, permitted it to go into unmolested public use.

But, the plaintiff insists, that the fact that he filed an application in 1852, is conclusive evidence in his favor, and cites, in support of this claim, the case of Adams v. Jones, [Case No. 57.] In that case, Mr. Justice Grier remarked: "By the application filed in the patent office, the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delay afterwards interposed, either by the mistakes of the public officers, or the delays of courts, where gross laches cannot be imputed to the applicant, cannot affect his right." With this doctrine, in its application to the facts of that case, we have no controversy. Adams filed his application in 1850, but did not receive his patent till 1857. There is no suggestion that he took his papers, including his application, from the office, and never returned them, thus withdrawing from the public the disclosure he had made of his invention, and all evidence of its character, except a drawing, from which, alone, no one could tell precisely or substantially what he claimed. There does not appear to have been any voluntary delay on the part of the applicant. On the contrary, he not only did not withdraw his application, but "continued to insist upon his right to a patent." The delay in prosecuting his appeal to a hearing "was not in consequence of any laches of the complainant's, but of the inability of the aged chief justice to attend to the business of his office." In applying the language of courts, attention must be paid to the facts with which they were dealing. This is of especial importance when citing their opinions in patent causes. When it was said by the court, in the case above cited, that, by an application filed in the patent office, the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent, and that this is conclusive evidence that he does not intend to abandon it to the public, the court must be understood as referring to an application remaining on file, and prosecuted with at least some diligence, unless prevented by some cause other than that of the applicant's voluntary omission to move in the matter. An application for a patent can disclose nothing to the public, nor give the public notice of any definite intention of the inventor, while that application, and the most important papers in which the invention is described, are, not in the patent office, but in the inventor's pocket. The remarks of the court in that case, which immediately follow those already cited, show that the opinion will bear no such construction as that sought to be put upon it by the present plaintiff. "The statute," Mr. Justice Grier adds, "forfeits the right of an inventor to a patent, only where the invention has been in public use more than two years before the application. A man might justly be treated as having abandoned his application, if it be not prosecuted with reasonable diligence. But, involuntary delays, not caused by the laches of the applicant, should not work a forfeiture of his rights. In this case, the complainant did not commence the manufacture of his improved lock till some time after his application was on file. The delay was not in consequence of his laches; and, within a reasonable time after the decision of the court as to the extent of his invention, a patent was granted for that portion of it to which he was clearly entitled. Here is no abandonment, either by the letter or spirit of the statute, but a continual claim, amid difficulties arising either from the obtuseness of officers, or accidental but unavoidable delays of public tribunals." In the case before us, no part of this long delay of ten years is chargeable to any body except the plaintiff himself, unless it be the "obtuseness of the officer," who rejected his application in 1852. It certainly did not require ten years' deliberation on the part of the plaintiff for him to determine whether he would even attempt to overcome that "obtuseness." This long delay he does not pretend to excuse. It was, under the circumstances, not only not reasonable diligence, but it was no diligence at all. It was not only laches, but very gross laches.

The case of Adams v. Edwards, [Case No. 53,] also cited by the plaintiff, has no special bearing on the present controversy. The charge of Mr. Justice Woodbury conceded that an application might be abandoned, and, whether it had been in that case, was one question submitted to the jury. But, though, in that case, the patent was not granted till seven years after the first application was made, the original application was renewed, amended, and persisted in, until it was finally granted. The same patent was involved in the case of Rich v. Lippincott, [Id. 11,758,] cited by the plaintiff.

But the plaintiff relies particularly on the case of Dental Vulcanite Co. v. Wetherbee, [Case No. 3,810.] In that case, the facts are given by the reporter as follows: "It appeared, that John A. Cummings first made an application for a patent for his invention in 1855, and that the same was, after three examinations, finally rejected, upon appeal, by the commissioner of patents, in 1856. The application was not further appealed, and was not renewed till March 25th, 1864, when a new application was filed, upon which the patent issued. In the interval between the filing of the original application and that of 1864, the invention had gone into use to a considerable extent, with the knowledge and consent of the then applicant, proved there-

to; and it also appeared, that, during the same interval, the inventor had made certain assignments of interests in the invention. Certain letters of the patentee, and other evidence, were introduced, tending to show that the inventor had not relinquished his design of obtaining a patent, at any time between the date of the original application and the final allowance of the patent." [Dental Vulcanite Co. v. Wetherbee, supra.] The following are the remarks of Mr. Justice Clifford on this point: "The next objection to be noticed is, that the inventor abandoned his invention, because his application for a patent, which was made April 12, 1855, was rejected February 6, 1856, and because he did not appeal at all, or make any new application, until the 25th of March, 1864. Strong doubts are entertained whether any new application was necessary; but, if it was, it is believed to be well settled, that the second application must be regarded as having been filed in aid of the first, on which the rejection took place. Godfrey v. Eames, 1 Wall. [68 U. S.] 317. Actual abandonment is not satisfactorily proved; and it is not possible to hold, that any use of the invention, without the consent of the inventor, while his application for a patent was pending in the patent office, can defeat the operation of the letters patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor, if his patent is allowed to have full operation after it is granted, but it would be very great injustice to hold, that any delay which the inventor could not prevent, should, under any circumstances, affect the validity of his patent." The plaintiff insists that the doctrine of that case is applicable to the one now before us, and fully supports the validity of his patent. We have, therefore, examined it with some care. The court evidently considered two questions as arising under that branch of the case—first, the relation of the last application to the first; and, second, that of actual abandonment of the invention while the application was pending. The first, if we correctly understand the remarks of the learned judge, seems to have been regarded as a question of law, which had been conclusively settled by the supreme court in Godfrey v. Eames, 1 Wall. [68 U. S.] 317: "Strong doubts are entertained whether any new application was necessary; but, if it was, it is believed to be well settled, that the second application must be regarded as having been filed in aid of the first, on which the rejection took place." And it is true, that the court, in the latter case, say: "In our judgment, if a party choose to withdraw his application for a patent, and pay the forfeit, intending, at the time of such withdrawal, to file a new petition, and he accordingly do so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the law." But this language of the court must be read in the light of the facts of the case before them. Those facts were, that "Godfrey, on the 31st of January, 1855, filed an application for a patent for boot-trees. This application the commissioner, on the 17th May, 1855, rejected for want of novelty. On the 24th April, 1857, within the time required by the rules, Godfrey submitted his case again. The old application was withdrawn, and a new one filed, simultaneously, the withdrawal fee of $20 going to make part of the new application fee of $30, and not in fact being received by the applicant." On these facts, the court might well regard the two applications as connected together by an unbroken continuity. That they did not intend to decide that every subsequent application for a patent should be deemed, in judgment of law, to relate back to the first, whatever the interval of time, or the intervening acts of the applicant between them, is clear; for, they immediately add: "The question of the continuity of the application should have been submitted to the jury. In directing them to return a verdict for the defendant, we think the learned judge who tried the cause in the court below committed an error." On that ground, a new trial was ordered.

On the second question, that of abandonment of the invention, the opinion in Dental Vulcanite Co. v. Wetherbee, as already cited, remarks: "Actual abandonment is not satisfactorily proved; and it is not possible to hold, that any use of the invention, without the consent of the inventor, while his application for a patent was pending in the patent office, can defeat the operation of the letters patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor, if his patent is allowed to have full operation after it is granted, but it would be very great injustice to hold, that any delay which the inventor could not prevent, should, under any circumstances, affect the validity of his patent." We conclude that the facts which the learned judge had in view when he made these remarks have been inaccurately reported. They speak of the knowledge and consent of the inventor to the use as having been proved; while the opinion refers to a use without the consent of the inventor. The onerous delays referred to in the opinion we infer to be the delays interposed by the action of the patent office. Those were the only delays which the "inventor could not prevent," or, at least, provide against, by notice to those whom he knew to be using his invention. Goodyear v. Hills, [Case No. 5,571a;] Gates v. Benson, (1870,) Dec. Com'r Pat. 65, Cartter, C. J.

Now, in the case before us, as we have already stated, we are constrained, by the undisputed facts, to hold, that the plaintiff abandoned his first application. In coming to this conclusion, we have not overlooked the cases of Pitts v. Hall, [Case No. 11,192,] and McCormick v. Seymour, [Id. 8,726,] cited by the plaintiff. But, in neither of those

cases, was this precise question before the court. In each, the point was, whether the inventor had abandoned his invention to the public within the two years next preceding his application for a patent. As Mr. Justice Nelson well remarked, in his charge to the jury, in Pitts v. Hall: "An abandonment or dedication may occur within the two years, and at any time down to the procurement of the patent. The mere use, or sale, however, of the machine, within the two years, will not alone, or of itself, work an abandonment. There must be something more, because the 7th section of the act of 1839, [5 Stat. 354,] permits the sale or use by the patentee at any time within two years before his application, without its operating to invalidate his right." And, again, in McCormick v. Seymour, the same learned judge informed the jury, that "the mere fact of making and selling an improvement or invention, or of putting it into public use, at any time within two years before the application of a patent, is not, of itself, an abandonment of the invention to the public. The right thus to use his invention before the granting of a patent is a right conferred on the inventor by the act of 1839." In both the cases cited, he charged, that where a defendant relies on an alleged abandonment of the invention to the public within the two years next preceding the application for a patent, he should be required to prove beyond reasonable doubt or hesitation. That is undoubtedly a sound rule. But the question now before us is, whether Bevin abandoned his application, made in 1852. On this question, we think the proof ample and conclusive. He filed his application, it was acted on by the office without delay, and rejected for a simple and intelligible reason. Instead of taking any steps to reverse the action of the office, he withdrew all his papers, including the application itself, except a single drawing, and then, for ten years, permitted his invention to go into notorious public use. During all this time the records of the patent office contained no evidence whatever of the character of his invention, or of his claims in regard to it. By inspecting this drawing left behind, nobody could tell what portion of the chimney or furnace was claimed as new, or of what the inventor supposed his discovery to consist.

But, we are told that the new application of 1862 must, in judgment of law, be deemed to relate back to the first one. We have already shown that the continuity of these applications is, according to the doctrine of Godfrey v. Eames, [supra,] a question of fact, and not of law. The evidence does not establish that continuity, either in fact or intent. The original application, although not formally and technically, was practically, withdrawn. The papers were taken from the office in 1852, and never returned. The application of 1862 made no reference to that of 1852, not even to the old drawing. When the application of 1862 was filed, there was practically no prior application pending, to which it could relate back. It follows, that, as the application of 1852 was abandoned, and there was no continuity between that and the one filed in 1862, the latter must be deemed the original application, upon which alone the patent issued; and, as the plaintiff failed to make that application until after his invention had been in public use, with his permission, for nearly ten years, his patent is void.

This conclusion renders it unnecessary that we should consider the other question raised by the answer, whether the invention was abandoned after 1862. Let a decree be entered dismissing the bill, with costs.

Case No. 1,380.

BEYER et al. v. The NURNBERG.

[3 Hughes, 505.] [1]

Circuit Court, D. Maryland. March, 1879.

COLLISION—VESSEL AT ANCHOR—LOOKOUT—ANCHOR-LIGHTS.

A vessel lying at anchor in a fairway or roadstead of a navigable water, with no anchor-lights burning, and but one lookout, and he asleep, at the time a steamer runs into her by no fault of the steamer, is solely in fault and must bear the loss from the collision.

[Appeal from the district court of the United States for the district of Maryland.

[In admiralty. Libel by Morton Beyer and others, owners of the bark Azow, against the steamer Nurnberg, for collision. Decree for respondent. Libellants appeal. Affirmed.]

BOND, Circuit Judge. This cause standing ready and having been submitted for hearing, and the proceedings and evidence in the cause and the arguments of the proctors, for the respective parties having been read, heard, and duly considered, the circuit court of the United States for the district of Maryland hereby finds the following facts and conclusions of law, upon which it renders its decree, viz:

Facts Found by the Court.

1st. Between twelve and one o'clock on the night of the 7th, or morning of the 8th, of May, 1877, a collision occurred between the steamer Nurnberg and the bark Azow in the Chesapeake bay.

2d. At the time of said collision, the said bark Azow was anchored in a roadstead or fairway of the Chesapeake bay in the usual path or track of steamers and large sail vessel coming to or going from the port of Baltimore.

3d. An anchor-lantern had been lighted and properly hung on said bark Azow at an early hour of said night, but said light had gone out before said collision, and at the time of said collision no anchor-light nor other light

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

was on said bark, and said bark could not herself be seen by them on board of said steamer at a sufficient distance to enable them to avoid her.

4th. Only one man was on duty as an anchor-watch on board said bark Azow at the time of said collision, the entire crew having been on duty all the night before. All except the anchor-watch were asleep below, and the anchor-watch himself was asleep at the time of the collision.

5th. No torchlight or other light was exhibited on said bark, or other warning given on board of her as said steamer approached.

6th. Said steamer had all her regulation lights burning brightly. They were all visible at the respective distances required by the act of congress and the usages of the sea, and they might all have been seen by a watch on lookout on board of said bark in time to ward off said steamer and prevent a collision.

7th. Said steamer, at the time of said collision, was proceeding at less than her usual rate of speed, on her proper course up the Chesapeake bay, to the port of Baltimore.

8th. There was nothing in the character of the night or in the locality of said collision to have rendered it imprudent or improper for said steamer to proceed at her customary rate of speed if she had chosen to do so.

9th. At the time of said collision said steamer was in charge of a competent, experienced, and skillful pilot; said pilot, her master, and second officer, were on the bridge navigating said steamer, and diligently engaged in looking out. A full sea-watch, consisting of nineteen men and officers, were assigned to their respective duties; twelve of her crew were on watch forward of the bridge. Two able seamen were assigned to and engaged in the special duties of lookouts. They were stationed forward; on the upper deck, as near as possible to the bow, one on the port, one on the starboard, and all in the positions most advantageous for the discharge of their respective duties. All of these officers and men diligently and skillfully discharged their respective duties from the time said steamer left her anchorage, a little after twelve o'clock on the night in question, in charge of the pilot, up to the moment of the collision. They saw lights on board of other vessels, in motion and at anchor, and avoided and passed them at safe distances. Shortly before said collision two anchor-lights on board of other vessels, one nearly ahead of said steamer and the other a little on her port, about three miles off, were reported by the lookouts on board of said steamer, and both of them were distinctly seen by the pilot and officers on the bridge. When the steamer was drawing near to the said vessel ahead, the pilot and officers on her bridge looked to see whether there was any thing in the way to prevent them from porting for the purpose of clearing her. None of them seeing anything in their way, the said steamer was ported, slightly altering her course so as to clear said vessel ahead. Before she had got well on her new course the two lookouts saw the bark Azow without any lights on her, and simultaneously, in a sharp and frightened voice, cried out: "Ship right ahead." The order was instantly given to stop said steamer, and put her helm hard aport. Both of these orders were instantly obeyed. But before said steamer could be stopped, and before her machinery could be reversed, or her course materially altered, she struck said bark with such force as to cut into and sink her.

10th. Said collision was caused entirely by the fault of those on board of said bark Azow, and everything was done on board of said steamer Nurnberg which have been done to avoid it.

Conclusions of Law.

Said collision having been caused entirely by the fault of those on board of said bark Azow, and everything having been done which could have been done on board said steamer to avoid the same, the libellants, owners of said bark, are not entitled to recover from the said steamer, or from the stipulators, damage therefor.

Decree.

It is thereupon, this fifth day of March, 1879, adjudged, ordered, and decreed that the decree in the above cause be, and the same is hereby affirmed, and that the libel be, and the same is, hereby dismissed, with costs to the appellee in both courts.

B. F. BRUCE, The, (MILLIGAN v.) See Case No. 9,602.

Case No. 1,381.

BHOLEN et al. v. CLEVELAND et al.

[5 Mason, 174.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1828.

ASSIGNMENT FOR BENEFIT OF CREDITORS—SUBSEQUENT ATTACHMENT—PRIORITY.

Where goods, on consignment at Boston, were, on the failure of the owners, assigned for the benefit of creditors, and before notice of the assignment could be reasonably given to the consignees, another creditor of the debtor's attached them, by a trustee process, in Boston, the debtor and the creditors being citizens of the state of Pennsylvania; it was *held*, that the assignment, if bona fide, was a sufficient title to pass the goods to the assignees, and would overreach the trustee process.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Whetmore v. Murdock, Id. 17,509.]

Trover [by John Bholen and another against Aaron P. Cleveland and another] for certain cases of merchandise. Plea, not guilty. [A verdict was rendered for plaintiff.]

At the trial, the facts appeared to be these. The firm of George & Alexander Holdball, of Philadelphia, consigned the goods in ques-

[1] [Reported by William P. Mason, Esq.]

tion to the defendants at Boston, and afterwards, on the 5th of April 1825, failed, and assigned their property, including these goods, to the plaintiffs, who were their creditors, for the benefit of their creditors generally. At the time of their failure, they were indebted to John Evans of Philadelphia; and, on the same day on which the assignment was made in Philadelphia, Evans wrote a letter to Boston directing a suit for his debt, against the defendants, as trustees of G. & A. Holdball. On the 9th of April 1825, on the arrival of the mail and the receipt of this letter, a process issued accordingly from the state court, and the defendants were sued as trustees. The plaintiffs, as soon as they reasonably could afterwards, made a demand upon the defendants for the same goods, offering to pay them their commissions and charges. The defendants refused to deliver them. The trustee process is still pending in the state court. The question was, whether, under these circumstances, the plaintiffs were entitled to recover.

Mr. Webster, for plaintiffs.
Sewall & Aylwin, for defendants.

STORY, Circuit Justice. The whole controversy turns upon this single point, whose was the property in these goods at the time when the trustee process was served? It is to be recollected, that this is the case of a general assignment made in Philadelphia, and the plaintiffs, as well as Evans, are citizens of the state of Pennsylvania. Their rights are, therefore, to be judged of by the laws of that state. It is not denied, that general assignments of this nature in favour of creditors, if bona fide, are valid, by the laws of that state, to pass the property contained therein. It is not denied, that the present assignment is bona fide and valid in its execution. The question is, whether it was legally sufficient to convey goods locally situated in Boston. As against the assignor himself, there can be no doubt. No immediate delivery was practicable; nor is it necessary in cases, where goods are not at the time within the reach of the parties. It is sufficient, if the assignees perfect their title to the goods, within a reasonable time afterwards, by a notice of their title and demand of the goods, or obtaining an actual delivery. After the assignment, the consignees held the goods for the benefit of the persons, who had the legal title thereto. The assignment worked an immediate transfer of the ownership.

If the law be so, as against the assignor, how can his creditor, Evans, be in a better situation? At the time of the service of the trustee process, the goods were no longer the property of the Holdballs. They had transferred them to the plaintiffs. It was not a race of diligence, where the first, who could attach them, would hold them. Nothing could be attached under the trustee process but the property of the Holdballs. It is not true, as the argument supposes, that no property in the goods passed to the plaintiffs, until they perfected their title by a notice and demand. Their title to the goods was complete by the execution of the assignment, subject to be defeated by their laches in not giving reasonable notice, or in not following up their title to possession. And, if the title were merely inchoate, still by the notice within a reasonable time, it became, by relation, good from the beginning. An inchoate title of this sort, would not be defeated by an intermediate attachment, unless there were laches.

Several years ago, the same question came before me, in a case in Rhode Island; and it was then ruled, as it is now ruled. That judgment was acquiesced in. If the defendants' counsel think me wrong, they can file a bill of exceptions to this opinion, and carry the cause to the supreme court for a final decision.

Verdict for the plaintiffs.

Case No. 1,382.

BIAS v. ROSE.

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

Circuit Court, District of Columbia. Dec. Term, 1818.

SLAVERY—DISTRICT OF COLUMBIA—PETITION FOR FREEDOM.

A slave brought into the county of Washington from Maryland, by his owner, and within three years thereafter mortgaged for his full value, does not thereby acquire a right to his freedom.

This was a petition for freedom, submitted to the court by Mr. Key, for [the negro Samuel Bias] the petitioner, and Mr. Jones, for [John Rose] the defendant, upon a case in which it was stated that the petitioner was brought into this county from Maryland, by one Richards, his owner, and within three years thereafter was mortgaged by Richards to W. Bowie, who assigned the mortgage to the defendant, who holds the petitioner under the mortgage. That Richards became insolvent, and was discharged under the insolvent act of the District of Columbia. The petitioner claims his freedom under the act of Maryland of 1796, c. 67, §§ 1–3. The first section is general, and prohibits the importation of slaves to reside, or for sale, and declares that if so imported they shall be free. The second section excepts slaves brought in by citizens of the United States, coming with a bona fide intention of settling in the state; but the third section says that nothing in the act contained shall be construed to enable any person, so removing, to sell or dispose of any slave so imported, unless such person

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

shall have resided within the state three whole years next preceding such sale.

THE COURT (THRUSTON, Circuit Judge, not sitting) was of opinion that the law was against the petitioner, and rendered judgment for the defendant.

BIAYS, (BAXTER v.) See Case No. 1,123.

Case No. 1,383.

BIAYS v. UNION INS. CO.

[1 Wash. C. C. 506.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

MARINE INSURANCE—MISREPRESENTATION AND CONCEALMENT BY ASSURED.

1. It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power, material to the risk, and if he omit to do so, the policy is void.

2. If he communicates all the information he has honestly obtained, he cannot be charged with misrepresentation or concealment, if it should, afterwards, turn out that his informant knew more than he had disclosed, or had not stated it truly.

3. If, for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequences would be the same, as if he had misrepresented the information given to him.

This was a policy on the Mary Ann, at and from Cape Francois to Baltimore. It appeared in evidence by the testimony of Captain West, that he commanded the Mary, and that he left the cape in company with the Mary Ann, and that they continued together until the afternoon of the 8th of September, 1804, when the Mary Ann hove to, in consequence of which, the Mary did so too, the wind blowing fresh. The night was dark; and in the morning the weather continued so thick, that he could not discover the Mary Ann. He continued drifting under reefed sails, till about twelve of the 9th; when supposing that the Mary Ann had shot ahead, he put on more sail, and arrived in six days at Baltimore. The wind blew fresh during the 6th, 7th, and 8th of September. When he arrived at Baltimore, he informed Hannah, the clerk of the plaintiff, that he had left the Mary Ann on the night of the 8th, the wind blowing fresh, which information was put into writing, and shown to Captain West, to say if that contained a true statement of the information he had given. Being approved by West, as containing the information he had given, it was in three days after the arrival of West forwarded to the agent of the plaintiff, with orders to make this insurance. This statement was shown to the defendant, when the insurance was made. West also proved, that when he last saw the Mary Ann, there was no appearance of any thing being amiss with her. The conformity of the statement shown to the defendant, with the information received from West, was proved by the testimony of Hannah. In December, 1804, some time after the arrival of West, his deposition was taken on the part of the defendant; when he swore, that he and the Mary Ann kept company, till the 8th at night, when he left her in a heavy gale, which had blown for the two preceding days; and in July, 1805, when his deposition was taken again, he swore that he gave this information to the plaintiff on his arrival. The Mary Ann has not since been heard of. The ground of defence was, that the representation made to the defendant, was materially variant from the information given to the plaintiff's clerk by Captain West.

WASHINGTON, Circuit Justice, (charged the jury.) It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power, material to the risk; and if he omit to do so, the policy is void. If he communicates all the information which he has honestly obtained, he cannot be charged with misrepresentation or concealment, if it should afterwards turn out that his informant knew more than he had disclosed, or had stated it untruly. I say "honestly obtained," because, certainly, if for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequence would be the same, as if he had himself misrepresented the information given to him. Proceeding upon these principles, I think, that without going farther than I am authorized to do, I may safely say, that if Hannah is believed, there is no ground for the charge of misrepresentation. The difference between the information given to the plaintiff, as stated by West on his examination in court, and that stated in his deposition in July, is material, or not. If not material, then the representation given to the office was substantially true; if material, then the witness, having contradicted himself, if his testimony in court is not more to be believed than that given out of court, he is not to be credited at all as to this point; and of course there is no proof of misrepresentation. But, on the contrary, Hannah proves, that the information given by West was committed to writing examined and approved by him, and this paper was shown to the defendant.

Verdict for plaintiff.

BIAYS, (WESLEY v.) See Case No. 17,419.

BIBB v. The WASHINGTON IRVING. See Cases Nos. 17,243–17,245.

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

Case No. 1,384.

BIBBINS v. BROOKFIELD.

The TOPAZ.

[17 Betts, D. C. MS. 36.]

District Court, S. D. New York. Nov. 12, 1849.

SEAMEN—WAGES—DESERTION—UNSEAWORTHINESS—INSUFFICIENT FOOD—EVIDENCE.

[1. In the absence of proof to the contrary, the presumption obtains that the hiring of a crew is for the return of the vessel to her port and their common port, where the service commenced.]

[Compare Graham v. The Exporter, Case No. 5,667.]

[2. Alleged unseaworthiness of a vessel, or insufficient supply of wholesome provisions for the support of the crew, unless clearly established, will not, in an action for wages, justify a seaman's desertion of his vessel before the completion of the voyage for which he shipped.]

[3. In a libel for wages, to which the defense is desertion, the libellants may show legal cause for such desertion, without alleging same in the libel, since such cause is not the foundation of the action.]

[4. Three weeks' time, consumed mostly in discharging cargo, and in taking another at a port during the progress of the voyage, does not show such an abandonment of the voyage as will justify desertion and a suit for wages at such intermediate port.]

[In admiralty. Libels by William Bibbins and John Wilson, respectively, against John A. Brookfield, master of the brig Topaz, for wages. Both cases were heard together, and the libels were dismissed.]

BY THE COURT. The libel articles upon a shipping contract made in January, 1849, for a voyage on board the brig Topaz from Newburn, North Carolina, to the West Indies, and thence to the port of New York, at $15 per month wages, and charges that the voyage was fully performed, and ended at New York the 15th of May last, and that there is due the libellants therefor the sum of $86, and prays for the production of the shipping articles on the hearing, and for a decree for the wages due him.

The answer denies the contract set up by the libel, and avers the agreement was from Newburn to the West Indies, thence to a port of discharge in the United States, and thence to Newburn; and that the libellant agreed by the shipping articles signed by him to perform that voyage, and not leave the vessel without consent of the commanding officer until the voyage, so to end at Newburn, should be terminated; and that he should not demand or be entitled to the wages, or any part thereof, until the arrival of the vessel at Newburn. That it also stipulates forfeiture for misconduct and insubordination, such as are usually inserted in shipping articles.

The respondent avers that the libellant duly executed the agreement, but denies he ever performed the voyage or was discharged therefrom; that, on the contrary, he deserted at New York, and refused to complete the voyage to Newburn. The respondent also alleges payment of $27.20 towards the wages, and that damages have been sustained by his desertion to the amount of $45. John Wilson, another of the crew, brought his action for wages on the same facts; and, the pleadings and proofs being the same, both cases were heard together. The articles produced by the respondent on the call of the libellants, and to the genuineness of which no objection was made, showed their names inserted as seamen; Wilson on the —— day of January, 1849, and Bibbins on the 9th of the month, each at $15 wages. It stated the voyage to be on board the brig Topaz, of Newburn, North Carolina, to one or more ports in the West Indies; thence back to a port of discharge in the United States; the voyage to end at Newburn. The stipulation in respect to the payment of the wages is in print, and as follows: "It is further agreed that no officer or seaman belonging to the said vessel demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the last abovementioned port of discharge, and her cargo delivered." Admitting the articles to be properly in evidence, this agreement is valid and obligatory so far as respects the time and place of payment. The Walterstorff, [Case No. 7,413;] Brown v. Hull, [Id. 2,018.] But the court will not permit such agreement to divest seamen of their equitable rights to wages from the mere fact of the vessel's not having arrived at the port named where suit is brought. The stipulation is rather to be regarded as one protective of the sound interests of seamen than in derogation of them, and will be enforced in that sense. The Mary Jane, [Id. 9,215.] This engagement is apparently fair and just in respect to the rights of these libellants. It places their earnings at their command at the port where they shipped, and where it will most naturally meet their own necessities or those of their families; and if the discretion was left with the court, no disposition would be left to intermeddle with or change the arrangement. This point must then be conclusive against the maintenance of the action, unless the libellants show legal reason for leaving the vessel before reaching the port of Newburn.

The first mate testifies she discharged her cargo from the West Indies at this port, and took in another for Newburn, and at the time of his examination she was ready to sail for that port. That was about three weeks after her arrival here. No abandonment of the voyage home was accordingly indicated, nor any purpose to postpone or evade the just claims of the libellants to their compensation; and the manifest equity of the case concurs with the rule of law that they were bound to await a reasonable period for the voyage to be completed should she fail ever arriving at her home port before instituting the action.

The libellants attempt to show there was adequate causes justifying their refusal to continue with the vessel, and to entitle them to collect their wages here. The day after she came into port and was exclusively moored, they both left her, and received their wearing apparel, etc., without the consent of the master, and against his positive prohibition. If the voyage was yet in progress, such abandonment of the vessel, unless excused by some of those necessities recognized by the maritime law, would be a desertion, working the forfeiture of all antecedent wages earned. The grounds taken by the libellants are (1) that the voyage terminated at New York; (2) that the ship was not in a seaworthy condition; and (3) that the libellants were not supplied with wholesome provisions sufficient for their support.

The proof is that the vessel was owned in Newburn, and that the libellants had families residing there. They give no evidence other than the shipping articles, and if those articles should be rejected for want of legal proof, the presumption must be that the hiring was for the crew to return in the vessel to her port and their common home port, where the service commenced. The testimony of the crew to the unsoundness and unseaworthiness of the vessel is too slight to justify her condemnation, and it is contradicted by the master, who speaks of her as entirely seaworthy, and denies the rottenness or insecurity of her masts, charged by the libellants. It was not necessary for them to allege those defects in their libel, as they are not the foundation of the action. The suit is for wages, and to the defense thereto of desertion. The libellants may give evidence showing legal cause for leaving the vessel. The exception to the admissibility of the proofs cannot be supported, but the evidence does not amount to the justification claimed from it. I find nothing in the proofs establishing the charge that the crew had not sufficient and proper provisions supplied them. A ship's fare in its best condition will not probably compare with that furnished at the table of respectable boarding-houses or private families in many particulars of preparation, variety, and flavor. It will doubtless be found little attractive or palatable; yet courts will not be disposed to attempt nice criticisms or requirements in those respects. They will see sailors fairly remunerated if straightened improperly in their allowances, or if the provisions are unwholesome or noisome, or cooked in a manner to injure or nauseate the men. Only one witness, and he a libellant, testifies to the bad quality of the provisions.

I am compelled to regard the allegations of the unseaworthiness of the vessel and badness of provisions as gotten up by these black men to excuse their refusal to work the vessel home, and to hold that they have failed to show any reliable evidence of any reasonable excuse for leaving her. Whether, then, the articles be adequately proved or not, these men have not fulfilled their shipping engagement, and as they admit articles were signed, they had no right to leave the vessel until the voyage was completed. Libels dismissed, with summary costs.

Case No. 1,384a.

BIBBINS v. The CITIZEN et al.

[9 Betts, D. C. MS. 14.]

District Court, S. D. New York. March 1, 1847.

SEAMEN—WAGES—ASSIGNMENT—SUIT BY ASSIGNOR.

[A seaman cannot maintain a suit for wages where the pleadings show an assignment of such wages for a bona fide consideration, which has been duly assented to by the owners of the vessel, and in pursuance of which certain payments have been made, none of the parties having received notice to disregard such assignment.]

[In admiralty. Libel by John W. Bibbins against the ship Citizen and Mulford and Sleight for wages. Libel dismissed.]

It appearing to the court, upon the pleadings and proofs in this case, that the libellant, before the commencement of this suit, for a bona fide consideration had duly transferred and assigned to E. Mulford & Co., of Sag Harbor, all his right and interest in the adventure and wages belonging and accruing to him on the whaling voyage in the pleadings mentioned, and had also executed to said assignee a full power to sue for and receive the same. And it further appearing to the court that the owners of said ship, and respondents in this case, had due notice in writing of said transfer and assignment and power, and gave their assent thereto, and have, since the completion of said voyage, accounted with the said assignees therefor, and in part paid and satisfied to them the earnings and compensation accruing to the libellant therein. And it not appearing to the court that the libellant has revoked or rescinded the said transfer, assignment, and power, or forbidden the said assignees and attorneys to act therein, or that the claimants have received any notice from him not to regard or observe the same on their part. It is considered by THE COURT that the libellant has no competent authority to arrest the said ship or the respondents in his own name, or for his benefit, upon the claims aforesaid, and cannot maintain the present action in his own right against the said ship in rem, nor against the respondents in personam.

Wherefore it is ordered, adjudged, and decreed by THE COURT that the libel in this cause be dismissed, with costs to be taxed, and that the said ship be discharged from arrest thereon, unless the said assignees shall, within ten days after notice of this decree, elect to continue and prosecute the action un-

der their aforesaid assignment and power. And it is further ordered, in case such election be made by the assignees, that within the said ten days aforesaid they give stipulation in this cause, according to the course and practice of the court.

BIBBINS, (GARDNER v.) See Case No. 5,222.

BICKET, (UNITED STATES v.) See Case No. 14,590.

Case No. 1,385.

BICKFORD v. The CAROLINE.

[Cited in The Eledona, Case No. 4,340. Nowhere reported; opinion not now accessible.]

BICKFORD, (FRANZ & POPE KNITTING MACH. CO. v.) See Case No. 5,061.

BICKFORD, (UNITED STATES v.) See Case No. 14,591.

Case No. 1,386.

BICKHAM et al. v. LAKE et al.

[Cited in Estes v. Spain, 19 Fed. 716. Since reported in 51 Fed. 892.]

Case No. 1,387.

In re BICKLEY.

[N. Y. Times, May 11, 1865.]

District Court, S. D. New York. May, 1865.

DISTRICT COURT — JURISDICTION OVER POLITICAL PRISONERS—MANDATE TO MILITARY OFFICER.

[1. The United States district court for the southern district of New York had no jurisdiction to act on the petition of a political prisoner who had been imprisoned in Fort Lafayette, in New York harbor, but who was imprisoned in Fort Warren, in Boston harbor, at the time of filing the petition.]

[2. Such court will not issue a mandate to a major general in charge of a military department to leave his immediate post of service, proceed to a remote one, and return from thence a political prisoner confined by order of the president, in order that such prisoner may be brought within the jurisdiction of the court, and receive the relief which the court can administer.]

[At law. Application of George W. L. Bickley on writ of habeas corpus for discharge from custody. Denied.

BETTS, District Judge. On the submission of the annexed files and documents to me by counsel for the respective parties concerned in the foregoing case, and upon their admission that the facts and circumstances connected with the matter thus brought to the attention of the court are truly set forth,—that is to say that the before-named George W. L. Bickley, being a citizen of the state of Ohio, and a citizen and resident of Cincinnati, in said state, for twelve years last past, was arrested at the city of Louisville, in the state of Kentucky, on the 18th day of July, 1863, and by order of the president of the United States, and by order of the secretary of war, was removed, as a state or political prisoner, to Fort Lafayette, in the harbor of New York, about March 20th, 1864, whence he was removed March 14th, 1865, in charge of Major-Gen. John A. Dix, as military commandant of the eastern military department of the United States, by order of the secretary of war to Fort Warren, situated in the harbor of Boston, in the state of Massachusetts, and in the same military department of the east, and is there held and confined, and was so held and confined at the time the order made by the court, on the application of the petitioner in this matter, was served upon the respondent,—upon those facts the respondent (Maj.-Gen. Dix) excepts to the jurisdiction of this court over the case so prosecuted for relief in this court. Other objections have also been taken, on the part of counsel for the respondent, to the legality of the claim of the petitioner that said Bickley be discharged, by means of these proceedings from his imprisonment, which have been discussed by counsel on both sides; but it being considered by the court that the exception taken to the jurisdiction of this court is well taken by the respondent and conclusive against this application and the relief prayed thereupon, I shall pass other points of objection to the maintenance of the present petition and motion, on part of the applicant, without detailed consideration thereof.

The leading feature in the constitution of circuit and district courts in the United States system of jurisprudence is that each court is strictly limited in its capacity and field of action. They exercise little or no inherent or incidental power beyond that of a police or self-protective character, and they possess very rarely any positive or affirmative authority not bestowed upon them by express appointment of law. Border courts in adjoining states, endowed with exactly like functions by statute, cannot interchange or exercise that common authority conferred independently upon each, across the separating line, without an enactment of positive law enabling either to act outside its special lines of demarcation, any more than if the sister states were foreign nationalities to each other. The federal courts established in Vermont have per se, in their constitutional structure and organization, no authority to enforce any description of legal process—monition, subpoena, summons, mandate or other form of control in the way of command or restraint, within the state jurisdiction of New Hampshire, unless a right to exercise such authority be specially conceded by public assent, and grant of the state to which such process is directed, or from particular appointment by act of congress. Ex parte Graham, [Case No. 5,658.] This matter and

the whole procedure on behalf of the prisoner assumes that the arrest and imprisonment of the prisoner was lawful in point of form and substance, and that he can be released therefrom only in accordance with the provisions of the act of congress of March 3rd, 1863, [12 Stat. 755, c. 81, § 1,] on the intervention of a remitting power in the president.

The application to this court is founded manifestly upon the understanding that the prisoner is in actual confinement within the southern district of New York, and for that reason he must obtain his discharge from the interposition of one of the United States courts of this district, as the tribunal which alone can have cognizance of the case, coupled with power to give the remedy which such facts might authorize. The petition avers that the prisoner was arrested at Louisville, Ky., July 18th, 1863, and removed, by order of the president and secretary of war, as a state or political prisoner, to Fort Lafayette March 20th, 1864, "and ever since has been, and is still, held therein as such prisoner." The written issue formed between the petition, and the answer and plea of the respondent, and the facts admitted by counsel, on the hearing, to exist in the case, prove that the prisoner was actually transferred, by order of the secretary of war, from Fort Lafayette, in this district, to Fort Warren, in Massachusetts district, and there imprisoned and confined by order of the secretary of war, and has continued under that confinement since that period. That removal of the prisoner, it is admitted, was with due authority of law, and was perfected previous to the present application being made to this court for the release of the prisoner. It was carried into effect by the express order of the secretary of war, under charge of Gen. Dix as military commandant of the eastern department, which includes both Fort Lafayette and Fort Warren. Gen. Dix personally resides in the city of New York, but is not resident keeper of either fort, and is not otherwise the commander of either than holding both within the compass of his general command of the eastern military department, embracing New York, with the New England states and state of New Jersey.

The gravamen of the wrong alleged to have been received by the prisoner, and which he claims to be protected against and have redressed by the arm and power of the civil law, is his false imprisonment and unlawful detention in confinement in Fort Lafayette, in this state and district. This demand rests upon the assumption that the prisoner, in that manner, is entitled to have administered in this court the like relief to him against illegal acts and doings committed on him through the agency of Gen. Dix within the sphere of his (Gen. Dix's) military authority, in any and every other tribunal of justice comprehended within that command, and that consequently there is no severance or independency of remedies which must be sought for and obtained at diverse and distinct localities, according to the residences of the parties sustaining or inflicting the injuries complained of, or in the jurisdictional competency of the judicatory appealed to for relief. Without regarding the inaccuracy of the petition in this case, stating that the prisoner was then held in confinement in this district on the presentation for his discharge on the 18th of March, 1865, when, upon the proofs, he had been transferred from Fort Lafayette, and imprisoned in Fort Warren on the 14th of March previously, or other statements variant from the actual or legal effect of the proofs in relation to the connection of Gen. Dix with the custody of the prisoner, to be vital or material in point of pleading or on the merits of the petition, it is plain that the gist of the application is that the court is prayed to interpose its judicial powers to release him from his confinement in prison on the commitment complained of, and made by order of the president and secretary of war, and that the essential inquiry is whether, on the merits, and regardless of informalities of procedure in this application, this court can entertain jurisdiction of that matter. The prisoner did not manifest, to any court or judge of this district, any desire to be brought before such court or judge to be discharged from imprisonment, or give proof that notice of the fact of his confinement ever reached a judge or court before the presentation of this petition to this court.

The specific remedy and relief prayed for in the petition is that the judge shall order said G. W. L. Bickley's discharge from imprisonment as such alleged state or political prisoner, and, upon the allegations in the petition, that relief was unquestionably the appropriate and only one personal to him. The penalty upon any officer of the United States for refusing to execute the order of the court, in that respect, imposed by the statute, is not allotted to the prisoner in his recompense. The only effective relief to the prisoner provided by the statute is opening the prison gate by order of the court or judge, and setting him free from his confinement, and that can only be done judicially by a court possessing jurisdiction and power competent to displace all opposition and resistance. The civil authority in that emergency supplants, by right, the military, and the mandate of the court of the United States would also supersede and suppress all local authority in the state of Massachusetts over prisoners confined in her prisons, and discharged therefrom by a jurisdictional order and judgment of a national tribunal in New York. Until such force and operation to foreign process is plainly appointed by a law of congress, or freely conceded by the state of Massachusetts, I cannot adjudge that this court is competent to give the re-

lief asked for, and compel the discharge of the prisoner from Fort Warren, and I accordingly hold that it has no jurisdiction in the matter of this application. A decree to the like import was made in this court in Re Blum, [Case No. 1,572,] on facts of similar character.

There is a manifest incongruity, at a time of flagrant war, for a civil tribunal to issue a mandate to a major-general in charge of a military department, coercing him to leave his immediate post of service and command in which he is placed by the president, and depart to a different and remote one, and return from thence a prisoner confined thereat by order of the commander-in-chief, with a view to replace such prisoner within the official cognizance of the judicial jurisdiction of the district in which his commitment was first made, that the prisoner may there receive the advantage of such relief as the local courts may be qualified to administer to him personally. It seems to me this would lead to a grave intermingling of judicial assumption toward the direction of the war power by the president in the field. and in the actual employment of the military in the service to which they are assigned by express authority of the commander-in-chief.

I am not aware of any power conferred by law on any judge or court to thus transcend and supersede, revoke or vary, the commands of the commander-in-chief to an officer of the army in respect to military services in time of war, and am not disposed to inaugurate a precedent of that character by venturing an order, as judge within this district, that Gen. Dix proceed from his post in New York to Boston, and return the prisoner, Bickley, personally from Fort Warren to Fort Lafayette, here to await and fulfill some judicial order of the court here to be applied for upon the matter proposed to be investigated in respect to his imprisonment. I perceive no further authority to grant the mandate asked in controlling the conduct of Gen. Dix in relation to the imprisonment of Bickley at Fort Warren, or his removal thence to Fort Lafayette. than to give a like order to govern his conduct, provided the petitioner was imprisoned at Halifax. The petition and application on the part of G. W. L. Bickley, the prisoner, is therefore denied by this court.

BICKLEY, (LEIPER v.) See Case No. 8,222.

Case No. 1,388.

The BICKMORE.

District Court, S. D. Florida. Dec. 18, 1865.

SALVAGE—COMPENSATION.

[Where cotton from a stranded vessel was saved and appraised at from $75 per bale for the damaged, to $200 for the dry, the court awarded the salvors 12 per cent. on $118,202, the appraised value of the cotton saved.]

[Cited in Baker v. The Slobodna, 35 Fed. 543.]

[Nowhere reported; no opinion can be found. Decree recorded in 9 Adm. Rec. 87.]

BICKNELL, (BANK OF SOUTH CAROLINA v.) See Case No. 898.

BICKNELL, (BROOKS v.) See Cases Nos. 1,944–1,946.

Case No. 1,389.

BICKNELL et al. v. TODD et al.

[5 McLean, 236;[1] 1 Fish. Pat. Rep. 452; 9 West. Law J. 1.]

Circuit Court, D. Ohio. April, 1851.

PATENTS FOR INVENTIONS—LICENSE TO MAKE AND USE—INCLUDES RIGHT TO REPAIR AND PURCHASE — RESERVATION OF RIGHT TO PROSECUTE FOR INFRINGEMENT—EQUITY—JURISDICTION—DOUBTFUL LEGAL RIGHT.

1. The right to construct a patented machine is distinct from the right to use it.

[Distinguished in Jenkins v. Greenwald, Case No. 7,270.]

2. The right to use necessarily implies the right to repair, and also a right to purchase a machine, when the one in use is destroyed, or too much worn for use.

[Distinguished in Jenkins v. Greenwald, Case No. 7,270. Cited in Steam Cutter Co. v. Sheldon, Id. 13,331.]

3. A patentee may reserve to himself the right to prosecute for piracies, within a district where the right of use is conveyed; but, if he shall afterwards clearly divest himself of that right, by conveying all his interest in the patent, within the particular district, the person who owns the right within the district may prosecute for piracies. It would be unreasonable, under such circumstances, to call upon the patentee to prosecute.

4. If, in the various transfers made, it may be doubtful whether an action at law can be maintained, it affords a ground for the exercise of a chancery jurisdiction.

[In equity. Bill by Bicknell & Jenkins against Todd and others for infringement of letters patent. A decree was rendered for complainants.]

Mr. Coffin, for complainants.

Mr. Norton, for defendants.

OPINION OF THE COURT. This is an application for an injunction. On the 21st April, 1846, Wilson, the assignee of Woodworth's patent for a planing machine, entered into a contract with Bicknell & Jenkins, and on certain conditions expressed, conveyed to them the "exclusive right to make, use, and vend to others to construct and use, during the full term of said letters patent, from this day until the 27th day of December, 1856, machines for planing, tongueing, and grooving boards, upon the principle, plan, and description of the said renewed pat-

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

ent and amended specifications, within the territory of Hamilton county, in the state of Ohio, and so much of the adjacent territory in the state of Kentucky, as lies along and adjoining said Hamilton county, and within five miles of the Ohio river, subject to the following restrictions: First. Hudson and Hughes had purchased a right of Wilson to make and vend to others one machine only, within the city of Cincinnatti. Second. That he had executed several licenses to persons to use machines within the county of Hamilton, on condition that the licensees shall pay fifty cents per one thousand feet, to be renewed in a certain event, securing one dollar and twenty-five cents for every thousand feet of lumber passing through the machine, &c.; and the said Wilson retains the right to license other machines within the territory, so that the aggregate machines within the territory do not exceed thirteen. Third. That the said Bicknell & Jenkins shall not erect for use, use or directly or indirectly authorize to be used within the said territory any machines until the number is or shall be reduced to eight; and when any right of any person to use any of the said thirteen machines shall cease, Bicknell & Jenkins shall not put in operation a machine or machines in lieu thereof until the whole number of machines in operation in said territory shall be reduced below eight; and when so reduced, the number of machines shall be kept at eight."

"Sixthly. Wilson agrees on due notice, to institute and prosecute all actions necessary to secure the monopoly granted by the said patent, within the said territory, at his own expense: and expressly reserves to himself all damages which may occur within said territory; and also an exclusive right to prosecute for piracies therein, and if the business shall be so interfered with by piracies as to affect seriously the benefit of the business, then a reasonable reduction from the amount to be paid shall be deducted on that account and allowed to the proper parties."

These are the only conditions necessary to be considered, in deciding the present application.

Under this contract, Bicknell & Jenkins have a right to make for use, within the district specified, the planing machine, under the restrictions named; and they have also a right to all the receipts under the thirteen licenses granted, they paying to Wilson the sum stipulated. The right to make a machine is distinct from that of using it; and these rights have been treated as distinct by the parties to the contract. This is clear from the words of the contract, and especially from that part of it which reserves the right to Hudson and Hughes to make a machine, which had been granted to them by Wilson.

Bicknell & Jenkins were bound not to make machines for use in the territory designated, until the whole number was reduced to eight; and when so reduced, the number was not to be increased. But how were they to be reduced? The contract declares that "when any right of any person to use any of the thirteen machines shall cease, Bicknell & Jenkins shall not put in operation a machine or machines in lieu thereof, until the whole number shall be reduced to eight." Now the right to use such machines could only cease in one of two ways. First, by a voluntary abandonment; or, secondly, by a refusal to render an account of the work done, and a failure to pay over the compensation or rents as they became due. There is no statement in the bill that either of these contingencies has occurred, in regard to any of the thirteen licenses. It is clear, then, the right to make for use within the district is vested in Bicknell & Jenkins, with the exception only in behalf of Hudson and Hughes who have the right to construct one machine. Many, if not all of the thirteen machines might become useless, and who has the power to replace them? It may be admitted that a licensee may repair his machine, but he cannot construct one. He may have a right to purchase one, for the right of use necessarily implies the right of purchase; but the right to construct, as before remarked, is distinct from the right of use.

The complainants allege that Hinkle, one of the defendants, claims to have a license from Wilson, by which he asserts a right to make said machines within the territory described, and that the other defendants protect themselves under the same license. And the complainants aver that the license of Hinkle is subservient to their contract, and is, consequently, subject to their right. That the defendants have no right under the license to construct a planing machine, and are limited to the right to use such machine. And an injunction is prayed. The license of Hinkle is dated some days after the date of the contract between the complainants and Wilson. The latter having conveyed to the complainants the right to construct machines for use in the district specified, he could convey no right subsequently to Hinkle to do the same thing. In the contract there was no reservation in behalf of Hinkle, as in the case of Hudson and Hughes; although their right to build a machine was prior to the contract.

An objection is made that the complainants have no right to maintain a suit against the defendants for piracy, Wilson having reserved in the contract an exclusive right to prosecute for piracies, on notice, &c. On the 2d of July, 1849, Wilson, for a valuable consideration, "assigned to Elisha Bloomer, all his right, title, and interest, in said patent, within the district described." Prior to this, Bicknell had assigned to Bloomer one half of his contract made with Wilson, in conjunction with Jenkins. But afterwards, on the 1st September, 1849, Bloomer assigns to Bicknell, in consideration of the sum of three

thousand dollars, "all his remaining exclusive right to build the Woodworth planing machine, within the territory conveyed to the said Elisha Bloomer by Wilson," &c.

From the above, it appears that Wilson has become divested of all interest in the patent, within the territory described; and that Bicknell, in relation to the contract with Wilson, by himself and Jenkins, has a right to claim his equal share of the benefits arising under that contract. Under such circumstances, it would be useless to give notice to Wilson to bring suit under the contract. He has now no interest in the matter, and of course should not prosecute. It is not doubted that a patentee or his assignee, in transferring a part of the patent, may reserve the right to prosecute for piracies. He is interested in the entire patent, and any suit for a violation of it may involve the validity of the right claimed. But this question arises under the contracts referred to.

The bill in this case applies for an injunction, on the ground that the defendants have no pretense of right to construct the machine, and consequently that the act complained of violated that part of the patent right which was conveyed to plaintiffs. This is the only ground on which the jurisdiction of this court can be sustained. I have entertained great doubts whether the plaintiffs have not an adequate remedy at law, and if so, relief in chancery should not be given. And I am induced to sustain the jurisdiction principally on the ground that from the assignments and re-assignments, it may be doubtful whether an action at law can be brought so as to obtain relief for the injury complained of. The right, I think, is clearly in the complainant to construct the machines for planing plank, within the district specified, and the right is infringed by either of the lessees making for themselves or others a machine. An injunction is allowed as prayed in the bill.

[NOTE. This patent was granted to William Woodworth December 27, 1828, for a planing mill; reissued, No. 71, July 8, 1845; also reissued in 1871.

[These patents have been the subject of litigation in the following cases: Gibson v. Van Dressar, Case No. 5,402; Brooks v. Fiske, 15 How. (56 U. S.) 214; Pitts v. Edmonds, Case No. 11,191; Wilson v. Barnum, Id. 17,787; Motte v. Bennett, Id. 9,884; Olcott v. Hawkins, Id. 10,480; Brooks v. Bicknell, Id. 1,944; Brooks v. Jenkins, Id. 1,953; Washburn v. Gould, Id. 17,214; Wilson v. Rousseau, 4 How. (45 U. S.) 646; Woodworth v. Wilson, Id. 712; Woodworth v. Hall, Case No. 18,016; Gibson v. Betts, Id. 5,390; Van Hook v. Pendleton, Id. 16,851; Woodworth v. Hall, Id. 18,017; Smith v. Mercer, Id. 13,078; Gibson v. Harris, Id. 5,396; Woodworth v. Edwards, Id. 18,014; Sloat v. Patton, Id. 12,947; Barnard v. Gibson, 7 How. (48 U. S.) 650; Bloomer v. McQuewan, 14 How. (55 U. S.) 539; Bloomer v. Millinger, 1 Wall. (68 U. S.) 340; Bloomer v. Gilpin, Case No. 1,558; Bloomer v. Stolley, Id. 1,559; Brooks v. Norcross, Id. 1,957; Brooks v. Bicknell, Id. 1,945, Id. 1,946; Brooks v. Stolley, Id. 1,962; Brown v. Shannon, 20 How. (61 U. S.) 55; Dean v. Mason, Id. 198; Foss v. Herbert, Case No. 4,957; Gibson v. Cook, Id. 5,393; Gibson v. Barnard, Id. 5,389; Gibson v. Gifford, Id. 5,395; Jenkins v. Greenwald, Id. 7,270; Livingston v. Woodworth, 15 How. (56 U. S.) 546; Lippincott v. Kelly, Case No. 8,381; Ritter v. Serrell, Id. 11,866; Simpson v. Wilson, 4 How. (45 U. S.) 709; Van Hook v. Pendleton, Case No. 16,852; Wilson v. Sherman, Id. 17,833; Wilson v. Simpson, 9 How. (50 U. S.) 109; Wilson v. Barnum, 8 How. (49 U. S.) 258; Wilson v. Stolley, Case No. 17,839; Wilson v. Turner, Id. 17,845; Wilson v. Rousseau, Id. 17,832; Brooks v. Stolley, Id. 1,963; Wilson v. Stolley, Id. 17,840; Woodworth v. Cook, Id. 18,011; Woodworth v. Sherman, Id. 18,019; Woodworth v. Stone, Id. 18,021; Woodworth v. Weed, Id. 18,022; Woodworth v. Curtis, Id. 18,013.]

Case No. 1,390.

BICKNER v. The WILLIAM D.[1]

District Court, S. D. New York. May 1, 1856.

SEAMEN—WAGES—VESSEL SAILED ON SHARES.

[In admiralty. Libel by William Bickner against the schooner William D. for seaman's wages, amounting to $33. Dismissed.]

Mr. Haskett, for libellant.

Mr. Whedon, for claimant.

HALL, District Judge. The libellant knew at the time he shipped that the vessel was run, and victualed and manned by the master, on shares, and that the general owner had nothing to do with the hiring or paying of the seaman. He also declared, subsequently, that when a vessel was running on shares as that was, the seaman could not libel the vessel, and I therefore conclude that he so understood it, and rendered his services on the credit of the master, and not on that of the ship. Libel dismissed, with costs.

Case No. 1,391.

Ex parte BIDDLE et al.

[2 Mason, 472.][2]

Circuit Court, D. Massachusetts. May Term, 1822.

COURTS OF THE UNITED STATES — JURISDICTION — DIVERSE CITIZENSHIP — REMEDIES UNDER STATE STATUTES.

1. The circuit court of the United States has jurisdiction in a case between citizens of different states, to sustain a petition for partition, according to the statutes of Massachusetts for partition of lands among tenants in common.

[Cited in Clark v. Sohier, Case No. 2,835; Perry Manuf'g Co. v. Brown, Id. 11,015.]

[2. All the remedies given by the laws of a state may, as a general rule, be pursued in the federal courts sitting in such state.]

[Cited in Cleveland v. La Crosse & M. R. Co., Case No. 2,887; Ex parte McNiel, 13 Wall. (80 U. S.) 243; U. S. v. Block 121, Case No. 14,610; Griswold v. Bragg, 48 Fed. 520; Davis v. James, 2 Fed. 621; Stansell v. Levee Board of Miss. Dist. No. 1, 13 Fed. 851.]

Petition [of Clement C. Biddle and others] for partition among tenants in common, un-

[1] [Not previously reported.]

[2] [Reported by William P. Mason, Esq.]

der the statutes of Massachusetts, of 11 March, 1784, c. 41, and 14th of February, 1787, c. 53.

Aylwin, for certain persons appearing as respondents, moved the court to dismiss the suit for want of jurisdiction, on the ground that this was a statute remedy, limited by the terms of the statute to the state courts.

W. Sullivan, contra.

[Motion to dismiss denied.]

STORY, Circuit Justice. The motion to dismiss this proceeding is founded upon the notion, that a petition for partition is a statute remedy, which is confined by the terms of the statutes to the state courts, and the argument is, that if so, it cannot be pursued in any other courts. It is certain, that the statutes confine this remedy in terms to the state courts; and so they do all other remedies, for no state legislature can be presumed to legislate, as to remedies, except in its own courts. If the argument be well founded in this case, it will have a most material bearing upon the jurisdiction of the courts of the United States, and shut out parties, who are entitled to sue, from almost all the most useful remedies, which the lex loci has provided for the protection of their rights. I have bestowed a good deal of reflection upon this subject, and am satisfied, that parties entitled to sue in the courts of the United States are in general entitled to pursue in such courts all the remedies for the vindication of their rights, which the local laws of the state authorize to be pursued in its own courts. It appears to me, this is the necessary result of the general principles of law, applicable to the organization of the courts of the United States. The process used in these courts is, in general, the same as in the state courts; and the laws of the states are expressly declared to be rules of decision in trials at common law in cases, where they apply. And the same doctrine must have been held without this express provision, and must now be implied in all suits, where the lex loci is to regulate the rights or remedies of parties. Infinite mischiefs would, upon any other principle, arise in the administration of justice; for there is scarcely a single right or remedy, which has not been materially changed and modified by the state legislatures. The whole structure of our judicial establishment manifestly contemplates, that in cases within the reach of their jurisdiction the courts of the United States are to administer the same remedial justice, that would be administered in the proper state courts. The 12th section of the judicial act of 1789, c. 20, [1 Stat. 79,] authorizes an alien, or a citizen of another state, who is sued in a state court, to remove the suit into the circuit court of the United States; and provides that "the cause shall there proceed in the same manner, as if it had been brought there by original process." —These terms certainly suppose, that every suit instituted in a state court, which might be removed from it, might be originally commenced in the circuit court; yet such suit might be altogether founded on a statute remedy, provided for and limited in terms to the courts of the state. Such in point of fact was the case of Wilson v. Mason, 1 Cranch, [5 U. S.] 45, founded on a summary proceeding, under a caveat, which, by the express provision of the state laws, was limited to the state court. Yet, although the jurisdiction of the supreme court was assailed on another ground, no objection of this nature was made to the jurisdiction of the district court, into which the suit was removed from the state court; and if there had been any validity in the objection, in a cause so earnestly and ably contested, it is scarcely possible, it should have escaped both the bar and the bench. If this petition had been brought by the respondents in a state court, the plaintiffs might certainly have removed it into the circuit court; and yet the very objection now urged would have applied as forcibly to that as to this case. It might then have been argued, that the remedy was limited to the state courts, and could not be enforced elsewhere; and that the suit could not be brought into the circuit court by original process, and therefore could not be removed there. I do not perceive the slightest difference in principle between the cases. If the special nature of the remedy would not prevent the removal of the suit; neither would it prevent its being pursued originally in this court. In this view the case already cited seems to me an authority fully in point, in support of our jurisdiction.

There is another objection, however, which appears to me entitled to more weight. To sustain the jurisdiction of the court it is necessary, that the suit should be between citizens of different states, or an alien should be a party. Here the petition states no adverse parties. It alleges, that the adverse parties are unknown, and only avers, that the plaintiffs are informed, and believe them to be citizens of Massachusetts. This is not sufficient; the parties should be named, and their citizenship or alienage averred on the record. But this objection is cured by the appearance of the respondents, who admit themselves to be citizens of Massachusetts, and aver an adverse interest, and, non constat, that there are any other adverse interests in the case. Upon the whole, I overrule the motion for dismissal of the suit.

Motion overruled.

BIDDLE, (BAKER v.) See Case No. 764.

BIDDLE, (TSCHEIDER v.) See Case No. 14,210.

Case No. 1,392.

In re BIDWELL.

[2 N. B. R. 229, (Quarto, [1868,] 78.)] [1]

District Court, N. D. New York.

BANKRUPTCY—DISCHARGE — PERSONAL AND PARTNERSHIP DEBTS—AMENDING PETITION.

[Where a bankrupt is liable for both personal and partnership debts, his petition for discharge, individually, may be amended so as to cover the partnership debts.]

[Cited in Re Marks, Case No. 9,094, and Re Johnston, 17 Fed. 72.]

[In bankruptcy. This was an application for leave to amend petition for discharge. Granted.]

Mr. Ganson, for the petitioner, stated that the petition in this case had been prepared for the discharge of the petitioners individually, but that nearly all the debts were those contracted as the firm of Bidwell, Banta & Co., that the petitioner was the surviving partner of that firm, the other members having died insolvent. He was in doubt whether a discharge granted upon the petition as now drawn and filed, would work a discharge of the petitioner from his debts as one of said firm as well as individually, and he therefore presented a petition of Mr. Bidwell asking the opinion of the court thereon, and for leave to amend the petition and its prayer, if considered necessary.

HALL, District Judge, remarked that without examination and without being bound by what he should say, he was of the opinion that a discharge granted on the petition filed would discharge the petitioner from his co-partnership as well as individual liability, but it would certainly be safer to amend the petition, and he granted the desired order.

BIDWELL, (BARRAS v.) See Case No. 1,039.

Case No. 1,393.

BIDWELL v. CONNECTICUT MUT. LIFE INS. CO.

[3 Sawy. 261.] [2]

Circuit Court, D. California. Dec. 21, 1874.

PLEADING—LIFE INSURANCE POLICY.

Where, by the express terms of the policy, "the proposals, answers and declarations" made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded upon the policy.

[See note at end of case.]

[At law. Action by Anna R. Bidwell against the Connecticut Mutual Life Insurance Company to recover on a policy of insurance. Defendant demurs. Demurrer sustained.]

[1] [Reprinted by permission.]

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

Beatty & Denson, for plaintiff.

Doyle & Barber, for defendant.

SAWYER, Circuit Judge. Action upon a life insurance policy. The complaint contains a copy of the policy, but does not set out, either in haec verba or in substance, the "proposals, answers and declarations" made by the applicant upon which the policy was issued. The policy set out contains the following clause: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declarations made by the said Alanson C. Bidwell, and bearing date the fifteenth day of November, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void." The defendant demurs, on the ground that the complaint is uncertain and insufficient, it appearing upon its face that the entire contract is not set out. I think this point well taken. It is well settled that under the provision of the policy cited, the proposals, etc., are not mere representations made as inducement to enter into a contract, but are warranties and a part of the contract itself. Miles v. Connecticut Mut. Life Ins. Co., 3 Gray, 580; 1 Bigelow, 173; Ryan v. World Mut. Life Ins. Co., 4 Ins. Law J. 37; Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381; Tebbetts v. Hamilton Home Mut. Ins. Co., 1 Allen, 305; McLoon v. Commercial Mut. Ins. Co., 100 Mass. 472; Kelsey v. Universal Life Ins. Co., 35 Conn. 235; Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 227; Lycoming Mut. Ins. Co. v. Saile, 67 Pa. St. 108; Rogers v. Charter Oak Life Ins. Co., Sup. Ct. Conn., [41 Conn. 97.] The application being a part of the contract, it is necessary to set it out in the complaint; otherwise it does not appear what the contract is. Bobbitt v. Liverpool & L. & G. Ins. Co., 66 N. C. 70; Steph. Pl. 132; Gould, Pl. c. 4, § 28; 1 Chit. Pl. 236.

The demurrer must be sustained, and it is so ordered.

[NOTE. The principal case evidently established the California practice, since it was followed in Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123, which state case was subsequently approved, but distinguished in Tischler v. California Farmers' Mut. Fire Ins. Co., 66 Cal. 178, 4 Pac. 1169. The contrary doctrine, however, has been held in Jacobs v. National Life Ins. Co., 1 MacArthur, 632, 4 Ins. Law J. 339; Mutual Ben. Life Ins. Co. v. Cannon, 48 Ind. 264; Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35. In Georgia, where, by statute, it is unnecessary to set out the application in the complaint, it has been held in Travelers' Ins. Co. v. Sheppard, (Ga.) 12 S. E. 18, that the policy is admissible in evidence without the application on which it was issued. In Indiana and North Carolina the courts hold that it is unnecessary to set out the application as a part of the contract, under state statutes allowing a general allegation of performance by plaintiff of conditions precedent. Pennsylvania Mut. Life Ins. Co. v. Wiler, 100 Ind. 92; Northwestern

Mut. Life Ins. Co. v. Hazlett, 105 Ind. 212, 4 N. E. 582; Britt v. Mutual Ben. Life Ins. Co., 105 N. C. 175, 10 S. E. 896. And Act Pa. May 11, 1881, (P. L. 20,) requires a copy of the application to be attached to the policy, and renders the application inadmissible in evidence if not so attached. See New Era Life Ass'n v. Musser, 120 Pa. St. 384, 14 Atl. 155; Norristown Title, Trust, etc., Co., v. Hancock Mut. Life Ins. Co., 132 Pa. St. 385, 19 Atl. 270.

[A substantially similar question has arisen in several cases as to the necessity of the insured to introduce the application in evidence; and it has been held in Mutual Ben. Life Ins. Co. v. Robertson, 59 Ill. 123, and Suppiger v. Covenant Mut. Ben. Ass'n, 20 Bradw. 595, that it is unnecessary, and in Pennsylvania Mut. Aid Soc. v. Corley, 2 Penny. 398, that a policy, referring to an application as part of it, is inadmissible in evidence, without either producing the application or accounting for it.]

BIDWELL, (UNITED STATES v.) See Case No. 14,592.

BIEDENFELD, (FRESE v.) See Case No. 5,111.

Case No. 1,394.

In re BIELER.

[7 N. B. R. 552.][1]

District Court, N. D. New York. Feb. 15, 1873.

BANKRUPTCY — DISCONTINUANCE OF PROCEEDINGS —SETTING ASIDE STIPULATION—FRAUD.

[Where a bankrupt gives a receipt and release under seal to his assignee in a settlement out of court, and a stipulation is filed discontinuing the bankruptcy proceedings, the bankrupt court has power to set aside the stipulation on proof that it was obtained from the bankrupt by fraud, or given under a mistake of fact; but such court will not do so until the bankrupt has sought and obtained relief in a court having jurisdiction to set aside the release for fraud, or to award damages.]

[In bankruptcy. Application of Francis J. Bieler, a bankrupt, to set aside a stipulation discontinuing bankruptcy proceedings. Denied.]

HALL, District Judge. This is an application upon the petition of the bankrupt for an order setting aside the stipulation of the bankrupt and other parties which provided for an absolute dismissal of the proceedings in this case. The petition also prays for such other order as to the court shall seem meet, on the grounds disclosed in the petition and affidavits on which the application is made.

The proceedings herein were commenced on the 21st of August, 1872, by the filing of the voluntary petition of the bankrupt, and Truman N. Burrill was appointed a special receiver of the bankrupt's property before the election of an assignee. He was subsequently, and on the 23rd of October, 1872, appointed the assignee herein, which appointment was approved the next day. Before this, and on the 24th of September, 1872, the bankrupt had presented his petition, showing that he had obtained the consent of all his creditors to a compromise and settlement of their claims against him for fifty cents upon the dollar, and praying for an order that the proceedings herein should be discontinued and authorizing the receiver to pay over the money and property in his hands to the bankrupt. An order for the creditors of the bankrupt to show cause against the prayer of said petition on the 22nd of October, 1872, was made upon said petition, but the final hearing thereon was not had until the 13th of November, 1872, when, on motion of the counsel of the bankrupt, it was ordered that all proceedings in the above entitled matter be dismissed upon the filing of the report of the receiver and assignee that all costs and disbursements, and his fees, disbursements and compensation herein are paid, and referring it to O. H. Marshall, Esq., to take proof and determine the amount of such costs, disbursements, fees and compensation, and directing that after the payment thereof, the remainder of the money and property of the bankrupt that had come to the hands of the receiver and assignee should be paid and delivered to the bankrupt. Instead of proceeding under the last mentioned order, the attorney of the bankrupt, on the 26th of November, 1872, presented to the court and filed a stipulation signed by himself as attorney for the bankrupt, and of the assignee of the creditors, and also by the attorney of the receiver and assignee, reciting that the accounts and claims of the assignee had been adjusted and arranged between the bankrupt, creditors, assignee and receiver, and stipulating that the proceedings in this case be discontinued absolutely; and that an order to that effect be entered, as of course, on filing the stipulation. On this stipulation, thus filed, the court granted the order for an absolute discontinuance, as shown by the minutes of the judge and clerk, but it does not appear that the order, if even drawn out and signed, is now on file. After this and on the 17th day of December, 1872, the counsel for the bankrupt applied on his petition for an order that the assignee and receiver account before O. H. Marshall, Esq., and pay over, &c. But the court denied the application on the ground that the proceedings had been dismissed upon the stipulation and application of the bankrupt, and the court had lost jurisdiction of the case, but it does not appear that any order in accordance with such decision has been drawn up or filed.

The petition on which the present application is founded states many of the proceedings in this matter, and that after the making of the order of November 12th, 1872, the assignee and receiver delivered to the bankrupt goods, money and property, and that he, believing the said goods, property and money so returned to be all that was due to

[1] [Opinion reprinted from 7 N. B. R. 552, by permission.]

him, signed a receipt to the receiver and assignee therefor. The petition then charges fraud and errors on the part of the receiver and assignee, that the stipulation given by the attorney of the bankrupt for the absolute discontinuance of the proceedings herein, as aforesaid, was entered into without his knowledge or consent, and improvidently and without a full knowledge of the facts; but it does not set forth any particulars of the accounts and statements upon the faith of which the receipt of the bankrupt was given, or give any specific and precise information in respect to any fraudulent, false or mistaken entry in the accounts of said receiver and assignee, or of any omission or error therein, such as should be made in a bill or petition for opening an account settled and adjusted between the parties in controversy. It is accompanied by an affidavit of James J. Bain that he has been acting as clerk of the bankrupt and of the receiver and assignee for six months last past, and has had access to the books of the said Bieler and said Burrill; that the material facts stated in the petition are true, and that the said Truman N. Burrill has retained in his hands large quantities of furniture and goods belonging to said Bieler, and has not accounted for the same or has sold the same and applied the proceeds to his own use; but he fails to make any particular and specific statement of any particular fraudulent, false or mistaken entry, or of any omission or inaccuracy in the accounts of the receiver and assignee. In opposition to the application, the attorney of the receiver and assignee, states by affidavit that he "was present at the final settlement between said Burrill and said Frank J. Bieler of the moneys and property in the hands of said receiver and assignee; that after the order dismissing the above entitled proceedings was made the said Burrill and Bieler accounted together of and concerning the moneys and property in the hands of said Burrill as receiver and assignee, and it was agreed between them what sum of money should be paid by said Burrill to said Bieler, and what property should be delivered &c.; and that on payment being made to Bieler he executed a receipt and release under his seal entitled in these proceedings in these words:

"Received of Truman N. Burrill, assignee and special receiver, full payment for all money and property which has come to his hands as such special receiver, also as assignee, and I do hereby release and discharge him from all claims and demands whatsoever. Witness my hand and seal, November 20th, 1872, (signed) F. J. Bieler," and such affidavit also states "that it was agreed that such settlement was full and final of all claims of every kind against said Burrill in favor of said Bieler arising out of said Burrill's receivership and assigneeship in the above entitled proceeding."

The affidavit of the receiver and assignee read in opposition to the application states the settlement and the giving of the receipt and release substantially as stated in the affidavit of his attorney, but states more fully the negotiations and examinations which preceded it, and it must be considered as a full denial of all the material allegations upon which the bankrupt's application is based, whether contained in the bankrupt's petition or the affidavit of Bain.

On the merits, then, no relief could be granted to the bankrupt until proof of his allegations had been made, but a reference might, perhaps, have been proper to ascertain the facts in issue between the parties, if there were not other grounds for denying the application. That this court might set aside the stipulation of the 26th day of November, 1872, upon satisfactory proof that it was obtained by fraud or given inadvertently and improperly, under a mistake of fact, is not doubted, but to do this without also setting aside the release of the 20th of that month would be of no service to the bankrupt. The stipulation was given in the bankruptcy proceedings, and for use in this court, and must be to some extent under its jurisdiction and control; but the execution of the receipt and release, though they were for the purposes of description entitled in the case, was an act between the parties to this application, carrying out a settlement privately made by the parties out of court, notwithstanding the prior order of the court providing for a reference and judicial settlement of the accounts of the receiver and assignee. Such receipt and release has never been filed and was probably never intended to be filed in this court, and it was not given or received under any order of the court. The parties chose to settle the matter themselves, rather than to have it settled under the reference. The proceedings in bankruptcy, so far as any question peculiar to the jurisdiction of the bankruptcy court was concerned, had already been closed; and the bankrupt's own attorney, in execution and fulfilment of the intention of the parties when the release was executed, obtained, upon a stipulation of the attorneys of the parties to this application, an order of the court for the absolute dismissal of the proceedings. The case has therefore passed out of the jurisdiction of the bankruptcy court, and even if I had the power I should not feel inclined to reinstate it and take jurisdiction of the new controversy which has arisen since the proceedings in bankruptcy were substantially terminated, and which is more proper for the consideration of a state court than of the court in bankruptcy.

It was urged, in support of the motion, that the bankrupt could only seek his remedy in this court because the state courts had no jurisdiction to set aside a stipulation entered into in this court; but, conceding that the state courts have no jurisdiction to set aside the stipulation for the absolute discon-

tinuance of the proceedings, it is considered that the stipulation would furnish no defence to an action in a state court. It only provides for the discontinuance of the proceedings here, and it is the receipt and release and not the stipulation which must be avoided (by reason of the alleged fraud,) by proceedings in a state court, or else the bankrupt must sue for the fraud by which he alleges it was obtained. If the bankrupt has any right of action against the receiver and assignee to set aside the settlement and release, as he alleges, it is for fraud or mistake in the settlement and procuring of the release, and not for any act which the receiver or assignee has done or omitted as an officer of this court. He can file his bill to set aside the release or sue the assignee for the fraud in a state court, but this court will not take jurisdiction of the controversy.

The motion or application will be denied, but without prejudice to any suit or proceeding which the bankrupt may institute in any court having jurisdiction, and the counsel for the assignee will be entitled to take a similar order in pursuance of the denial of the former application, and also to have drawn up and signed the order of absolute discontinuance directed on the filing of the stipulation of November 26th, 1872.

BIESENTHAL, In re. See Cases Nos. 1,235 and 1,236.

Case No. 1,395.

In re BIGELOW et al.

[2 Ben. 469;[1] 1 N. B. R. 667, (Quarto, 202.)]

District Court, S. D. New York. June 23, 1868.

BANKRUPTCY—LIEN OF CREDITOR—BANK STOCK.

Where bankrupts, at the time of the adjudication in bankruptcy, were indebted to a bank, in which they severally owned stock, and the by-laws of the bank provided that the stock of stockholders should be liable for their debts to the bank: *Held*, that the bank had a lien upon the stock, and had the right to apply it toward such indebtedness, whether it was an indebtedness of the bankrupt firm, or of the individual stockholders.

[Cited in Knight v. Old Nat. Bank, Case No. 7,885.]

[See note at end of case.]

[In bankruptcy. In the matter of Edward Bigelow, David Bigelow, and Nathan Kellogg, composing the firm of E. & D. Bigelow, involuntary bankrupts. For further proceedings, see Case No. 1,396.]

[2] [By THEODORE B. GATES, Register:

[I, one of the registers in said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause the following questions arose and were stated, and the facts in relation thereto agreed to by the counsel for the opposing parties as follows, to wit: by Jacob H. Dubois, who appeared for Elijah Dubois, the assignee in bankruptcy of the above named bankrupt, and Peter Cantine, who appeared for the First National Bank of Saugerties, a creditor of said bankrupts, individually and as partners. The First National Bank was duly organized as a national bank in the year 1865, under the provisions of the act of congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, [13 Stat. 99.] That an adjudication in bankruptcy in the above matter, upon the petition of a creditor, was made against the above named bankrupts, individually and as copartners, on the 16th day of November, 1867. That on the said 16th day of November, 1867, and prior thereto for two years and upward, David Bigelow and Nathan Kellogg were each stockholders in said bank, and each owned twenty shares of the capital stock thereof, amounting to the sum of $2,000 each, and said stock was standing in their respective names on the books of said bank on the sixteenth day of November, and still so stands there. That on the 16th of November, 1867, David Bigelow was indebted to the said bank individually, the amount of a note which became due November 8, 1867, in the sum of $637.46, which still remains unpaid. On the 16th November, 1867, Nathan Kellogg was indebted to said bank individually upon notes which had matured at different times between October 15th and November 13th, 1867, in the sum of $2,971.22, which still continue due and unpaid; that the total liabilities of Nathan Kellogg individually to said bank on the said 16th day of November, 1867, were $8,048.41. That said bank is a creditor of said bankrupts as copartners to the amount of $14,745.28, of which amount the sum of $5,788.38 matured on the 6th day of October, 1867, and was due on and before the 16th day of November, 1867. The said bank claims to have a lien upon said stock so held by the said Nathan Kellogg and David Bigelow, and to apply the same towards the payment of the indebtedness to said bank as aforesaid, which was due on the 16th day of November last as aforesaid, and refuse to transfer said stock to the assignee of said bankrupts upon the books of said bank; that said bank stock has not been sold; that the bank claims such lien under and by virtue of the provisions of the by-laws of said bank.

[The assignee and other creditors of said bankrupts, on the other hand, claim that the bank has no such lien, that the by-laws, if valid, do not in fact create or give any lien or preference to said bank upon said stock, for the payment or security of such indebtedness or any part thereof: and if the by-laws do in terms give or contemplate a lien or preference in behalf of said bank over the other creditors, they are void and of no ef-

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

[2] [From 1 N. B. R. 667.]

fect as being in contravention of the 35th section of the act of congress aforesaid, [13 Stat. 110; Rev. St. 5201,] under which the said bank was incorporated as aforesaid, and which section is as follows: "Sec. 35. And be it further enacted, that no association shall make any lien, or discount, on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of this act."

[That, in the fifth clause of the articles of association of said bank, under which they were organized as a banking association, under the provisions of the act of congress aforesaid, it is provided, in the recital of the powers of the directors of said bank, that they shall, among other things, have power "generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid, and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under the said act, for the general regulation of the business of the association, and the entire management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal debtor or otherwise, without the consent of the board."

[That on the 17th day of April, 1865, the comptroller of the currency gave to said bank the usual certificate of its organization as a national institution, under and according to the requirement of the act of congress aforesaid; that on the 11th day of July, 1865, the directors of said bank passed the following resolution: "Resolved, that we adopt the articles of association of the old Bank of Ulster as by-laws." That the said articles of association so covered by said resolution as aforesaid, contain the following provisions:

["Sec. 3. This association shall not under any pretence loan money on a pledge of shares of the capital stock of the association, but this shall not be so construed as to prevent the association from applying the shares of any individual shareholder in manner hereinafter named, toward the payment of a bona fide debt, which said shareholder may owe to the association.

["Sec. 4. The association and the board of directors hereinafter mentioned shall have power (whenever any shareholder thereof shall owe a debt then due to the association and which shall have been due and unpaid for the space of three months) to give notice to such shareholder that if such debt be not paid and satisfied at the expiration of ten days from the time of such notice, the shares of the capital stock of this association held by such shareholder or standing in his name, or so much thereof as may be necessary, will be sold in satisfaction of such debt, and if at the expiration of said ten days the said debt of such shareholder shall remain due and unpaid, the board of directors hereinafter mentioned shall have full power and authority to proceed and sell the shares held by such shareholder, or such part thereof as shall be sufficient to pay such indebtedness, either at the board of brokers in the city of New York, or at public auction in the village of Ulster, and to appropriate the proceeds of the sale, if of sufficient amount, in satisfaction of such debt, and, if not of sufficient amount to pay the whole debt, then toward, and on account of, such indebtedness.

["Sec. 5. No shareholder of this association shall be permitted to transfer his share, or receive a dividend or interest thereon, who shall owe to the association a debt, which shall have become due and have remained, for the space of one day, unpaid, until such debt be paid, unless by and with the consent of the board of directors of the association hereinafter mentioned, and any transfer made contrary to the provisions of this article shall be null and void.

["Art. 5, sec. 1. The board of directors shall cause suitable books to be kept for the registry and transfer of the shares of the association, and every transfer to be valid shall be made in such books and signed by the shareholder, or his attorney duly and specially authorized thereunto in writing.

["Sec. 2. No shares shall be transferred on which any call for an instalment of capital, or any interest on such instalment shall remain unpaid.

["Sec. 3. Every transfer shall be made and taken expressly subject to all the conditions and stipulations contained in these articles; and every person becoming a shareholder by such transfer shall in proportion to his shares succeed to all the rights and liabilities of prior shareholders.

["Sec. 4. The board of directors may close the transfer books at any time for a period not exceeding ten days, as the convenience of the association may require."

[The articles of association of said bank were signed, sealed and acknowledged by, among the other corporators, the said David Bigelow, Edward Bigelow, and Nathan Kellogg severally. As the bank claimed this lien upon the stock, the bank and the assignee agreed upon a statement of facts raising an issue of law, which the register adjourned with cause, giving the following opinion:

[Opinion of the Register:

[I am, therefore, of opinion, that under given circumstances, the national bank may take the shares of one of its stockholders even against his will, but whether the present is such a case, I have very serious doubt.

[The Bigelows, and Kellogg, were adjudicated bankrupts, as appears by the annexed papers, on the 16th day of November, 1867, and on the petition of the First National Bank of Saugerties. The indebtedness set out in the case agreed upon and hereto annexed had mostly accrued prior to that time. The assignee was not appointed until the 25th January, 1868.

[The articles of association vest in the board of directors power in certain cases to take certain specific measures to attach and enforce their lien; this lien does not proceed of its own vitality, but the officers of the bank must set it in motion, or they gain nothing by it. It is a right reserved in favor of the bank, if the bank elects to avail itself of it, in the prescribed mode. But if it does not, the debtor is not divested of his title, and if another claimant appears under authority of the law, after the bank might, but before it has taken any step to attach its lien, I doubt whether the second is not the superior claimant. Here the bank seems to have taken no action to establish its right to the stock in question. In the mean time the assignee, by operation of law, became vested with title to all the property, both real and personal, of the bankrupt. He interposes in behalf of the creditors, and claims this stock as part of the assets of the bankrupts. Opposed to this claim the bank sets up its dormant lien, which I think was terminated by the non-action of the bank itself, and the appointment of the assignee in bankruptcy.] [3]

BLATCHFORD, District Judge. I think the bank has a lien upon the stock so held by Kellogg and Bigelow, and has the right to apply the same toward the payment of the indebtedness to the bank which was due on the 16th of November, 1867, as well the individual indebtedness as the copartnership indebtedness.

[NOTE. A similar decision was rendered by Mr. Justice Clifford in the circuit court for the Rhode Island district in 1871, in Knight v. Old Nat. Bank, Case No. 7,885; but the supreme court has since taken a different view of the question, in Bullard v. National Eagle Bank, 18 Wall. (85 U. S.) 589. In this case, the association was also organized under the act of June 3, 1864, (13 Stat. 99.) A by-law, duly authorized by the articles of association, made all debts due from stockholders a lien upon their stock. The trustee of a bankrupt stockholder, indebted to the bank, brought suit against the bank for refusing to allow a transfer of the stock until such indebtedness had been discharged. In the circuit court there was a division of opinion and, among others, the following question was certified to the supreme court: "Whether a national bank organized under and controlled by the act of 1864, can acquire a valid lien upon the shares of its stockholders by the articles of association or by-laws as proved in this case." Mr. Justice Strong, delivered the opinion of the court, answering this question in the negative, on the ground of the prohibition contained in the thirty-fifth section of the act, (13 Stat. 110; Rev. St. § 5201,) and of the evident intention on the part of congress to relieve shareholders from the restriction imposed by the thirty-sixth section of the prior act of February 25, 1863, in omitting that section entirely from the substituted act of 1864. This thirty-sixth section made all debts due from shareholders to the association a lien upon their holdings, (12 Stat. 675.) Bullard v. National Eagle Bank, 18 Wall. (85 U. S.) 589. See, also, In re Keiler, Case No. 7,648.]

[3] [From 1 N. B. R. 667; the report from 2 Ben. 469, containing merely a condensed statement of the register's findings and opinion.]

Case No. 1,396.

In re BIGELOW et al.

[2 Ben. 480; [1] 1 N. B. R. 632, (Quarto, 186;) 1 Am. Law T. Rep. Bankr. 95.]

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

BANKRUPTCY—APPLICATION BY CREDITORS TO SELL COLLATERALS — PREVIOUS PROOF OF DEBT NECESSARY.

1. Where, in bankruptcy proceedings, a creditor, claiming to hold collaterals as security for an indebtedness of the bankrupts, applied for an order to sell the same, under the twentieth section of the bankruptcy act, [March 2, 1867; 14 Stat. 526,] which was opposed by the assignee in bankruptcy on the ground that the creditor had not proved his debt, as required by the twenty-second section of the act: *Held*, that the creditor could substantiate his claim against the bankrupts, so far as to comply with the requirements of the twenty-second section, without previously ascertaining the value of the securities which he held.

2. That, as the creditor's right to hold the collaterals was dependent upon his ability to show himself to be a creditor, no permission to sell the collaterals could be granted, until his right to sell them was shown, as required by the twenty-second section of the act.

[Cited in Re Bloss, Case No. 1,562; Re Frizelle, Id. 5,133; Re Brinkman, Id. 1,884; Phelps v. Sellick, Id. 11,079; Re California Pac. R. Co., Id. 2,315; Re Hufnagel, Id. 6,837; Re Crossette, Id. 3,435.]

[3. Cited in Re Stansell, Case No. 13,293, as implying that, in proving a mortgagee's debt, the lien should be stated in order that it may not be considered waived.]

[In bankruptcy. In the matter of Edward Bigelow, David Bigelow, and Nathan Kellogg. Heard on an application by the National Bank of the Commonwealth for an order to sell certain collaterals. Denied.

James Emott and E. H. Pomeroy, for the motion.

P. Cantine, opposed.

BENEDICT, District Judge. This is an application, on the part of the National Bank of the Commonwealth, for an order directing the sale by the bank of certain stocks belonging to the above-named bankrupts, which the bank claims to hold as security for the indebtedness of the bankrupts to the bank.

The application is founded upon a petition setting forth that the bank is a creditor of

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

the bankrupts to the extent of $31,880, as security for which it holds certain stocks pledged by the bankrupts, the value of which is uncertain, and as to which value the assignee in bankruptcy declines to agree; and the petitioners therefore pray for an order to sell said stocks, in accordance with the provisions of the twentieth section of the bankruptcy act, [March 2, 1867; 14 Stat. 526,] which declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct."

The application is strenuously opposed by the assignee in bankruptcy, principally upon the ground that it is premature, inasmuch as the petitioners have taken no steps whatever to exhibit or prove their debt in the manner required by the twenty-second section of the bankruptcy act.

The question thus raised I have considered with some care, because of the very positive opinion expressed by the intelligent counsel for the petitioners, that, if the application of the petitioners be now denied, it will be impossible for them to make proof of their debt without by that act releasing their right to the securities which they claim to hold.

This opinion, I am satisfied, by an examination of the various provisions of the bankruptcy act, is erroneous; and I am also satisfied that, in the present posture of the proceedings, the application of the petitioners cannot be granted.

According to the plain words of the very provision of the twentieth section which gives power to make the order here prayed for, the right to the order is made to depend upon certain facts, namely: the existence of a debt owing to the creditor from the bankrupt, by virtue of which the creditor is to be admitted to share in the distribution of the bankrupt's estate, and the existence in the hands of the creditor of securities pledged by the bankrupt to secure the payment of that debt.

How these facts shall be made to appear, is not provided in the twentieth section, but is provided in the twenty-second section. According to the twenty-second section, any creditor desiring to be admitted to share in the estate of the bankrupt by virtue of a debt owing him from the bankrupt, must exhibit his claim in a deposition, setting forth the consideration thereof and the securities, if any, held therefor. Upon this deposition a hearing may be had, and testimony offered both in support of and in opposition to the averments of the deposition; and an adjudication is to be thereon made. But it will be noticed that the value of the securities which may appear to be held by the creditor is not required by the act to be set forth in the deposition, and that form twenty-one only requires an estimate of that value to be made. The value of the securities forms no part of the issue which the deposition tenders, nor is it a fact of any importance to be known until it shall appear that there is a valid indebtedness, and that such property is held as security therefor.

These facts having been made to appear, and it being thus determined that the person claiming to be a creditor is in fact entitled to share in the distribution of the estate, it then becomes necessary to ascertain the value of the property of the bankrupt which the creditor is entitled to hold, in order, by charging that value against the indebtedness shown to exist, to fix the amount which is to be allowed as the creditor's debt, for which he is entitled to be admitted to share in the distribution of the assets.

The mode of ascertaining this value is given in the portion of the twentieth section above cited, and when this value has thus been ascertained and deducted from the indebtedness proved, then the debt of the creditor is proved within the meaning of the twentieth section.

As used in that section, the word "debt" means the amount upon which the dividend is to be computed, and the phrase, "prove his debt," is equivalent to the phrase, "share in the distribution of the assets."

A creditor does not prove as against the estate, or offer to so prove, the whole indebtedness of the bankrupt exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness, in order to arrive at the balance of the account, for which balance alone the creditor seeks to be admitted to share in the distribution of the assets; and I fail to find any provision in the bankruptcy act which declares that the exhibition of such a deposition, and proving the facts which it avers, if it be contested, will invalidate the right of the creditor to the securities which he is found to hold.

But it is said that the twentieth section declares that if the security be not sold or released, the creditor shall not be allowed to prove any portion of his debt, and therefore that the sale asked for is a necessary precedent to any attempt to exhibit a claim to be a creditor. I have above stated that this clause does not, in my opinion, refer to the exhibition of the claim required by the twenty-second section, but refers to the right of the creditor to have his debt placed on the list as entitled to draw a dividend. But, if this be not so, it is by no means certain that the clause is applicable to any case but one where the value of the property exceeds the sum for which it is held as security, which is not the case here; and, besides, if the clause be applicable to this case, it certainly

does not declare that if the creditor does prove his debt, he shall lose his security. And, inasmuch as, in this case, the assignee, who is the only person opposing, insists that the petitioners can and must prove their debt, it would seem that the clause could be no impediment to the petitioners.

My conclusion, therefore, is that the petitioners can exhibit and substantiate their claim against these bankrupts so far as to comply with the requirements of the twenty-second section, without previously ascertaining the value of the securities which they hold, and that inasmuch as their rights to the proceeds of the stocks, which they concede to be the property of the bankrupts, is dependent upon their ability to show themselves to be creditors, and to hold this property as security, no permission should be granted them to sell the property until their right to do so is shown in the manner required by the twenty-second section of the act. To grant that permission now would be to assume the existence of facts which may never be made to appear, for it cannot now be shown that the petitioners will ever seek to participate in the proceedings in bankruptcy; or, if they do, that upon the hearing it will be adjudged that they have any debt, or, if they have, that these stocks were pledged to them as security therefor; and what title would be conveyed by a sale made under such circumstances, in the event of its being adjudged, in the bankrupt proceedings, that the petitioners were not creditors of the bankrupts, or that they did not hold these stocks of the bankrupts as security for any debt.

To grant that permission would be to assume as proved the facts upon which the right to the order is, by the act, made dependent, and yet make the order for the sole reason that these same facts have not been, and cannot now be, proved.

I must confess my inability to see how such action can be properly required of the court.

The motion is therefore denied.

Case No. 1,397.

In re BIGELOW et al.

[3 Ben. 146;[1] 2 N. B. R. 371, (Quarto, 121;) 2 Am. Law T. Rep. Bankr. 41.]

District Court, S. D. New York. Jan. 29, 1869.

BANKRUPTCY—JOINT AND SEVERAL DEBT—PARTNERSHIP ASSETS AND INDIVIDUAL ASSETS—COUNSEL FEES FOR DRAWING SCHEDULES.

1. Where members of a firm had been adjudged bankrupt, and a creditor proved a claim against them separately and not against the firm, the foundation of the claim being a bond made by the bankrupts, "composing the firm of E. & D. Bigelow & Co.," in which they bound themselves, "jointly and severally," the assets of the partnership not being sufficient to pay the partnership debts, but the assets of one of the partners being sufficient to pay all his separate debts in full: *Held*, that the creditor was entitled to dividends upon his debt out of the several assets of the individual bankrupts.

[Cited in Re Howard, Case No. 6,750; Re Bradley, Id. 1,772; Emery v. Canal Nat. Bank, Id. 4,446; Re Long, Id. 8,476; Re Tesson, Id. 13,844; Re Vetterlein, 20 Fed. 110.]

2. Counsel fees for attending on behalf of a bankrupt and opposing proceedings in involuntary bankruptcy, and for drawing inventories and schedules required to be made and filed under the order of adjudication of bankruptcy, are not proper charges against the estate in the hands of the assignee.

[Cited in Re Jaycox, Case No. 7,239; Re Gies, Id. 5,407.]

[In bankruptcy. In the matter of Edward Bigelow, David Bigelow, and Nathan Kellogg, doing business as the firm E. & D. Bigelow & Co. Heard on application by John Bigelow to prove a certain claim and the register's report thereon. Proof allowed. Heard also on claim of bankrupt's counsel. Disallowed.]

The firm of E. & D. Bigelow & Co., composed of the bankrupts above named, and its individual members, were adjudged bankrupts, in involuntary proceedings. Debts were proven to the following amounts:

Against the firm	$209,748 24
Against Edward Bigelow individually	55,395 67
Against David Bigelow individually	13,961 83
Against Nathan Kellogg individually	45,715 78

The assets were as follows:

Assets of the firm	$22,787 07
Assets of Edward Bigelow	14,131 03
Assets of David Bigelow	32,346 75
Assets of Nathan Kellogg	22,709 93

John Bigelow filed proof of a claim against the several bankrupts for $5,495.64, founded upon a bond executed by "Edward Bigelow, David Bigelow, and Nathan Kellogg, and composing the firm of E. & D. Bigelow & Co.," by which the obligors bound themselves "jointly and severally," and their "heirs, executors, and administrators, and each of them."

Other creditors objected to this claim, as against the separate estates of the bankrupts, alleging that the debt was originally a partnership debt, and should receive dividends only out of partnership assets. Thereupon, the court referred it to the register, [Theodore B. Gates,] to take proofs and report them to the court, with his opinion.

[2] [Asa Bigelow died intestate about 1850, leaving children and heirs at law, Edward Bigelow, David Bigelow, John Bigelow, Susan E. Kellogg, and Adaline B. Beers. Asa Bigelow left an estate valued at seventy-five thousand dollars, about twenty-five or thirty thousand dollars of which was in notes of the firm of E. & D. Bigelow & Co., composed of these bankrupts.

[On the 1st day of February, 1851, Asa

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

[2] [From 2 N. B. R. 371, (Quarto, 121.)]

Bigelow's heirs agreed upon a division of their father's estate, and in carrying out that agreement, the bond above mentioned was executed and delivered to John Bigelow, and he, at the same time, executed an agreement to the other heirs, wherein, in consideration of a bill of sale of certain articles of personal property, made to him by his co-heirs, and in further consideration of the bond above mentioned, which is described as having been executed by Edward Bigelow, David Bigelow, and Nathan Kellogg, composing the firm of E. & D. Bigelow & Co., he releases his interest in the residue of the personal estate, and agrees to execute releases of his interest in the real estate, when the bond shall have been paid. He subsequently gave these releases without requiring the condition to be first performed. Nathan Kellogg had no personal interest in the estate of Asa Bigelow, and derived no benefit from this division, nor was he a party to any of these transactions, excepting only the bond. John Bigelow was owing his father's estate an amount, which, added to the sum provided for in the bond, made about one-fifth of the entire estate.

[The evidence introduced both by the solicitors for John Bigelow and for the opposing creditors, was mainly directed to the object of showing what was the consideration for the execution of this bond; the solicitor for Bigelow claiming, that it was the execution of the agreement by his client to release his interest in the real estate, so far as Edward and David were concerned, and that, as to Kellogg, it was a matter of private arrangement among themselves, and cannot affect John Bigelow. The solicitor for the opposing creditor argues, that this bond was given for and on account of the firm's indebtedness to the estate of Asa Bigelow, and that it was delivered to John Bigelow as a part of the personal estate of his father, and in extinguishment of an equal amount of the notes of the firm of E. & D. Bigelow & Co., held by that estate. I think the evidence sustains the position of the solicitors for the opposing creditors. John elected to take his share out of the personal estate, and as a necessary consequence, agreed to release his interest in the real estate. A large part of the personal estate was in notes of the firm of E. & D. Bigelow & Co. Two members of the firm were equal co-heirs with John Bigelow, the other members had no interest in the estate. With him it was only a question whether the firm should continue to owe the estate to Asa Bigelow, or merge a part of that indebtedness in a bond to one of the heirs. The bond was given, and for a sum which, added to the advancements made to John Bigelow, discharged his claim upon the estate. The provision in the agreement making the release depend upon the payment of the bond, was in the nature of a security, and did not enter into the question of consideration.

[If it were allowable to adopt the theory on which the examination was conducted, I should have no difficulty in arriving at what would seem to be the inevitable conclusion, that as this was originally a partnership debt, it can only be paid out of partnership assets, but I doubt the power of the court to remit a creditor under these circumstances, to his original and extinguished remedy. The bond presented by the claimant in this case is, by express terms, joint and several, and the obligee could have maintained an action for its breach against all or either of the obligors.

[Does the fact that the obligors have gone into bankruptcy change or restrict the rights of the creditor? Section 36 of the bankrupt law [March 2, 1867; 14 Stat. 534] provides, that where partners are adjudged bankrupt "all the joint stock and property of the co-partnership, and also, all the separate estate of each of the partners, shall be taken," &c., and "all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts. * * * the net proceeds of the joint stock shall be appropriated to pay the debt of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." Any balance of the separate estate of any partner is to be added to the joint stock for the payment of partnership debts, and any surplus of joint stock is to be divided and appropriated among the separate estates "as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner, shall be applied to the payment of the separate debts."

[The instrument under which John Bigelow claims dividends, is joint as to the co-partnership, and several as to each of the individual members; and as they have chosen to make themselves thus liable, I do not see how this court can interfere to diminish the security they have placed in the hands of their creditors. Even if the English doctrine of election obtained in this country, the court could only require the creditor to do what he has already done; he has elected to look to the assets of the individual members of the late firm, and has not proved his claim against them as co-partners.

[Our American authorities incline to treat creditors of the bankrupts according to their strict legal right, and to enforce the principles that would obtain at law. The decision of the case of Mead v. National Bank of Fayetteville, [Case No. 9,366,] by Judge Hall, in the northern district, is the latest authority on this question of the rights of creditors in bankruptcy proceedings. Edwin S. Russell, Porter Tremain, and Augustus Tremain, were adjudged bankrupts. They had been co-partners in business, and were indebted to the Bank of Fayetteville in the sum of forty-three thousand dollars, which was evidenced

by sundry notes of the firm as maker, and each of these notes bore the endorsement of one of the co-partners. Prior to the bankruptcy, the form of the paper which evidenced such indebtedness was changed upon the application of the officers of the bank, and the firm notes were taken for fourteen thousand dollars, on the notes of Porter Tremain for ten thousand dollars, on those of Augustus Tremain for nine thousand dollars, and those of Edwin S. Russell for ten thousand dollars. The notes made by the firm were endorsed by Edwin S. Russell, and those made by one of the individual partners were respectively endorsed by the other two members of the firm. The notes were given for debts which were the proper debts of the partnership.

[The assignee filed his bill, insisting that the whole debt of the bank being in equity, and in fact the debt of the firm, must be proved as a debt against, and take a dividend from, only the joint estate of the bankrupts; and that no part of it could be paid out of the individual estate of the bankrupts, in consequence of their individual liability either as makers or endorsers.

[The counsel who argued the case had been unable to find any decision under the act of [August 19,] 1841, [5 Stat. 440,] which determined the question, and Judge Hall states, that but a single case—In re Farnum, [Case No. 4,674]—in which this question appears to have been decided had come under his observation.

[Judge Hall says, that when these notes were dishonored the bank was the legal creditor of the several parties thereto, according to the form of their several and respective obligations, and there is no reason for holding that the legal relation of debtor and creditor thus subsisting, did not exist under the bankrupt law. Judge Hall holds that the bank had a right to prove its debts against the makers of the note held by it, and is entitled to dividends from the joint and separate estates of the bankrupts, according to such proof; and that the utmost that can be claimed against the bank is, "that it may be driven to its election;" but in the next paragraph the judge thinks it doubtful whether the bank is compelled to elect, and referring to the case of Farnum, decided by Judge Sprague under the bankrupt law of 1841, intimates that a creditor who holds a bill of exchange drawn by the firm and endorsed by one of the members, was entitled to dividend from the joint estate of the firm, and also a dividend from the separate estate of the partner who made such endorsement, and quotes from the Farnum case the declaration of Judge Sprague, "that the right of a party holding two valid obligations, to the benefit of both, was founded both in law and justice." In Borden v. Cuyler, 10 Cush. 478, cited by Judge Hall, Judge Cushing, in delivering the opinion of the court, declared that it remained a mooted question in the United States, and that in Massachusetts the practice and the weight of professional opinion favored the double proof, but that the point had not then been adjudicated.

[The weight of American authority favors the right of a creditor who has a contract joint as to the firm and several as to one or more of the partners, to prove against the firm and the individual partner or partners, and to receive dividends from the joint and individual assets. I have no doubt that the creditor is entitled under his proof to dividends out of the several assets of the individual bankrupts, resulting in the payment in full of the bond.] [3]

BLATCHFORD, District Judge. I concur with the register, that the creditor, John Bigelow, is, under his proof of debt, entitled to dividends out of the several assets of the individual bankrupts.

The register also submitted to the court a bill, which had been presented to the assignee by counsel for the bankrupts, for services in attending on the return of the order to show cause, and successfully resisting two of the grounds on which the adjudication of bankruptcy was sought, and also for services in preparing the inventories and schedules required, under the order of adjudication of bankruptcy, to be prepared and filed by the bankrupts.

BLATCHFORD, District Judge. I do not think the bill is a charge against the estate of the bankrupts in the hands of the assignee.

Case No. 1,398.

In re BIGELOW et al.

[3 Ben. 198; [1] 2 N. B. R. 556, (Quarto, 170;) 2 Am. Law T. Rep. Bankr. 87.]

District Court, S. D. New York. April, 1869.

BANKRUPTCY—DEBT TO WIFE.

Where a wife having received money from her father's estate, put it in her husband's hands, with the verbal understanding that she was to have it when she wanted it, and afterwards drew all but $700, and it appeared that the husband had at various times given her furniture and stock, and taken out policies of life insurance for her benefit, and her husband was, some seven years after the receipt of the money, declared a bankrupt: *Held*, that the wife was entitled to prove the $700, without interest, as a debt against her husband's estate.

[Cited in Re Blandin, Case No. 1,527; Clark v. Hezekiah, 24 Fed. 665.]

[In bankruptcy. In the matter of Edward Bigelow, David Bigelow, and Nathan Kellogg, doing business as the firm of E. & D. Bigelow & Co. Heard on application by Mary B. Bigelow to prove a certain claim and the register's report thereon. Proof allowed.]

[3] [From 2 N. B. R. 371, (Quarto, 121.)]

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

In this case objections were filed by creditors to a claim of Mary B. Bigelow against the estate of her husband, Edward Bigelow. The court referred the matter to the register to take proof of the facts, and report to the court, with his opinion.

The register reported that the evidence seemed to establish the following facts:

1. Between July, 1859, and the spring of 1861, Mrs. Bigelow came into possession, by two several payments, of about $1,500 from her father's estate.

2. This money she handed over to her husband for safe keeping, with the verbal understanding that she was to have it when she wanted it.

3. She subsequently drew all but $700 of this money from her husband to purchase silver plate, leaving in her husband's hands the sum of $700, which she now claimed, together with interest thereon from 1859.

4. Her deposition for proof of her claim set out the demand as follows: "Is justly and truly indebted to this deponent in the sum of $1,141.00, being the balance of money belonging to this deponent, as her separate estate, which was left to this deponent by her father, David Boies, and which this deponent lent to her husband, the said Edward Bigelow, about 1859. The principal sum thus had by the said Edward Bigelow, as aforesaid, was $700, which, together with interest to the 16th of November, 1867, amounts to the said sum of $1,141.00," to which was added the formal part of the deposition.

5. No note or writing was made of this transaction, nor did Mrs. Bigelow keep any written account of the amount placed in, or drawn from, her husband's hands. She testified: "I kept along from year to year, as I expended money, a recollection as to the balance remaining due to me."

6. In August, 1863, she received from her husband, out of this fund, $20.00.

7. It was shown on the part of the contesting creditors, by the examination of Edward Bigelow and his wife, that, since their marriage, Mr. Bigelow had given his wife certain household furniture, also a horse, harness, carriage, and sleigh, some stock in a silver mine, which cost $100, and also 20 1-5 shares of turnpike road stock, on which $12.60 per share had been paid. There were also life insurance policies taken out for the benefit of Mrs. Bigelow and the children; and Mrs. Bigelow received $120 as the proceeds of hay raised upon Bigelow's farms, and sold by Mrs. B. in the fall of 1867, at or about the time of the commencement of bankruptcy proceedings against her husband.

By THEODORE B. GATES, Register:

[2] [There are some apparent inconsistencies in Mrs. Bigelow's evidence—yet I think they are more apparent than real. She relied entirely upon her recollection to keep the account of this fund, or rather of the amount due to her from time to time, dismissing from her mind the particulars in relation to what had been drawn and expended. If the expression "I kept along from year to year, as I expended money, a recollection as to the balance remaining due to me," is understood, as I have no doubt it was intended, to refer to the eight hundred dollars which she spent for silver plate, and that this expenditure was made in several smaller sums, and at sundry times; and that in speaking of the "balance of money belonging to her" and of the "principal," she refers to the sum of seven hundred dollars as a part of the fifteen hundred dollars, which she had let her husband have, and which, alone, she then regarded as the loan or trust held by him for her—wiping out, as it were, dollar after dollar, until about seven hundred dollars remained—then the testimony becomes consistent and intelligible. And taking this view of it I have no difficulty in arriving at the conclusion that at the time of Edward Bigelow's bankruptcy he was indebted to his wife in the sum of seven hundred dollars, and that equity would hold him to be her trustee for that amount.

[The proof negatives the theory of the contesting creditors' solicitor, that this was a gift and not a loan or trust. Mrs. Bigelow expressly swears that her husband was to hold this money for her, and that she was to have it when she wanted it. While the law regards with great distrust claims of this character, equity will protect the rights of the wife even against the creditors of the husband. The court being satisfied that the money was the separate property of the wife, and was placed in the husband's hands as a loan or trust for the benefit and use of the wife, and not as a gift, will adjudge him to be her debtor to that amount, and will award payment to her as to any other creditor. Woodworth v. Sweet, 44 Barb. 268. This was so held even before our statutes in relation to the separate estates of married women, and is founded upon the plainest principles of equity.

[I have had some difficulty in arriving at a satisfactory conclusion as to the exact amount of money of the claimant's remaining in Mr. Bigelow's hands at the time of his bankruptcy; but I think a reasonable and fair construction of Mrs. Bigelow's evidence justifies the conclusion, that over and above all sums which she had from time to time "drawn" out of this fund, for silverware and for other purposes, through a period of seven or eight years, there still remained of the original fifteen hundred dollars, the sum of seven hundred dollars, which Mrs. Bigelow came to regard and speak of as though it alone was the basis of her claim.

[In the absence of any agreement to pay interest, and in view of the fact that Mr. Bigelow's relation to this fund was that of

[2] [From 2 N. B. R. 557.]

trustee for the benefit of his wife, I do not think it carries interest—certainly not until after demand.

[The various transfers of items of personal property from Mr. Bigelow to his wife, at different times during their married life, and previous to his bankruptcy, are proven to have been gifts, and are neither numerous nor of much value. They were not given by him or received by her on account of his indebtedness to her, or with any reference to such indebtedness. They were such gifts as the position of the donor justified him in making and the donee in accepting. The time when made, the circumstances of the parties, and the nature of the gifts, repel the idea that they had any other character than that attributed to them by Mr. Bigelow.

[If these were purely and simply gifts from husband to wife, I do not understand how they can be held to be payments. To make them such, would be to create an unthought-of contract between the parties, and to pervert an act of respect and affection into the sordid channel of barter and traffic. The solicitor for the contesting creditors insists that if these things were given by the husband to the wife, then the seven hundred dollars must have been given by the wife to the husband. I am unable to see any necessary connection between the premise and the conclusion. Even if the deduction were logical, it would be overturned by the positive evidence that one was a loan and the other a gift.

[It is true, that "he who asks equity must do equity," but this wholesome rule has never been held to authorize the marshaling of the reasonable and proper gifts a husband may make to his wife, and offset them against a fund held by the husband in trust for the wife. If the gifts were disproportioned to the circumstances of the parties, or there were reasons to suspect the motives with which they were made, the court might enforce the principle in the manner and to the extent demanded by the contesting creditors.

[It is a common practice, supported by law, for husbands and parents to insure their lives for the benefit of wives and children. Mr. Bigelow has done so. While the wife acquired a property in the policy taken out for her benefit and in her name, she does not appear to have incurred any liability therefor.

[There is no proof that she authorized or suggested such insurance, nor is there any proof as to the present value of the policy. Whether it is ever of value to Mrs. Bigelow, depends upon the payment of the annual premiums and the tenure of their respective lives. I do not think it constitutes an equitable offset to Mrs. Bigelow's claim.

[Mrs. Bigelow sold and received payment for about one hundred and twenty dollars worth of hay, grown on her husband's farm shortly before his bankruptcy. I think it fairly inferrible from all the evidence, that this money was used by her for the benefit of her family, and that it was not received for or used as her separate property. In swearing to her claim, and in her subsequent examination, she does not refer to it, and I assume that she did not regard it as her money or apply it to her own use, but that it went to defray the current expenses of the family.

[My conclusion is, that Mary B. Bigelow has a just claim against her husband's estate for the sum of seven hundred dollars, and that she should receive her dividends thereon with the other creditors.] [3]

M. Schoonmaker, for claimant.
P. Cantine, for creditors.

BLATCHFORD, District Judge. I concur in the views of the register. [An order will be entered admitting Mrs. Bigelow as a general creditor to the amount of seven hundred dollars.] [4]

BIGELOW, (BATTIN v.) See Case No. 1,108.

Case No. 1,399.

BIGELOW et al. v. ELLIOT et al.

[1 Cliff. 28.] [1]

Circuit Court, D. New Hampshire. May Term, 1858.

PARTNERSHIP — WHAT CONSTITUTES — PARTICIPATION IN PROFITS—SHARE OF PROFITS IN LIEU OF SALARY—DORMANT PARTNER.

1. When two or more persons agree that each shall contribute capital or labor for the purpose of carrying on a business, and that the profits shall enure to their joint benefit, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement, and even though they may have expressly stipulated to the contrary.

2. Community of profit is the true criterion whereby to determine whether any agreement for the carrying on of business constitutes a partnership; but if one receives as a compensation for his services, or as rent, a stated portion of the profits, as a measure of the amount of his salary, or the mode of payment, he will not on that account be liable as a partner.

3. Where one participates in the profits of a business, ostensibly carried on by another, he is equally liable, when discovered, for debts of the concern, contracted during the time of such participation, to creditors without knowledge of the actual relations of the parties when the credits were given. Partnership in such cases is a conclusion of law upon the facts; but secrecy on the part of the dormant partner, and want of knowledge of the actual relations of the parties on the part of the creditor, are essential elements of the liability.

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[3] [From 2 N. B. R. 557.]

[4] [From 2 N. B. R. 556, (Quarto, 170.)]

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

4. Dormant partners, or those held to be such by mere implication of law, need not in any way give notice of the dissolution of partnership.

This was an action of assumpsit [by John Bigelow and others against William Elliot and Stanford Hovey] for goods sold and delivered, and the case was submitted to the court upon an agreed statement of facts. The plaintiffs claimed to recover of the defendants as partners in trade under the firm name of S. Hovey. Hovey did not appear, and was defaulted. Elliot appeared and pleaded the general issue. It was admitted that the defendants, on the 2d of April, 1856, entered into an agreement, which in substance provided as follows: Elliot was to furnish a stock of merchandise, consisting of watches, jewelry, and certain fancy goods. to an amount not less than two thousand dollars, and as much more as he might desire, and place the same in a store or salesroom to be provided by Hovey, and to allow him to sell at retail therefrom, upon certain specified conditions, namely, Hovey was to keep accurate entries of the sales made from the stock, rendering an account of the same as often as Elliot might desire, and pay all the money to him on demand as fast as collected; he was to be responsible for the safe-keeping and return of all the merchandise intrusted to his care as above, or the avails thereof, and of all goods sold on credit, but was not to sell any goods on credit to an amount exceeding one hundred dollars, without consent of Elliot, in writing, specifying the parties and merchandise. All the expenses of the concern, including rent, lights, fuel, clerk-hire, insurance, taxes, and other necessary incidental expenses, were to be paid from the profits of the concern, except the pay for the services and personal expenses of Hovey, for which no provision was made in the agreement. No clerk or workman was to be employed about the concern except such as were approved by Elliot. All watch-work or other jobs taken or done at or by the concern were to be set down as sales and profits, and divided as such. The net income, after paying expenses "as above," was to be equally shared between the contracting parties. Hovey could purchase, on his own account, any goods or merchandise that he might see fit, expose the same for sale, and sell in the store with Elliot's merchandise, provided that the profits on the same were equally shared "as above." Elliot was to have the privilege of selling any goods in the store to his friends and customers, or of taking any article therefrom to sell, but the profit on any article thus sold in the store was "to go to the concern," except that on musical instruments, which was to be the exclusive property of Elliot. Merchandise was to be furnished at cost, or regular six months' prices, and Hovey had the privilege of seeing the bills. A true account of all exchange trades was to be kept, and the result of the same to be set down as trade, and the profit carried out accordingly. Finally, it was agreed that either party might terminate the contract at pleasure.

In pursuance of this agreement, Hovey hired a store in his own name and carried on business from April, 1856, to January, 1857,—Elliot's interest in the stock and business remaining a secret. During this time goods to the amount of four thousand eight hundred and sixty-six dollars and fifty-seven cents were furnished by Elliot, and Hovey put in goods to the amount of about four thousand dollars. This suit was brought to recover for goods so purchased by Hovey, and which constituted a part of the goods so put into the store by him. These goods were sold to Hovey by the plaintiffs, who were ignorant of the agreement between him and Elliot, and the purchase was made without consultation with Elliot and without his knowledge. At the time of the sale the plaintiffs had no knowledge of the existence of the written agreement, or that Elliot had any interest either in the store or the goods, and remained in ignorance of it till April, 1857, when Elliot as trustee in another suit made the disclosure. On the 12th of January, 1857, Elliot sold the balance of the goods furnished or put into the store by him to Hovey, and they made a settlement of the business done under the agreement up to the 1st of the same month. In that settlement Hovey accounted to Elliot for one half the profits of the business, deducting expenses, and gave him his note for the amount. Elliot then took a mortgage on all the goods in the store to secure his claim against Hovey. If the court came to the conclusion that the action could be maintained against both defendants, then judgment was to be entered in favor of the plaintiffs for the whole amount claimed, with interest from the date of the writ; but if the court was of the opinion that it could not be sustained against Elliot, the first-named defendant, then judgment was to be entered in his favor for his costs.

Clark & Smith, for plaintiffs.

It is not essential in all cases, to constitute a partnership, that there should be both community of interest in the capital stock and in the profits. If there is community of profit, they are partners. Story, Partn. § 27; Ex parte Hamper, 17 Ves. 404; Reid v. Hollinshead, 4 Barn. & C. 867; Smith v. Watson, 2 Barn. & C. 401; Hesketh v. Blanchard, 4 East, 144; 1 Pars. Cont. 158; Biss. Partn. 4; Doak v. Swann, 8 Greenl. 170; Cobb v. Abbot, 14 Pick. 289; Bostwick v. Champion, 11 Wend. 571. There must be a similar common interest in the losses of the concern to some extent, at least so far as they constitute a charge upon or a diminution or deduction from the profits, since the net income is alone to be shared, and there must be in all

cases a deduction of the losses to a greater or less extent, according to the agreement of the parties, in order to ascertain what are the profits. Story, Partn. §§ 19, 23, 60; Bond v. Pittard, 3 Mees. & W. 359; Gilpin v. Enderbey, 5 Barn. & Ald. 954; Cheap v. Cramond, 4 Barn. & Ald. 663; Ex parte Langdale, 18 Ves. 300. That the parties are such partners is to be determined by their actual participation of the profits, which is held to require of them a participation of the losses, because it diminishes the fund from which the losses are to be paid. 1 Pars. Cont. 133; Grace v. Smith, 2 W. Bl. 998; Waugh v. Carver, 2 H. Bl. 235; 1 Smith, Lead. Cas. 821, and notes; Biss. Partn. 9. As to third persons the defendants were partners.

Morrison & Stanley, for Elliot.

Hovey's position was simply that of an agent, receiving a portion of the profits as compensation. Clark v. Reed, 11 Pick. 446; Hesketh v. Blanchard, 4 East, 144; Ex parte Hamper, 17 Ves. 403; Thompson v. Snow, 4 Greenl. 264; Wilkinson v. Frasier, 4 Esp. 182; Meyer v. Sharp, 5 Taunt. 74; Rice v. Austin, 17 Mass. 197; Miller v. Bartlet, 15 Serg. & R. 137; Loomis v. Marshall, 12 Conn. 69; Harding v. Foxcroft, 6 Greenl. 76; Mair v. Glennie, 4 Maule & S. 240; Goode v. McCartney, 10 Tex. 193; Johnson v. Miller, 16 Ohio, 431; Mason v. Potter, 26 Vt. 722; Clement v. Hadlock, 13 N. H. 185; Chandler v. Brainard, 14 Pick. 285; Knowlton v. Reed, 38 Me. 246; Muzzy v. Whitney, 10 Johns. 226; Holme's Case, 2 Lewin, Crown Cas. 256; Newman v. Bean, 1 Fost. [N. H.] 93; Judson v. Adams, 8 Cush. 556; Turner v. Bissell, 14 Pick. 192; Wilson v. Whitehead, 10 Mees. & W. 503; Pott v. Eyton, 3 C. B. 32. So in Denny v. Cabot, 6 Metc. [Mass.] 82, the question at issue is well considered, and the doctrine of Turner v. Bissell is approved. And see, also, Dry v. Boswell, 1 Camp, 329, and note; Gibson v. Stevens, 7 N. H. 352; Grace v. Smith, 2 W. Bl. 998; Blanchard v. Coolidge, 22 Pick. 151; Hoare v. Dawes, 1 Doug. 371; Bowyer v. Andersen, 2 Leigh, 550.

CLIFFORD, Circuit Justice. Partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Story, Partn. § 2. Other writers define it as an agreement between two or more persons for joining together their goods, money, labor, and skill, or either or all of them, for the purpose of advancing lawful trade and of dividing the profits and losses arising from it, proportionably, or otherwise, between them. They may be divided into general and special or limited partnerships. General partnerships are properly such where the parties carry on all their trade and business for their joint benefit and profit, and it is not material whether the capital stock be limited or not, or the contributions of the parties be equal or unequal. Willet v. Chambers, Cowp. 814. Special partnerships are those formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties or one of them. When they extend to a single transaction or adventure only, such as the purchase and sale of a particular parcel of goods, they are more commonly called limited partnerships, but the appellation is indiscriminately applicable to both classes of cases. Various other subdivisions are also employed to designate the different phases of this relation, which need not be repeated, as mere definitions cannot avail much in determining the question under consideration. All such commercial and business relations are usually created by the mere act and consent of the parties, and in this they differ from corporations, which require the sanction of public authority either express or implied. Ang. & A. Corp. (4th Ed.) § 41. Such consent of the parties may be testified either in express terms or by articles of copartnership or positive oral agreement, or the assent may be tacit, to be implied solely from the acts and dealings of the parties. An implied or presumptive assent has equal operation with one that is express and determined; and it may be laid down as a general proposition, that persons having a mutual interest in the profits and loss of any business carried on by them are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to contract that relation. Decided cases have established the doctrine, that when two or more persons agree that each shall contribute capital or labor for the purpose of carrying on a trade or business, and that the profits arising therefrom shall enure to their joint benefit, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement. 1 Smith, Lead. Cas. (Ed. 1855,) 982. All of the writers and decided cases agree that persons engaged in trade or business may become partners as to third persons in mercantile and business transactions by a participation in the profits of the trade or business, even in cases where the participant may have expressly stipulated against some of the usual, and, as between themselves, material incidents to that relation. Difficulties frequently surround the inquiry, arising out of the peculiarities or complicated character of the stipulations, and hard cases have induced courts of justice to seek for qualifications and exceptions to the general doctrine as expounded and laid down in the early decisions at common law upon the subject. While there is no diversity of opinion in re-

gard to the general doctrine that such may be the result, some of the attempts which have been made to qualify and restrain and limit it have given rise to many inconsistent, and in some instances contradictory, decisions.

One of the earliest cases usually cited in support of the general doctrine is that of Grace v. Smith, 2 W. Bl. 998, which was decided before the Revolution. It was an action against the defendant as a secret partner with another, to whom the goods had been delivered, and who had become a bankrupt. They had recently been partners, but had dissolved, and the defendant had ostensibly retired from the firm. He retired on the terms that the stock and debts should be carried to the account of the other partner, but agreed to loan him a certain sum or let it remain in his hands for seven years, at five per cent. interest, with a certain yearly annuity for the same period. On a motion for new trial it was held, that the true criterion whereby to determine the question of liability was to inquire whether the ostensible owner agreed to share the profits with the retiring partner, or whether the latter only relied on the profits as a fund for payment; and De Grey, C. J., remarked, that every man who has a share of the profits of a trade ought also to bear his share of the loss, adding that if any one takes a part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. That principle is more satisfactorily stated in Waugh v. Carver, 2 H. Bl. 247, which was decided in 1793, and is generally regarded as the leading case upon the subject under consideration. In that case, Eyre, C. J., held, without qualification, that he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. He also remarked to the effect that the principle as stated was the foundation of the decision in Grace v. Smith, and emphatically added, I think it stands upon the fair ground of reason. Both of these cases were cited and approved in Cheap v. Cramond, 4 Barn. & Ald. 663; and the same principle was reiterated in substantially the same language. In the case last named a merchant at home had recommended consignments to a merchant abroad, and it was agreed that the commissions on all sales of goods, recommended by one house to the other, should be equally divided, without allowing any deductions for expenses; and it was unanimously held by the court of the king's bench that this was a participation in profit, and constituted a partnership between the parties to the extent of those transactions. Abbott, C. J., in delivering judgment, stated the principle of the decision to be, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners inter se, and based it upon the fact, that each house received from the other a part of that fund on which the creditors of the other relied for the payment of their demands. This principle has also been decisively affirmed by the supreme court in Winship v. Bank of U. S., 5 Pet. [30 U. S.] 560. Marshall, C. J., said, "Partnerships for commercial purposes are necessarily governed by many general principles well known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. . . . . Acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restricted, fair dealing requires that the restriction should be made known. Such stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law."

All of these cases show that community of profit constitutes the true criterion whereby to ascertain and determine whether any given agreement for the carrying on of trade or business be or be not really one of partnership; and, as a general rule, whenever it appears that two or more persons have agreed that each shall contribute capital or labor, or both combined, for the purpose of carrying on a trade or business, and that the profits shall be received on joint account, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, whatever may have been their intentions when they entered into the agreement, and even though they may have expressly stipulated to the contrary. Smith, Merc. Law, (Ed. 1836,) 44.

It is not necessary, to constitute a partnership, that there should be any property constituting the capital stock which shall be jointly owned by the partners; but the capital may consist in the mere use of property owned by the individual partners separately, and it is sufficient to constitute the relation that they have agreed to share the profits and losses arising from the use of property or skill, either separately or combined. Bostwick v. Champion, 18 Wend. 183. Exceptional cases will doubtless occur, in which the general rule as stated will be clearly inapplicable, or where it may need some limitation or qualification to administer justice between the parties. It was to this view of the law that the learned judge referred, in Cheap v. Cramond, when he said that the agreement before the court was perfectly dis-

tinct from the cases put in the argument, of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed salary, which is only a mode of payment adopted to secure or increase exertion. Special cases also occur where a person may be allowed to receive a part of the profits of a business without becoming a legal or responsible partner. Thus, a party may, by agreement, receive by way of rent a portion of the profits of a farm or tavern without becoming a partner. 3 Kent, Comm. (Ed. 1858,) 33. So, to allow a factor for his commissions a percentage on the amount of sales, instead of a certain sum in proportion to the quantity of goods, does not make him a partner when it appears to be adopted merely as a mode of payment. Dixon v. Cooper, 3 Wils. 40. For the same reason, a person in trade or business may employ another as clerk or servant, and agree to pay him a share of the profits, without giving him the rights of a partner; and if he holds no interest in the capital stock, and there are no other circumstances to show any mutuality of interest between them, he will not be held liable even as to third persons, merely because he was compensated in that way. Burckle v. Eckart, 1 Denio, 342, 3 Comst. [3 N. Y.] 142; Dwinel v. Stone, 30 Me. 384. Seamen also may take a share, by agreement with the shipowner, in the profits or gross proceeds of a whale-fishery or coasting voyage by way of compensation for their services; and the responsibility of partners has never been supposed to flow from such special agreements. Hazard v. Hazard, [Case No. 6,279;] 3 Kent, Comm. (Ed. 1858,) note a, p. 34. All of these citations, and many others of a kindred character, are exceptional cases, resting upon special circumstances which take the matters in controversy out of the operation of the general rule as laid down in the principal case. Attempts have also been made to ingraft other qualifications on the general doctrine, in regard to which there is still considerable diversity of opinion. Applying the exceptional principle, that a contract which merely created a debt without conferring an interest in the profits of a trade or business may not, under special circumstances, constitute a partnership, as in case of a mere factor, agent, or clerk, courts of justice in some jurisdictions have held that the law will never imply a partnership not contemplated by the contracting parties, not even as to third persons, on account of any participation in the profits, unless the stipulation for such participation be of a character to create an interest in the profits, as profits, so as to entitle the party to an account, and to give him a specific lien, or a preference in payment over other creditors. It was so held in effect by Wilde, J., in Denny v. Cabot, 6 Metc. [Mass.] 92. If, said the learned judge, in delivering the opinion of the court, "the defendant had stipulated for a share in the profits, whether gross or net profits, so as to entitle him to an account, and to give him a specific lien, or a preference in payment over other creditors, and giving him the full benefits of the profits of the business without any corresponding risk in case of loss, justice to the other creditors would seem to require that he should be holden to be liable to third parties as a partner. But where a party is to receive a compensation for his labor in proportion to the profits of the business, without having any specific lien upon such profits to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner even to third persons." Attention is also drawn to several other cases where the same limitation is adopted, and which rest upon the same supposed distinction, and it is insisted by the counsel for the defendant that he is not liable within the principles there laid down. On the other hand, many cases are cited by the counsel for the plaintiffs, asserting a broader and somewhat more general scope of liability, and they contend that the defendant is liable whether the principle of the decisions first named be sound or unsound. Suppose the distinction to exist, and to be well taken, strong doubts are entertained whether it furnishes any better or safer guide for the solution of this class of questions than the one which previously existed in the well-known and long-established rule laid down in the leading case. But having come to the conclusion that the present case runs clear of that distinction, whether well or ill founded, the point will not be further considered at this time.

Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relations between the parties at the time the credit was given, and that liability exists, notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. Secrecy on the part of the dormant partner, and want of knowledge of the circumstances of the case, and of the actual relations of the parties, on the part of the creditor, are therefore essential elements of the liability. Dormant or secret partners are held liable under such circumstances, partly on the ground that every man who has a share of the profits of a trade ought also to bear his share of the loss, and partly on the ground of policy and necessity, to prevent bad faith in secret arrangements; as all experience has shown that, if the rule were otherwise, third persons might be exposed to numberless frauds. In such cases partnership is a conclusion of law arising out of the

facts and circumstances of the transaction; and if the creditor has full knowledge of the circumstances, and of the actual relation of the parties, no such implication will arise. As a general rule, parties are allowed to regulate their own agreements in their own way; and if they are fairly and understandingly made, courts of justice will not interfere to prevent their being carried into effect according to their intentions, unless they contravene some principle of public policy or some positive rule of law. Parties may enter into business arrangements, and participate in the profits, under stipulations that such participation shall not constitute them partners, or render them liable as such; and if their agreements are so framed as clearly to express that intention, the law, as a general rule, will hold them bound by their terms and conditions; and no reason is perceived why any different rule should prevail in respect to third persons dealing with them, who have full knowledge of the stipulations, and of the actual relations which they sustain to each other. To all such creditors there is no dormant or secret partnership or secret arrangement, and to all such there are no circumstances or elements in the case out of which the implication of partnership can arise, and consequently the parties, under such circumstances, as to such creditors, ought not and cannot be held to be partners. Courts of justice have sometimes held that something less than knowledge of the circumstances and of the actual relations of the parties, on the part of the creditor, will be sufficient to defeat a recovery in cases of alleged partnership by implication of law. It is said that it will be sufficient to defeat a recovery in the case supposed, if it appear that the creditor was informed of such facts and circumstances as would induce a man of ordinary care and prudence to suspect that such was their actual relation, or such as would lead a reasonably prudent and cautious man to make inquiry as to the truth of the fact.

Attempts were made, and at one period with very general success, to incorporate that rule into that part of the commercial law which has respect to the rights and obligations of indorsers of bills of exchange and promissory notes, and many courts of justice held that indorsers were not liable to holders for value where it appeared that the latter, at the time of the transfer, had knowledge of such facts and circumstances as ought to have excited the suspicions of a prudent and careful man; and, accordingly, the party otherwise liable might set up equities as between himself and the antecedent parties to the paper on the exhibition of that proof. Gill v. Cubit, 3 Barn. & C. 466; 3 Kent, Comm. (Ed. 1858.) 103. Twelve years' experience under the rule was sufficient to satisfy the court which first adopted it that it was unsafe, inexpedient, and impracticable, and in some jurisdictions at least the last remnant of the rule has been shaken off. Goodman v. Harvey, 4 Adol. & E. 870; Goodman v. Simonds, 20 How. [61 U. S.] 343; Chit. Bills, (12th Ed.) 257.

All the reasons urged against the rule in its application to bills of exchange and promissory notes appear to apply with equal force against its adoption in cases like the one under consideration. Nothing less than proof that the creditor had knowledge of the circumstances and of the actual relations of the parties can meet the exigency of such a defence; and the question whether he had such knowledge or not, like other disputed questions of scienter, must be submitted to the jury under proper instructions from the court. Each partner is the accredited agent of the company, and, as such, has authority to bind the whole within the scope of the partnership business, either by the purchase of goods or the borrowing of money to pay the debts or carry on the business, or for the selling, pledging, mortgaging, or assigning the property and effects on hand. That consequence arises from the fact that when a partnership is formed for a particular purpose it is understood to be in itself a grant of power, at least to the acting members, to transact its business in the usual way. If that business be to buy and sell, then, says Marshall, C. J., the acting member buys and sells for the company, and every person with whom he trades in the way of business has a right to consider, and the law adjudges, that he represents the actual company, whoever may compose it. Winship v. Bank of U. S., 5 Pet. [30 U. S.] 560; Smith, Merc. Law, 73, 74; Pars. Merc. Law, 174. When the partnership is dissolved, notice published in the journals will be sufficient for the public, but express notice ought to be given to those who have dealt with the firm, which is generally given by a circular letter. Godfrey v. Turnbull, 1 Esp. 371; Kirwan v. Kirwan, 2 Cromp. & M. 617; Newsome v. Coles, 2 Camp. 617. Dormant partners, or those held to be such by mere implication of law, need not give such notice in any way, for the reason which will presently be stated. Evans v. Drummond, 4 Esp. 89; Grosvenor v. Lloyd, 1 Metc. [Mass.] 19. Whether dormant partners, who are held to be such as between the parties, and known to the public as sustaining that relation, can be relieved from responsibility for future debts without giving such notice, need not now be determined. Evans v. Drummond, 4 Esp. 90; M'Iver v. Humble, 16 East, 168; Carter v. Whalley, 1 Barn. & Adol. 11. Notice is not required in the case of a partnership implied by law, for the reason that liability to creditors for future contracts ceases when knowledge of the circumstances and actual relations of the parties begins; and as to dealers with the company, who have no knowledge of their relations to the business, the bona fide discontinuance of those relations will be sufficient to terminate the im-

plication on which the liability arises. Applying these principles to the facts of this case as they have been agreed by the parties, it is clear that the plaintiffs are entitled to recover. According to the agreed statement of facts, the plaintiffs were guilty of no laches in giving the credit, as they never had any knowledge of the circumstances or actual business relations of the defendants until about the time this suit was commenced, and consequently now have the right in contemplation of law, inasmuch as those relations have since been discovered and are now proved or admitted, to regard the defendant, who is defaulted and who purchased the goods and contracted the debt, as having represented the other defendant as well as himself when the purchase was made and the credit given. All of the stipulations which testify their relations were secret, and no one except the defendant, who fails to appear, knew that any one besides himself had any interest either in the store or goods. He transacted all the business, and ostensibly was the sole person interested in the ownership of the goods or in the profits of "the concern," and yet every purchase and sale was made under the secret stipulation in writing that the net income or profits, after paying all the expenses of the concern, including rent, lights, fuel, clerk hire, insurance, taxes, and other necessary incidental expenses, should be equally shared between the contracting parties. Goods to the amount at least of two thousand dollars were to be furnished by this defendant, and the other defendant was to furnish the store, and was at liberty to furnish goods to any amount he might see fit; and in case he exercised that privilege, it was expressly stipulated that the profits of the same should be shared in the same way. As a matter of fact, both defendants furnished goods, and the agreed statement shows that the respective amounts were about equal. While it was contemplated that Hovey should ostensibly transact the business and appear to the public as the sole person interested, it was carefully stipulated that the other defendant should have the privilege of selling any goods in the store to his friends and customers, and that the profits of the same, musical instruments only excepted, should go to the concern and be equally shared between them. This defendant also stipulated for an account, and the agreed statement shows that the other defendant, on the 12th of January, 1857, rendered to him a full account of the business, pursuant to the terms and conditions of the written stipulation, and the moiety of the profits belonging to this defendant were included in the note given at the settlement by the other defendant.

On this state of facts not a doubt is entertained that these defendants were partners as to third persons within the principles already explained, and equally so, even if it be admitted that a participation in the profits is not sufficient to constitute that relation, unless it be of a character to entitle the alleged dormant partner to an account, and to give him a specific lien or a preference in payment over other creditors; and accordingly there must be judgment for the plaintiffs against both defendants for the amount specified in the agreed statement, and for their costs.

BIGELOW, (FOREMAN v.) See Case No. 4,034.

Case No. 1,400.

BIGELOW et al. v. LOUISVILLE.

[3 Fish. Pat. Cas. 602.][1]

Circuit Court, D. Kentucky. July, 1869.

PATENTS — LICENSE TO CONTRACTOR — ROYALTY — LIABILITY OF THOSE CLAIMING THROUGH THE CONTRACTOR.

1. Where a city agreed with contractors for a certain patented pavement, and the exclusive licensee of the patentee agreed with the contractors that they might proceed to execute their contract without charge or responsibility to the patentee or to him, but at the same time notified them that he would not release the city, but would look to and require it to pay him royalty, [not, however, notifying the city to that effect,] *held*: That this reservation was of no effect, because inconsistent with the license to the contractors. He could not authorize them to use the patented process without relieving them from responsibility for an infringement, and the very act of relieving them relieved the city.

2. The relieving of the parties primarily liable, by a universal rule of law as well as of justice, relieves those who are only secondarily responsible.

This was an action on the case, [by George T. Bigelow, administrator, etc., of Samuel Nicholson and Walter R. Davis, against the city of Louisville, and was] tried by the court, without a jury, to recover damages for the infringement of letters patent for an "improvement in wooden pavements," granted to Samuel Nicholson, August 8, 1854, reissued December 1, 1863, and extended for seven years from August 8, 1868. This patent is more particularly referred to in the report of Nicholson Pavement Co. v. Hatch, [Case No. 10,251.] The facts in the case are specially found by the court.

George W. Weisinger, for plaintiffs.

J. Graham Moore and Joshua F. Bullitt, for defendant.

BALLARD, District Judge. This cause having been heretofore submitted to the court, and the evidence and arguments of counsel having been heard, it appears to the court that this is an action brought by the administrator of Samuel Nicholson, deceased, against the defendant, for the violation of the deceased's patent right in a certain new and useful "improved wooden pavement." The defendant has pleaded not guilty, and

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

the parties have filed a stipulation in writing, in conformity to the statute, waiving a jury, and agreeing that the issue might be tried and determined by the court.

I shall proceed to find the facts specially, so that the party feeling himself aggrieved by the judgment which shall be rendered may seek redress by proper proceedings in the supreme court. I find:

1. That letters patent were regularly issued by the United States to the plaintiff's intestate, on August 8, 1854, for a new and useful "improved wooden pavement;" that the patent was surrendered and reissued December 1, 1863, and that this last was surrendered and reissued August 20, 1867.

2. That the general council of the city of Louisville, by resolution approved March 4, 1867, directed the mayor to advertise for bids, and to contract for the improvement, with the Nicholson pavement, of Jefferson street, from the west line of Fifth to the east line of Seventh streets, and that the mayor did make the required advertisement.

3. That on April 24, 1867, the defendant entered into a contract with Duckwall & Troxell, by which the latter, for a consideration to be paid by the former, agreed to improve the portion of street above mentioned with the Nicholson pavement, the work to be done under the supervision of the city engineer.

4. That the patentee, on June 7, 1867, executed to Walter R. Davis a writing of the following tenor, to wit: "To all whom it may concern: I, the undersigned, Samuel Nicholson, of Boston, state of Massachusetts, being the patentee of a certain patent granted to me by the United States, for improvements in wooden pavements, dated August 8, A. D. 1854, and reissued to me by letters dated December 1, A. D. 1863, do hereby grant an exclusive license unto Walter R. Davis, now of the city of Louisville, in the state of Kentucky, his heirs or assigns, to lay said pavement in the said city of Louisville, on condition that he shall, without delay, proceed to procure contracts for paving in the said city, and that he shall pay to me, or to my legal representatives, monthly, or as often as measurements of the pavement put down shall be made, a royalty or patent fee in cash at the rate of sixteen cents per square yard, superficial measurement, he may lay or permit others to lay in the said city of Louisville. And I hereby agree that this license may continue in full force during the term of my present patent. In case the said Davis or his assigns, or such person or persons as he may authorize to lay said pavement by virtue of this license, shall neglect or refuse to prosecute said work, or shall not use proper efforts and diligence in obtaining contracts therefor, or shall conspire or connive with other parties, in any manner, at any time, to prevent the adoption of said patented pavement in the said city of Louisville, or to delay the construction of the same therein, to the damage of the said patent and the injury of the said patentee, or shall neglect or refuse to pay said fee or royalty to said patentee, as herein agreed to be paid, then the said Nicholson, or his legal representatives or assigns, may terminate this license by giving ten days' notice of his intention to do so, and of the cause for which the same is to be revoked, such notice to be given in writing and directed to the said Walter R. Davis, and deposited in the Boston office."

5. That, after the granting of said license, and before Duckwall & Troxell had laid any of the pavement under their contract, but after they had graded a portion of the street and procured some of the material necessary for the making of the pavement, the said Davis notified them of his "exclusive license," but agreed with them that they might proceed to execute their work, without charge or responsibility to the patentee or to him, in consideration that they would allow him to superintend the execution of the work as far as might be consistent with their contract with the city. He, however, at the same time, notified them that he would not release the city, but would look to and require it to pay him royalty.

6. That after the date of the reissued patent, and before its expiration, the contractors laid said pavement according to the process and method described in said patent, and that the licensee, Davis, superintended the work so far as to see that it was done well, and according to the specifications of the patent.

7. That the motives which induced Davis to allow Duckwall & Troxell to use the patented process were: First, a desire not to interfere with their contract; second, a desire to commend the patented pavement to the city of Louisville, with the hope of thereby inducing it to improve in the same way other streets; third, an expectation that he could thus license Duckwall & Troxell to use the patents, and yet hold the city liable.

8. It does not appear that the city had any notice of the purpose of Davis to hold it responsible until after the work was done.

9. It is conceded that if the plaintiff is entitled to recover anything, he is entitled to two thousand one hundred dollars in damages. I shall not decide the important question raised by counsel whether or not the patent of Nicholson covers the product as well as the process; nor that other important question, whether the city could be liable for using the patent when it only contracted with others for a price to be paid to supply it with the product made under its superintendence; nor still that other difficult question, whether or not Walter R. Davis is the "assignee," the "grantee," or only the "licensee" of the patentee.

It is immaterial whether the writing vested in Davis the exclusive right of making and using the thing patented in the city of Louisville, or only gave him a license with-

power to license others, for even if it be such a license, the power conferred therein to license others gives to a license granted by him the same effect as if it had been granted by the patentee himself. Duckwall & Troxell contracted to lay down a Nicholson pavement, and, if they could not do so without infringing Nicholson's patent, or without paying him "royalty," still they were bound to perform this contract or to respond to the city in damages. The city did not undertake to supply them with the right to lay down the required pavement. Its mayor, it is true, advertised for bids for the making of the Nicholson pavement, but the city had the right to suppose that those who bid or contracted, would come clothed with authority to do the required work, or at least that they would obtain such authority before commencing it. The just expectation of the city was, in fact, realized. The contractors did, before they used any part of the patented process, before they had laid any of the alleged patented pavement, obtain a valid license to use the invention from Davis, who had the right to use, and to license others to use the invention in this city.

The reservation, by Davis, that he would hold the city liable for the "royalty," especially as it was not notified to the city, was of no effect, because inconsistent with the license he had granted to Duckwall & Troxell. He could not authorize them to use the patented process, without thereby relieving them from responsibility for an infringement, and the very act of relieving them relieved the city, conceding that it would have been liable had no license been obtained. The relieving of the parties primarily liable, by a universal rule of law, as well as of justice, relieves those who are only secondarily responsible. In my opinion, the claim of the patentee in the case, which is, in fact, the claim of Davis, has no more foundation than if Davis himself had been the contractor instead of Duckwall & Troxell; and, had he been the contractor, I imagine such claim must have struck even him as so obnoxiously unfounded that he would not have asserted it. Let judgment be entered for the defendant.

Case No. 1,401.

BIGELOW v. MATTHEWS.

[7 Blatchf. 77.][1]

Circuit Court, S. D. New York. Dec. 22, 1869.

PATENTS—INFRINGEMENT—NOVELTY—IMPROVED SODA-WATER APPARATUS.

1. In the apparatus described in the reissued patent granted to Edmund Bigelow, December 4th, 1866, for "improved apparatus for supplying and measuring syrups in soda-water," the original patent having been granted to him April 6th, 1858, an air tube or vent in the chamber of the faucet is necessary to enable such chamber to fill and discharge, and is a part of such faucet.

2. Under the first claim of such patent, namely, "the employment of reservoirs in permanent cases or stands, revolving or otherwise, as herein described, with the registering faucets, substantially as and for the purposes herein set forth," a faucet, to be the faucet of such claim, must be a faucet with such air tube or vent.

3. The second claim of such patent, namely, "a self-registering apparatus, with an air tube or vent, substantially as herein set forth, combined with a reservoir, as and for the purposes herein described," is, in this view, a mere duplication of the first claim.

4. The first claim of the reissued patent granted to Edmund Bigelow, August 6th, 1867, for "improved soda-water apparatus," the original patent having been granted to him January 25th, 1859, namely, "the combination of the conduit through which the mineral waters are drawn, and the syrup-cans, with the ice reservoir, all in one stand or castor, substantially as and for the purpose described," is void for want of novelty.

5. The measuring faucet is not a part of the combination in such claim and is not a part of the syrup-can.

6. The second and third claims of such reissued patent of 1867 are valid and are infringed by apparatus constructed in accordance with letters patent granted to John Matthews, Junior, October 3d, 1865, for a "soda-water apparatus."

In equity. This is a final hearing, on pleadings and proofs, of a suit [by Edmund Bigelow against John Matthews] founded on two letters patent of the United States granted to the plaintiff. [Decree for perpetual injunction and an accounting.]

One of the patents [No. 19,824] was originally granted to him April 6th, 1858. It was reissued to him May 4th, 1858, and again reissued to him December 4th, 1866, [No. 2,406,] for "improved apparatus for supplying and measuring syrups in soda-water." The other patent [No. 22,697] was originally granted to him January 25th, 1859. It was reissued to him August 6th, 1867, [No. 2,711,] for "improved soda-water apparatus." The bill alleged an infringement of both of the patents by the defendant, by the making and selling of soda-water apparatus containing the inventions claimed therein.

Charles M. Keller, for plaintiff.

Thomas A. Jenckes and Francis C. Nye, for defendant.

BLATCHFORD, District Judge. The reissue of 1866 declares the nature of the invention described therein to be, "the provision of any desired number of apartments, reservoirs or separate chambers, to be filled with syrups or other liquids, used as a beverage, and having a measuring faucet affixed to each reservoir, so as to draw from it, and at the same time measure, a given quantity of the fluid contained therein, without removing or handling said reservoir, which is

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

set in contact with, or adjacent to, ice, by which its contents are kept cool." The specification states, that the reservoirs may be placed in a line, side by side, in a permanent or rotating stand. The drawings show a circular stand of reservoirs, with a central space as a receptacle for ice to cool the contents of the reservoirs. The measuring faucet has in it a registering or measuring chamber, which communicates by a pipe with the reservoir. A rod or stem runs through the faucet in a vertical direction, and carries and operates two valves. The upper valve is a conical valve, which fits the supply opening from the pipe leading to the reservoir. The lower valve is on the lower end of the stem and serves to open and close the discharge orifice of the measuring chamber. The upper end of the stem passes out from said chamber through a packing box at its top. The lower end of the stem is guided in its movement by a bar, on which rests a spiral spring, which bears on the upper valve and keeps it raised from its seat or open, and also keeps the lower valve closed. In this condition, the communication between the reservoir and the measuring chamber, by which the latter is filled, is left open. By pressure downwards on the top of a head or thumb-piece affixed to the upper end of the valve-stem, the stem is depressed, forcing the upper valve down to its seat, and thus cutting off the communication between the chamber in the faucet and the reservoir, and at the same time opening the lower valve, which closes the exterior of the discharge orifice. By this operation the contents of the faucet are discharged. By removing the pressure from the stem, the spring throws up the stem, the lower valve is closed and the upper valve is opened, and the measuring chamber is again filled. The specification states, that, to enable the chamber of the faucet to fill and discharge, it is necessary to have a vent therein, which may be at any convenient and proper point, and that a tube should extend from the vent up to the top of the reservoir, or other convenient point, "that will prevent the overflow of the contents of the reservoir when it is filled." The claims of this patent are as follows: (1.) The employment of reservoirs in permanent cases or stands, revolving or otherwise, as herein described, with the registering faucets, substantially as and for the purposes herein set forth; (2.) A self-registering apparatus, with an air tube or vent, substantially as herein set forth, combined with a reservoir, as and for the purposes herein described.

The apparatus of the defendant is constructed in accordance with letters patent granted to John Matthews, Junior, October 3d, 1865, for a "soda-water apparatus." It has a series of syrup-reservoirs, arranged in a permanent case or stand, with a registering or measuring chamber under each reservoir, constructed and operated in such manner as to be capable of measuring and discharging a definite quantity of syrup. Such chamber has at its bottom a discharge orifice and at its top a filling orifice. The filling orifice opens directly into the reservoir. A rod or stem runs vertically from above the top of the reservoir through the syrup in it, and through the measuring chamber to the bottom of it, and, on the stem and within such chamber, are two valves, one of which fits the lower side of the filling orifice and the other of which fits the upper side of the discharging orifice. These valves are so arranged that the lifting of the stem opens the discharge orifice and closes the filling orifice, and permits the contents of the chamber to be discharged, and the depression of the stem closes the discharge orifice and opens the filling orifice, and allows the chamber to be filled, the movements of the two valves in both directions being simultaneous. The raising of the stem in the defendant's apparatus effects what is effected by the depression of the stem in the plaintiff's, and the depression of the stem in the defendant's effects what is effected by the raising of the stem in the plaintiff's. In the defendant's apparatus there is no such vent, with a tube extending up from it, as is found in the plaintiff's patent of 1866, that is, no vent from the measuring chamber, when empty or being filled, other than such vent as is afforded by the orifice through which the syrup comes from the reservoir; whereas, in the plaintiff's patent of 1866, there is such vent, with a tube, in addition to what vent may be afforded by the pipe through which the syrup comes from the reservoir. Such additional vent is described, in the plaintiff's patent of 1866, as necessary to enable the chamber to fill and discharge, and it is shown by the testimony to be thus necessary, in the apparatus described in that patent.

The first question is, whether the defendant's apparatus, thus described, infringes the plaintiff's patent of 1866. It is necessary, in order to determine this question, to first define the scope of what is claimed in the patent. As the defendant does not employ a self-registering apparatus, with such an air-tube or vent as is described in the plaintiff's patent, it is not insisted by the plaintiff that the defendant's apparatus infringes the second claim of the patent. The inquiry will, therefore, be confined to the construction of the first claim of the patent. As the air-tube or vent, before referred to, is necessary to enable the registering chamber to fill and discharge, it is impossible to employ the reservoir in connection with the registering faucet which contains the registering chamber, for the purpose, specified in such first claim, of filling such chamber with syrup from the reservoir and then discharging such syrup from such chamber, without using such air-tube or vent. Such vent is described in the specification as being at some point in the chamber of the faucet and as having the tube extend-

ing from it. The vent is, therefore, a part of the faucet. The faucet is not such a registering faucet as is referred to in, and intended by, the first claim of the patent, unless it is a faucet with such a vent. In this view, the second claim of the patent is a mere duplication of the first claim. Each claims a combination of the reservoir with the self-registering faucet containing the vent. There is no patentable substance in having several reservoirs, each with such a faucet, beyond what is found in having one reservoir with such a faucet; and the first claim of the patent would be infringed by employing one reservoir with such a faucet. As the defendant's measuring chamber has not the additional vent referred to, it does not infringe the first claim of the patent.

The plaintiff's patent of 1867 states the purpose of the invention therein described to be, "to economize ice, by combining with an ice-reservoir, placed on a counter, or other convenient stand, for drawing mineral water or other beverage, a conduit or pipe, through which said liquids are drawn, and a syrup-can or cans, by which said liquids are flavored; also, to economize syrup and effectually measure the same by thoroughly ventilating the measuring faucet affixed to said cans." The syrup-cans are described as being placed in juxtaposition to the ice chamber, in a stand or caster. To each syrup-can is attached a measuring faucet like that described in the patent of 1866, with the addition of a vent or air-passage in the valve-stem, so as to admit air into the measuring chamber when the discharge valve is opened to discharge the contents of the chamber. The stem has two openings in it, one above the other, the portion of the stem between such two openings being hollow. The upper opening always remains outside of the measuring chamber. The lower opening is outside of the chamber when the discharge valve is closed and the supply valve is open, but the depression of the stem, which closes the supply valve and opens the discharge valve, carries such lower opening within the chamber, so that the air which issues from it into the chamber, and which is free to come through the hollow stem from the communication between that and the atmosphere, through the upper opening, aids in discharging the syrup from the measuring chamber. The conduit for the passage of the mineral water passes through the ice-chamber, so that such conduit and the syrup-cans are cooled by the ice in one and the same ice-chamber. The claims of the patent of 1867 are as follows: (1.) The combination of the conduit through which the mineral waters are drawn, and the syrup-cans, with the ice-reservoir, all in one stand or caster, substantially as and for the purpose described; (2.) An air-vent, in or connected with the valve-stem of a measuring faucet, as above set forth, or in any manner substantially the same; (3.) In combination with a syrup-caster, substantially as herein described, a measuring faucet, or its equivalent, so made that, when the discharge port is opened, the supply port is closed by proper plug or other formed valves, connected with a stem so constructed and arranged that it admits external air in to the measuring chamber when the discharge port is opened by the movement of said stem, all substantially in the manner and for the purposes herein set forth. It is alleged by the plaintiff, that the defendant's apparatus infringes each one of the three claims of the patent of 1867. The defendant's apparatus has a conduit or pipe through which the mineral water is drawn, and a series of syrup-cans or reservoirs to contain the syrups, and an ice-reservoir to contain ice for the purpose of cooling the articles, and a stand or case by which the conduit, the syrup-cans and the ice-reservoir are all combined together, so as to constitute a combined apparatus for drawing mineral water and syrups. Each of the three instrumentalities in the defendant's apparatus, forming part of such combination has the same mode of operation in itself, and in reference to its co-members in the combination, and in reference to the combination, and is used for the same purpose, as the corresponding one of the three instrumentalities in the plaintiff's combination in his first claim; and such combination, in the defendant's apparatus, has the same mode of operation, and is used for the same purpose, as the combination in the plaintiff's first claim. Therefore, the defendant's apparatus infringes the first claim of the patent of 1867. But I think that claim is void for want of novelty. The Hubbell apparatus and the Parrish apparatus anticipated the invention covered by such first claim. Each of them employed a series of syrup-cans arranged around a central ice-chamber, and the draught pipe of the mineral water was arranged so as to be refrigerated by the same chamber. The counsel for the plaintiff seeks to save the first claim of the patent of 1867, by contending that the measuring faucet is a part of the combination in such claim, and is virtually a part of the syrup-can. But this view cannot be admitted. The specification speaks of the measuring faucet as being affixed to the can, and, again, as being attached to the can. It cannot be regarded as a part of the can. It was admitted by the counsel for the plaintiff that, unless the faucet could be regarded as a part of the can, the first claim was anticipated by the apparatus of Hubbell and by that of Parrish.

We come now to the question, whether the second and third claims of the patent of 1867 are infringed. The rod or stem of the defendant's apparatus is hollow. It is open at its lower end and there is an aperture in it near its upper end, which last named aperture remains at all times above the surface of the syrup in the syrup-reservoir. The atmospheric air can thus pass freely through the rod or stem. When the

measuring chamber is full of syrup and the discharge orifice is closed, the lower aperture in the stem is entirely below the discharge orifice. When the stem is raised, thus opening the discharge orifice, such lower aperture in the stem passes up, with the lower end of the stem, through the descending syrup, until the valve which fits the lower side of the filling orifice reaches its seat and closes such orifice, and the air which passes through the length of the stem from above issues from such lower aperture in the stem into the measuring chamber, above the syrup which is being discharged from it, and aids in the discharge of such syrup. The principle or character of the air-vent in the valve-stem of the plaintiff's apparatus, and of such valve-stem with such air-vent, is, that the stem has a linear motion, and, in such motion, carries the orifice from which the air issues, from the outside of the measuring chamber to the inside thereof, and to a point behind the syrup that is being discharged from such chamber, so that the air so issuing may follow and press upon the receding syrup; and that the motion of such orifice is co-incident with the motion of the two valves that are carried by the stem; and that such orifice is always outside of the measuring chamber when such chamber is being filled, and is always within such chamber when such chamber is being emptied. The second claim of the patent of 1867 is for the combination of such an air-vent with such a valve-stem, in a faucet which has a measuring chamber. It is not necessary that the faucet should be one having, in addition, the air-vent in the measuring chamber, described in the patent of 1866. On this construction, there is no doubt that the defendant's apparatus infringes the second claim of the patent of 1867. It has an air-vent in the valve-stem, and the principle or character of such air-vent, and of such valve-stem with such air-vent, is the same as the principle or character, before described, of the plaintiff's air-vent and valve-stem. The mode of operation of the valve-stem and the air-vent in the defendant's apparatus is the same as the mode of operation of the valve-stem and the air-vent in the plaintiff's apparatus. The differences between the movements of the two apparatuses, in that the valve-stem in the plaintiff's apparatus moves downward to close the filling orifice, and to open the discharge orifice, and to carry the air-vent in the valve-stem into the measuring chamber, and in that the valve-stem in the defendant's apparatus moves upward to perform the same three functions, are mere formal differences and not differences in substance. They are outside of the real invention claimed by the plaintiff in the second claim.

The proper construction of the third claim of the patent of 1867 is, that the measuring faucet, or measuring apparatus, must be so made, that the discharge port shall be opened and the supply port be closed simultaneously, by valves, which valves must be connected with a stem, so constructed and arranged as to admit external air into the measuring chamber of the apparatus when the discharge port is opened by the movement of the stem; that the stem must have a linear motion; that the movement, by the stem, of the orifice so admitting air into such chamber, and the motions and relative positions of such orifice at different times, shall be as before defined in respect to the second claim; and that such faucet or apparatus shall be combined with a syrup-caster, substantially as in the plaintiff's patent. It is not necessary, in respect to the third claim, any more than in respect to the second, that the measuring faucet, or measuring apparatus, should have, in addition, the air-vent described in the patent of 1866. Nor is it necessary, in either the second or the third claim, that the measuring apparatus should be technically a faucet. Any measuring apparatus, having the characteristics of the plaintiff's faucet, is his faucet. The defendant's apparatus is a manifest infringement of the third claim of the patent of 1867. It has a measuring apparatus, containing a measuring chamber, which has a discharge port and a supply port, each closed by a valve. Both of such valves are closed simultaneously. Such valves are carried by a stem, which has a linear motion. The stem is so constructed and arranged, as to admit external air into the measuring chamber when the discharge port is opened by the movement of the stem, and the principle or character, and mode of operation, of the air-vent, and of the valve-stem, and of the valves, and of the orifices in the stem, and the combination of the measuring apparatus with the syrup-caster, are the same, in substance, as in the plaintiff's apparatus.

I have examined carefully all the testimony introduced on the part of the defendant, to affect the novelty of the inventions covered by the second and third claims of the patent of 1867, and find nothing to affect the novelty of either of those claims, according to their construction before given. Nor is there evidence satisfactory to show that the plaintiff was not both the original and the first inventor of what is covered by both of those claims, as thus construed.

There must be a decree for a perpetual injunction and an account, in respect to the second and third claims of the patent of 1867. The question of costs will be reserved until the coming in of the master's report.

BIGELOW v. NEW JERSEY R. CO. See Case No. 9,620.

BIGELOW, (TUCKERMAN v.) See Case No. 14,228.

Case No. 1,402.

BIGGS et al. v. BARRY et al.

[2 Curt. 259.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

NEW TRIAL—MISCONDUCT OF JURY — SALE — RESCISSION BY SELLER — FRAUD — STOPPAGE IN TRANSIT.

1. Where the plaintiff claimed on two distinct grounds, either of which, if found in his favor, would entitle him to a verdict, and it appeared that the jury did not consider and decide on either ground separately; but that some might have decided on one, and some on the other, the verdict was set aside.

[Cited in Glaspell v. Northern Pac. R. Co., 43 Fed. 909.]

2. If goods are sent to a forwarding merchant, to await in his hands the instructions of the purchaser, respecting any further transit, their transitus is at an end when they reach his hands, so that they cannot be stopped by the vendor.

3. To avoid a sale upon the ground that the vendees did not intend to pay for the goods, it is not enough that they knew themselves to be insolvent and had no reasonable expectation of being able to pay them when purchased; these facts may induce the jury to find a fraudulent purpose, but they are not, of themselves, sufficient.

[Cited in Parker v. Byrnes, Case No. 10,728.]

[See D'Wolfe v. Babbett, Id. 4,220.]

[At law. Trover by John Biggs and another against Michael O. Barry and others. Verdict for plaintiffs. Defendants move for new trial. Granted.]

C. B. Goodrich, for plaintiffs.

J. A. Loring, contra.

CURTIS, Circuit Justice. This was an action of trover, for a quantity of hosiery and gloves of the agreed value of $3,500. The jury found a verdict for the plaintiffs and the defendants moved for a new trial. At the trial before me, it appeared, that the plaintiffs manufactured these goods at Leicester, England, under orders given for them by a firm of Hall Brothers, who were commission and general merchants at Nottingham, England, and at New York. Pursuant to directions given by Hall Brothers, the goods when ready, were sent to Liverpool, to Edwards, Sanford & Co., who were forwarding merchants there, and who in many previous transactions, had acted for Hall Brothers in receiving and forwarding their goods. The merchandise in question was shipped by Edwards, Sanford & Co., to Boston, under bills of lading making it deliverable to their order, and which having been indorsed by them in blank, were sent to the defendants, by Hall Brothers. Hall Brothers having become insolvent before the arrival of the goods, and their price being unpaid, the plaintiffs demanded the goods of the master of the vessel in which they came, before they had been received by the consignees, under the bills of lading. These facts were not controverted.

The case turned on two points. 1. Whether the plaintiffs had the right to stop the goods in transitu, at the time they demanded them. 2. Whether the sale by the plaintiffs to Hall Brothers was voidable by reason of a fraud of the purchasers, in making the purchases. The fraud alleged was, that they were deeply insolvent, and knew themselves to be so, when the purchases were made, and that their intent was such, that the vendors had the right to avoid the sale and reclaim the goods. Each of these questions was submitted to the jury, with instructions as to matter of law, which will be presently stated, and with directions to consider them separately, and if either was found in favor of the plaintiffs, to render a verdict for them, otherwise to find for the defendants. By consent of parties the jury, who retired just before the adjournment of the court in the evening, were told that they might seal up their verdict, and separate, and come in and render it the next morning. When they came into court, the next day, they returned a verdict for the plaintiff, and upon motion of the defendants' counsel, and with the consent of the plaintiffs' counsel, the court inquired of them whether they had found their verdict on both, or one, and if one, which of the points put to them by the court. The foreman stated, that the jury did not take up the points separately, but took a ballot on the general question whether the plaintiffs were entitled to recover; and the jury being unanimous on that, they proceeded no further. He further said his own opinion was with the plaintiff on both points; and one of his fellows indicated that he did not agree with the foreman in that. But the court declined to hear any further statements of what passed in the jury-room, if all agreed that they did not take up and consider the two questions separately. This was assented to, and the verdict was affirmed and recorded. I am clearly of opinion the verdict should not be allowed to stand. It was the duty of the jury to consider and decide on each question separately. If they could agree that the plaintiff had the right to stop in transitu, or if they could agree that the purchase was voidable for fraud, then the plaintiffs were entitled to a verdict. But if some of them were with the plaintiffs on one point, and some on another, they agreed on nothing; and no verdict should have been rendered.

It was argued, that it did not appear they did not agree on some one point. It is true, that as they never considered the questions separately, it does not appear what the result of such a consideration would have been; and this is the very difficulty. The court is apprised that in point of fact the twelve men never did concur in opinion, and agree to

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

render a verdict upon either ground. What they would have done can only be conjectured; and a conjecture is not a fit basis for a judgment.

It was also urged, that the defendants should have moved to have the jury retire again and further consider their verdict; and that the court had power to send the jury out again, though they had once separated. It is not necessary to determine whether the court had that power. It did not think it proper, under the circumstances, to exercise it, and I do not consider the defendants waived any thing by not moving the court on the subject. Whether a jury shall, or shall not be directed to retire and further consider their verdict, is a matter solely under the control of the court, and to be regulated by its discretion in each case. The interposition of counsel, at such a time, is generally not permitted, and I do not think, can ever be necessary to prevent a waiver of any right to his client, unless he is called on by the court to know what he desires. At all events, in this case, there was not, in my opinion, any waiver, and the verdict must be set aside, and a new trial ordered.

With a view to this new trial, it is proper to state my opinion on the questions of law involved in the case. In reference to the right to stop in transitu, the jury were instructed that, if the goods were sent by the plaintiffs to Edwards, Sanford & Co. at Liverpool, to be there subject to the orders of the buyers, and under such circumstances that they could go further only by force of instructions to be given to Edwards, Sanford & Co., by the buyers, then the transitus was ended when the goods reached the hands of Edwards, Sanford & Co.; that a delivery to forwarding agents, employed by the buyer, to remain with them until the buyer should send orders respecting their destination, was, in legal effect, a delivery to the buyer; and the only transitus definitely contemplated when the goods left the hands of the seller, was completed, and the right to stop the goods was terminated. But if when the goods left Leicester, they were destined to a foreign port, either New York or Boston, under a consignment then already made, and Edwards, Sanford & Co. were to forward their goods on their way to their destination without further orders or instructions from the buyers, then the transitus was not ended when the goods came to Edwards, Sanford & Co., but continued until they reached the consignee in New York or Boston. On reviewing this instruction, and comparing it with the authorities, particularly with the case of Valpy v. Gibson, 4 Man., G. & S. 837, I am satisfied of its correctness, and the same instruction will be given on the new trial.

Concerning the question of fraud the jury were told, in substance, that it was not enough to enable the plaintiffs to avoid the sale, that the buyers knew themselves to be insolvent when they made the purchase; that fraudulent conduct on their part must be proved; that if they bought, knowing they could not pay, or intending not to pay for the goods, this was a fraud; that the jury must, therefore, consider the state of mind of the buyers, and decide whether the plaintiffs had proved, that when they made the purchases in question, Hall Brothers had no expectation of paying for the goods; and that, in this point of view, no reasonable expectation was, in legal effect, no expectation; for the law did not allow men to set up and rely upon expectations which had no foundation in reason.

I am of opinion that the last clause of this instruction, which makes no reasonable expectation to be the same in legal effect, for this purpose, as no expectation, was erroneous. This is not a question of reasonable expectation, but of fraudulent purpose. It is not a question whether the grounds of their belief that they could and should pay, were sound and rational, but whether they did so believe, in point of fact. Lord v. Goddard, 13 How. [54 U. S.] 198; Com v. Eastman, 1 Cush. 221; Chamberlain v. Hoogs, 1 Gray, 172; Jones v. Howland, 8 Metc. (Mass.) 377. It is true that the jury, in considering whether an expectation to pay did in fact exist, may, and should pay much regard, to the inquiry whether any reasonable ground for such expectation existed; and if none can be discovered, it might be proper for them to find that no expectation to pay in fact existed. But it might, also, under some circumstances, be proper for them to find otherwise; they might think that an over sanguine and rash, but honest man, had trusted to appearances and built on foundations which were not reasonable, but nevertheless had an actual existence in his mind; and that though his conduct was unreasonable when measured by their judgments, and blameworthy, it was not fraudulent. This instruction, therefore, must be modified, if a new trial should be had.

Case No. 1,403.

BIGGS v. BLUE et al.

[5 McLean, 148.][1]

Circuit Court, D. Ohio. Oct. Term, 1850.

EJECTMENT — JUDGMENT—VALIDITY—REVERSAL — SCIRE FACIAS — ATTACHMENT—AFFIDAVIT — IRREGULARITIES—SET-OFF — VENDOR AND VENDEE —BONA FIDE PURCHASER.

1. When a title is set up under a judgment on an attachment, although the affidavit on which the writ issued does not appear in the record, the judgment cannot be treated as a nullity. This omission by the clerk does not show that no affidavit was made, as required by the statute.

2. When the court has a general jurisdiction, irregularities do not make void the proceeding.

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

The proceedings on the attachment may be erroneous, which may be ground for reversal, but when the judgment is used collaterally, such errors do not make void the judgment.

[See Pennington v. Gibson, 16 How. (57 U. S.) 65; McGoon v. Scales, 9 Wall. (76 U. S.) 23; Miller v. U. S., 11 Wall. (78 U. S.) 268; Ludlow v. Ramsey, 11 Wall. (78 U. S.) 581.]

3. The attachment was laid on part of a larger tract of land, without describing specially the part. The judgment on the attachment after the sale of the land, was reversed. The Bank of Steubenville, the plaintiff in the attachment, became the purchaser. At common law, when a judgment is reversed, the party shall be restored to all he has lost. And where the thing lost is certain, this is done without a scire facias.

4. In a suit against administrator of Biggs by the bank, the amount at which the land was purchased was pleaded as an offset, and allowed the administrator.

5. The land having been sold to an innocent purchaser, the legality of the sale on the attachment becomes a question.

6. The sale of the tract followed the description of the property given on the service of the attachment, of a part of the tract. This is indefinite, but may be made sufficiently certain, if the residue of the tract had been sold. To afford an opportunity to show this fact a new trial is granted.

Stanton, Allison & Curry, for plaintiff. Mr. Stanbery, for defendants.

OPINION OF THE COURT. This is an action of ejectment for 666⅔ acres of land in Union county. A patent was given in evidence, dated the 15th March, 1822, to Benjamin Biggs, the ancestor of the plaintiffs. The survey was made the 28th October, 1801. The land is situated in the Virginia Military tract. The heirship of the plaintiffs was proved by several witnesses.

The defendants claim under an attachment sale; and the principal questions in the case arise, as to the validity of the proceedings on the attachment. It is contended that those proceedings are void on several grounds. 1. There is no affidavit, as the statute requires, in the record. As this question comes up collaterally, it is not necessary to inquire what effect the objection might have had before a court of error, called to revise the judgment on the attachment. But we apprehend that in such a case, the objection would not be available. In making up the record the clerk may have omitted the affidavit, supposing it not to be a part of the record; and if deemed a necessary part of it, on allegation of diminution a court of errors would award a certiorari to perfect the record. When the question comes up collaterally, as in this case, the court cannot presume there was no affidavit, from its not being copied into the record. We know, in fact, that there was an affidavit, as a copy of it certified is before us. But to this it is objected, that it is the copy of a copy.

The court in which the attachment issued had general jurisdiction, and a want of jurisdiction will never be presumed against it. The rule is different as applied to inferior courts of a limited jurisdiction, where, upon the face of the proceedings, the jurisdiction must appear. In Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449, the court say, there is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. In Grignon's Lessee v. Astor, 2 How. [43 U. S.] 319, it was held, that "it was for the court to decide upon the existence of the facts, which gave jurisdiction; and that the exercise of jurisdiction warrants the presumption that the facts which were necessary to be proved were proved." "The court say the power to hear and determine a cause is jurisdiction; it is coram judice whenever a case is presented which brings this power into action."

The attachment law requires a notice to creditors to be given three months, and it appears from the record that six weeks' notice only was given. On this ground a writ of error having been prosecuted to the supreme court of the state, the judgment on the attachment was reversed. There were other irregularities in the proceedings in the attachment assigned, but they were such as were proper to be considered by a court of errors, as they did not make the proceedings void. The Bank of Steubenville brought the attachment to recover a debt against Biggs, the ancestor of the plaintiffs, and the bank became the purchaser of the land which was sold under the attachment. And it becomes an important question to consider what effect the reversal of the judgment can have on the title to the land. At common law, if a judgment is reversed in error, the party shall be restored to all he has lost. And a writ of restitution will be issued to inquire what profits the plaintiff, who recovered, has taken or received from the land. C. P. 306. Where the money appears upon record to have been levied and paid, the defendant shall have restitution without a scire facias. If the plaintiff after a recovery in ejectment is disseized, or makes a feoffment, and then the judgment is reversed, a writ of restitution shall not be awarded against the disseizor or feoffor. 2 Salk. 587. But where money is levied under a judgment and paid to plaintiff, and the judgment is afterwards reversed, the party shall have restitution without a scire facias, as the amount is certain. 2 Salk. 588. The statute of 1st February, 1822, (2 Chase, St. p. 1238,) § 15, provides, "that if any judgment or judgments, in satisfaction of which any lands or tenements belonging to the party hath or shall be sold, shall at any time thereafter be reversed, such reversal shall not affect or defeat the title of the purchaser or purchasers, but in such case restitution shall be made of the moneys by the judgment creditor, for which such lands or tenements were sold, with lawful interest from the day of sale." In this statute there is no exception.

There seems to be no reported case in Ohio involving the precise points now before us. The case of Hubbell v. Broadwell's Heirs, 8 Ohio, 127, has no application where the creditor plaintiff is the purchaser and owner of the land. The court say, "Where lands have passed by a sale under execution to a stranger to the judgment, the statute compels the owner of the land, on reversal of the judgment, to pursue the fruits of the sale, into the hands of his antagonist. But when a party to the judgment purchases and continues to hold, the rule does not apply with the same force." This seems to be equivalent to saying that the statute does apply, but with less force. The court however add: "The purchaser is a party to the errors, and it seems most consonant with justice to restore the land itself to its original owner, where it remains between the original parties, and within reach of the court, no new rights intervening." Under the circumstances there was a decree for redemption.

It appears that by a decision of the supreme court in Jefferson county, in a writ brought by the Bank of Steubenville against the administrator of Biggs, on a note, the defense set up, under a notice was, that the defendants will claim a set off for twelve hundred dollars, the amount of a sale which is due and owing to defendant as administrator, &c. The cause appears to have been submitted to the court by consent of parties. And the court found that the said Biggs in his life time did assume in manner and form as stated by plaintiff. And they also found "that the defendant was entitled to offset the sum of eleven hundred and forty-two dollars and five cents, that being the amount of the purchase money and interest of the land purchased by the said bank, under the judgment which appears to have been reversed." Thereupon it was considered that the bank recover, &c., deducting the above sum.

The lessors of the plaintiffs claim under a patent, on a Virginia Military survey, No. 4075, situate on the waters of Mill creek, containing 666⅔ acres, more or less. The attachment was laid on No. of survey 4075, containing 375 acres, original quantity 666⅔ acres. The appraisers under the attachment returned, "also one tract of 375 acres on the No. 4075, original quantity 666⅔ acres." The deed by the sheriff on the sale under the attachment, states, "also one tract of 375 acres, on the map No. 4075, original quantity 666⅔ acres." The appraisement of the 375 acres, was at one dollar and twenty-five cents per acre; it was sold at 83⅓ cents per acre. The consideration named in the sheriff's deed to the bank was the sum of nine hundred forty-five dollars eighty-three and one-third cents, but this included other tracts than the one now in controversy. After the reversal of the judgment on the attachment, the consideration money paid by the bank, at the sheriff's sale, was claimed as an offset to a suit brought by the bank against the administrator of Biggs, and was allowed, so that no further demand exists by the plaintiffs against the bank. But the legality of that sale remains to be tested. The land attached and sold must be so described as to make it certain; for, if in this respect there was a want of certainty, the legal title of Biggs was not transferred to the bank, and from the bank to the present holders. Every tract attached, or levied on by execution, must contain that certainty of description which would be sufficient in a deed of conveyance. The attachment was laid on a part of a tract. without designating what part. This would seem to be an incurable defect of description, unless certainty can be shown from other facts. As, for instance, if Biggs had sold and conveyed all the tract except the number of acres on which the attachment was laid, that might, perhaps, show with reasonable certainty the particular part attached and sold. On this ground the court granted a new trial in the case, with the view to establish the doubtful points which seemed to have taken the defendants by surprise. They are innocent purchasers, and whilst they rest upon their legal rights, it is but just that they should have a full opportunity of establishing them.

A new trial is granted.

BIGLER v. AVERY. See Case No. 14,481.

BIGLER, (PARKER v.) See Case No. 10,726.

Case No. 1,404.

BIGLER v. WALLER.

[Chase, 316;[1] 3 Am. Law T. Rep. U. S. Cts. 157; 4 N. B. R. 291, (Quarto, 86;) 3 Chi. Leg. News, 26; 5 Am. Law Rev. 570.]

Circuit Court, D. Virginia. Sept., 1870.[2]

WAR—INTEREST—SUSPENSION—END OF CIVIL WAR—DAMAGES TO ESTATE PAID IN CONFEDERATE MONEY—CREDITS.

1. The supreme court of the United States having held (Hanger v. Abbott, 6 Wall. [73 U S.] 532,) that the late war suspended the statute of limitations, and in Ward v. Smith, 7 Wall. [74 U. S.] 452, that interest did accrue during the war, in that particular case, making an exception to the general rule that interest does not accrue between citizens, or subjects of belligerent states, it may not unreasonably be inferred from the language of the court that if the direct question came before them it would be decided that interest did not accrue between parties to the late civil war.

[Cited in Brown v. Hiatt, Case No. 2,011.]

2. It is the duty of this court to decide the question as it believes the supreme court would decide it. Bigler, a citizen of New York, was indebted to Waller, a citizen of Virginia, in the sum of thirteen thousand dollars, due for land sold by Waller to Bigler, which sum was due and payable May 10, 1861. Bigler was ex-

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

[2] [Reversed by the supreme court in Bigler v. Waller, 14 Wall. (81 U. S.) 297.]

cluded from occupation of the estate during the war, the improvements placed on it by him were greatly injured, and Waller was entitled to possession during the war by virtue of a sale under a trust deed and purchase by him of the property. If interest on a debt should cease in any case it should in this.

3. The proclamation of President Lincoln of April 19, 1861, declaring a blockade of the ports of the insurgent states must be regarded as the first formal recognition of the existence of civil war by the national authority. The supreme court has held that the war ended on August 2, 1866, so far as the captured and abandoned property act is concerned, but they have declined fixing any precise date of termination applicable to all cases. In this case the establishment of the adhering government of Virginia at Richmond as the recognized government of the whole state is to be taken as the end of the war in this state. This event took place when the executive department of that government was removed from Alexandria to Richmond, on May 26, 1865. The period to be excluded in the computation of interest is the time from April 19, 1861, to May 26, 1865.

4. Confederate money received by Waller from the Confederate government, for damages done the property after Waller was in possession of the same, must be scaled down to its gold value as of the date of its receipt and interest to be calculated on the sum thus ascertained. For the amount of this payment and interest Bigler's debt to Waller is to be credited.

5. The proof of damages to Bigler by reason of Waller not performing certain covenants in his contract of sale being too vague and unsatisfactory to form the basis of decree, no damages are to be allowed him.

[See note at end of case.]

[In equity. Suit by James Bigler against William Waller and Robert Saunders to remove cloud from title to land. Decree that complainant pay Waller's administrator the sum of $17,377.48 in United States coin.]

Bigler, a citizen of New York, in May, 1853, purchased from Waller, a citizen of Virginia, the estate of Rippon Hall, consisting of two thousand acres of land, and improvements, lying in the county of York, and state of Virginia. Bigler was to pay Waller thirty thousand dollars for the estate, five thousand dollars in cash and the residue divided during a period of ten years, and accordingly Waller, on May 10, 1853, executed and delivered to Bigler, a deed of the property, who thereupon paid Waller five thousand dollars in cash, and on June 23, 1853, executed and delivered to Saunders as trustee, a trust deed reconveying Rippon Hall to him to secure the payment of the twenty-five thousand dollars due Waller. These payments were to be two thousand dollars on May 10, 1855, with interest on the whole sum unpaid, and one thousand dollars annually on that day, with interest on the whole sum unpaid, until May 10, 1863, when the whole of the twenty-five thousand dollars then unpaid was to become due and to be paid. It was provided that the failure to pay any one of these sums would be considered "a defalcation which shall authorize Waller to require Saunders to execute this trust according to law." It was provided that in case of a sale sixty days notice should be given in newspapers in Richmond, and the city of New York. Bigler paid all the installments provided for in this deed of trust up to and including May 10, 1860, leaving thirteen thousand dollars due as purchase money secured by this trust deed. He also improved the property by the erection of wharfs, mills, and buildings, and laid off a village and town lots, and built school-houses, and other improvements. But York county extends along the York river to the Chesapeake, and contains within its limits Yorktown, the scene of the termination of the first invasion of Virginia. It is open to the sea, and is covered by the guns of any hostile fleet which rides the waters of its great boundaries. Consequently at the first approach of civil war, the Rippon Hall enterprise was abandoned by its owner and projector, who returned to New York, and made no further sign until June, 1865, when he returned and resumed possession. In the meantime his installment payable May 10, 1861, had become due, and being absent, and presumably unable to return, he did not pay it. Waller then required Saunders, the trustee, to sell under the deed of trust, which he did on April 1, 1862, Waller himself becoming the purchaser for seventeen thousand dollars in money, which was then quite equal in value to greenbacks, and Saunders conveyed the estate to Waller, on receiving Waller's note for the amount due over and above the sum which Bigler owed him. No notice of course was published of the sale in the papers of the city of New York, the state of Virginia then exercising control of York county. In May, 1862, the buildings on the estate were burned by Colonel Duke, an officer of the Confederate army, and the military line of the Confederate states receded up the Peninsula towards Richmond, while those of the United States as regularly followed them, at once inclosing York county and Rippon Hall. McClellan's move in the spring of 1862, placed that part of Virginia permanently within the federal lines, and there was no reason in law nor fact why Bigler might not have returned to his property in June, 1862, and disregarded the said sale by Saunders of April, 1862. Waller adhered to the side of Virginia, and retired with the forces of the Confederacy, and in 1863, secured the payment of two thousand dollars in Confederate currency for the injury done to the Rippon Hall estate. When the war was over, it seems to have been at once understood that the sale and deed of April, 1862, by Saunders to Waller, were utterly void, for Bigler forthwith in June, 1865, re-entered into possession of his property, and Waller proceeded to bring suit against him in New York for the thirteen thousand dollars and interest, the balance of the purchase money due him. At that time the courts of New York were much more apt to respect any rights which he might have had against Bigler, than those of the restored state of Virginia. In order to

draw off the attack in New York, this bill was filed in this court by Bigler against Waller, charging that Waller claimed thirteen thousand dollars due him for unpaid purchase money, when in truth there was not a cent due, which claim it was charged was a cloud on the title, and the court was prayed to remove the same, by decreeing that Waller owed money to Bigler for damages done the estate, during Waller's constructive possession, largely over and above the purchase money unpaid. Whereupon after much endeavor the New York proceedings were all stopped, and the questions came up before this court for decision.

J. K. Hayward, for complainant.

This suit was brought by James Bigler, of New York, against William Waller and Robert Saunders, of Virginia, to remove a cloud from the title to plaintiff's estate situated in York county, Virginia, and called Rippon Hall.

I. In 1853, James Bigler, by his agent, F. W. Hammond, of Virginia, made an agreement in writing with defendant Waller to purchase for thirty thousand dollars, two thousand acres of land in Virginia, called Rippon Hall. This agreement contained the following covenant: "Said Waller will allow said Bigler to sell such portions of the land as he may see fit, from time to time; the said Bigler paying over to said Waller, such proceeds of sales as will afford ample security for the liquidation of the residue of the debt."

II. On May 10, 1853, Bigler paid five thousand dollars of the purchase money; gave his bond for the balance, twenty-five thousand dollars; took a deed of the property, and at the same time took possession of the estate.

III. On June 22, following, Bigler made and delivered a trust deed to Robert Saunders, to secure the payment of the bond, which deed provided for the sale of the estate in default of payment, according to the terms of the bond, in the following manner: "It is understood that in case of sale, the trustee shall give sixty days' notice in newspapers in Richmond and in the city of New York."

IV. The agreement for sale, bond and trust deed are in pari marieta.

V. The plaintiff made improvements on the estate consisting of a wharf, mills, hotel, store, church, school-houses, planted an orchard comprising some thirty thousand fruit trees, laid out a village, and built a large number of private residences, prior to 1857, at an expense of one hundred and fifty thousand dollars.

VI. In the spring of 1854, Bigler contracted to sell portions of said estate (village lots), but was prevented from effecting said sales by Waller's refusal to release his mortgage lien, which refusal damaged the plaintiff to great amount.

VII. The plaintiff fulfilled his agreement until May 10, 1861, when there were thirteen thousand dollars unpaid on the bond.

VIII. The plaintiff, by his tenants, was in actual possession of the estate until the war broke out, in April, 1861. His actual possession of the estate was resumed in June, 1865.

IX. On April 1, 1862, Waller caused a sale of the estate at public auction without the advertised notice provided for in the trust deed, and purchased it himself for seventeen thousand dollars Confederate money, took a deed from the trustee, and gave his notes for the balance of the purchase money over the amount claimed to be due on the bond. Waller exercised various acts of ownership over the estate after this purchase, such as collecting rents, disposing of personal property, &c., as will more fully appear in a subsequent part of the argument.

X. The pleadings show that Bigler claims that the bond has been more than paid, by rent, waste and damages, for which Waller is liable; that the bond ought to be canceled, and judgment entered for the balance found due from Waller to Bigler; also that Waller and Saunders should execute to Bigler a release deed of all claim to said estate; while Waller claims that the sum of thirteen thousand dollars, with interest, still remains due on the bond, and that the mortgage deed should stand until this sum is paid.

XI. At the May term of this court, this cause was referred to George Chahoon, Esq., a commissioner of this court, to state an account between the parties, of what was due to Waller on the bond, and of the offsets in the nature of waste, rent and damages, due from Waller to Bigler; also to make such recommendations as he might think proper. The commissioner attended to his duty and filed his report in the clerk's office on November 2, 1867.

XII. Account A in said report finds thirteen thousand dollars, with interest, to be due from Bigler to Waller on the bond.

XIII. Account B in said report finds forty-three thousand dollars, with interest, to be due from Waller to Bigler on account of damage, waste and rent, claimed in plaintiff's bill.

XIV. Statement C shows a balance of twenty-six thousand one hundred and eighty-six dollars due from Waller to Bigler, for which judgment should be entered in favor of Bigler.

XV. Said report recommends that said bond be canceled, and Waller and Saunders execute a release deed to Bigler, of all claim to the land.

First. The item of three thousand dollars in account B is for Waller's breach of his covenant to release, contained in Ex. A. The evidence proves that soon after the sale May 10, 1863, Bigler laid out a "village" on the estate, and contracted with Johnson, Sterling, and Jones, together "with a half dozen others," to sell to each of them a

"village lot," of "three or four acres," at "three hundred dollars per acre," each lot to be released from Waller's mortgage lien. Waller refused to release, and Bigler lost the sales of said lots thereby. These damages are specific and allowable, being the difference between the then possible price of three hundred dollars per acre, and the actual price afterwards obtained of ten dollars per acre. This Waller does not deny, and I apprehend that there can be no question concerning the amount of the damages suffered on account of the loss of said sales, there being no discrepancy in the testimony concerning this matter. And the court will not fail to observe that in proving the plaintiff's claim we have carefully avoided putting in evidence what might be considered in the nature of speculative or constructive damages. Waller does not deny his refusal to release the "village lots" to "Sterling, Johnson, and Jones," at the request of Bigler, nor attempt to lessen the amount of the land which he puts at "ten, fifteen, or twenty acres," or the price which it would have brought, to Bigler per acre, but claims that such release would have injured the estate, i. e., impaired the security for his debt, to the amount of five thousand dollars. Now, it may be very well said that if the release of these lots would injure the estate five thousand dollars, it would benefit Bigler the same amount, and this sum might properly measure the damages incurred by the plaintiff by the loss of those sales, instead of the three thousand dollars found by the U. S. commissioner. The only defense offered by Waller to this claim for damages was a "second contract," which Waller swore was made June 22, 1853, and which he avers was a substitute for the first; and he further testifies that he had the means of fixing its date precisely, and that it contained the following condition: "The said Waller agrees that said Bigler shall sell such portions of land as he may see fit, provided it does not operate a serious reduction of the security afforded by the trust deed."

In regard to this second agreement, it will be remembered that Waller's deed to Bigler was dated May 10, 1853, and to pretend an agreement for the sale of real estate made more than a month after the sale was completed, and the title passed, is simply nonsensical and absurd. Since Waller does not deny Bigler's offer to pay over to him all the purchase money of said land, the defense set up to this claim utterly fails. I may remark, by the way, that, in explaining the loss of the "second contract," Waller swears in his answer that he deposited the same for record at the York county court-house, and he believed it was destroyed with the records at that place, but on learning from plaintiff's counsel that none of those records were lost, he was ready with another version of the story, equally explicit, and probably equally true. If the force of this portion of Waller's testimony was not destroyed by the written evidence in the case, e. g., the prior date of the deed, and the language of the bond, together with its own intrinsic contradictions, and was not specifically contradicted by Bigler and by Smith, we might insist upon the application of the maxim "allegans contraria non est audiendus." The bond which Waller pleads recites that the contract for sale was "signed by Hammond," hence the sale must have been based upon the first contract, and not upon the "second," which Waller avers was signed by Bigler; ergo, Waller is estopped from setting up this "second contract." The above facts demonstrate that the agreement of April 3, 1853, was the operative and the only contract between the parties antecedent to the debt. The language of that instrument was "ample security" for the "residue of the deed." This "residue" in the spring of 1854 was necessarily less than twenty-four thousand dollars, probably less than twenty thousand dollars, and the value of the estate, as improved, was more than sixty thousand dollars, leaving it "ample security" for the "residue" of the debt; and this even when diminished in value five thousand dollars (Waller's estimate of the damages for a release), which five thousand dollars would have itself been lessened three thousand dollars, what Bigler offered to pay for a release, leaving two thousand dollars actual damage, according to Waller's estimate, without considering the increased value of the estate from having a village built upon it. It is proved in evidence that this identical claim of three thousand dollars damage in a similar suit in the supreme court of the state of New York, between the same parties, Waller and Bigler, has been adjudicated already, and a judgment entered therein in favor of Bigler against Waller, which is still in force, and not impeached or reversed. Waller having brought a suit against Bigler on the bond in the supreme court of the state of New York, the court had jurisdiction of the parties and of the subject-matter, so that that adjudication referred to is conclusive and binding upon the parties until reversed. The subject-matter of this point "transit in rem judicatam." [U. S. v. Leffler,] 11 Pet. [36 U. S.] 100; 18 Johns. 433; Broom, Comm. 369 et seq. A judgment record of a sister state, duly authenticated, is conclusive. Dobson v. Pearce, 12 N. Y. 156; 1 Abb. Pr. 97; 1 Duer, 142; Const. U. S. art. 4, § 1, [1 Stat. 18;] Acts Cong. May 26, 1790, [1 Stat. 122, c. 11;] and March 27, 1804, [2 Stat. 299, c. 56, § 2.]

Second. The United States commissioner found that Waller was liable for twenty-five thousand dollars waste done to the realty.

I. Waller was liable for this waste, for he was in possession of the estate when the waste was committed.

II. If Waller was in either actual or constructive possession he would be equally

liable whether the waste was committed by himself, by his lessees, or by strangers.

III. The plaintiff claims that Waller was in actual or constructive possession, from April, 1862, until June, 1865, as a disseisor, and that during that period twenty-five thousand dollars waste (and much more) was committed on the estate by the rebels, who were Waller's lessees at the time. Colonel Duke, an officer of the Confederate army, burned two mills and the wharf, worth thirty-two thousand dollars, May 2, 1862, and injured the houses. The question of "adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is a question of law." [Bradstreet v. Huntington,] 5 Pet. [30 U. S.] 402. Waller has no equity to say that he is not responsible for the acts of the rebels, for he voluntarily assumed the responsibilities of a disseisor, so far as the plaintiff is concerned, by the unlawful manner in which he (Waller) got possession, and also by his voluntary aid to the rebels, and his voluntary lease to them of portions of the premises. The facts upon which the plaintiff relies, to show Waller's possession at the time of the waste, are taken from Waller's testimony, and may be supposed, from its unveracious character, to be strained to the last degree of intendment, exculpatory of himself.

The defendant Waller admits substantially the following facts: (a). Waller caused a void sale of the estate under the mortgage deed, April 1, 1862, and that, too, when it was impossible for Bigler to protect it. (b). Waller attended said sale on the premises, and guarded by rebel forces, purchased an estate worth one hundred and eighty thousand dollars for seventeen thousand dollars Confederate money. (c). Waller took a deed of the estate from the trustee, and paid the balance of the purchase money, some two thousand dollars Confederate money. (d). Waller found the rebel authorities in possession of the estate at the time of his purchase. (e). Waller claimed and received two thousand dollars in realty, four thousand five hundred dollars—of the rebel authorities, for the occupation of the estate, in 1863 or 1864. (f). Waller sold or made an agreement to sell the estate in Richmond during the war. (g). Waller disposed of personal property on, and belonging to the estate, in 1863 or 1864. (h). Waller contracted to have the mill removed to Richmond for sale, during the war, to enable the spy Knapp to have the appearance of a legitimate business while betraying the movements of the Federal army. (i). Waller has always claimed to own the estate since the pretended purchase, especially to Bigler in 1865. (j). The tenants whom Bigler found in possession of the estate in 1865 claimed to hold under Waller, and refused to attorn to plaintiff. (k). Waller performed all the acts of ownership or possession possible, under the circumstances at that time, to show that he claimed to be the owner of the property. (l). Waller purchased and entered April 1, 1862, and took the esplees till June, 1865. Therefore he was an actual disseisor of the plaintiff's estate during that period, he having "entered without right, under claim and color of title, and took the esplees."

Bigler elects to consider himself disseised by Waller during the period from April 1, 1862, until June, 1865. 4 Kent, Comm. § 482 et seq.; Id. (11th Ed.) p. 83; 2 Washb. Real Prop. 484, 286; Melvin v. Proprietors, etc., 5 Metc. [Mass.] 15, 32; Comins v. Comins, 21 Conn. 413; 12 Johns. 118; 18 Johns. 355, and cases cited; Crabb, Real Prop. 1006; 16 Mo. 273; 8 N. H. 52 et seq. Said the court in a late case: "But almost any interference with the possession of land in derogation of the rights of the owner, may, if he (owner) so choose, be considered as a disseisin. . . . The elements of actual disseisin are, entering and intending to usurp possession; yet we have seen that one may become a disseisor, though entering peaceably under a void deed." In Society for Propagation of the Gospel v. Town of Pawlet, 4 Pet. [29 U. S.] 507: "It is distinctly intimated that a possession may be adverse whenever an ouster may be presumed; and also unanimously ruled that it may be adverse and maintain a bar under the statute, even where ouster is in terms repelled and not to be presumed from the very circumstances of the case. The court says a vendee in fee derives his title from the vendor, but his title, though, is adverse to that of the vendor." [Blight v. Rochester,] 7 Wheat. [20 U. S.] 535. "If this be the correct doctrine of the court—and there can be no doubt of it—it seems to follow that wherever the proof is that one in possession holds for himself to the exclusion of all others, the possession must be adverse to all others." [Bradstreet v. Huntington,] 5 Pet. [30 U. S.] 439. "Where one having no title conveys to a third person, who enters under the conveyance, the law holds him to be a disseisor. . . ." "The common law attaches to the disseisin a variety of legal rights and incidents." Bradstreet v. Huntington, 5 Pet. [30 U. S.] 402; Spencer & Storrs, Arguendo, 429. "An entry on the land of another, made under claim or color of right, is an ouster." [Ewing's Lessee v. Burnet,] 11 Pet. [36 U. S.] 41, 52. "So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, &c., such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held; and the continued claim of property has been evidenced by public acts of

ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim." 2 Smith, Lead Cas. (6th Am. Ed.) 642, m. 566. "If a stranger is in possession, under or acknowledging the title of the devisee, or remainder man, it is equivalent to an actual entry." 4 Metc. [Mass.] 67. "A conveyance of wild and vacant lands gives a constructive seisin thereof indeed to the grantee, and attaches to him all the legal remedies incident to the estate." "An entry into a parcel in the name of the whole will inure as an entry into the vacant parcel; under a conveyance taking effect under the statute of uses the bargainee has a complete seisin without actual entry of seisin." Green v. Liter, 8 Cranch, [12 U. S.] 250. Said Lord Mansfield, in Taylor v. Horde, 1 Burrows, 110–112: "The consequences of actual disseisin, considered as such, continue law to this day." "Though our property is allodial, yet feudal tenures, by which this peculiar effect of a disseisin is produced, may be said to exist among us, in their consequences and the qualities which they originally imparted to estates." Supra. "By exercising acts of ownership under the title of the disseisor, the disseisor becomes a disseisor by color of title." 3 Watts, 71. "Disseisors can not qualify their own wrong by alleging that they have entered claiming a less estate than a fee. A party entering upon land under color of title is presumed to enter and occupy according to his title." 11 Fost. [N. H.] 41, 54. "If one enters under a void grant he is a disseisor." 5 Metc. [Mass.] 33. "An entry and possession by a party under a claim of title in himself by virtue of a void grant, whether by parol or otherwise, is not less adverse than if possession were taken and held without any color of title whatever." 21 Conn. 413. "If seisin of a party is proved, the legal presumption is that such seisin continues, and the burden remains on him who alleges a disseisin, even after he has given prima facie evidence of such disseisin." 5 Metc. [Mass.] 173, caption. "Neither actual occupation, cultivation, nor residence are necessary when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." Washb. Real Prop. (Ed. 1862,) p. 495, § 32. "In a disseisin under color of title the disseisin goes to the boundaries of the title." 15 Ga. 545. "A deed duly executed, delivered, and recorded, will, it is believed, in all the states, actually pass the seisin of the grantor of the estate thereby conveyed, without any formal entry, either by force of the express provisions of statutes or of the doctrine of uses." 2 Smith, Lead. Cas. (5th Am. Ed.) 561.

Wherefore the plaintiff claims that the defendant was an actual disseisor of this estate in April, 1862, and much more that he was a disseisor at plaintiff's election. In defense of these acts Waller claims to have been acting in our interest—for us, in fact, as our agent; at the same time he claims title to the estate under and by virtue of his purchase. This agency we disavow, and it is unnecessary to go into an argument to show the absurdity of his acts compared with this claim of agency for us, since the law will not allow a man so to stultify himself as to claim that he is holding adversely and under his grantor at the same time. [Blight v. Rochester,] 7 Wheat. [20 U. S.] 535, 548; 3 N. H. 27, 49; 18 Johns. 355; 13 Johns. 118, 406. The only difficulty which has arisen in cases raising the question of disseisin, is where the owner does not elect to consider himself disseised. 5 Metc. [Mass.] 33; [Ewing's Lessee v. Burnet,] 11 Pet. [36 U. S.] 41; Spencer, [20 N. J. Law,] 487; 12 N. H. 9; 15 Ga. 545; 8 Cow. 601, 604. If the facts proved in evidence, and the law cited, maintain the proposition which I have enunciated, viz., that Waller by his acts desseised the plaintiff, at the time of the waste, then the argument is reduced to the question as to what are the liabilities of such a disseisor.

The plaintiff claims that Waller is liable for all the injury done to the estate by the defendants, by his lessees, or by strangers while he was in such possession. This subject involves the doctrine of "constructive waste," as incident to disseisin. Much of the learning of disseisin is so obscured in the Year Books by the abbreviations of a dead language, and the poor typography of a foreign one, as to be difficult of access by the modern student. Lord Mansfield remarked in Taylor v. Horde, in regard to the learning of one branch of this subject of disseisin, that it "was once well known, but is not now to be found," . . . "and the more we read, unless we are very careful to distinguish, the more we shall be confounded." Yet in the same case he said: "The consequences of actual disseisin, considered as such, continue law to this day." A. D. 1757. 1 Burrows, 112. To the same effect is 11 Fost. [31 N. H.] 41. Yet the Reports of Assize abound with cases of this kind, some of which are cited in 11 Coke, post; while their frequency in the old books, and their rarity in the modern, may be ascribed both to the increasing respect for modern titles to real estate, and to the fact that now nearly all the cases for damage to the realty fall within the purview of some of the numerous statutes of waste.

The consequences of disseisin were fully discussed, the principles involved well settled, and the disseisor's liability recognized, by frequent adjudications of the courts in the earliest period of our judicial history. Owing to the rude and lawless character of British society before the eleventh century, and the frequency of this particular injury

to the rights of tenants by men of great influence in the community, there seems to have grown out of the exigencies of the time and the equities of this class of cases, the common-law rule, that disseisors should be liable for "triple" the amount both of the mesne profits and the damage to the estate committed during their term. The state of society under which this rule of law originated, as well as the rule itself, is well set forth in the very interesting work of Mr. Reeves on the History of English Law. As to the form of the remedy for torts of this kind, the earliest seems to have been an action of trespass or a writ of entry; but after the time of Henry II. an assize, or assize of novel disseisin, was the common form of the action, until the statutes of waste were passed, when an action of waste or an action in the nature of waste, was the almost universal remedy. Says Mr. Reeves, vol. 1, (1st Ed., Quarto,) p. 242: "If judgment was given for the complainant the land was to be restored, with all its produce, received and to be received, from the disseisin to the time of judgment; and, as the sheriff was commanded to keep the land in peace till the assize was taken, the disseissee was to recover damages for any unjust abuse or misuse of the land in that interval. The disseisor was to suffer certain penalties. He was to be in misericordia regis in proportion to the nature of the disseisin; as, whether it was cum armis or without, so as the misericordia was never less than the damages; besides this, he suffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the disseisin, he suffered a treble penalty: the misericordia for the disseisin; for the peace, imprisonment; and for the robbery, as it is termed by Bracton, a heavy redemption. However, he did not lose life or limb, as the robbery was not prosecuted criminally. The disseisor, if he was the principal in the fact, was also to give to the sheriff on account of his disseisin, an ox and five shillings ('for the carcase of a pasturing ox, one shilling.' Herb. Inns Ct. p. 10); but those who were only in aid, force, or counsel, in general, did not give this mulct to the sheriff, though in some counties they did. The disseisor was also to render damages, to be estimated by the oath of the jurors, and further, if need were, to be taxed by the justices if the jurors had been excessive; though the justices were not to estimate the damages at a larger sum than the jurors, unless it were a very clear thing that the jurors had taxed them much lower than was reasonable or proper. Brac. Rom. Law, p. 186, 187, b. This liberty of increasing the damages was allowed to the judges, in order that disseisins might never escape the proper punishment of the law; for in those times of disorder and oppression there were many great men who would commit disseisins for the mere purpose of making the most of the fruits and profits during the time they could keep their unlawful possession, and when they had raised great sums thereby they could generally escape with a small misericordia, through the ill-placed lenity, of jurors, who, when they by their verdict took from a disseisor the land, were unwilling to load him besides with heavy damages. For these reasons, it was expected that the justices should examine very carefully into the change that had been made on the land since the disseisin, either through the willfulness or neglect of the disseisor, or any other wise; all which he was to be compelled to make good, though much damage might have happened, by death of cattle and other accidents, which it was out of his power to govern; nor was any allowance to be made the wrong-doer for improvements."

It is obvious from the above extract, which contains the law as known to the earliest writers, (Brac. Rom. Law, p. 168, et Britton, cc. 42, 44,) what were the liabilities incident to disseisin at the common law. But Lord Coke was of the opinion that the lessor had no remedy against his lessee for waste, prior to the statute of Marlborough, unless he had bound him by covenant not to do waste. 2 Inst. 145. Therefore the statute of Marlborough, (52 Hen. III. c. 23, A. D. 1267,) enacted that "fermors" should be liable for "full damage" and a "grievous amercement." Lord Coke, commenting upon the non faciant of this statute, says: "This prohibiteth that farmers, shall not do waste, and yet if they suffer a stranger to do waste they shall be charged with it, for it is presumed in law that the farmer may withstand it; 'et qui non obstat obstare potest facere videtur.' In 1278 the statute of Gloucester was passed, which enacted the old common-law liability of disseisors, viz., "triple damage" against "termors" for waste; and on this statute Lord Coke comments as follows: "The tenant shall by construction of law answer for waste done by a stranger." 2 Inst. 303; 1 Inst. 43, 46.

Subsequent to the statute of Marlborough, five different statutes of waste were passed, including 11 Hen. VI. c. 5; 6 Edw. I. cc. 5, 13; 13 Edw. I. c. 22, (2 Westminster;) 20 Edw. I. Stat. 2; 9 Hen. III. c. 4; giving "triple," "double," and actual damages against the holder of every possible species of an estate, except disseisors and trespassers, who were left to be mulct by the rule of the common law; and incident to the actions brought under these statutes was the doctrine of "constructive waste." During the thirteenth, fourteenth, and fifteenth centuries, English society became less turbulent, and nearly all of the actions for damage to the realty were included in some of the various statutes of waste, and we find the severity of a "triple" penalty relaxed to actual damages with costs, which were given to the successful party for the first time by St. Marl. 2 Reeves, Eng. Law, (2d Ed.) p. 148. The first case I find translated, which is ex-

actly in point, is Moore v. Hussey, Hob. 98, (A. D. 1627,) the material part of which, together with the valuable note of Justice Williams, I extract from the Boston edition of 1829: "At the common law, and before the statute of Gloucester, c. 1, if A were disseised by B, and B enfeoffed C, or were disseised by him, A had no remedy for damages against the feoffee or disseisor, but was to bring his assize against B, who was the immediate disseisor, and therein he was to recover the mesne profits by way of damage, not only for his own time, but also for the profits received by the feoffee or second disseisor. And likewise if A, the first disseisee, had re-entered, whereby he had lost his assize, he might by an action of trespass, vi et armis, brought against his disseisor, recover the mesne profits for all the mesne possessions; but neither at the common law, nor now, can he recover upon his re-entry damages against the feoffee, lessee or second disseisor by action of trespass vi et armis; for that fits not his case, as to them who did no immediate trespass."

The doctrine of the text is supported by the following authorities: Spelman v. Pole, 34 Hen. 35; Kingsmil, Frowike, and others, 13 Hen. VII. 15, 16; Liford's Case, 11 Coke, 51; Symons v. Symons, Het. 66; Brooke, Abr. "Trespass," pl. 35; Bac. Abr. "Trespass," G., 2; 1 Wood, Conv. 108; Keilw. pl. 2; Vin. Abr. "Trespass," R., 4, pls. 2, 5; Case v. De Goes, 3 Caines, 261; Fletcher v. McFarlane, 12 Mass. 46; Emerson v. Thompson, 2 Pick. 491; Stearns, Real Act, in notis, 419. Says the learned author of these notes: "Those who hold that the disseisee may maintain an action of trespass against the alienee of the first disseisor, or against a second disseisor, found their opinion, first, on a legal fiction, that by the re-entry of the disseisee he is remitted to his original possession, and is as if he had never been out of possession, and then all who occupied in the meantime, by what title soever they came in, shall be answerable to him in trespass for the profits during their own time; and secondly, upon a liberal construction of the statute of Gloucester, c. 1, which provided that in an assize of novel disseisin the tenant should be liable to the disseisee for damages if the disseisor was unable to satisfy them. To this it is answered that a legal fiction ought never to be perverted to make an act which was lawful when done, a trespass by relation ex post facto, because 'in fictione juris semper equitas existit;' and, secondly, that the statute of Gloucester was limited in its operation to certain specified cases of possessory and ancestral writs, of which trespass is not one, and therefore is left as at common law; and by the common law the disseisor alone was liable to damage, though the land might be recovered against his alienee. Again, the action of trespass vi et armis, as suggested in the text, fits not the case of the disseisee as to the alienee of the disseisor or as to his disseisor who did no immediate trespass to the original disseisee. This action is the appropriate remedy for an injury to the possession only. A mere title, however valid, or a mere right of entry or possession, however perfect, is not sufficient; so strictly true is this position, that the disseisee can not maintain the action even against his immediate disseisor for any act done by him after the disseisin and during the continuance of his possession. Even after his restoration to the possession, it is only by the legal fiction of a remitter, a kind of jus postlimini, that he is enabled to maintain the action against the tort feasor himself. The disseisor, while in possession, is seized of an estate in fee, an estate recognized by law, an estate sufficient to satisfy the covenants in his deed of lawful seisin, and of good right to convey. Vide Pincombe v. Rudge, [Yel. 139,] in notis. His alienee therefore comes into possession by legal title, which, though not indefeasible, is so far valid as to protect him from being a trespasser by his entry. He enters under the authority of a person having title and in actual possession. He does not therefore violate the possession of any one; in other words, he does not commit a trespass against any one. Can the alienee, then, be made a trespasser ab initio by a fiction of law, without any unlawful act of his own, by the subsequent entry of the disseisee? The general rule of law is that a trespass must be an injury at the time when the act is done, and that an injury that has been derived from an act which was in the first instance lawful can not be a trespass. The exception to the rule is that whenever the person who at first acted with propriety under an authority or license given by law, afterwards abuses that authority or license, he becomes a trespasser ab initio. This exception does not apply to the alienee of the disseisor, who enters and retains his possession by title. His case, therefore, comes within the general rule; and it would seem, therefore, that, upon legal principles, he is not liable in trespass to the disseisee either before or after his re-entry. It may be said that this doctrine does not apply to a second disseisor because his original entry is tortious; that he enters without title or color of right, and is therefore liable in trespass as a tort feasor to the first disseisee. But this reasoning is by no means satisfactory. As trespass is the appropriate remedy for an injury to the possession only, the action must be brought by him whose possession is disturbed, that is, by the first disseisor. The first disseisin, by his disseisin of the owner, becomes seised of an estate of inheritance which, though defeasible by the disseisee, is a good and valid estate as to all who are strangers to the title. The trespass, therefore, which the second disseisor commits by entering upon the pos-

session of the first disseisor, is a trespass against the latter, and not against the original disseisee; accordingly it is well settled that the first disseisor may maintain his action against his disseisor, and, if the original disseisee may also maintain the action, then the trespasser will be doubly punished for the same trespass." Paramour v. Yardley, 2 Plow. 546.

The case of 2 Pick. 473, may be explained by making a distinction between the heir of the disseisor and a purchaser. As to the value of this authority (Hobart) Lord Kenyon, in 6 Durn. & E. [6 Term R.] 441, alluded to it as "his most excellent volume of reports." The case of Liford, 11 Coke, 51, is to the point, and the best decision in the old reports on this subject. "If one disseises me, and during the disseisin he cuts down the trees, or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him vi et armis for the trees, grass, corn, &c.; for after my regress the law as to the disseisor and his servants supposes the freehold always continued in me. But if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, &c., and afterwards I re-enter, I shall not have trespass vi et armis against those who come in by title; for this fiction of the law that the freehold continued always in me shall not have relation to make him who comes in by title a wrong-doer vi et armis; for, in fictione juris semper aequitas existit." H. 7, Hilary term 11, Y. B. pt. 11; 19 Hen. VI. 28b.; 34 Hen. 6d.; 33 Hen. VI.; 39 El. B. R.; Holcombe v. Rawlins, 2 E. 4, are not to the contrary; they only hold that the lessee is liable, &c. But in such case I shall recover all the mesne profits against my disseisor, in the same manner as the disseisee in such cases should recover in an assize at the common law before the statute of Gloucester, c. 1, damages only against the disseisor; also it is to be presumed that the feoffee has given consideration or recompense to the disseisor, and that the lessee has paid rent to him or other consideration, and therefore in reason the disseisor is to be charged with the whole. 2 Rolle, 554; Owen, 112; Cr. El. 549. The same law if my disseisor is disseised, and afterward I re-enter I shall not have an action of trespass against the second disseisor, because the said fiction of law as to action extends only to my disseisor; and if I should punish the second disseisor he would be twice charged; and therefore I shall recover all the mesne profits against my disseisor, his servants and others, who have committed the trespass by his commands and his right; and so has the law been often taken upon consideration of all the books. Peter de Vanlore's Case, 9 Edw. 3, 2, a. b.; 10 Hen. VI. 14; 19 Hen. VI. 27; 22 Hen. VI. 21; 32 Hen. VI. 32; 33 Hen. VI. 46; 34 Hen. VI. 30; 37 Hen. VI. 35; 38 Hen. VI. 28; 2 Edw. IV. 18; 9 Edw. IV. 39; 11 Edw. IV. 4; 20 Edw. IV. 18; 21 Edw. IV. 5, 74; 22 Edw. IV. 31; 6 Hen. VII. 9; 10 Hen. VII. 27; 12 Hen. VII. 25; 13 Hen. VII. 15b.; 1 Washb. Real Prop. (2d Ed.) 105, 117, § 35; Chipman v. Emeric, 3 Cal. 283.

The modern case which discusses this question is White v. Wagner, 4 Har. & J. 373. This cause was considered with great learning and research, both arguendo and by the court which consisted of Buchanon, Earle, Johnson, and Martin; and Johnson who gave the opinion says: "It is novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss or for injuries done to it, which the possessor could not restrain. The common carrier, the sheriff, and others are responsible for losses which they could not prevent. As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it when committed, as in most cases it would be impossible for the landlord to ascertain in time, or come at the wrong-doer, it appears to have been the policy of the law to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or the king's enemies." The above case establishes clearly the "liability of the lessee for all injuries amounting to waste done to the premises during his term, by whomsoever these injuries may have been committed, except acts of God and the king's enemies."

We have thus traced the history of this rule of the common law from the earliest times to its full recognition by the American courts, (White v. Wagner, ante,) and in concluding this point, may add that this principle of law is founded upon the soundest reason; for deplorable indeed would be the condition of owners of real estate if such were not the law. This liability is the only security they have against collusion with strangers to commit waste. The owner is presumed to be absent from the premises, and not to know who committed the waste. If the person in wrongful possession is not liable, he will have small inducement to prevent it or incur the trouble and expense of a lawsuit to recover damages forthwith. This reason applies with special force to this particular case. Waller could have recovered damages for the waste from the rebel authorities, which from the circumstances, was and is impossible for Bigler to do. The proof which was easy for, and not denied to Waller, it is impossible for us to obtain. Waller's meddling with the estate was an attempt at the grossest fraud on Bigler, and his liability as a disseisor for his acts is clear and well defined by the law of Virginia. Tate's Dig. Va. (Ed. 1823,) 518; 2 Hen. Va. St. 563; 1 St. at Large Va. (N.

S.) p. 193, (1682-83;) Code Va. 1849, tit. "Waste;" Code Va. 1860, tit. "Waste;" 6 Rand. [Va.] 8, 18.

The law of Virginia in this respect does not differ from the common law. The reason of the law applies in this particular case with greater force than in any one which has fallen under my observation; and there is no equity which can relieve Waller, for he does not come into court with clean hands. It is an evidence that the questions raised by this point have been adjudicated in the said action in New York, where it was found that Waller was an actual disseisor and liable for the waste committed during this period, which we submit is conclusive in this action. If it is urged that this may have been law once, but is not now, we reply in the language of Fortescue, (408:) "For there are many things that have never been altered, and are law now."

The United States commissioner found fifteen thousand dollars rent for three years' possession. This finding assumes the three following propositions, viz.: (1.) Waller's possession during that period. (2.) His liability for rent. (3.) The value of the rent, fifteen thousand dollars.

1. The question of Waller's possession has been argued, (ante.)

2. If Waller was in possession of the estate, he is liable for the full value of the rent at the time he took possession (April 1, 1862), nor can he be heard to say that waste committed by himself, or by his lessees, or by strangers during his possession, should lessen the amount of the rent for which he is liable. (a). Since it would be taking advantage of his own wrong, which is contrary to a maxim. (b). It is clearly settled that waste by a stranger will not excuse a lessee from the payment of rent, and it would be strange if a wrong-doer could be in a better position in this respect than a lessee under the ordinary covenants. (c). The defendant can not plead that this estate was neutral ground at the time of his possession, and so very dangerous as to be of no value, since the waste for which he is liable (the destruction of the wharf and mill), was the cause of its being abandoned territory or neutral ground. Had the dock and mill remained, it would have been a strategic point, and occupied by either army to the advantage of the owner.

3. The value of the rent is estimated by Smith at seven thousand dollars per annum. Bigler estimates it at the same, and Southard at from five thousand dollars to ten thousand dollars per annum. There is not a scintilla of evidence in the case to show that this estimate was not the minimum rental value of the estate when Waller took possession and before the waste was committed. Paradine v. Jane, Aleyn, 26, 27; Pollard v. Shaffer, 1 Dall. [1 U. S.] 210; 1 Ch. Cas. 72, 84. "If a man receives my rent, it is at my election if I will charge him with a disseisin by bringing an assize." Vin. Abr. "Disseisin," p. 15, Ja. B.; Hill. Rem. 104.

Waller received rent for the estate in the above period two thousand dollars from the C. S. A., and is liable for full rent to plaintiff whether he collected it or not. 8 Term R. (39 Geo. III.) 267; Perk. Conv. § 738; 1 Coke, 98a; 1 Rolle, Abr. 236; Style, 162; Plow. 29; 1 Rolle, Abr. 519, 939; Sid. 266, 447; Style, 431; Id. 48. It is in evidence that Waller's liability for rent during this period has been adjudged in said case in New York: "And when a point that has been decided on the merits in a suit at law is again brought in question on the same ground in equity, it is res adjudicata." Kingsland v. Spalding, 3 Barb. Ch. 143; 1 Johns. 96; 1 Eng. [6 Ark.] 317.

Plaintiff seeks to recover against Waller, the value of the personal property taken from the estate while it was in Waller's possession. Bigler swears that this amount is ten thousand dollars, which not being denied by Waller, is taken for confessed. If it is claimed that the rebel authorities were public enemies in such a sense as to constitute an exception to a disseisor's common-law liability or excuse his torts done by their authority, it may be answered on the authority of Touteng v. Hubbard, 3 Bos. & P. 302, approved in Esposito v. Bowden, 4 El. & Bl. 978, that a stranger can not plead the act of his own government as an excuse for the breach of his own contract, because it would be taking advantage of his own wrong; a fortiori, neither can Waller plead to his liability for constructive waste, that the rebel authorities (his government) committed the waste. There is a decision in the Year Books, (33 Hen. VI. p. 6,) that such public enemies must not be "traitorous subjects of the king." But they were not public enemies. Vide Justice Chase, Raleigh, N. C., decision, Shortridge v. Macon, [Case No. 12,812.]

It is urged that equity will relieve the rigor of the common law in this particular of "constructive waste." To that argument it may be answered: "If the law has determined a matter with all its circumstances, equity can not intermeddle." Will. Eq. Jur. 39. "The assertion that chancery will decree against the general rule of law, and relieve against every mischief which happens, contrary to natural justice, is not founded in principle or supported by authority." Id. 39. "And it is said in Rooke's Case, 5 Coke, 99b, that discretion is a science not to act arbitrarily, according to men's wills and private affection; so the discretion which is executed here is to be governed by rules of law and equity which are not to oppose, but each in his turn to be subservient to the other." Id. 41. "A court of equity has no power to relieve against a general rule of law, nor to abate the rigor of the common

law, nor to afford relief in cases against natural justice, in every case, for many such exist without any redress, legal or equitable." Id. 41. "Equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy can not be had in the courts of common law." Id. 41. "The jurisdiction of equity is assistant, concurrent, and exclusive." Id. 41. "A court of equity can in no case relieve against a positive act of the legislature or an established rule of the common law." Id. 48. "When a court of chancery has once gained possession of the cause, if it can determine the whole matter it can not be the handmaid of other courts nor beget a suit to be ended elsewhere." Id. 41.

The report of the commissioner should be confirmed, and judgment entered against William Waller in favor of the plaintiff for the sum of twenty-six thousand one hundred and eighty-six dollars, with interest from April 3d, 1865, and costs; and a decree entered that defendants Waller and Saunders execute a release deed to James Bigler of all claim to said Rippon Hall estate, and Bigler's bond be delivered up and canceled.

J. Alfred Jones, for respondents.

CHASE, Circuit Justice. The general principles on which this case must be adjudicated were announced at the last term. But a suit commenced by the defendant (Waller), in a state court of New York against the plaintiff (Bigler), prior to the bringing of the present suit in this court was then pending and undetermined, and we did not think proper until that suit should be disposed of to proceed to final decree here.

That suit, however, has been terminated by discontinuance, and there is no reason why a final disposition of the litigation should not now be made.

The principles stated at the last term require that all the exceptions taken to the report of Commissioner Chahoon be sustained, except so far as the views now to be stated may affect this general order.

It is not denied that on May 10, 1860, the sum of thirteen thousand dollars was due from the plaintiff (Bigler) to the defendant (Waller), as a balance of the purchase money agreed to be paid for the estate sold to the former by the latter.

The questions to be considered are these:

1. By what rule shall interest be computed on this balance? In other words, shall interest be allowed for the period during which intercourse between the parties, and between the parts of the country in which they respectively lived was suspended by the civil war?

In a case decided by the circuit court of the United States for the district of North Carolina, [Shortridge v. Macon, Case No. 12,812,] it was held that interest did not cease during the recent civil war, in consequence of the residence of the parties to the contract in the hostile sections of the country. Since that decision was made it has been held by the supreme court of the United States, in the case Hanger v. Abbott, 6 Wall. [73 U. S.] 532, that the statute of limitations was suspended by the civil war in the insurgent states as to non-residents, having causes of action against residents of those states. And in the case of Ward v. Smith, 7 Wall. [74 U. S.] 452, while it was held that under the circumstances of that particular case interest did not cease, the opinion of the court was put upon circumstances creating an exception to the general rule that interest does not accrue during war between citizens or subjects of belligerent states. The general rule was neither affirmed nor denied; but it may not unreasonably be inferred from the language of the court, that if the direct question presented by this case were before that tribunal, it would be resolved in favor of the maker of the bond. Bigler, the maker, was in occupation of the estate purchased at the commencement of the war by his agent; and not only was he wholly excluded from occupancy and from possession during its continuance, but the improvements put on the property by him at great cost were destroyed, and the estate otherwise was greatly injured. Waller, the obligee, was in the Confederate army, and at a sale made under the trust deed executed by Bigler to secure the bond became himself the purchaser; and he was doubtless, though since the war he has disclaimed title to the land as against Bigler, entitled as such purchaser to the possession.

We have already said that Waller is not to be held responsible for the injuries sustained by Bigler in consequence of the war; but, on the other hand, we can not doubt that if interest on a debt should cease in any case it should cease in this; and our duty is to determine this question as we believe it would be determined by the supreme court if submitted to its consideration.

It is more difficult to determine the period during which interest should cease. The actual beginning of war against the United States, doubtless, preceded the proclamation of the president of April 15, 1861, calling out the militia to suppress insurrection; but the proclamation declaring the blockade of the ports of the insurgent states must be regarded as the first formal recognition of the existence of civil war by the national government.

That proclamation was issued on April 19, 1861, and that date, therefore, must be taken as the date of the commencement of the war. The period of its termination has not been so definitely ascertained.

It was declared by the concurrent action of the President and of congress to have ended on August 2, 1866, and this date has been recognized by the supreme court as the end of the rebellion, intended by the abandoned and captured property act and some other legis-

lative provisions. In another case depending on the effect of the statute of limitations the court thought fit to decline fixing any precise date of termination applicable to all cases.

This question being thus left open, we think it right in this case, to take the establishment at Richmond of the adhering government of Virginia as the recognized government of the whole state as the end of the war in this state. This event may be said to have taken place when the executive department of that government was removed from Alexandria to Richmond, on May 26, 1865. The period, then, to be excluded in the computation of interest is the time from April 19, 1861, to May 26, 1865.

2. What credit, if any, is to be given to Bigler for money received by Waller from the Confederate government?

The evidence shows that the sum of two thousand dollars, was thus received in October, 1863, by way of compensation for use made of the property and of indemnity for waste committed upon it. At that time it appears that the rate of Confederate notes for gold was thirteen for one. For this sum of two thousand dollars, reduced to the specie equivalent, with interest on the sum thus ascertained, credit is to be given on the bond.

3. What credit, if any, should be given to Bigler for damage sustained by reason of non-fulfillment on the part of Waller of his contract to release to purchasers? It is clear enough upon the evidence that under the original contract of purchase, Bigler had a right to sell portions of the estate, and to have these portions released to the purchaser on payment to Waller of so much of the purchase money as would leave his security unimpaired. And it is sufficiently proved that some time after the purchase, in 1853 or 1854, Bigler had some offers to buy small parcels of the tract, and applied orally to Waller for a release; and that Waller, for some reason, refused. But it does not appear that Bigler at that time, or at any time afterwards, until this controversy arose, set up any claim for damages. On the contrary, Bigler continued to make payments on account of the purchase until May, 1860. Under these circumstances it would be difficult to sustain the claim for damages were the proof of the quantity of land sold, the price offered, and the demand for release under the contract much clearer and more specific than it is. But on all these points the evidence is vague and indefinite—much too vague and indefinite to form the basis of a decree. We are obliged, therefore, to deny any credit on account of damages. A decree may be entered in comformity with these principles.

[NOTE. Complainant appealed from the decree of the circuit court, directing the payment of $17,377.48, in United States coin, to the administrator of Waller; and in delivering the opinion of the supreme court in Bigler v. Waller, 14 Wall. (81 U. S.) 297, Mr. Justice Strong held that there was no sufficient reason for the allowance of a credit on complainant's bond in consequence of Waller's refusal to execute releases, passed on several questions not raised in the principal cause, and reversed the decree of the lower court, on the ground that it directed the amount of the decree to be paid in United States coin. For a hearing on motion to dismiss the appeal, in the supreme court, see 12 Wall. (79 U. S.) 142.]

Case No. 1,405.

Ex parte BILL.

[3 Cranch, C. C. 117.][1]

Circuit Court, District of Columbia. May, 1827.

ARREST—PRIVILEGE—WITNESSES.

A recommitment of a debtor upon a ca. sa. after he has been out for more than a year upon a prison-bounds bond, is not a breach of his privilege as a witness and party, bound to attend the court.

Habeas corpus [for the discharge of A. T. F. Bill from custody.] Upon the return it appeared that Mr. Bill had been committed in execution upon a ca. sa., and had taken the benefit of the prison bounds, upon giving the bond and security required by law, more than a year ago. At the expiration of the year the plaintiff required the marshal to recommit him to close custody, agreeably to the act of congress of June 24, 1812, § 3, (2 Stat. 755,) "to amend the laws within the District of Columbia," by which it is enacted, "that the benefit of the prison rules shall not be allowed to any debtor hereafter taken or charged in execution within the said district for more than one year from the date of the bond given by him or her for keeping within the said rules, after the expiration of which time, if the person so taken or charged in execution shall not be discharged by due course of law, it shall be the duty of the marshal or other officer, to whose custody such person was committed, to recommit him, or her, to close jail and confinement, there to remain until the debt for which, he or she was taken or charged in execution shall be paid, or until he or she shall be discharged under the act of congress for the relief of insolvent debtors within the District of Columbia."

The marshal, accordingly, so recommitted him during the session of this court, and while Mr. Bill was bound to attend this court as a witness, and had a cause depending in court for trial at this term. Mr. Bill moved to be discharged, and claimed the right of a witness, and of a party to be free from arrest during the session of the court.

THE COURT (nem. con.) refused to discharge him, being of opinion that it was not a new arrest; but was analogous to the case of the bail taking his principal, which is said

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

to be an exception to the general rule. See 3 Starkie, Ev. pt. 4, pp. 1726, 1727. The prisoner was remanded.

Case No. 1,406.

BILL v. BECKWITH et al.

In re NEAL.

[2 N. B. R. (1868,) 241, (Quarto, 82;) 1 Chi. Leg. News, 103.] [1]

Circuit Court, N. D. Ohio.

BANKRUPTCY—FRAUDULENT TRANSFERS—SUMMARY PROCEEDING TO RECOVER PROPERTY—ISSUES OF FACT—TRIAL BY JURY.

1. Property fraudulently disposed of by a bankrupt in proceedings by or against him may be recovered by the assignee upon petition in the bankruptcy court, proceedings upon which may be of a summary character.

2. The district judge may order issues of fact arising in such cases to be tried by a jury.

3. Suits may be brought at common law, or by bill in equity, for the recovery of property in such cases, but as they must be governed by the technical rules, and be subject to the delays incident thereto, it is preferable to proceed by summary proceedings in the court of bankruptcy, that being a cheaper, speedier, and more simple mode.

[Cited in Foster v. Ames, Case No. 4,965; Norris' Case, Id. 10,304; Markson v. Heaney, Id. 9,098; Goodenow v. Milliken, Id. 5,535; Re Dole, 3,965; Hudson v. Schwab, Id. 6,835. Contra: Barstow v. Peckham, Id. 1,064; In re Marter, Id. 9,143.]

[Appeal from the district court of the United States for the northern district of Ohio.

[In bankruptcy. Petition by H. N. Bill, as assignee of John C. Neal, against Seth R. Beckwith, Charles P. Vaupel, and James P. Moore for the recovery of property fraudulently transferred by the assignor. The petition was dismissed, and the assignee now petitions for review. The order was reversed.]

Willey & Carey, for assignee.

Hon. James Mason and Wyman & Barlow, for respondents.

SWAYNE, Circuit Justice. On the 22d of January, 1868, as is alleged, John C. Neal, being insolvent, and in contemplation of bankruptcy, did, with the intent to defraud his creditors, transfer a certain stock of goods, consisting of drugs, chemicals, &c., belonging to him, to Seth R. Beckwith. He, the said Beckwith, knowing the design of said Neal, and being also aware of his insolvency, connived with the said Neal, and obtained possession of said property. Shortly afterwards, Beckwith sold, or pretended to sell, said property to Chas. P. Vaupel and James P. Moore, who, at the time had full knowledge of the facts before stated, and took possession of said property under those circumstances.

The assignee of Neal filed his petition against the said Beckwith, Vaupel, and Moore, setting forth the facts of the fraudulent transfer and pretended sale, praying for an order that they show cause why they should not be required to deliver over said property to him, and pay him the proceeds of any part of the property they had sold. Thereupon Beckwith, Vaupel, and Moore moved the district court to dismiss the petition on the ground of its being irregular "and without authority of law." Upon argument the court below sustained the motion, and dismissed the petition with costs.

A petition for review was then filed by the assignee, praying this court to review and reverse the decision of the district court. The position of the defendants is, that while the district court has full jurisdiction to proceed with an action at law or in equity, such jurisdiction can be exercised only in one of these ways. The question is a statutory one, and must be decided according to the provisions of the statute which bears upon the subject. The first section of the bankrupt law [14 Stat. 517] provides as follows: "That the several district courts of the United States be and they hereby are constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said court shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases, and controversies, arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens, and other specific claims, thereon; to the adjustment of the priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of, the bankruptcy, until the final disposition and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity." "Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as

[1] [Reprinted from 2 N. B. R. 241, (Quarto, 82,) by permission. 1 Chi. Leg. News, 103, only contains the syllabus.]

well as at the places designated by law for holding such courts."

Now, it is very clear, from the language of that section, that the fullest and most comprehensive authority is given to the district court and to the district judge in respect to all matters relating to a proceeding in bankruptcy. There is a special provision—special authority is given in regard to the collection of the assets of the assignor by the assignee. The act provides that his jurisdiction and authority may be exercised at the place appointed for holding court in the district, or by the district judge at chambers. As to a large portion of the jurisdiction thus conferred by the section, it was clearly intended it should be exercised in the most summary and informal manner by the district judge at chambers as well as in term. It will have been observed that express authority is given to exercise the jurisdiction thus conferred in court and at chambers, and there is no disagreement between the exercising of the jurisdiction thus conferred upon any one subject or class of subjects and any other subject or class of subjects. The context is entirely harmonious with this view of the subject, and the same authority is given to the district judge to exercise his jurisdiction under the act at chambers, as at term, or when the court is regularly held.

Now, it seems to me very clear that a suit in equity, or an action at law of any kind, could not have been intended to be conducted by the judge in vacation and sitting at chambers. It is true that at the outset the act uses the language "jurisdiction is hereby conferred," and if that is true, the implication would be irresistible that the jurisdiction thus given was intended to be exercised in the ordinary way. The conclusion is irresistible in my mind, that while there can be no doubt that an action at law, in a proper case, may be sustained by the district court in a certain class of cases, that is, when the regular term is held; yet it is equally competent for a district judge in vacation at chambers to conduct a summary proceeding not in either of these formal modes.

I will further remark, under this head, that the mode of procedure in this summary way which the judge is authorized to institute and conduct is in no wise different from that intended by the act of congress. The object and policy of the bankrupt law undoubtedly was that the proceedings under it should be summary; that matters should be settled as speedily as possible, and that the proceedings might be cheapened, they being greatly so by this summary and informal mode of proceeding. And it is also the policy of the law that, except in a regular action at law or suit in equity, this court has a general, and I may say universal jurisdiction in the way of superintending such matters.

By the second section of the bankrupt act it is provided that the circuit court, "shall have a general superintendence and jurisdiction in all cases and questions arising under this act," and therefore may be as informal and direct as a proceeding of this same general character, which the district judge, in vacation, sitting at chambers, is authorized to conduct. As I have had occasion more than once to remark, the second section of the bankrupt act, which confers the authority to which I have referred, upon the circuit judge in the circuit court, is copied verbatim from the insolvent law of Massachusetts, and, of course, the adjudications of the legal tribunals of that state throw some light upon the subject. I have had occasion heretofore to examine very carefully the adjudications of that state touching this subject, and find the supreme court of that state sometimes exercises supervisory authority upon the statement of counsel; sometimes upon the admissions of parties; sometimes upon complaint and answer.

The whole mode of procedure, while it is of this summary character, is subject to the authority, to be exercised in such manner as shall be thought proper, they of course always being careful while the proceedings are made summary, not to permit them to be so summary that wrong or injustice is done to either party. Some further light is thrown on this subject by subsequent provisions of the statute. The fifteenth section provides generally "that the assignee shall demand and receive from any and all persons holding the same, all the estate to be assigned or intended to be assigned under the provisions of this act, and he shall also sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors. But upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale, as will in its opinion prove to the interest of the creditors, and the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort." Then the twenty-fifth section provides as follows:

"That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of. And whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds re-

ceived in place of the estate disposed of. And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale."

It will be observed without any further search, that this section makes provision for two classes of cases in respect to disputed estates: First, as to the property in possession of the assignee. In regard to that case, it is provided that the court may, when it shall deem proper, order a sale; and in any action in relation to the subject, the proceeds of the sale shall be held to constitute the measure of damages which shall be recovered. Second, as to the property claimed by the assignee. The same provision is made upon this subject; that is, that the court may order a sale of the property not in possession of the assignee, and the funds realized by the sale shall constitute the measure of damages in an action at law. Now this implies very clearly that the court may exercise such control as it deems proper in regard to property which is in controversy, and which property is not in the possession of the assignee. Of course it must be reduced to possession. But where a sale has been made, and the proceeds realized by that sale are in controversy, I cannot doubt, in the light of this provision on that subject, that it was the intention of congress, that in all cases of that character the court may order estates, not in possession of the assignee, if it deems proper to take that course, to be delivered over to the assignee, in order that it may be sold and the proceeds held subject to the rights of the party who may prove himself entitled to it under the bankruptcy.

The last provision of this section throws strong light on the policy of the legislature on this subject: "But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action, commenced any time before the court orders the sale." That is to say, from the obvious meaning and spirit and purpose of the context of these several sections, that any property not in possession of the assignee may by the court be ordered into possession of the assignee. Under the new Code which is to govern us, if the court orders it, the party may recover the property from the assignee by giving bonds with sufficient security, and it is then of but little importance to the creditors how long the litigation may be delayed, provided this property may be kept secured and safe as it is intended by law, if the assignee should maintain his claims. If the claims of the assignee should fail, then the property is in the right hands, and the creditors are in no way affected. But let us look for a moment from this stand-point, and see what follows from this construction. It is contended by the counsel for the respondents in this case, that where a bankrupt, on the eve of bankruptcy, makes a fraudulent sale, and delivers over an estate, the assignee cannot proceeed in this summary way, but can only bring an action of fraud. Very well, then there must be delay until the trial; then there may be longer delay, if sufficient cause be shown; and if the fraudulent vendee of the property shall find that the action is likely to result in recovery against him, after the lapse of any length of time, during which time he might have been able to postpone a final determination of the case, his property is out of his hands, and the assignee is just where he was at the commencement, and he is obliged to commence anew.

It seems to me to be very clear that that is not the intention of the statute, and that it is in direct conflict with the obvious purposes and design of the law-makers in framing this provision upon the subject. I will remark more conclusively than I have done, that from the language as used, "that the district judge may exercise this summary jurisdiction as in equity," it is very clear to my mind that if, in conducting such a proceeding, the district judge shall be satisfied that justice will be subserved by a jury trial, he can direct the issue to be so tried, and the parties can have as full and deliberate a trial as if the assignee had proceeded at law.

It may be proper to remark, in this connection, that in this class of cases, in most instances, a party can resort to an action at law to recover the property of which a fraudulent sale has been made. If he does, the amount to be recovered is the value of the property; and the rule of law is, no matter what the object of the vendee is, no matter whether he has bought it of the vendor, having done all in his power to repair the wrong he had done, or blot out the fraud he had committed; yet, if there were fraudulent transactions, and the sales were void, the court, in an action against him, can go no further than in an action at law. As I remarked, the measure of damages in a proceeding by petition shall be the value of the proceeds of the sale of the property.

In an equity proceeding, if the property has been honestly applied to the debts of the fraudulent vendor, it may be credited in the creditor's bill. The great principle in equity cases is, that the fraudulent vendee shall derive no profit or benefit for himself. In this connection I will add, what I have already said, that in my judgment the district judge may proceed just as he may think proper, being bound only by the right administration of justice between the parties. This summary procedure is not a new matter in bankrupt legislation in this country by any means.

Under the bankrupt law of 1841, the rule of the supreme court, in construing the act with reference to adjusted claims, was, that the district court has jurisdiction of a bill

in equity, and also jurisdiction to proceed as in this case. In Ex parte Christy, 3 How. [44 U. S.] 292, Justice Story uses the following language: "But it is objected that the jurisdiction of the district court is summary in equity and without appeal to any higher court. This we readily admit. But this was a matter for the consideration of congress in framing the act. Congress possesses the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States, and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by congress in such a manner as shall in their judgment best promote the public convenience, and the true interests of the citizens. Because the proceedings are to be in the nature of summary proceedings in equity, it by no means follows that they are not entirely consistent with the principles of justice, and adapted to promote the interest as well as the convenience of all suitors. Because there is no appeal given, it by no means follows that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments either of the district or of the circuit court in criminal cases; and yet, within the cognizance of one or both of these courts, are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors, affecting the liberty and the property of the citizens. And yet there can be no doubt that this denial of appellate jurisdiction is founded on a wise protective policy. The same reasoning would apply to appellate jurisdiction from the decrees and judgments of the circuit court, which are limited to cases above two thousand dollars, and cases below that sum embrace a large proportion of the business of that court."

The truth is, (as has been already asserted,) that in no other way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on where the whole jurisdiction was confided to a single court, in the collection of assets, in the ascertainment and liquidation of liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve the interest of all concerned; in preventing, by injunction or otherwise, any particular creditor or person having an adverse interest from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. The remarks of that learned judge are so strikingly applicable here that I can entertain no doubt in this case, and the order of the district court, dismissing the petition of the assignee, is reversed with costs.

Case No. 1,407.

BILL v. NEW ALBANY, ETC., RY. CO.

[2 Biss. 390;[1] 4 Alb. Law J. 49.]

Circuit Court, D. Indiana. Nov. Term, 1870.

FORECLOSURE AGAINST RAILROAD COMPANY—TRUSTEE SHOULD REPORT TO CIRCUIT COURT—INTERFERENCE BY STATE COURT — RECEIVER —WHEN APPOINTED.

1. Where a bill had been filed in this court to foreclose a mortgage given by a railroad company, various interlocutory orders entered, a trustee appointed who had taken possession of the road, and on the faith of these orders, certain bonds had been surrendered, stocks taken, and debts and liabilities incurred, this is the proper tribunal to decide the rights and equities of the parties in interest.

2. Trustee should report to this court—and any of the parties have the right to insist upon such report. He has no right to turn over to another jurisdiction matters which had been partially adjudicated here, and this is the only court whose decision upon the rights involved here is binding on the parties.

3. When a party in interest in such case asks for relief, it is no answer to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of this court to give relief.

[See Renner v. Marshall, 1 Wheat. (14 U. S.) 215.]

4. Where during the pendency of the suit in this court, the trustee acting with certain bondholders, but without notice to or permission from this court, filed a bill in the state court to foreclose the same mortgages which are the subject of this bill, and making no reference to the case in this court, upon which a receiver was appointed, foreclosure ordered, and sale made by the sheriff, who under order of the court delivered the road to the purchasers; such an interference on the part of the state court with property at the time within the jurisdiction of this court was unauthorized, and it is nevertheless within the control of this court, to adjudicate upon the equitable rights of all who have ever been before it.

[Cited in Union Trust Co. v. Rockford, R. I. & St. L. R. Co., Case No. 14,401; Wilmer v. Atlanta & R. Air-Line R. Co., Id. 17,775; Owens v. Ohio Cent. R. Co., 20 Fed. 15. See, also, Minnesota Co. v. St. Paul Co., 2 Wall. (69 U. S.) 609.]

5. A bondholder and stockholder is entitled, in such a case, to the equitable interposition of this court to protect his rights under its decrees and to demand an account from the trustee or his representatives.

6. The purchasers and their counsel having had notice of what had occurred in this court cannot claim to be bona fide purchasers.

7. The company being insolvent, the original trustee having died without rendering a proper

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

account to this court, and the road being in the actual possession of parties acting in hostility to its decrees, a receiver should be appointed.

In equity. This was a petition for an accounting and the appointment of a receiver [of the New Albany & Salem Railroad Company,] filed under decrees in this case rendered in June and December, 1858, by John Savage Shaw, a bondholder as well as a stockholder of the road, for himself and all others similarly situated in relation to the property. [Receiver appointed. See note at end of case.]

Williamson was the trustee in five mortgages given by the railroad company in 1851, 1852, 1853, 1855 and 1856, for more than $5,000,000, on all of which interest was due on the first of August, 1857. As by the terms of the mortgages they were liable to foreclosure for non-payment of interest, on that day the trustee filed a bill to foreclose the same in this court, and asking for the appointment of a receiver. On the second of November, 1857, the motion for a receiver was denied, with leave to renew the same upon any new statement of facts; but the company was required on the first of January, 1858, to make a report of the gross and net earnings of the road, and one-half of the net earnings was to be set aside for the payment of the interest of the bonded debt of the company, and the other half for the payment of its floating debt. For opinion then rendered, see volume 1 of this series, p. 198, [Williamson v. New Albany, etc., R. Co., Case No. 17,753.] On the 8th of December, 1857, the court, acting upon the principle that the road was within its control, enjoined the collection of certain executions on judgments obtained in the courts of the state. On the 23d of June, 1858, Mr. Williamson, the trustee, filed a petition in the nature of a supplemental bill, alleging that a basis of settlement had been agreed on between the company and three-fourths in value of all the holders of bonds issued. Some of the stipulations of the settlement were that the time of payment of a portion of the bonds was to be extended; certain of the bonds, in a contingency named, were to be converted into stock; certain holders of stock might surrender the same and receive a per centage of the new stock, and a new organization of the company was provided for. The supplemental bill stated that it was for the interest of all parties that the agreement should be carried out, and asked that it should be ratified and confirmed by the court. The trustee also requested that he might have the right to borrow two hundred thousand dollars on the security of the road in order to pay some pressing claims, and that the possession of the road might be given him. Accordingly, on the 23d of June, 1858, a decree was rendered ratifying and confirming the basis of settlement as set forth by the trustee, and also enjoining certain parties from proceeding under executions against the company issued from the courts of the state. All stockholders and bondholders who had not subscribed to the agreement, were to have ninety days to come in and avail themselves of the benefits of the decree. The road and its fixtures and appurtenances were ordered to be delivered to the trustee until certain sums of money were paid, and whenever they were repaid in full, the trustee was to surrender at their request in writing to the directors of the company, the road and its appendages. In the meantime the road was to be operated by such directors, officers, agents and employes as the trustee should deem best. All questions touching the payment of costs and the expenses of the trustee were reserved by the court for further consideration. This is called in the record an interlocutory decree.

On the 16th of December, 1858, what is termed a final decree was entered, determining the interests under the mortgages and in the capital stock. The road was, on certain conditions, surrendered to the holders of the second and third mortgages, and income bonds, and they were declared to be tenants in common of the road in named proportions; but this was to be subject to certain other mortgages mentioned, the lien of which was to remain valid, and save the incumbrances and claims specifically provided for in the decree, they were to be invested with the whole property. The decree also declared how the net earnings of the road, after the first day of May, 1859, were to be appropriated, and it gave the holders of certain bonds of the capital stock the right to surrender the same and receive an interest in the road; and they were prohibited from enforcing their claims in any other way. This decree was in terms made subject to that of June, 1858, and both were entered with the consent and acquiescence of all the parties in court—complainant, defendant, stock and bondholders.

The order made on the 2d of November, 1857, as to the reports of the earnings of the road, was complied with until changed by the subsequent order of the court as heretofore stated.

On the 28th of May, 1859, the trustee, by supplemental bill, asked and obtained from the court an order restraining certain judgment creditors from interfering with the property of the road, and the trustee and his successors and the holders of the bonds, in conformity with the previous orders of the court, were adjudged to have and enjoy the possession of the property surrendered. Various unimportant orders were made and the cause regularly continued to November term, 1861, when the trustee filed a supplemental bill, in which he referred to the decrees rendered by the court, and stated that the action was still pending, and that no final decree for sale had ever been rendered. He also declared that the company had changed its name, and was

then known as the Louisville, New Albany and Chicago Railroad Company. The trustee submitted to the court the question whether such property should be sold, as was necessary to pay certain indebtedness, or whether the road should be sold as an entirety, and then the surplus be divided between the holders of bonds and mortgages according to their respective priorities. On the 17th of December, 1861, the court made an order referring to the supplemental bill, as one praying for a decree, that the railroad and appurtenances should be sold under a foreclosure of the mortgage mentioned in the same, that notice be given by publication to all persons interested to show cause at the next term why the prayer of the bill should not be granted. The order provided that the clerk should make publication unless the trustee should direct otherwise, and the evidence is that the trustee did so direct, and accordingly no publication was ever made. Nothing further appears on the record, except some orders about the payment of counsel fees, and the usual order of continuance until the November term, 1865, when the trustee filed a petition for the sale of certain property not used in operating the road, and also for the sale of the Gosport branch; and the court, on the 8th of December, 1865, authorized the trustee to make the sale. The cause was then regularly continued until the May term, 1869, when the trustee on the 6th day of July made a report that on the 15th of August, 1867, he had sold the property as authorized by the court.

Before this report was made, and during the spring of 1868, Henry H. Horner, a bondholder under one of the mortgages, filed a bill to foreclose the same in the court of common pleas of White county, in this state, which afterwards was removed by change of venue to Tippecanoe county. To this bill an answer was filed, alleging the pendency of the case in this court as a reason why the state court should not take jurisdiction of the cause. But that court held that as Horner had not become a party to the agreement on which the decree was rendered in this court, he was not bound by it. The state court announced its readiness to appoint a receiver of the road, but on the 20th of September, Horner, without any further action of the court, dismissed his bill. The counsel and parties who defended the suit of Horner, acquiesced in the opinion of the state court, and did not come to this court to request action in the subject matter of the controversy.

During all this time, from the date of the decrees rendered in this court, Williamson remained in possession of and operating the road, but up to September, 1868, had filed no reports, and had asked for no further action of this court than as heretofore stated.

On the 4th of September, 1866, Williamson, without notice to or permission from this court, filed a bill in the court of common pleas of White county in this state, to foreclose the same mortgages which were the subject of the bill filed in this court in August, 1857. He, as trustee, did this, as it was said, on demand of the bondholders, many of whom had been parties to the agreement ratified by the decree in June, 1858. The bill did not refer in any way to the case in this court, but stated that in 1859 the name of the company had been changed under the authority of law to the Louisville, New Albany and Chicago Railroad Company, and that the company had not held an election for directors, nor had there been a meeting of directors for eight years. On the 22d of September, 1868, the court of common pleas, on motion of the plaintiff, appointed a receiver of the road, and authorized him to take possession, and the receiver did accordingly, on the first of October, take possession of the road. The company was defaulted, and on the 25th of January, 1869, a final decree of foreclosure was entered, and an order for the sale of the road and its appurtenances made, being the entire road from New Albany to Michigan City. On the 8th of April, 1869, the sheriff of White county in obedience to an order to that effect from the court, sold the road to certain parties, eight and ten per cent. bondholders, for the sum of $100,000, though they state that their agent was authorized to bid not exceeding two millions of dollars, nearly the whole of the $100,000 being paid by pro rata credit on the bonds held by the bidders. Objections were made to the sale on various grounds, but they were all overruled by the court, and the sale confirmed, and the sheriff ordered to make a deed, which was accordingly executed to the purchasers on the 26th of May, 1869, which deed was afterwards approved by the court, and ordered to be delivered to the purchasers, and the receiver was required to deliver up to them possession of the property. Under this decree the purchasers took possession, and have been since the 21st of June, 1869, operating the road under the name of the Louisville, New Albany & Chicago Railway Company, and it was said have converted their bonds into stock, or have surrendered the greater part of the eight and ten per cent. bonds to the court of common pleas of White county.

In August, 1869, Williamson died, and under the mortgages, Bill, the present complainant, was the alternate trustee. On the 10th of November, on motion of Shaw, who had leave to file a petition showing his right to the equitable interposition of the court, the alternate trustee was required to appear at the next term, and cause himself to be substituted as complainant; Bill then moved to dismiss the cause, and the motion to dismiss and the motion of the petitioner to be heard on his equities were fully argued before the court, (Davis, J., at that time alone holding the court), and on the 4th of June,

1870, the court overruled the motion to dismiss, and gave Shaw, the petitioner, leave to file any further pleadings, in conformity with the equity practice of the court, requisite to determine his rights. Under this leave, Shaw presented a petition alleging that he is a bondholder under the mortgage of 1855; that he is the owner of one thousand and ninety shares of the capital stock of the company, issued in lieu of bonds which, with the interest warrants attached, were surrendered to the company under the agreement embodied in the decree of December, 1858; that under the decree of June, 1858, the company on the 6th of October, 1858, executed to Williamson an instrument in writing confirming to him and his successors the powers intended to be vested by the decree; that the trustee still having possession of the property, delivered the same in October, 1868, to James F. Joy, (the receiver appointed by the court of common pleas of White county) without any authority from this court, but at the instance of a majority of the holders of the bonds then outstanding, who continued in possession of the same till it was passed over to certain parties in June, 1869, (the bondholders and purchasers under the decree of the court of common pleas of White county) at whose instance, among others, the bill was filed in this case, in August, 1857; that a large portion of the bonds secured by mortgage of 1853, of 1855, and of 1856, with the interest warrants, were surrendered, and were converted under the decree of this court into the stock of the company; that a part of the earnings have not been accounted for, and of those he had no knowledge until the affidavits were filed in June last in this application; that Williamson, the trustee, was managed by certain of the bondholders so as to act in their interest alone; that these parties had denied the rights of the petitioner and those like him to share in or interfere in the management of the property; that since they have had control of the road, there have been large earnings of which they have made no report to this court, nor to any one not connected with the usurpation; that he had no knowledge of these acts until the parties had possession of the road; that Bill, the alternate trustee, was in collusion with those parties; that an account should be taken of the earnings of the road from the time it was placed in the hands of Williamson and of the amount of bonds outstanding, and converted into stock, and of the indebtedness and assets of the company; and that a receiver should be appointed.

J. McDonald and Mr. Hughes, for petitioner.

Hendricks, Hord & Hendricks and Henry Crawford, for defendants.

DRUMMOND, Circuit Judge. This court, in June last, decided that Bill could not, on his mere motion, dismiss the suit, to the prejudice of the parties interested in the trust, and that Shaw, as bondholder and stockholder, claiming rights under the decrees of this court, was entitled to be himself heard in support of those rights. And, in a certain sense, the questions now remaining are, whether he has made out in his petition a case for the equitable interposition of the court; and, what relief, if any, the court can give to him and others standing in like relation to the property.

The bill filed in this court was for a foreclosure of the mortgage and a sale of the property, because of the non payment of the interest. For all purposes contemplated by the bill, originally, the trustee properly represented the parties interested in the mortgages, and if the case had gone on in the ordinary way no other parties than the trustee and the company would have been brought in. But after the case had been some time pending, a compromise agreement was made, which was afterwards ratified by the court in the form of a decree. It may be conceded, though the decree of December, 1858, seems to have been drafted on a different hypothesis, as one of the terms of the decree in June was that bonds should be turned into stock, that even the order of the court could not make that effectual without the consent of the bondholders. That would be changing the contract without their assent. The decrees were taken by consent, and on the presumption that all would unite, as nearly all did. But, however this may be, it is certain that by the decrees of this court great changes had been made, with their acquiescence, in the original rights of many of the bond and stockholders. On the faith of the decrees, bonds had been surrendered and stock taken, debts and liabilities had been incurred, and the property pledged to secure them. It had been placed in the hands of a trustee to carry out the orders of the court. It is true the decrees had undertaken to go too far, that is, to order certain things to be done depending upon conditions which might never be complied with, a very common error made by counsel when drafting uncontested decrees to which the attention of the court is not particularly called. In point of fact in this case, if the claims referred to in the decrees were paid in 1864, and by their terms the property could be surrendered by the trustee, there seem to have been no directors of the company to whom to surrender it. They had ceased to exist, the entire control and management of the road being then in the hands of Williamson. Although it is said he kept possession of the road at the request of the bondholders, yet no formal act appears to have been done. There can be no doubt it was the imperative duty of the trustee to report the facts to this court, and ask for its direction. And, notwithstanding the opinion of the state court on this point, it is

equally clear that, under the circumstances of the case, if any bondholder under the mortgage, who had not become a party to the agreement in this court, wished for a foreclosure of the mortgage, or any relief, this was the proper forum to approach for that purpose. The rights of the parties were adjudicated here. The property, for certain purposes, was here. It was not possible that the cause could be divided into fragments, and, in the actual state of affairs, one party in interest go to one court, and another to a different court, for the enforcement of his equitable rights. If the understanding of the parties and the terms of the decree were entirely carried out, there would be no difficulty; but if in that way their expectations were not realized, and there should be a failure to satisfy the claims of the creditors, there would seem to be no question that this court was the proper tribunal to do equity, because it was only by control over the orders of the court, already made, that this could be accomplished. The decree did not require the trustee to report his acts and doings to this court, but the implication is strong that he should have so done. The interests of the company, as well as of the bondholders and creditors represented in the compromise agreement and decree, very much depended upon the management of the road by the trustee. It was their right to know through this court whether the trustee had fulfilled the duties of his trust. The evidence shows that he misappropriated the funds of the road. If Williamson were living, can there be a doubt that any party to the decree of this court would have the right to insist that he should report his doings as trustee to this court?

It would be impracticable for the court to adjust the equities of the parties without knowing the manner in which the duties of the trust had been performed, if it became necessary to act on an application. For example, how can the court settle the equities of Shaw without knowing what has been done by his trustee? And certainly the court of common pleas of White county could not enter a proper decree without the same knowledge. Williamson had been in possession operating the road for ten years. The rights of all parties were seriously affected by the disposition he made of the earnings of the road during that time, and by the manner in which he performed the duties of his trust. Any adjudication of the rights of the parties under these five mortgages, without regard to what had been done in this court, would necessarily be imperfect, and therefore inequitable, and for the simple reason that interests had been acquired here which could not be changed or modified elsewhere without the consent of the parties. In any controversy thereafter it was not possible to treat the decrees of this court as though they had never been made. That is what the court of common pleas of White county seems, in one sense, to have done. In fact, nowhere in the bill or in the decree in that court is there any intimation of the decrees of this court.

Then as to the action of Williamson, the trustee: He had never fully reported to this court what he had done as to the expenses and earnings of the road, or as to the road itself—whether he still held it or had turned it over to the bondholders. In November, 1861, he stated in a supplemental bill that the action was still pending in this court, and that no final decree of sale had ever been rendered, and submitted to the court, among other things, the question whether the whole road should be sold, and the court made a rule to show cause why this should not be done, on which rule there was no action. In 1865 he applied for an order to sell the Gosport branch, which was granted. Under these circumstances, if a sale of the road was desired either by the trustee or those bondholders who were connected with the decree of this court by appearance here, it would seem that application should be made to the same court for the sale of the property. It could hardly be said then to be fair dealing, while the case was thus proceeding here, for the trustee and some of the bondholders to turn over to another jurisdiction rights which had been partially adjudicated, thus ignoring everything that occurred here. It is true that they seem to have had the opinion of a state court to justify their action, but as this court was the one in which the controversy was originally commenced, and in which, for certain purposes, it was yet pending, it is the only tribunal whose decision was binding upon the parties in this court. Before he adopted so grave a measure, therefore, and one calculated so much to complicate and embarrass matters in dispute, he should have come to this court for directions and relief. One litigation should have been disposed of before another on the same subject-matter was begun. The fact appears to be that the trustee and the first bondholders thought that the last bondholders had ceased to have any interest in the road, because of the inadequacy of the property to respond to inferior liens, and acted accordingly—a conclusion which could only be reached under the authority of this court. Inasmuch, therefore, as the case was still here, as for certain purposes the property was subject to the control of the court, in the interests of the parties before it, to appeal to another court to foreclose the mortgages and sell the road was unwarranted, and not consistent with the obligations due to all. The trustee was responsible just as much to others as he was to those who demanded he should foreclose, and whose instructions he obeyed. If, then, it was a breach of duty for Williamson to proceed in the court of common pleas of White county, as I think it was, what is the effect upon the right of this court to retain jurisdiction of the cause and of the subject-matter? There can be no doubt it has

created great confusion in the position of those claiming under the mortgages, and embarrassment in the court to deal properly with their interests. It has thus brought about an apparent conflict between courts, state and federal, which should always be avoided. But the conflict arises from acts done after this court had obtained jurisdiction of the cause, and for which, therefore, it cannot be justly held accountable, and when a party affected by an order or decree entered in a pending cause asks for relief, it is no answer to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of the court to give relief. The question always must be, is it competent for the court to act? If so, its duty is plain, and it necessarily follows from what has been said that, in my opinion, the property is still within the control of this court to adjudicate upon the equitable rights of all who have ever been before it. It is said that those interested delayed in making application to call on the trustee to account. But he was a trustee, who could not, therefore, complain of laches. And, besides, they had the right to presume that the trustee would protect their interests, acting under the sanction of the court. It may not be out of place to refer to the practical result of the wrongful act of the trustee, though if on any other ground it could stand, it might not be material. At the sale under the decree of the court of common pleas of White county, the entire road from New Albany to Michigan City, 288 miles, a property worth some millions, was purchased by seven persons, some of whom say they were acting for bondholders, for the sum of $100,000. If that purchase is unassailable, then these seven bondholders, or those they represent, acquired it absolutely, and any other creditor is without remedy. If they have allowed other bondholders, not connected with them, to convert their bonds into stock, that was a matter of favor and not of right. In April, 1869, the property was sold, and in November of the same year the petitioner made his application to this court. It has been said that admitting the decree of the state court was rendered without reference to authority of this court, yet that a just result was reached. The answer is—even if that might change the aspect of the case—this court cannot know that to be so. The data on which to arrive at a true result is not before it, and cannot be until it is made acquainted in a proper way with what the trustee has done.

It is a necessary conclusion from what has been said, that the petitioner is entitled to the equitable interposition of the court, to protect his rights under its decrees, and to demand an account from those who represent the former trustee.

The thirty-eight miles of road from Michigan City to the east line of Illinois has been operated by the Michigan Central Railroad, a corporation of the state of Michigan, which constructed, it is said, at its own expense, that portion of the road, under a contract made with the New Albany and Salem Railroad Company in 1851. No part of the earnings of that section has ever been accounted for to the defendant or to its successors. And though that line was not included in any of the mortgages, yet there can be no doubt that as the defendant is insolvent the creditors of the defendant may be entitled under certain circumstances to an account of the earnings, expenses and cost of the construction of that part of the road; but as to that part no order will be made.

Whether a receiver should be appointed, is a question often attended with difficulty, and to answer it properly is one of the most embarrassing duties a court of chancery has to perform. The difficulty is increased by the peculiar situation of the property in this case, claimed under a decree of a state court, but it would seem to follow, if the principles heretofore stated are sound, that this court has not lost control of the subject matter of the suit, and that the interference of the state court in dealing with and disposing of property at the time within the jurisdiction of this court, was unauthorized. The only inquiry, therefore, is whether there is any necessity for the appointment of a receiver while the court is settling the rights of the parties. The company is insolvent, the former trustee is dead, having made no reports to this court of the manner in which he performed his trust; the present trustee caused himself to be made a party to the litigation in the state court. After the death of Williamson he sought to dismiss the proceedings in this court. The parties at present in possession of the road are acting in hostility to the decrees of this court, and the interests thereby adjudicated. It would appear to be impossible to give any relief to the petitioner and others in similar relations, unless the court shall take control and possession of the property.

The parties now in possession can hardly claim to be bona fide purchasers, without notice, for they and their counsel had knowledge of what had occurred in this court. The road seems to have been operated by Williamson at first in the name of the defendant, and then as the Louisville, New Albany and Chicago Railway Co., and since the sale and organization under the decree of the state court the present possessors have called it the Louisville, New Albany and Chicago Railway Company, keeping the name and business distinct in each case.

Very possibly difficult questions may arise out of the sale under the decree of the state court, where the interests of third parties may be affected, but it is to be hoped rights may be adjusted so as to give proper protection to all who ought to have it.

It is claimed that those who are now in possession of the road have not been made parties to this proceeding, and have not been

impleaded so that they could answer. Due notice has been given of this motion to the trustee and to the superintendent of the present company, which professes to represent those who purchased under the decree of the state court. The application has been pending since November, 1869. The purchasers themselves have filed an affidavit in court, and there can be no question but all parties have had ample opportunity to be heard. The motion of the petitioner has been fully and ably argued by the counsel on both sides, and the court has had all the assistance in the investigation of the case which their zeal and ability could furnish.

My Brother GRESHAM did not hear the argument at the present term, but the questions were, more or less, fully discussed before him at the November term last year, when the petitioner made his application, and he has been consulted in the case, and concurs in this opinion.

We think, therefore, a receiver should be appointed.

NOTE, [from original report.] For the opinion of the court in this case, on motion for appointment of a receiver, and construction of powers of the trustee, consult Williamson v. New Albany, etc., R. Co., [Case No. 17,753.]

[After the appointment of the receiver in the principal cause, Charles E. Bill, the successor of the original trustee, filed a supplemental bill for the foreclosure of mortgages remaining in force, the questions arising under which were subsequently appealed to the supreme court, and determined in Shaw v. Bill, 95 U. S. 10.]

BILL, (UNITED STATES v.) See Cases Nos. 14,593 and 14,594.

Case No. 1,408.

In re BILLING.

[3 Ben. 212;[1] 2 N. B. R. 512, (Quarto, 161;) 2 Am. Law T. Rep. Bankr. 87.]

District Court, S. D. New York. April 23, 1869.

CONSTRUCTION OF STATUTES—BANKRUPTCY ACT OF 1867—FIFTY PER CENT. CLAUSE.

1. A statute will not be construed as being retroactive, unless the intention that it shall be so appears on its face.

[Cited in Brooke v. McCracken, Case No. 1,932; Tinker v. Van Dyke, Id. 14,058. See, also, U. S. v. Heth, 3 Cranch, (7 U. S.) 399; Prince v. U. S., Case No. 11,425; Harvey v. Tyler, 2 Wall. (69 U. S.) 328; Schenck v. Peay, Case No. 12,450; Ellis v. Connecticut Mut. Life Ins. Co., 8 Fed. 81; Warren Manuf'g Co. v. Aetna Ins. Co., Case No. 17,206.]

2. When such intention appears, the statute will be allowed to act retroactively unless some vested right will be impaired, or some contract will be violated thereby.

[Cited in Re Griffiths, Case No. 5,825.]

3. The second clause of the 33d section of the bankruptcy act provided, that, "in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." The year expired on June 1st, 1868. On July 27th, 1868, an act was passed declaring that the second clause of the 33d section above mentioned "shall not apply to the cases of proceedings in bankruptcy commenced prior to the first day of January, 1869," &c., &c. 15 Stat. 227, [c. 258.] *Held*, that, the provisions of this latter act extended to proceedings in bankruptcy commenced between June 1st, 1868, and July 27th, 1868, as well as to proceedings commenced on and after July 27th, 1868.

[In bankruptcy. Application of William Billing, a bankrupt, for a discharge. Granted.]

Benedict & Boardman, for bankrupt.

BLATCHFORD, District Judge. This is a case of voluntary bankruptcy. The petition was filed on the 8th of June, 1868. The proceedings have progressed in due course and the petitioner has applied for a discharge. His assets have not paid and will not pay fifty per centum of the claims against his estate, and the assent in writing of a majority in number and value of his creditors who have proved their claims has not been filed. On this state of facts, the question arises, whether he is entitled to a discharge. On the 8th of June, 1868, when his petition was filed, the period of one year from the time the bankruptcy act went into operation had expired. The expiration of that period brought into effect the provision of the second clause of the 33d section of the act, [14 Stat. 533,] which is this: "In all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." By the 50th section of the act, no proceeding under the act could be commenced until the 1st day of June, 1867. The act, therefore, so far as the second clause of the 33d section is concerned, went into operation on the 1st day of June, 1867, and that clause took effect in respect to all proceedings in bankruptcy commenced after the 1st day of June, 1868. The filing of the petition in the present case, on the 8th of June, 1868, followed as it was by an order of adjudication, was, under section 38, the commencement of proceedings in the case. Therefore, if the second clause of the 33d section had remained unaltered, it is manifest that no discharge could be granted in this case. But, by the act of July 27, 1868, (15 Stat. 227, [c. 258,]) it is declared that the provisions of the second

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 2 Am. Law T. Rep. Bankr. 87, only contains the syllabus.]

clause of the 33d section of the bankruptcy act "shall not apply to the cases of proceedings in bankruptcy commenced prior to the first day of January, eighteen hundred and sixty-nine," and that "the time during which the operation of the provisions of said clause is postponed shall be extended until said first day of January, eighteen hundred and sixty-nine," and that said clause is so amended as to read as follows: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

The question which arises on this legislation is, whether the act of July 27th, 1868, in saying that the provisions of the second clause of the 33d section of the original act should not apply to the cases of proceedings in bankruptcy commenced prior to the 1st of January, 1869, meant only proceedings which should be commenced after the 27th of July, 1868, and prior to the 1st of January, 1869, or meant proceedings which had been commenced before the 27th of July, 1868, as well as proceedings which should be commenced on and after that day; and whether the extension of the time during which the operation of the provisions of such second clause was postponed, was an extension to commence only on the 27th of July, 1868, or an extension to commence retroactively on the 2d of June, 1868; and whether such second clause of the 33d section, in its amended form, is to be regarded as being in force only from the 27th of July, 1868. In other words, the question is, whether the provisions of the act of July 27th, 1868, were wholly prospective, or whether they were also retroactive, so as to prevent the coming into operation until after the 1st of January, 1869, of such second clause of the 33d section.

The general rule is, that a statute will not be construed as being retroactive in its operation, unless the intention that it shall be so retroactive appears on its face, and that, when such intention appears, the statute will be allowed to operate retroactively unless some vested right will be impaired or some contract will be violated. It is the fair import of the legislation referred to, that congress intended to give to all debtors in whose cases proceedings in bankruptcy had been commenced or should be commenced on or before the 1st of January, 1869, the privilege of obtaining a discharge without any restriction as to the per centage which their assets should pay, or as to the procuring of the assent in writing of any of their creditors. The provisions for a discharge, in the act, are remedial and beneficent, and no reason can be assigned why congress should remove such restriction in the cases of proceedings commenced on and after the 27th of July, 1868, and not remove it in the cases of proceedings commenced before that day and after the 1st of June, 1868. There were in this district eighteen cases commenced after the 1st of June, 1868, and before the 27th of July, 1868. On a view of all the provisions of law, it must be held, that congress has expressly manifested its intention to make no discrimination against those cases. This question has been submitted to Mr. Justice NELSON and he concurs in the views here expressed. A discharge will, therefore, be granted.

BILLING, (SMITH v.) See Case No. 13,014.

BILLINGS, (RUDDICK v.) See Case No. 12,110.

BILLINGTON, (BARNES v.) See Case No. 1,015.

Case No. 1,409.

BILLS v. NEW ORLEANS, ST. L. & C. R. CO.

[13 Blatchf. 227.][1]

Circuit Court, S. D. New York. Jan. 6, 1876.

REMOVAL OF CAUSES — STATE PRACTICE — WRITS — ATTACHMENT.

1. An action at law commenced in a state court by summons and complaint was removed into this court before issue joined. Before removal, an attachment had been issued in the suit, according to the law of the state, and a reference made to take the deposition of a witness to be used on a motion in the suit. After removal, the defendant entered a rule in this court requiring the plaintiff to declare, and the plaintiff entered a rule in this court requiring the defendant to plead. The plaintiff now moved to set aside the first rule, and the defendant moved to set aside the second rule, and the plaintiff also moved for leave to proceed in the reference so made and pending, in accordance with the statute of New York: *Held*, that all three of the motions must be granted.

[Cited in Rosenbach v. Dreyfuss, 1 Fed. 395; Bryant v. Leyland, 6 Fed. 127.]

2. As a complaint had been put in in the state court, no further pleading on the part of the plaintiff was necessary. Nor was there any occasion for the plaintiff to enter a rule to plead against the defendant, there being no such practice in the state court.

[Cited in Oscanyan v. Winchester Repeating Arms Co., Case No. 10,600.]

3. The provisions of sections 646, 914, and 915 of the Revised Statutes of the United States, and of sections 4 and 6 of the act of March 3, 1875, (18 Stat. 471, 472,) show an intention to secure in each state one method of procedure in all common law cases, and to attain that result by adopting, in general, the procedure of the state courts in the respective states.

[Cited in Central Trust Co. v. South Atlantic & O. R. Co., 57 Fed. 10.]

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

4. The distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded; but, in the absence of such provisions, the state practice prevails.

[At law. Action by Orrin A. Bills against the New Orleans, St. Louis & Chicago Railroad Company. Motions by both plaintiff and defendant. Granted.]

Lucius E. Chittenden, for plaintiff.
Francis N. Bangs, for defendant.

JOHNSON, Circuit Judge. This cause was commenced by summons and complaint in the supreme court of the state of New York. An attachment was obtained in the case according to the law of the state, and, in the course of the proceedings to render the attachment effectual, a reference was made to Mr. Edsall to take the affidavit or deposition of one Kelly, to be used on a motion in the action. While this reference was pending, the action was removed, on the application of the defendant, to this court. The action was founded upon a claim at law, as distinguished from equity, and had not reached an issue when it was removed, no answer having been put in.

As a complaint had been put in in the state court, no further pleading on the part of the plaintiff was necessary, and there was, consequently, no occasion for entering a rule requiring him to declare. That rule, taken by the defendant, must be set aside.

On the same ground, there was no occasion for the plaintiff to enter a rule to plead against the defendant; for, in that respect, also, the practice in the circuit court must be conformed to that in the state court, in obedience to section 914 of the Revised Statutes. That rule must, also, be set aside.

The plaintiff further asks for an order of this court in respect to the attachment proceedings and the reference ordered therein, pending which the cause was removed to this court. Several provisions of the statutes of the United States bear upon this question. In addition to the provisions of section 914 of the Revised Statutes, by which the practice, pleadings, and forms and modes of proceeding in the state courts, as they may exist from time to time, are adopted, to govern in the circuit and district courts, in civil causes other than equity and admiralty, the next section (915) contains a distinct rule in respect to attachments. By that section, in common law causes, the plaintiff is entitled, in the circuit and district courts, to similar remedies, by attachment or other process against the property of the defendant, as were then provided (June, 1872, 17 Stat. 197, [§ 6,]) by the laws of the state in which those courts were held, for the courts thereof. It was further provided, that, from time to time, (in the future,) the circuit and district courts might, by general rules, adopt such state laws as might be in force in the states where they should be held, in respect to attachments and other process against the property of defendants. But it was provided that similar preliminary affidavits or proofs, and similar security to that required by the state laws, should be furnished by the party.

In addition to these provisions, which relate to attachments sued out in the United States courts, there are special provisions as to attachments procured in the state courts in causes afterwards removed into the circuit courts of the United States. Thus, section 646 of the Revised Statutes provides, that "any attachment of the goods or estate of the defendant, by the original process, shall hold the same to answer the final judgment, in the same manner as, by the laws of such state, they would have been held to answer final judgment had it been rendered by the court in which the suit was commenced." This section, the construction of the latter part of which is rendered difficult by the substitution of the word "state," probably, for "United States," is followed, in the act of March 3, 1875, (18 Stat. 471, § 4,) by the provision, "that, when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant, had in such suit in the state court, shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree, in the same manner as, by law, they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced, * * * and all injunctions, orders, and other proceedings, had in such suit, prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." Section 6 of the same act likewise provides, that the circuit court shall, in all suits removed under the provisions of that act, proceed therein as if the suit had been originally commenced in the circuit court, and the same proceedings had been taken in such suit, in said circuit court, as shall have been had therein in such state court, prior to its removal. Taking all these provisions together, I think it plain, that it is the intention of the law making power, as disclosed by the direction for conformity, in respect to attachments in original suits, to the laws of the states, by the direction to proceed in removed suits as if they had been originally begun in the circuit court, and as if what had been done in the state court had taken place in the circuit court, and by the other provisions which have been referred to, to secure, in each state, one method of procedure in all common law cases, and to attain that result by adopting in general the procedure of the state courts in the respective states. If this view is not allowed to govern, then I fail to see how the clear indications of the legislative will in respect to

attachments are to be carried out. If it does govern, then the practice and procedure of this court is as well defined as that of the state court, and can be applied in practice by the body of the profession, which has been bred up in the state practice as it now exists, and is, to a great degree, ignorant of that practice which preceded it. Of course, the distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded; but, in the absence of such provisions, the state practice prevails.

Entertaining these views, I am of opinion that the plaintiff is entitled to proceed in the reference pending when the cause was removed, in accordance with the laws of New York in that behalf; and that the order asked for in that respect should be granted.

BILLY, (FENDALL v.) See Case No. 4,725.

Case No. 1,410.

BILSON v. MANUFACTURERS' INS. CO.

[Brunner, Col. Cas. 290;[1] 7 Am. Law Reg. 661; 3 Phila. 547; 16 Leg. Int. 228.]

Circuit Court, E. D. Pennsylvania. July 9, 1859.

INSURANCE—ASSIGNMENT OF POLICY.

Under a clause in a fire insurance policy that the liability of the insurers should cease upon assignment of the policy without their consent, *held*, that an assignment to a mortgagee from whom the insurers subsequently received the premium for a renewal was by such act ratified by them: but a subsequent conveyance of the fee by the mortgagor to the mortgagee would avoid the policy. A transfer to the mortgagee as collateral security, with the assent of the insurers, would not convert the contract into a new one on his interest.

[At law. Action by Bilson against the Manufacturers' Insurance Company on a policy of insurance. Verdict for plaintiff. Defendant moves for new trial, which was granted.]

Before GRIER, Circuit Justice, and CADWALADER, District Judge.

CADWALADER, District Judge. The defendants insured the plaintiff in fifteen hundred dollars against loss by fire, on a building in Baltimore, for one year from the 14th of March, 1856. The policy provided that the defendants' liability should cease in case of a total or partial assignment of the policy, without their consent in writing indorsed upon it; and also declared that the policy should become void in case of any transfer, or termination of the interest of the insured (meaning interest in the building or subject of insurance),either by sale or otherwise. It contained a provision that the risk not being changed, the insurance might be continued for such further time as might be agreed upon; the premium for the renewal being paid, and its payment indorsed, or a receipt for it given. The plaintiff, on the 12th of September, 1856, subscribed, on the back of the policy, an assignment of all his title and interest in it, to William Conine. This party's interest was under a mortgage of the premises insured, executed by the plaintiff, to secure the payment of a debt greater in amount than the sum insured. This assignment was made by filling up, in a fair hand, and subscribing, a blank form printed in large type. Conine and the plaintiff resided in Baltimore, where the defendants had a resident agent, through whom the above-mentioned insurance and the renewal mentioned below were effected. On the 14th of March, 1857, the defendants renewed the insurance for another year. Their agent's receipt for the premium for this renewal was indorsed upon the policy directly under the above-mentioned assignment. This assignment was in such visual juxtaposition that the agent could not have failed to see the whole of it, when he subscribed the receipt, without an extraordinary want of attention to what was before him for inspection. It was proved that Conine had paid this premium for the renewal of the insurance; and there seemed to be no reason to doubt that he was the person for whose benefit the insurance was intended by the parties in Baltimore to continue in force. After this renewal the plaintiff, by a deed, of which the existence was not made known to the defendants, for a pecuniary consideration in addition to the mortgage debt, conveyed the equity of redemption of the premises insured to the mortgagee, Conine, absolutely in fee. After the plaintiff's interest had been thus entirely divested, the building was, before the end of the second year, consumed by fire. The loss thus incurred was of an amount greater than the sum insured.

The defendants at the trial objected to the plaintiff's recovery, on the ground that his assignment of the policy to Conine having been made without the written consent required by the policy had annulled the insurance. On this point the court instructed the jury that the evidence would justify them in finding that the defendants' agent, when he renewed the insurance, was aware of the existence and contents of the assignment, which was then, in effect, exhibited to him, adding, that if the jury should so find, the act of renewal included, sufficiently, the consent required by the policy. The jury found a verdict for the plaintiff. The court is of opinion that, upon the point on which the instruction was given the verdict was right, and that the instruction, as to this point, was not erroneous.

But the court is also of opinion that this is not the point on which the decision of the

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

case properly depends. The question of interest in the insurance as distinguished from that of interest in the subject of insurance was alone considered at the trial. The difficulty in sustaining the verdict arises from the fact that the conveyance of the equity of redemption by the plaintiff to Conine changed entirely the interest on the subject of insurance. As the previous mortgage debt had in amount exceeded the sum insured, Conine's acceptance of this conveyance might, possibly, not have modified substantially his interest in the insurance, as it would have been retained by him if the defendants had approved of the conveyance. But be this as it may, the conveyance converted his interest in the subject of insurance from that of a mere security for a debt into an absolute, exclusive ownership; and at the same time determined entirely the plaintiff's interest in the subject. Though attention may not have been particularly directed at the trial to the effect of this change of interest, the defendants, if it entirely discharged them from liability, ought not to be deprived of the benefit of it on a motion for a new trial.

Another point which has been taken on behalf of the defendants is, that though an action of assumpsit, at the suit of Conine, had been sustainable upon the act of renewal as a contract with him, the present action of assumpsit by the party originally insured, who, on the renewal was neither the promisee nor the party to whom the loss was to be paid, cannot be sustained. If the decision in Tillou v. Kingston Mut. Ins. Co., 1 Seld. [5 N. Y.] 406, were law, there could, upon the facts of the present case, have been a recovery in an action at the suit of Conine. That case was adjudged by the court of appeals of New York in 1851. Three partners, owning a mill, in which they conducted their joint business, held a policy of insurance on it against fire, which, like the policy now in question, contained a provision that it should become void if the property insured was alienated by sale, or otherwise. The policy was assigned by the parties insured, with the assent of the insurers, to secure a mortgage on the mill for a debt of less amount than the sum insured. One of the partners insured, on afterwards retiring from the business, conveyed his interest in the mill to the other two owners. It was destroyed subsequently by fire. Two points were decided: the first, that this conveyance by one partner to the others had, except as to the mortgage, annulled the insurance; the second, that the mortgagee was, nevertheless, to the amount of the mortgage debt, entitled to the benefit of the insurance.

The decision of the first point, that, where partners are insured, an assignment by one of them to the others annuls the contract of insurance as between them and the insurer, has been questioned in a subsequent extrajudicial dictum of the same court. 3 Smith, [17 N. Y.] 412. But the decision on this point has been followed in a direct adjudication by the supreme court of Pennsylvania, in the recent case of Finley v. Lycoming County Mut. Ins. Co., [30 Pa. St. 311.] In this case the court said: "That a sale by one partner to the other is within the prohibition, cannot be doubted. There is no exception in its favor in the instrument; and the terms used give no reason to imply any." These terms were the same as in the New York case. The partner who, without the consent of the insurer, conveys his interest in the subject of insurance to his co-partners gives them, from thenceforth, an exclusive dominion and control where he had, previously, the right of participating in any control or dominion that could have been exercised. He thereby ceases to be a protector of the property insured against fire from fraud, or from any other cause for which the personal identity of a party insured can be material to an insurer. The decision on this point, therefore, appears to have been founded in sound legal reason.

On the second point the decision was founded on the assumed reason that the approval by the insurers of the assignment of the policy to the mortgagee had constituted a distinct and independent contract by them, with him, entitling him to the benefit of the insurance, in such a manner that his interest was not liable to be affected by subsequent acts or omissions of the party originally insured. On this point the decision has been overruled by the court of appeals of New York in the recent cases of Grosvenor v. Atlantic Fire Ins. Co., 3 Smith, [17 N. Y.] 391, and Buffalo Steam-Engine Works v. Sun Mut. Ins. Co., Id. 401, 414. As the law of New York is now settled, the assignment of a policy of insurance against fire to a mortgagee, with the assent of the insurer, merely gives to the mortgagee the right of requiring that the amount insured shall, to the extent of the mortgaged debt, be paid to him whenever it would afterwards have been recoverable by the mortgagor if no such assignment had been made. The approval of the assignment by the insurer does not convert his former contract of insurance into a new one for the independent insurance of the mortgagee. Unless the mortgagor could have recovered, if no assignment had been made, there can be no recovery of the insurance by or for the mortgagee. Therefore, a subsequent alienation of the equity of redemption by the mortgagor, made before any loss by fire, without the consent or approval of the insurer, annuls the insurance as to both mortgagor and mortgagee.

The cases reported in 7 Casey, [31 Pa. St.] 430, 8 Cush. 133, 136, 137, and 10 Cush. 352, 353, show that a like doctrine on the subject prevails in Pennsylvania and in Massachusetts. In [Carpenter v. Providence Washington Ins. Co.,] 16 Pet. [41 U. S.] 501, 502, Judge Story, in delivering the opinion of the supreme court, said that if "a mortgagor pro-

cures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity) as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss. But it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy."

Consequently, if in the present case the conveyance which divested the plaintiff's interest had been to another person than the mortgagee, the insurance would, from the date of such conveyance, have been to all intents and purposes at an end. The authorities define so clearly the rule of decision, and the principle from which it is deduced, that we would not be at liberty to consider the convenience or expediency of the rule, or to inquire into probabilities of justice, or injustice, in the result of its ordinary application. The comparative magnitudes of the mortgage debt, and the sum insured, cannot affect the question of the application of the rule. Nor can its application be affected by the circumstance that the person to whom the absolute conveyance in fee has been made was the same party to whom the policy had been previously assigned with the assent of the insurers. If the question depends upon the change of interest, not the insurance, but in the subject of insurance, these distinctions cannot be attended with any material difference. We have seen that the approval by the defendants of the assignment of the policy to Conine, though a recognition of him as the substitute of the plaintiff to receive the payment of a loss, had not been a dispensation with any former condition of the contract as to a change in the ownership of the subject of insurance. In two of the cases which have been cited the transfer by a partner to his co-partners of his interest in an insurance of property of their firm had introduced no new person as a party insured. The doubt in those cases did not arise from the identity of the person, but from the identity of the character of the interest which, by the transfer, had been changed as to the remaining partners in proportion, but not in kind, though it had been absolutely determined as to the retiring partner.

In the present case, not only was the plaintiff's interest, and with it his protective dominion and control, forever determined by the conveyance in question, but this dominion and control were irrevocably vested in Conine, by whom they could not previously have been exercised, and the character of whose interest was thus entirely changed. His personal identity as mortgagee was, therefore, so far as the reason of the rule is concerned, immaterial. The case thus appears to be completely covered by the authorities. They show that there could not be a recovery of the insurance in an action at the suit of either Conine or the present plaintiff. The verdict must, therefore, be set aside, and a new trial ordered.

GRIER, Circuit Justice. I fully concur with my Brother CADWALADER in all his views as above expressed.

BIMELER, (GOESELE v.) See Case No. 5,503.

Case No. 1,411.

In re BINFORD.

[3 Hughes, 295;[1] 17 N. B. R. 353.]

District Court, E. D. Virginia. April 3, 1878.[2]

CONDITIONAL SALE—VALID STIPULATIONS — POSSESSION OF GOODS—PRESUMPTION—FIXTURES.

1. Where a sale of goods is made on condition that the title of the vendor is not to pass until the purchase-money shall be paid, and the goods are delivered to the vendee: *Held*, that such a stipulation is valid; and, if all taint of fraud is disposed, a subsale of the goods by the vendee, before payment in full to the vendor, will not affect the title of the original vendor.

[See Blackwell v. Walker, 5 Fed. 419.]

2. The possession of goods does not of itself carry along with the property in them, nor of itself indemnify the real owner of them.

3. In Virginia the possession of the fixtures and outfit of a tobacco manufactory does not create the presumption that the title to them is in the person using them.

[In bankruptcy. John J. Binford excepts to the report of the register of the liens and their priorities binding on the estate of Charles T. Binford, a bankrupt. The exceptions were sustained.]

HUGHES, District Judge. This is a contention between John J. Binford, of Richmond, and Dohan, Carroll & Co., of New York, as to which shall be paid in full their claim against John H. Greanor out of the proceeds of the sale of certain property of the bankrupt [upon which the two parties claim liens.][3]

I think the facts of the case are as follows: It seems that certain tobacco-manufacturing fixtures and property were sold by Cook & Laughton, auctioneers, at auction, in Richmond, on March 11th, 1873. They were

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

[2] [Reversed by the circuit court in Case No. 1,411a.]

[3] [From 17 N. B. R. 353.]

paid for by John J. Binford in cash; the whole price of the goods purchased amounting to five thousand two hundred and thirty-nine dollars and sixty-four cents. In making up that sum, Binford used a note of John H. Greanor for one thousand three hundred and sixty dollars, given him by Greanor for the purpose. Binford had this note discounted on his own credit, as a means of making up the amount of cash purchase-money due for the goods. There was immediately afterwards another transaction in respect to this specific property. Greanor and his son-in-law, Charles T. Binford (who was the son of John J. Binford), were tobacco manufacturers. I believe the evidence shows that at that time Charles T. Binford was in the employment of Greanor. At all events, it is very plain that John J. Binford's purchase of the property in question was made as a means of aiding his son Charles in business. These being the social relations subsisting between the three men, John J. Binford and John H. Greanor, immediately after Binford's purchase of the property, made an agreement with each other that Greanor should take charge of the property, and use it for the purpose of carrying on the business of a tobacco manufacturer; that he should pay John J. Binford for the property the price which it had cost at auction; and that John J. Binford should continue to be the owner of the property until Greanor should complete, by payments made from time to time, the reimbursement to Binford of the purchase-money. Greanor was to pay as rent for the property a rate equal to eight per cent. of the amount due to Binford. This understanding may have been had, and probably was had, before the time of the auction sale. At all events, Greanor, who understood what ought to be the value of the several articles sold, did the bidding at the sale; Binford, not being a tobacco manufacturer, not himself making the bids. The account of the auctioneers was made out against Binford; and the purchase-money was paid by him. Greanor thereupon went into the business of manufacturing tobacco, using the outfit which had thus been supplied by John J. Binford.

I will here remark that it is quite customary in Richmond, and other Virginia cities and towns, for tobacco fixtures and other property used in the tobacco manufacture to be used by manufacturers who are not themselves owners of such outfits; and that the possession of such property by manufacturers does not and is not taken to imply ownership; and that the using of such property by persons not owning it does not raise a presumption of fraudulent intent. As appears in this case, these outfits are quite costly; and it is not for the interest of trade, and it is not the policy of the law, to require the ownership of such property to attend the possession, and to identify the real owner.

Greanor went on with the business of manufacturing tobacco in Richmond, with the use of this property, from March, 1873, to February 11th, 1876. During that interval of time he made payments to John J. Binford, at different dates down to November 20th, 1875, of such sums as left the balance then due at the amount of one thousand five hundred and fifty-eight dollars and seventy-two cents. No bill of sale or writing had ever passed from Binford to Greanor in regard to this transaction; no paper of any sort was put on public record; and now the amount due to Binford is about one thousand seven hundred and thirty-one dollars and thirty-one cents. On the 11th of February, 1876, Greanor, having occasion to settle an old debt due to, and to borrow additional money from, the firm of Dohan, Carroll & Co., of New York, made a deed of trust, by which he conveyed the property which had been procured for him by Binford as has been described, and some other property in his tobacco factory, to a trustee in trust to secure the payment of fifty-five hundred dollars to the New York firm. No mention was made at the time to Dohan, Carroll & Co. of the title of John J. Binford; and no mention of this deed was made to John J. Binford, who remained ignorant of its existence until the following April. On the 15th of April, 1876, Greanor made a sale and deed of assignment, by which he conveyed to his son-in-law, Charles T. Binford, all the property which he had previously transferred by deed of trust for the benefit of Dohan, Carroll & Co. The consideration of this transfer to Charles T. Binford was the latter's undertaking to pay off debts of Greanor to the amount of eight thousand eight hundred and five dollars and thirteen cents, as shown by a schedule attached to the deed of assignment, in which schedule it appears that five thousand dollars was then due to Dohan, Carroll & Co., and one thousand five hundred dollars due to John J. Binford. Greanor's deed of assignment to Charles T. Binford made mention of the deed of trust which had been executed in February preceding for the benefit of Dohan, Carroll & Co.; and of the fact that the claim of John J. Binford was "secured by title retained to nearly the whole of said property except the engine and boiler;" that is to say, the property used by Greanor in his tobacco factory, and embraced in the terms of the deed of trust.

After this assignment, Charles T. Binford went on with the business of manufacturing tobacco until his bankruptcy, which occurred on the 8th November, 1877. At an early stage of the bankruptcy, the property which is the subject-matter in which the present contention originated was sold by consent, under an order of this court, and the proceeds of sale not being sufficient to pay off in full the two claims of John J. Binford, and of Dohan, Carroll & Co., the question now to be determined is, which is entitled first to

be paid? it appearing from the register's report that one thousand seven hundred and thirty-one dollars and thirty-one cents is the amount due to Binford; and four thousand four hundred and seventy-three dollars and ninety-six cents the amount due to Dohan, Carroll & Co.; while the fund applicable to these two claims only amounts to five thousand three hundred and eighty-three dollars and two cents.

The real question is as to the title and ownership of the property on the 11th February, 1876, when Greanor made his deed of trust in favor of Dohan, Carroll & Co. Was it Greanor's property, and had he power to make title to it in prejudice of the right of John J. Binford to be paid what was due him under the agreement which had been made between himself and Greanor in March, 1873? I can see no taint of fraud in the transaction of March, 1873. Indeed the character of the parties is such as to forbid the surmise of any intentional fraud. The transaction was a natural one, growing spontaneously out of their personal relations to each other. There is no feature in it which suggests the imputation that it was intended to delay, defraud, or hinder creditors in their rights. From motives of affection which do him honor, Mr. Binford had bought the property constituting the outfit of a tobacco manufactory, and paid for it. He had bought it, not for his own use, tobacco manufacturing not being his business, but for Greanor, with whom his son was associated in that business. Both Greanor and his son were without capital, and probably without credit; a thing not unusual with tobacco manufacturers, whose trade is subject to great vicissitudes. He therefore gave Greanor the use of this outfit for his business, in a manner to show that he did not desire to make profit on his transaction; but only sought, while putting Greanor on his feet in business, to incur no loss by his act. The requirements of Davis v. Turner, 4 Grat. 422, and of Curd v. Miller, 7 Grat. 187, are fully satisfied by the evidence taken in the case.

I see nothing illegal in the contract or agreement which J. J. Binford made with Greanor. The property was his by purchase. It was competent for him to lend or hire it to Greanor. It was competent for him (and not unusual in like cases in Virginia) to hire Greanor this outfit for manufacturing tobacco, upon the terms which were in fact agreed between them. By that agreement the title to the property was not to pass from Binford to Greanor until Greanor should have fully paid for it. And, if it was competent for the two men to stipulate that until the whole purchase-price was paid the title should remain in Binford, then the title remained in Binford until the last cent was paid. The authorities are conclusive on the right of a vendor to stipulate for a retention of title, after surrender of possession, until the performance of conditions agreed upon as precedent to the passing of the title. The last I have observed is that of Fosdick v. Schall, 99 U. S. 235. The first case I know of in which this principle was laid down was that of Mires v. Solebay, 2 Mod. R. 243. There the title had been reserved after the delivery of a flock of sheep until the vendee should at a certain day pay the purchase-price. The vendor made a second sale before payment, and the sale was held to be good against the first vendee. That was a stronger case for the defendant than the one at the bar, because it was the person in Binford's place whose sale was held to be valid, and not the person in Greanor's place.

Benjamin, in his work on Sales, treating of sales of personal property, says: "Sec. 320. Third rule.—To these may be added, where the buyer is by the contract bound to do anything as a condition either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods have been actually delivered into the possession of the buyer Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the purchaser on delivery, nor until he performs the condition or the seller waives it, and the right continues in the vendor even against creditors and subsequent purchasers of the vendee. 2 Kent, Comm., (12th Ed.) p. 497, note 1, and numerous cases there cited; 27 Mo. 45; 7 Blatchf. 548, [Bauendahl v. Horr, Case No. 1,113;] 2 Pick. 512; 2 Hill, (N. Y.) 326; 4 Hill, (N. Y.) 449; 18 N. Y. 552; 114 Mass. 376; 3 Thomp. & C. 380, 644. Where these goods are sold at a fixed price, to be paid on a certain day, and delivery is made upon an agreement, express or implied, that until the price is paid the title is to remain in the vendor, payment is a condition precedent, and, until performance, the property is not vested in the purchaser. 7 Gray, 155, 158; 4 Vt. 558; 25 Mich. 48; 8 Gray, 158; 18 Vt. 182; 9 N. H. 298; 15 Gray, 225; 24 Vt. 55; 12 N. H. 298; 4 Cush. 195; 22 Vt. 203; 11 N. H. 230; 1 Rice, 121; 45 Vt. 118; 12 Ired. 268; 98 Mass. 149, 150; 38 Vt. 448; 103 Mass. 522; 8 Vt. 151. And such agreement is valid, though the goods were not in existence so as to be a subject of bargain and sale when the agreement was made, if, when delivered, they were delivered under the agreement. 114 Mass. 376. The vendor in such cases may reclaim the goods, where the price has not been paid, even from one who has purchased them or taken a mortgage of them from this vendee in good faith and without notice. 98 Mass. 149; 3 Gray, 545; 40 N. Y. 314; 114 Mass. 376; 5 Gray, 306; 45 N. Y. 499; 109 Mass. 376; 8 Gray, 241; 79 Pa. St. 488; 15 Kan. 600; 49 Me. 219; 46 Ill. 319; 25 Mich. 48; 45 Vt. 4, 18, 118, 122. Good faith does not aid the purchasers in such cases, because their vendors, having no title

to the property, could convey none. Such purchasers hold the same legal condition as do bona fide purchasers of stolen goods. 8 Gray, 159, 160."

In Connecticut, where, as throughout New England, the law of sales has been most diligently studied, in the case of Forbes v. Marsh, 15 Conn. 384, Williams, C. J., used the following language: "In this class of cases the vendee comes into possession of property which was known to belong to another man. Whether, therefore, the vendee had borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly, we find that all these cases of conditional sales, made bona fide, have been held good against attaching creditors, as well as between the parties. In the cases above cited from New York and Massachusetts, Strong v. Taylor, 2 Hill, 326; Hussey v. Thornton, 4 Mass. 405; and Barrett v. Pritchard, 2 Pick. 512, the claim was made by creditors. So, too, in the cases of Vincent v. Cornell, 13 Pick. 294; Fairbank v. Phelps, 22 Pick. 535; and Patten v. Smith, 5 Conn. 201, the same principle was recognized, though the cases may have been determined on other points."

Nor is the law thus laid down contrary to good morals or public policy. I conclude, therefore, on the strength of these authorities, that the title in the property which Binford purchased on the 11th of March, 1873, and then delivered to Greanor, was still in Binford when Greanor made his deed in favor of Dohan, Carroll & Co., on the 11th of February, 1876.

And the next question is, whether that deed could have the effect of defeating John J. Binford's title in the property, which by his agreement with Greanor was not to terminate until after all the purchase-price, which had been agreed to be paid by Greanor, had been paid. As to the legal title, the property was still Binford's on the 11th of February, 1876. Did or could Greanor's deed of that date have the effect of conveying the property, in prejudice of Binford's title? I think not, for very plain reasons. It is an elementary principle of law that "nemo dat quod non habet." The title to this property was not in Greanor, and he could not convey a title which was not in him. The finder of lost property cannot, by sale and delivery, pass away the title of the owner who lost it. The thief who has stolen property cannot, by sale and delivery, convey it to a person who buys it from him and pays him full value. There is no principle more clearly settled in the law of all countries than the principle that the mere possession of personal property does not confer title. In England an exception to the general rule in regard to markets overt and the city of London prevails; but these exceptions are not allowed in this country. The rule of caveat emptor holds universally with us in regard to personal property. In the interest of commerce, certain forms of choses in action, "payable to bearer," are held to pass by mere delivery; but I know of no instance in which specific property, not owned by the person in possession, has been held to have been validly sold and transferred by him in prejudice of the real owner.

There have been a few cases in the English courts, in which it has been intimated that sales by persons holding property not their own, where these persons have held and passed the muniments of title to the property (such as bills of lading), might perchance be good, but there are no definite, authoritative decisions establishing even these exceptional cases. The cases leaning most strongly in favor of such an exception are those of Boyson v. Coles, 6 Maule & S. 14; McGregor v. Thwaites, 3 Barn. & C. 24; and Williams v. Barton, 3 Bing. 139. In the last-named case, which was one where strong equities existed in favor of the purchasers from a person who had possession of and had sold personal property not really his own (it was a case in the English court of exchequer chamber), Mr. Chief Justice Best said: "Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that, when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it, should retain that property against the owner. But this is not the law of England. Possession is not proof of property. . . . . The exception in our law (of sales in market overt by persons having property in possession) proves that if a person acquires possession of property in any mode other than in market overt he cannot keep it against the owner."

It is only where the title to property is evidenced by muniments of title, and these instruments are left by the owner in the hands of the person in possession, and that person is enabled, by these muniments of title, to hold himself out as the owner of the property, that there can even be a question whether that person can, by sale, pass title to a bona fide purchaser. A pawnee cannot, as a general rule, have a better title than the pawner, or a vendee than a vendor; and it is only where the owner of goods has lent himself to accredit the title of another person, by placing in his power those symbols of property which usually accompany and evidence the title, and has thus enabled him to hold himself out as owner and purchaser of them, that even a question can arise whether one, other than the owner of goods, can sell the title of them. A case of this sort was that of Boyson v. Coles, in 6 Maule & S. 24; and it was there held that, in spite of the equities shown in the case, the vendee of

property took only such title as the vendor held, and was bound by the rule, caveat emptor, and could not pass the real owner's title to the property. In Dyer v. Pearson, 3 Barn. & C. 42, Ch. J. Abbott said: "The general rule of the law of England is, that a man who has no authority to sell cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz.: the case of sale in market overt. . . . Now, this being the rule of law, I ought (it was on a motion for a new trial) either to have told the jury, that even if there was an unsuspicious purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiff; or I should have left it to the jury to say whether the plaintiffs had, by their own conduct, enabled Smith to hold himself forth to the world as having not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then, perhaps, a sale by such a person would bind the true owner. That would be the most favorable way of putting the case for the defendant; and that question, if it arises upon the evidence, ought to have been submitted to the jury. It is unnecessary to consider what would be the effect of the evidence upon that question." But the word "perhaps," used by the learned judge, shows that it is still a question whether possession of the property and of the documentary muniments of title, and the holding himself out as the owner, enables the holder to pass a title.

In the light of the decisions which I have noticed, I do not think there can be a doubt of the law on this subject. The title of Binford in the property in question still existed on the 11th of February, 1876. It was not in Greanor; and, therefore, Greanor's sale of the property was, in fact, only a sale of his interest in the property. It was a sale which was subject to the title of Binford; and I will therefore make a decree directing that the report of the register be confirmed, subject to the exceptions made to it by John J. Binford, which are sustained.

[Reversed by circuit court in the following case, Case No. 1,411a.]

Case No. 1,411a.

In re BINFORD.

[3 Hughes, 304.] [1]

Circuit Court, E. D. Virginia. 1879.[2]

CONDITIONAL SALE — RIGHTS OF SELLER — BONA FIDE PURCHASERS—BURDEN OF PROOF—LACHES.

[1. An express agreement between a seller and a buyer that a sale should be conditional must be proved by the seller, in order to claim title to the property sold, as against creditors or subsequent bona fide purchasers of the buyer.]

[2. A seller who silently allowed the property sold to be subjected to a deed of trust, to be conveyed by the buyer, and finally to be sold for the benefit of creditors of the subsequent buyer, is estopped by his laches to claim title to the property on the ground that the sale was conditional.]

[Appeal from the district court of the United States for the eastern district of Virginia.

[In bankruptcy. John J. Binford excepted to the report of the register of the liens and their priorities binding on the estate of Charles T. Binford, a bankrupt. Exceptions sustained. Case No. 1,411. Reversed on appeal.]

BOND, Circuit Judge. This is a dispute between John J. Binford, of Richmond, and Dohan, Carroll & Co., of New York, as to which of the parties has the prior right to have its claim against John H. Greanor paid in full out of the proceeds of the sale of certain property of the bankrupt. Dohan, Carroll & Co. claim under a deed of trust made by Greanor for their benefit, dated 11th February, 1876; and J. J. Binford under a lien for unpaid purchase-money, or on the ground that the sale of March, 1873, by J. J. Binford to Greanor was a conditional sale.

The facts of the case, briefly stated, seem to me to be as follows: On the 11th of March, 1873, J. J. Binford bought at auction certain tobacco-manufacturing fixtures, paying for them the sum of five thousand two hundred and thirty-nine dollars and sixty-four cents, partly in cash and partly by a note for one thousand three hundred and sixty dollars, given him by Greanor for the purpose. Immediately afterward possession of these fixtures was given to Greanor by J. J. Binford, no bill of sale or other written document passing between them; but it is alleged by Binford, it being agreed that the transaction should be a conditional sale, and that title to the fixtures should not pass to Greanor until all the purchase-money should be paid. The books of the parties show that from time to time Greanor did pay large sums of money to Binford in settlement of this account, amounting altogether to about four-fifths of the debt, with interest. On the 11th of February, 1876, Greanor, being in need of a further advance of money, to carry on the business of manufacturing tobacco, upon which he had entered with the fixtures obtained from Binford, applied to Dohan, Carroll & Co., his correspondents in New York. To secure this new loan and his previous indebtedness, Greanor gave a deed of trust to Dohan, Carroll & Co. of his property in these fixtures, under which deed they now claim. Some time after this Greanor transferred all his property in said fixtures to Charles Binford, by an instrument which recited the deed of trust given to Dohan, Car-

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

[2] [Reversing Case No. 1,411.]

roll & Co., and certain other debts, and which expressly made the transfer subject to said debts. Shortly after C. Binford became bankrupt and the property was sold.

Such being the facts, briefly stated, let us examine the grounds on which each party claims the precedence. First, as to the "lien for unpaid purchase-money" [3] claimed by Binford. Possession is indispensable to the existence of a lien, and an abandonment of the custody of the property over which the right extends divests the lien. In such a case the vendor is deemed to surrender the security he has upon the goods, and to trust to the personal responsibility of the vendee. 3 Pars. Cont. 243, 244, cases there cited. There is no better settled rule of law than this, and the reason of it is most obvious. For were it not so there would be no safety in any purchase of personal property. It would require as long and as anxious, as well as a far more difficult search into the title of the vendor of a horse, as is required into the title to a house. For the purchaser would have to assure himself that each owner had paid in full the purchase-money to the previous owner ever since the animal was foaled in order to avoid some one taking possession under a "lien for unpaid purchase-money."

It is alleged, however, that the transaction by which the fixtures passed to Greanor from J. J. Binford, was a conditional sale, and that the title to them was not to pass to Greanor until all the purchase-money was paid. It is perfectly competent for two parties to make such an agreement, and between the vendor and vendee it is unquestionably good, the vendee taking no title until the whole of the purchase-money is paid. How it affects the rights of bona fide subvendees, for a valuable consideration and without notice, or of attachment creditors, is another and more difficult question, upon which the authorities are divided. It seems, however, to be settled that there must be an express agreement to that effect, and that the burden of proof is upon the vendor who claims against creditors of the vendee; moreover, it being in the nature of a secret agreement, it is not looked upon with favor and must be strictly proved. Leighton v. Stevens, 19 Me. 154; Haggarty v. Palmer, 6 Johns. Ch. 437; Keeler v. Field, 1 Paige, 315; Smith v. Lynes, 1 Seld. [5 N. Y.] 41. Moreover the vendor must be guilty of no laches in permitting the subsale, for if he be he is estopped to deny the title of his vendee. Benj. Sales, 580, 581; cases cited.

Now applying these rules, it seems to me that there is no sufficient proof of an express agreement made at the time of the sale, nor do the subsequent acts of the parties tend to show that there was any such express agreement between them. And, moreover, if there were such proof the vendor (Binford) has been guilty of such laches as to estop him from claiming the benefit of it. For if there was such an agreement as claimed, yet the vendor silently allowed the vendee, first, to make a deed of trust of the property, then to convey it, and finally allowed it to be sold for the benefit of the creditors of the subvendee. Can he now come forward and say that in point of fact the title had always remained in himself? To quote the words of Tindal, C. J., in a similar case: "He, the vendor, is estopped by his own admissions, for unless this amount to an estoppel the word may as well be blotted from the law."

Binford then can claim no priority over other unsecured creditors, and the report of Register Atkins should, I think, have been confirmed, and an order will be passed accordingly reversing that of the district court.

[3] No claim of lien was asserted in the district court, and in the language quoted, if quoted correctly, the word "lien" must have been inadvertently used; the question was simply one of title, not of lien.

Case No. 1,412.

BINFORD v. The VIRGINIA.

[1 Quart. Law J. (1856,) 153.]

District Court, E. D. Virginia.

CARRIERS OF GOODS—NOTICE TO CONSIGNEE—DUE DILIGENCE.

1. It seems that apart from any agreement between a common carrier and the consignee of goods entrusted to his care, the strict rule of the common law with respect to the liability of other carriers, is not applicable to steamers and railroads that have a regular time of arrival and departure.

2. When the question of diligence arises at all in the case of a carrier, he is bound, like other bailees for hire, warehousemen or wharfingers, to the exercise of due diligence only.

[See note at end of case.]

[In admiralty. Libel by Binford, Mayo & Blair against the steamer Virginia, belonging to the Union Steamship Company, for injury to goods shipped. Decree for respondents.]

Gregory & Steger, for libellants.
Crump & Day, for defendants.

HALYBURTON, District Judge. In this case the libellants allege that certain goods were shipped on board the steamer Virginia at Philadelphia, to be carried thereon to Richmond, and there delivered, to the libellants in good order and condition, and that said goods were not so delivered, but were in a damaged state, for which compensation is claimed. To prove the delivery of the goods at Philadelphia, a bill of lading is offered as evidence, which purports to be signed by J. Cummings. The respondents do not admit the delivery of the goods or the authenticity of the signature of Cummings, or his authority to sign a bill of lading for the Union Steamship Company, which they say can only be proved by an instrument under seal, in which way, only, it is alleged the agent of a corporation can be appointed. There is no evidence in the cause that we have seen

to prove that the Union Steamship Company is a corporation; but if that fact had been shewn, it would not affect the case. We think it sufficiently shewn that the goods were delivered as alleged in the libel, that J. Cummings signed the bill of lading, and that he was duly authorized to do so. It is now quite settled in this country, that a corporation may appoint an agent by vote, and also that an agency may be implied in the case of a corporation as in other cases. The dealings of the agent of the company in reference to these goods in Richmond after their arrival, together with the circumstances, are sufficient to satisfy us that Cummings had authority to sign the bill, and if this were not so, they amount to such a recognition of his acts by the company as would bind them by implication.

It was also proved that the goods were not delivered to the libellants in good order and condition, according to the contract, but were wet and damaged by a freshet in James river, whilst they were under a shed belonging to the company, or at least were in custody. This brings us to the inquiry whether the goods were delivered to Binford, Mayo & Blair at Richmond, according to their promise contained in the bill of lading or not. It seems to be settled law in this country, that where the carriage is by land, the carrier is bound to deliver the goods to the owner personally, or to his agent at his residence or place of business, but if the carriage be in foreign or probably in our own ships and vessels, as they must stop at the wharf, it is sufficient if notice be given of the arrival of such vessels at the wharf, and delivery be made there on request. These general rules, however, may all be modified and controlled by the usage of particular places, as is shewn by numerous decisions in relation to this point, from the earliest to the latest, both English and American. See Golden v. Manning, 2 W. Bl. 916; Garside v. Proprietors of Trent & M. Nav. Co., 4 Term R. 581; Hyde v. Same, 5 Term R. 389; Bourne v. Gatliffe, 42 E. C. L. 337; Gibson v. Culver, 17 Wend. 305; Thomas v. Boston & P. R. Corp., 10 Metc. [Mass.] 472.

In the case of Gibson v. Culver, cited with approbation by Judge Story, it was decided in conformity with the general principle laid down in the cases above cited and in other cases, that notice might be rendered unnecessary by uniform, continued and well known usage to that effect; and in the case in 10 Metc. [Mass.] the court decided that "proprietors of a railroad, who transport goods on their road and deposit them in their warehouse, without charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of goods from the warehouse, but are liable as depositaries only for want of ordinary care." Hubbard, Justice, pronouncing the opinion of the supreme court of Massachusetts in that case, said: "From the very nature and peculiar construction of the road, the proprietors cannot deliver merchandize at the warehouse of the owner, when situated off the line of the road as a common waggoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unloaded and put in a place of safety. After such delivery at a depot the carriage is completed. But owing to the great amount of goods transported, and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unloaded, and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unloaded and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being ready to receive them, have unladed them and put them in a safe and proper place for the consignee to take them away, and he can take them at any reasonable time. The liability as common carriers being ended, the proprietors are by force of law depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care." From the principle adopted in this case, which seems to have been elaborately argued and maturely considered, and to be sustained both by reason and authority, we are not disposed to dissent, so far at least as it is applicable to the case before the court. That the same person may be at the same time both a carrier and a warehouseman, and that his responsibility and liability as carrier may be terminated by a delivery of the goods into his own warehouse, without any special agreement to that effect, and by force of usage, is clear from many authorities, particularly the cases of Garside v. Proprietors of Trent & M. Nav. Co., already mentioned, and Allan v. Gripper, 2 Cromp. & J. 218. Whether such liability be terminated or not in any particular case may depend, in the absence of any express agreement, upon what may reasonably be supposed to have been the understanding of the parties, to be inferred from usage and other circumstances.

Steamboats and railroad cars have fixed periods of arrival and departure, and cannot, therefore, wait to give notice before delivery

of the cargo and this is known to those who employ them beforehand.[1] The convenience and the interest of the public, and especially of the merchants, are greatly promoted by regularity and dispatch in these matters. There would be much more inconvenience, not only to proprietors of steamboats and railroads, but to the public, in requiring them to give notice to the owners of all merchandize on board, than in requiring the owners to take notice of the arrival of the boat or car, provided that the proprietors of the boats and cars are required to take proper care of the goods for a reasonable time after delivery; and if, in addition to those considerations, there be a uniform, continued, and well known custom for boats to begin to unlade immediately after their arrival, without giving any notice, and if the owners or consignees be not present to receive their goods, to deposit them in a warehouse or some secure place to be safely kept until they shall be demanded, we can see no sufficient reason why, in the absence of express words to the contrary, the court should not regard it as the understanding of the parties to a bill of lading that the goods shall be so delivered and deposited, and the risk of the carrier in that capacity be ended, he being bound as a warehouseman to take care of them for a reasonable time thereafter. Such a construction of the agreement would seem at least to be proper in all cases where the owners of goods might and would have received them, if they had made a demand for them.

There seems, too, good ground for maintaining that, apart from any supposed agreement, the strict rule of the common law with respect to the liability of other carriers is not applicable to that class of whom we are speaking. The rule was established for the protection and convenience of the public, and should not be extended to cases very different from those it was meant to embrace, and where its effect would be the very reverse of what was intended. "Cessante ratione cessat et ipsa lex." If the proprietors of steamboats and railroad cars were held in all cases to the strict responsibility of ordinary carriers until notice could be given to the consignees of goods, and what might be regarded as a reasonable time afterwards allowed to take the goods away, the inconvenience and the loss arising from the delays which would thereby be occasioned, and the increased cost of transportation, would be very much greater, we believe, than are likely to result from the rule of law, as we here suppose it to be.

In the case before the court, it appeared from the evidence, that the usage was uniform, and had been so for years, for steamers to unload as soon as it was convenient to them after they were moored at the wharf, and without giving notice to the owners or consignees of the goods, to deposit them under a shed where they were protected from bad weather and by a guard from thieves, when the owners or consignees, or some agent authorized, or supposed to be authorized by them, were not present to demand them. It was usual to deliver goods to any licensed drayman or teamster who might be ready to take them, but this was done for the benefit of the consignees, and by what seems to have been regarded as implied authority from them. These carriers were regarded as the agents of the consignees, paid by them, and made responsible by them for any damage done to the goods while in their custody, and not as agents for the steamboat or railroad companies. In this case we regard the delivery of the goods, so far as the steamboat company were concerned as carriers, as having been complete when they were placed under the shed. The transit was at an end, and the company were bound no longer to take care of the goods as carriers, but as warehousemen, or other depositaries.

They are, of course, answerable for ordinary negligence, but the burthen of proving that is on the libellants; and, according to the case of Muddle v. Stride, 38 E. C. L. 163, if it be left doubtful, by evidence, whether there was negligence or not, the libellants must fail. This was an action at law against carriers by water for damage to goods, and the lord chief justice, in delivering the opinion of the court, said to the jury: "If, on the whole, in your opinion it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict, because you are to see clearly that they were guilty of negligence, before you can find your verdict against them."[2]

If that opinion of the chief justice be correct, there can be no doubt what the decision of the court ought to be in this case, because, certainly, if we look at the whole evidence, a clear case of negligence does not

[1] In this case the steamer arrived after the usual time.

[2] In this case the evidence for the plaintiff was that the packages damaged were put on board in good order. The vessel met with rough weather, and on her arrival off the port of Dover (her point of destination) the captain was signalled that it would be dangerous to enter, and in consequence went to Margate and remained there. The goods were afterwards sent on board another vessel from Margate to Dover, and upon being opened were found damaged. The declaration alleged that the defendants had not used due care, and the defendants pleaded not guilty. It was upon this state of the pleading that Lord Denman gave his charge. But the case, even if it can be cited as authority for the opinion expressed, seems to have been misreported, because the verdict of the jury under the instruction, and upon the evidence detailed, was for the plaintiff in the amount of damages claimed by him, and the verdict stood; and if we take the opinion of the court as it was expressed, and the judgment upon the verdict of the jury, they inevitably conflict. But give the authority its full weight, and we say it is utterly in conflict with the com-

appear. But without putting the case upon this ground, we think the defendants have shewn that ordinary and reasonable care was used to preserve the goods. The place in which the goods were deposited was as safe as that in which goods delivered by other steamers are usually put. There was no reason, at the time, for supposing they were in any danger from a flood.

There was nothing, so far as is disclosed by the testimony in this cause, to have deterred a very prudent man from allowing his goods to have been placed there. The inundation was unusual and entirely unexpected, and, when it came, reasonable and earnest efforts appear to have been made to protect them. The court is therefore of opinion that the owners of the steamer are not liable for the damage sustained in this case.

The chief witness to prove the degree of diligence used was the agent of the owners of the steamer, but he was called by the libellants, and there is nothing in the case to discredit his testimony. If, in another case, the evidence should be different upon the point of diligence, the decision of the court might of course be different. If, however, we are wrong in our opinion about the law of delivery, or as to the proper construction of the contract, and the goods, after having been landed, were still in the possession of the company as carriers, we should still think, upon another ground, that the owners of the steamer were not liable in this case. Carriers have never been held responsible for what is called the act of God, which, according to the interpretation of that phrase of law by Lord Mansfield in the case of Trent & M. Nav. Co. v. Wood, 26 E. C. L. 360, is natural necessity, (as winds and storms, which arise from natural causes,) and is distinct from inevitable accident. Inevitable accident may be the result of human agency, and is then, of course, not the act of God; but inevitable accident produced by irresistible physical causes is the same thing with the act of God. "By inevitable accident," says Judge Story, "commonly called the act of God, is meant any accident produced by physical causes which are inevitable,—such as a loss by lightning, storms, perils of the seas, by inundations and earthquakes, or by sudden death or illness. Loss or damage caused by inundation is very commonly mentioned to illustrate the rule, and is as apt an illustration as any." In the case before the court it is alleged by the libellants, and shewn by the testimony, that the injury for which compensation is claimed was done by a freshet in James river. This was undoubtedly the direct and immediate cause of the mischief. But it is said in reply that the damage to the goods was occasioned by the flood and the culpable negligence of the carrier combined, and not by the flood alone. There may certainly be found a case or two like that of McArthur v. Sears, 21 Wend. 190, from which it may, perhaps, be inferred that the court was of opinion that carriers are responsible for loss produced by tempests, or inundations, or causes of like kind, when they have been guilty of the slightest imaginable degree of negligence, or have not used all possible precaution. We are of opinion, however, that wherever the question of diligence arises at all in the case of a carrier, he is bound, like other bailees for hire, warehousemen, or wharfingers, for example, to the exercise of due diligence; that is to say, of ordinary diligence only.

In most cases the carrier is also an insurer, and in such cases no degree of diligence or care or precaution can exonerate him, and therefore no question about degrees of diligence can ever arise. But whenever it can be shewn that the direct and immediate cause of damage is the act of God, the carrier, we think, is not responsible if he can show that he has used due and reasonable diligence; that is to say, in such a case, ordinary care, or such care as the generality of mankind use in their own concerns. He is surely not responsible because he may have failed to adopt some precaution which no man, not the most prudent and cautious of men, would ever have thought of; and if so, if there be any neglect or want of caution for which he is not responsible, so that the court is obliged to inquire into the degree or diligence he has exercised in a particular case, we know not what better rules can be applied than those which are applicable to other bailees for hire. Suppose, for instance, the owners of the steamer, instead of erecting their shed where they did, had built a warehouse on the north side of Main street, some feet higher than any freshet has risen within the memory of men, and goods there deposited had been injured by a rise in the river, can it be maintained that in such a case they would have been liable for the loss? Or suppose they had erected a warehouse entirely of wood, altogether beyond the

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mon law rule as to the liability of carriers as shown in the decisions in England and this country from the time of Coggs v. Barnard, 1 Smith, Lead. Cas. (Lord Holt's opinion,) marg. p. 92, to the present day, both in England and this country. Gilbart v. Dale, 5 Adol. & E. 543; Griffiths v. Lee, 1 Car. & P. 110; 1 Term R. 659; Story, Cont. § 752b; Dusar v. Murgatroyd, [Case No. 4,199;] McArthur v. Sears, 21 Wend. 190; Hyde v. Trent & M. Nav. Co., 5 Term R. 389; Steamboat Co. v. Bason, Harp. 264; Colt v. McMecken, 6 Johns. 160; Siordet v. Hall, 15 E. C. L. 87; Boyle v. McLaughlin, 4 Har. & J. 291; Campbell v. Morse, Harp. 468; Sprowl v. Kellar, 4 Stew. & P. 382; Turney v. Wilson, 7 Yerg. 340; Friend v. Woods, 6 Grat. 189; 6 Whart. 505; Hill v. Humphreys, 5 Watts & S. 125. In all these authorities, and very numerous others we have at hand, the doctrine in Muddle v. Stride, if it can be supposed to be correctly reported, is overruled, and the common law liability of carriers for hire laid down to be that they are liable for all losses except such as happen from inevitable accident, without the intervention of man, or from the act of God, of the public enemy, or the owner of the goods.

reach of the water, and it had been destroyed, and the goods in it, by lightning, would they have been held liable because, if the house had been built of some less combustible material, of iron or of brick for example, it would not have been consumed, and the goods would have been safe? And, if the carrier would not have been liable in the cases put, it is shewn that there may be cases where they would not be liable, though they might not have taken the highest possible degree of care, or even that degree which some men of extreme caution might possibly have used. The reason of the strict rule of the common law with regard to carriers which was, as is stated by Lord Holt in the great leading case of Coggs v. Bernard, 2 Ld. Raym. 909, to prevent fraud and collusion which could not be proved, is wholly inapplicable to cases like those above supposed. Where once it is clearly proved that the loss or damage was the direct result of a storm or earthquake or inundation, there is an end to all possibility of collusion or of fraud in the matter; and if the carrier can then shew that he has exercised due diligence, we know not why he should not be exonerated as well as a warehouseman or other bailee for hire.

Amies v. Stevens, 1 Strange, 128, was a case in which the plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through a bridge the hoy sunk by a sudden gust of wind, and the goods were spoiled. The defendant was held not answerable, the damage being occasioned by the act of God. "For," it was said by the court, "though the defendant ought not to have ventured to shoot the bridge if the general bent of the weather had been tempestuous, yet this, being only a sudden gust of wind, had entirely differed the case." From which I infer that the court thought the carrier bound to exert ordinary prudence, and guard against all probable accidents, but not to provide against mere possibilities. The case of Colt v. McMecken, 6 Johns. 160, was just the reverse of Amies v. Stevens. In Colt v. McMecken, a vessel ran ashore in consequence of a sudden failure of the wind, and she afterwards sunk, in consequence of which the goods of the plaintiffs were lost or damaged by the water. The jury found a verdict for the defendants, and a new trial was moved for upon two grounds: 1st, for a misdirection to the jury in stating that the failure of the wind was the act of God; and 2d, for that the verdict was against evidence on the point submitted to the jury in relation to the negligence or carelessness of the master of the sloop after she struck. Spencer, Justice, delivering the opinion of the court, after remarking that the sudden cessation of the wind was the act of God, says, in reference to the second point: "The master did everything which could reasonably have been expected of him to prevent the vessel from sinking; accordingly my opinion is against a new trial." Kent, Chief Justice, differed from the other judges, but only as to the fact of negligence. He concurred in the general doctrine that the failure of the wind was the act of God, but thought the carrier had been negligent. "He ought," says the chief justice, "to have exercised more caution and guarded against such a probable event in that case as the want of wind to bring his vessel about."

In Siordet v. Hall, 15 E. C. L. 87, it was decided that where damage was done to a cargo by water escaping through the pipe of a steam boiler in consequence of the pipe having been cracked by frost, the carrier was responsible, upon the ground of negligence. Best, Chief Justice, said: "No one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron, and, if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter when frost may be expected. The jury found that this was negligence, and I agree with their verdict." With reference to the case of Dale v. Hall, 1 Wils. 281, in which it was held that a loss occasioned by a leak which was caused by rats gnawing a hole in the bottom of the vessel was not to be deemed a loss by inevitable casualty. Sir William Jones remarks that "the true reason of that decision was that it was at least ordinary negligence to let a rat do so much mischief in the vessel, and that the Roman law has so decided in an analogous case." Though Sir William may have been mistaken as to the reason which influenced the court in that case, the remark shews what his own opinion was as to the degree of negligence for which a carrier is in such cases responsible. The case of Bowman v. Teall, 23 Wend. 306, appears to me to sustain the same doctrine. Judge Story also says that the freezing of a canal is the act of God, and may be an excuse unless the carrier omits due diligence. The case of a canal freezing and the case of Siordet v. Hall, supra, seem to illustrate the mode and the exception. The freezing of a canal is an act of God, unavoidable by human diligence. The freezing of water in a boiler so as to cause it to crack might have been avoided. In the case of Boyle v. McLaughlin, 4 Har. & J. 291, cited at the bar, and in Campbell v. Morse, Harp. (S. C.,) both of which bore a considerable analogy to the case before the court, though the carrier was held liable in each case, it was on the ground of negligence.

It being clear that in the case before the court the inundation was the act of God, and it appearing to the court from the evidence in the cause that it was not foreseen when the goods were placed under the shed, and could not have been foreseen, but was most sudden, unusual, and unexpected; that there was no want of due care and caution in placing the goods there, or of due diligence in endeavoring afterwards to remove them, the court is of opinion that the damage was oc-

casioned by the act of God, and the defendants not liable for that reason.

NOTE, [from original report.] It is from this part of the opinion that we seriously dissent, and think we can show, upon authority conclusive at least in this country, and particularly so in Virginia, that the doctrine as laid down by the learned judge is not law. It appears, we think, from the very authorities he cites in his own support. In the case of Amies v. Stevens, [1 Strange, 128,] cited by the judge, it was decided that the act by which the loss was occasioned was an act of God, and that, therefore, the carrier was not liable; and we think the fair inference is, though it was considered the act of God, yet the carrier would have been held responsible if the slightest negligence had been shewn. So, in Colt v. McMechen, [6 Johns. 160,] cited as above, where the vessel ran ashore in consequence of a sudden failure of the wind, and the goods were injured, the court was of opinion that this was an act of God, and relieved the carrier of his liability; but even from this judgment Chancellor Kent dissented, being of opinion that the captain might have avoided the loss by tacking the ship before she was so near the shore as to run into it by the wind's sudden failure. So, in Siordet v. Hall, also cited by Judge H., where damage was done to a cargo by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost, the carrier was held responsible, though the freezing was the act of God, yet the consequences might have been avoided by care. In the case of Dale v. Hall, [1 Wils. 281,] also, it was held that a loss occasioned by a leak which was caused by rats gnawing a hole in the bottom of a vessel was not to be deemed a loss by inevitable casualty. These are the only authorities which Judge Haliburton cites, and in our opinion, so far from supporting him, they are very strong the other way.

The rule, so far as we have been able to gather it from a careful examination of the authorities, seems to be that the inevitable accident (or the act of God, for in many of the authorities these are used as convertable terms) which will excuse a carrier from his liability as such must be such an accident as could not have been avoided by the exercise of any human skill and foresight. For this proposition we have authority in almost every state in the Union where such a question would be likely to arise. For instance, in the case of McArthur v. Sears, 21 Wend. 190, cited with disapprobation by Judge H., it is explicitly decided by the supreme court of New York that nothing will excuse a carrier from liability except inevitable accident or acts of public enemies, and proof of the utmost care was inadmissible. In that case the captain stranded the vessel by mistaking a light, and it was shown that it was almost impossible to avoid the mistake which caused the accident. We have already noticed the opinion of that distinguished jurist, Chancellor Kent, in the case of Colt v. McMechen, decided by the same court. In Boyle v. McLaughlin, 4 Har. & J. 291. An unexpected freshet in the river injured flour which the carrier had placed in a situation generally safe on the bank. It was held he was liable because he might have placed the flour in a situation where no such liability would have existed. So in Steamboat Co. v. Bason, Harp. 262, the supreme court of South Carolina decided, in a case where a steamboat was grounded, where grounding was inevitable, and the stern of the vessel sank, and bilge water injured the goods that, although great care was taken, possibly greater diligence might have been used. The same court, in the case of Campbell v. Morse, referred to above, decided that in a case where a waggoner, crossing a regular ford, was stalled, and, the creek rising rapidly, the goods were injured, the carrier was held responsible because he might have avoided the accident.

In the case of Sprowl v. Kellar, 4 Stew. & P. 382, it is said in the judgment of the court that the inevitable accident which excuses a carrier must be beyond the prevention and control of human prudence. So, in the case of Turney v. Wilson, 7 Yerg. 340, it is decided that a carrier is liable for all losses that could have been prevented by any human skill and foresight. In the case of Eagle v. White, 6 Whart. 505, the defendants, who were common carriers on the railroad from Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiffs from Philadelphia to Columbia. The cars arrived at the latter place about sun-down on a Saturday evening, and by direction of the plaintiff were put on a sideling. The plaintiffs declined receiving the goods on that evening, on the ground that it was too late, whereupon the agent of the defendant left the cars on the sideling, taking with him the keys of the cars, and promised to return on Monday morning. The car remained in this situation until Monday morning, when they were opened by the plaintiff by means of a key which fitted the lock; and on examination it was discovered that one of the boxes had been opened, and the contents taken away. Held, that the defendants were liable to the plaintiff for the value of the goods lost. The defendants were held liable as common carriers. Rogers, J., delivering the opinion of the court, said: "A common carrier is in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is liable for all losses which do not fall within the excepted cases of the act of God or inevitable accident, without the intervention of man and public enemies. This, as Chancellor Kent remarks in his Commentaries, has been settled law for ages; and the rule is intended as a guard against fraud and collusion, and is founded on the broad principles of public policy and convenience. It is a principle of extraordinary responsibility, which has stood the test of experience, and which we are unwilling to see frittered away further than has been already done in those cases where carriers have been, as I think, unwisely permitted to limit their own responsibility." In Dusar v. Murgatroyd, [Case No. 4,199,] Judge Washington decided that the owner of a vessel was answerable for the carelessness or unskilfullness of his master, and that by the common law nothing could excuse a carrier but the act of God, of the public enemy, or of the party complaining.

In Virginia, in as full and explicit a manner as in any other state in the Union, the common law doctrine of the liability of carriers is decided in our courts in Murphy v. Staton, 3 Munf. 239. There, the court of appeals decided that "a common carrier is liable for all accidents to goods entrusted to him for transporation except such as arise from the act of God, the public enemy, or owner of the goods," and that, in order to excuse a carrier from his liability as such, "it is not enough for him to prove (the goods being carried by water) that the navigation is attended with so much danger, that a loss may happen, notwithstanding the utmost endeavors of the waterman and crew to prevent it, that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him." The onus lies on him to exempt himself from liability. So, in the case of Friend v. Woods, 6 Grat. 189, the court of appeals sanctions the doctrine laid down in Murphy v. Staton, that the common law liability of carriers is the law of Virginia, and Judge Daniel, delivering the unanimous opinion of the court, says: "By the common law a carrier is treated as an insurer against all damage to or loss of goods intrusted to him for transportation, except such as may arise from the act of God, the public enemies,

or the act of the owner of the goods;" and, further: "The case (Murphy v. Staton) may be regarded as settling that the liabilities of common carriers upon our navigable streams are fixed by the common law rule, and that losses arising from the ordinary dangers of navigation, however great and however carefully guarded against, do not fall within the exception." This case came up on an exception to the instruction of the court below "that if the jury believed from the evidence that the boat was stranded by running upon a bar previously formed in the ordinary channel of the river, but that the existence of the bar might by human foresight and diligence have been ascertained and avoided, although those in charge were ignorant of its existence at the time the boat ran upon it, the defendants were liable for the loss." This instruction the court of appeals unanimously affirmed, and in the opinion cites with approbation the decision in McArthur v. Sears, the case to which Judge H. also refers, and which he overrules. We think these cases show that, so far from there having been any modification of the common law doctrine of the liability of carriers, that liability, in most of the states of the Union, has been upheld in its broadest extent, and that the rule laid down in the decision of Friend v. Woods and McArthur v. Sears, that a carrier is answerable for injury to goods in his charge, wherever that injury might have been ascertained and avoided by human foresight and diligence, or by the use of all possible precaution, is the rule of law upon the subject in this country. We have been the more particular in our consideration of these authorities because we think that the adoption of the modified rules laid down in this opinion would generally place the mercantile community in the power of insolvent and irresponsible agents, and enable them, by fraud or negligence, to inflict incalculable mischief.

Case No. 1,413.

BINGHAM v. FROST.

SAME v. WILLIAMS.

[6 N. B. R. 130.][1]

District Court, N. D. New York. Jan. 9, 1872.

BANKRUPTCY—FRAUDULENT TRANSFERS—"CONVEYANCE"—MORTGAGE.

The word "conveyance" in the bankrupt act is a generic term, including all proceedings to dispose of or encumber property in derogation of the equality of creditors, with intent by such disposition either to defeat or delay the operation of the act; hence it includes mortgages on real estate which, if given contrary to the provisions of the thirty-ninth section, are void, and deprives the mortgagee of all right to prove his claim in bankruptcy, even though he should be willing to surrender his rights under the mortgage.

[See Bingham v. Richmond, Case No. 1,415.]

[In equity. Bills by Charles S. Bingham, as assignee in bankruptcy of David S. Wing, against Frost and against Williams, to restrain proof of debts. Opinion of referee in favor of complainant.]

Opinion of J. D. HUSBANDS, Referee. My opinion in the case of this plaintiff against Richmond & Gibbs [Case No. 1,415] applies to these cases if a mortgage on real estate is included in the word "conveyance," as used in and within the meaning of sections 14 and 39 of the bankrupt act, [March 2, 1867; 14 Stat. 522, 536.] These cases forcibly illustrate the hindrances and delay produced by mortgages. Section 14 provides that all property conveyed by the bankrupt in fraud of his creditors vests in the assignee. Section 39 enacts that the creditor receiving a conveyance contrary to the act shall not be allowed to prove his debt in bankruptcy. If it be not a conveyance within the meaning of the act, the assignee is not vested with the title to the land under section 14 as against the mortgages, because this section relates to fraudulent conveyances, and it is the provision that makes it his duty to invoke the aid of the court to annul the fraudulent proceedings. Bump, Bankr. (3d Ed.) 297, and cases cited. In this state the title remains in the mortgagor and descends to his heirs and the interest of the mortgagee is a chattel interest. But the word "conveyance," in the bankrupt act, is a generic term, including all proceedings to dispose of or encumber property in derogation of the equality of creditors, with intent by such disposition either to give a preference or to defeat or delay the operation of the act. Its elementary definition, therefore, is to be ascertained. Bouvier defines a legal mortgage of lands to be a conveyance of lands by a debtor to his creditor as a pledge or security, &c., with a proviso. See, also, 1 Rev. St. marg. p. 762, § 38. 4 Kent, Comm. 136, says: "A mortgage is the conveyance of an estate by way of pledge for the security of a debt, and to become void on payment of it." 1 Washb. Real Prop. 475, defines a mortgage to be an estate created by a conveyance absolute in its form, but intended to secure, &c.

Books of forms have a heading of "Conveyances by Deed or Mortgages." See Clerk's Assistant. The form of a mortgage is a grant, &c., and this conveyance is intended as a security. Such also is the definition in the United States courts. Marshall, C. J., in U. S. v. Hooe, 3 Cranch, [7 U. S.] 73, says: "The difference is a marked one between a conveyance which purports to be absolute and a conveyance which from its terms is to leave the possession in the vendor. If in the latter case the retaining possession was evidence of fraud no mortgage would be valid." In Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 441, it is said that "a mortgage is a conveyance of property and passes it conditionally," which is stated as a very plain proposition, and Story, J., adds: "A mortgage is a lien for a debt and something more. It is a transfer of the property itself as a security for the debt." In Wilkins v. Wright, [Case No. 17,666,] the court says that the distinction between a trust deed and a mortgage is somewhat technical. I cannot divest myself of the idea that the word "conveyance," as used in sections 14 and 39 of the act, includes mortgages, and therefore these mortgages to the defendants. It may be proper for me to say that I think there is a

[1] [Reprinted by permission.]

construction which can reconcile sections 23 and 39. Section 23 is negative, denying the right to prove a preferred debt in any case without a surrender; but it nowhere declares that in all cases of surrender the debt may be proved. Then comes section 39 in involuntary bankruptcy, which declares that in cases described in that section, the debt shall not be proved at all in bankruptcy. Where is the repugnance? Read together in this view as it is, in case of any preference whatever, a surrender must be made in order to prove the debt, but in cases specified in section 39, such creditor as is therein defined, "shall not be allowed to prove his debt in bankruptcy." Thus they are in harmony. If section 23 had provided that in all cases of surrender the debt may be proved, this construction could not be given to it; but it has not. There is no case of preference out of section 39 where the debt can be proved without a surrender. There is no case within it where it can be proved, because this section in so many words forbids it; the creditor in a certain sense being a party to the fraud on the act. It is observable that in most of the cases stating that section 39 is qualified by section 23, the question was not involved, for the debt was held not provable for other reasons. I cannot allow myself to legislate where such a distinction may be given in order to follow the opinion of judges for whom I have great resp ct. My duty is done by taking the statute as I find it. The complainant is entitled to a decree.

Case No. 1,414.

BINGHAM v. REDDY.

[5 Ben. 266.] [1]

District Court, N. D. New York. June, 1871.

NEGOTIABLE INSTRUMENTS—ALTERATION OF PROMISSORY NOTE—DATE—ADDITIONAL MAKERS.

In an action brought by the assignee in bankruptcy of D. S. Wing, to set aside a mortgage executed by D. S. Wing, the plaintiff, in order to prove the insolvency of Wing at the time of mortgage was given, proved a promissory note, a copy of which is as follows: "$10,000. West Goshen, Ct., 20 May, 1868. On demand, we promise to pay to the order of E. Wing, ten thousand dollars, at E. Wing & Co.'s office, value received. E Wing & Co. D. S. Wing. J. B. Thompson. H. Crandall, Jr." The note was indorsed by E. Wing, J. B. Thompson and H. Crandall, Jr. The signature of D. S. Wing was an accommodation merely. The defendant requested the court to charge that this note was not a valid obligation against D. S. Wing, because (1.) It had been altered after its signature by D. S. Wing, by the addition of the names of Thompson and Crandall as joint makers; and (2.) It had been altered after its signature by the striking out of the words "after date," those words being part of the printed blank, and the note having been signed by D. S. Wing in blank. *Held*, that neither of these facts made such an alteration of the note as to prevent it from being a subsisting obligation against D. S. Wing. The case of Gardner v. Walsh, 5 El. & Bl. 83, criticised.

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

[In equity. Bill by Charles S. Bingham, as assignee in bankruptcy of David S. Wing, against John W. Reddy, to set aside a mortgage. Verdict for plaintiff. Defendant moves for a new trial. Denied.]

HALL, District Judge. This cause is now before me upon the motion of the defendant for a new trial of the issues tried and determined at the last May term of this court; and also upon the application of the plaintiff for a final decree in his favor, upon the pleadings, proofs and verdict.

The bill was filed to set aside a mortgage executed by the bankrupt, and which was conditioned for the payment of the sum of $2,300 in one year from the date. This mortgage was dated Sept. 2, 1869, and was, on that day, executed and acknowledged by the bankrupt, and duly recorded in the county clerk's office.

On the 21st day of the same month a petition in bankruptcy was filed against the mortgagor, and he was afterwards adjudicated a bankrupt upon such petition; the execution of such mortgage being one of the acts of bankruptcy upon which such adjudication was made.

The bill alleges that at the time the mortgage was executed David S. Wing was insolvent, and that he executed such mortgage with intent to give a preference to the defendant over his other creditors, and to defeat and delay the operation of the bankrupt act, [14 Stat. 534, § 35.] It also alleges that the defendant accepted such mortgage with a view of obtaining a preference over the other creditors of Wing; and that, at the time he received such conveyance, he had reasonable cause to believe that a fraud on the bankrupt act was intended, and that said Wing was insolvent.

The defendant's answer denied such allegations; and, under a stipulation of the parties, certain issues, based upon such allegations and denials, were ordered to be tried before a jury. They were so tried, and the jury rendered a verdict for the plaintiff upon all the issues submitted.

In order to prove the insolvency charged, the plaintiff, amongst other proof of indebtedness, proved a note of $10,000, dated May 20, 1868, signed by E. Wing & Co., and by David S. Wing, the bankrupt, and also by J. B. Thompson and H. Crandall, Junior. David S. Wing testified that he signed this note, with several others, at the request of his brother, the senior partner of the firm of E. Wing & Co., in Connecticut; that the note, which was in part printed or lithographed, was entirely filled up, with the exception of the amount and date, before he signed it.

By the testimony of J. B. Thompson, it appeared that he and Crandall put their names on the back of the note, after it had been signed by E. Wing & Co., and at the request, and for the accommodation of that

firm; and it is upon the testimony of Thompson (and not upon that testimony and the testimony of David S. Wing), and also upon the evidence furnished by the note itself, as stated by the parties in a bill of exceptions agreed to by their counsel (without the intervention of the judge, or any settlement of or signature to the bill), that the defendant moves for a new trial.

The printed or lithographed part of the note, before the addition of any writing, was in the following letters, characters, and figures:

"$ 186 .

After date promise to pay to the order of

dollars at

value received."

As presented at the trial, the note read as follows:

"$10,000. West Goshen, Ct., 20 May, 1868.

"On demand, we promise to pay to the order of E. Wing, Ten thousand dollars, at E. Wing & Co.'s office, value received.

"E. Wing & Co.
"D. S. Wing.
"J. B. Thompson.
"H. Crandall, Jr."

On the back of the note the names of E. Wing, J. B. Thompson, and H. Crandall, Jr., were indorsed.

On being shown this note, Thompson testified that he saw E. Wing & Co. sign the note; that it was signed in the firm name by Henry E. Wing, a member of the firm, at the time he (the witness) indorsed the note; that E. Wing and Mr. Crandall indorsed it at the same time; that he saw the note filled up at the time he indorsed it; that a week or two after, Henry E. Wing brought him the note, and said the bank wanted their names on the front, to make it good, as it was not negotiable on demand without; and that he then put his name on the front of the note. On his cross-examination, he stated that the note was all blank when he first saw it, except the name of David S. Wing; that it was all filled up at the time he indorsed it, and at Wing's office.

After stating this testimony, the bill of exceptions sets forth that "the defendant's counsel, at the close of the evidence, requested the court to charge that this note, in September, 1869, was not a valid obligation against David S. Wing; and that the court declined so to charge; and the defendant excepted."

As no question, except that presented by this bill of exceptions, was raised by the defendant's counsel, in opposition to the plaintiff's application for a final decree, the discussion will be mainly upon the bill of exceptions; but as the bill of exceptions does not state all the facts necessary to the proper presentation of the legal question intended to be presented, and as the granting of a new trial is a matter of discretion, the whole evidence, and the general facts of the case, may properly be considered.

The objections raised, and upon which the invalidity of the note referred to is insisted on, are: 1. That by the subsequent addition of the signatures of Thompson and Crandall, as joint makers,—some one or two weeks after the note had been signed by E. Wing & Co., and indorsed as stated,—the note was materially altered in such manner as to affect and alter the responsibility of David S. Wing; and that he was, therefore, discharged from his liability.

2. That the note—having been signed by D. S. Wing, in blank, at the request and solely for the accommodation of E. Wing & Co.—was not binding against D. S. Wing, because the words "after date" were afterwards erased; the implied authority given by D. S. Wing extending only to the filling of the blanks, and not to the erasure of any words contained in the blank signed.

Both of these objections assume what is not stated in the bill of exceptions, but which was proved on the trial, that the note in question was, as against David S. Wing, accommodation paper. The last objection also assumes that the words "after date" were stricken out after the blank was signed by D. S. Wing; and though it is insisted, and, I think, with reason, that there is no direct proof of this fact, these objections will be considered as though the facts thus assumed were sufficiently proved.

The first objection above stated was urged at the trial: and it was earnestly insisted that it was fully sustained by the case of Gardner v. Walsh, 5 El. & Bl. 83. In that case the plaintiff declared upon a note, by which the defendant, and Elizabeth Barton, and Alice Clarke, jointly and severally promised to pay to the plaintiffs, or their order, £500. The defendant pleaded (with other pleas) "that the said promissory note, at the time when the same was first made and drawn, was intended by the defendant to be, and was, made and drawn by the said Elizabeth Barton and the defendant only; and that, after the same was so made and drawn by the said Elizabeth Barton and the defendant (being the said making thereof by the defendant in the declaration mentioned), and after the said note was completed, issued, and negotiated,—that is to say, by the said Elizabeth Barton and the defendant,—the plaintiffs, without the consent of the defendant, caused the same to be added to, altered, and changed in a material part thereof, and in a material point,—that is to say, by causing the said Alice Clarke to sign the same, and become a joint maker thereof." And this plea further averred, "that the alteration was not made in correction of any mistake originally made in the making or drawing of said note, nor to further any intention of the said parties, or either of them, existing at the time when the note was first made by

the defendant, or was first issued or negotiated."

On the trial it appeared that the plaintiffs were merchants, and had business transactions with Elizabeth Barton; that they had arranged with her to give her further credit, if she would get two sureties to sign with her a promissory note; and that she had proposed the defendant and Alice Clarke as such sureties. It further appeared that Elizabeth Barton proposed to the defendant to sign the note, as her surety; that he agreed to do so, and accompanied her to the office of the plaintiffs, and there signed the note, along with Elizabeth Barton; and that Alice Clarke afterwards signed the note. It was also clearly shown that, at the time the defendant signed the note, Barton, the principal debtor, was a party to the arrangement that Alice Clarke was to sign it as an additional surety; but it was not proved, and was, perhaps, left in doubt upon the evidence, whether the defendant was or was not aware of this arrangement. The learned judge instructed the jury that, if the signature of Alice Clarke was added without the previous assent of the defendant, the plea was made out, as the addition of her signature materially altered the note. Under this direction, the jury found for the defendant, on the plea above stated; and for the plaintiffs on the other issues.

The plaintiffs moved for a new trial for misdirection, on two grounds: First, that supposing the addition of Clarke's name to be unauthorized by the defendant, it was not a material alteration in the contract; and, Secondly, that the defendant, under the circumstances, was bound to the plaintiffs by the arrangement made by Barton with them, whether he had personal knowledge of its terms or not. The court decided that the plaintiff was not entitled to a new trial on the ground first stated; and that if, after the note was a perfect instrument, according to the intention of the parties, as the joint and several note of the defendant and Elizabeth Barton, "and after it had been completed, issued and negotiated," the plaintiffs, without the consent of the defendant, had caused it to be signed by Alice Clarke, as a joint and several maker, the defendant was discharged from his liability upon it.

A new trial was, however, granted upon the second ground, with leave to the defendant to amend his fifth plea as he might be advised, confining him, nevertheless, to a single plea setting up the alleged vitiation of the note by the signature of Alice Clarke.

Upon the report of the case it would seem that the new trial was properly granted for the misdirection of the judge. As between the principal in the note and the payee, and under the evidence in the case, the note was not completed, issued and negotiated until the signature of Alice Clarke had been obtained; and therefore the plea had not been proved, and a new trial was granted.

This appears from the remarks of Mr. Justice Crampton; and, when the new trial was granted for this misdirection, leave was granted to amend the plea so as to correspond with what might be the proofs in the case, and to present the question suggested by Crampton, Justice, and also by Lord Chief Justice Campbell when he said, "It may be a question whether allowing a note to be signed in a form apparently perfect, without informing the signer of an intended addition, is not equivalent to a representation that it is perfect." The proofs would not support the plea as it stood, but might support a plea presenting the question suggested; and, therefore, when a new trial was granted upon the plaintiff's application, an amendment of the plea was authorized. On a careful consideration of the whole of the report of the case, I do not think it aids the defendant, or materially changed the rule in regard to the alteration of instruments, uniformly recognized, in England and in this country, both before and after this decision. See Byles, Bills, (3d Am. Ed.) marg. pp. 255, 256; and see, also, the form of the plea in Gardner v. Walsh, ubi supra.

The alteration of an instrument, which avoids it upon the technical and strict ground of alteration, is generally made after the instrument has had a legal existence or inception, and not before; and I am inclined to think that no such question of alteration can be raised upon the evidence in this case.

But the question, whether there was a material and unauthorized alteration of the note after it was signed by Wing, the party sought to be charged, so that he has never executed, or become legally bound by the particular instrument presented and proved, which is a somewhat different question, is presented in this case by the second objection before stated. This objection, in the form and for the reason now stated, was not, it is believed, presented at the trial; but it is now sufficiently presented by the bill of exceptions, and the application for a final decree.

It was conceded, upon the argument, that the execution of the blank note implied an authority to fill the blanks at discretion; and that E. Wing & Co. might have filled in a date prior to the actual issuing of the note. It was also conceded that it might have been made payable at any time after the date so inserted; and, as a consequence, the note might have been so drawn as to be due on the very day of its negotiation. See Mitchell v. Culver, 7 Cow. 336, and case in note; Goodman v. Simonds, 20 How. [61 U. S.] 343, 361; Bank of Pittsburgh v. Neal, 22 How. [63 U. S.] 96. But it is insisted that the words "after date" being in the blank, there was no authority to strike them out, any more than there would have been authority to strike out hundred, and insert thousand, if the note, otherwise blank, had been filled up as a note for five hundred dollars.

The question is, in substance, whether

there was a material and unauthorized alteration of the note; and whether the fact that the words "after date" had been erased, which appeared on the face of the note when offered for negotiation, was sufficient notice to the party receiving the same that the note had been altered after signature, and in a manner not authorized by David S. Wing, the bankrupt; and this question is not entirely free from doubt. Assuming that the words "on demand" had not been inserted, and that the words "after date" had not been stricken out when the note was signed by the bankrupt, the first question is, What is, in substance, the authority to the depositary and holder of such a note, so signed in blank, when neither date nor time of payment has been filled into the blank? As a general rule, it may be said that the authority is to insert such date, and such time of payment as the holder may elect, or even to omit the insertion of any specific time of payment, leaving it payable, by legal inference, on demand. Michigan Ins. Bank v. Eldred, 9 Wall. [76 U. S.] 544.

Suppose, in this case, the words "on demand" had not been written into the note, but the blank, where they are written, had been left unfilled, and the words "after date" not erased; or that the words "on demand" had been written in, and the words "after date" had not been stricken out. Or, again, suppose the note had been made payable ten days after date, and so dated that it legally fell due on the day of its negotiation, would the note have been invalid, or the rights or liabilities of the bankrupt have been different from what they now are? I am not prepared to say that they would have been; or to say, that the fact that the words "after date" were in the blank when signed, was any legal limitation to the authority of E. Wing & Co. to make the note payable on demand, or on the day of its negotiation, by such date and other words as they might select for that purpose. It would, in my judgment, operate as a most unfortunate check to the negotiation of commercial paper, if a limitation of authority, and notice of such limitation, should be inferred upon such slight and inconclusive circumstances, which would hardly excite the suspicion of the most prudent bank officer.

In the case of the Mahaiwe Bank v. Douglass, 31 Conn. 170, which was much relied on by the defendant's counsel, the whole contract had been changed after the signature of the defendant had been indorsed on a blank draft upon a specified firm. The contract had been made a Connecticut contract, instead of a New York contract, by changing the date from the city of New York, to Canaan, in Connecticut; and, instead of a draft on a firm whose name was inserted in the blank, it was made a promissory note, addressed on its face to another firm. This latter address was merely surplusage; but, as before stated, the other alterations in the form and character of the instrument were sufficient to work an entire change in its character and obligations. In the case of Ives v. Farmers' Bank, 2 Allen, 236, also much relied on, it was held that the time of payment, as well as the amount, was fixed by the blank note as signed, after which the words "three months" were inserted before the words "after date," by which the specified time of payment was changed.

Assuming, then, that the question is to be decided upon the evidence of Thompson alone, and that his testimony requires the inference that the words "after date" were stricken out at the time he indorsed the note, I still think the defendant is not, upon the bill of exceptions, entitled to a new trial, upon the ground that the blank note was filled up in a manner not authorized by David S. Wing.

I am the more willing to act on this conclusion, as I should deem it proper, in case I granted a new trial, to allow an amendment of the bill, and of the issues in this case, so as to present the question, whether the bankrupt did not give, and the defendant receive the mortgage in controversy, in contemplation of the bankrupt's insolvency; and, under the evidence upon the trial, the jury, on such an issue, would doubtless have found for the plaintiff, whether the fact of actual insolvency had or had not been proved. Besides, the appearance of the note, and the testimony of David S. Wing, the bankrupt, make it most probable that Thompson is mistaken in regard to the blank note not being filled up, even, in part, at the time he first saw it; and it is most probable that the bankrupt correctly stated that, when he signed it, it was entirely filled up, with the exception of the date and amount.

A new trial is denied, and the plaintiff is entitled to a decree, with costs to be taxed.

Case No. 1,415.

BINGHAM v. RICHMOND et al.

[6 N. B. R. 127.][1]

District Court, N. D. New York. Jan. 9, 1872.

BANKRUPTCY—FRAUDULENT TRANSFERS—INTENT OF CREDITOR.

A creditor who accepts a chattel mortgage with a view to obtain a preference, having reasonable cause to believe at the time that a fraud on the act was intended, and that his debtor was insolvent, will not be allowed to prove his debt in bankruptcy, and likewise loses the lien of his mortgage.

[See In re Richter's Estate, Case No. 11,803; In re Black, Id. 1,458.]

[In equity. Bill by Charles S. Bingham, as assignee in bankruptcy of David S. Wing, against Richmond & Gibbs, to set aside a chattel mortgage, and to restrain proof of debt. Report of referee in favor of complainant.]

[1] [Reprinted by permission.]

Scott Lord, for plaintiff.
R. P. Wisner, for debtor.

Opinion of J. D. HUSBANDS, Referee. In this case a bill is filed on the equity side of the court to set aside a chattel mortgage made by David S. Wing, the bankrupt, September tenth, eighteen hundred and sixty-nine, to these defendants, filed in the proper office September eleventh, eighteen hundred and sixty-nine, to restrain the proof of the debt by these defendants. The bill alleges the insolvency of Wing at the time, and the intent by its execution to give the defendants a preference over his other creditors, and to defeat and delay the operation of the bankrupt act, [March 2, 1867; 14 Stat. 534, § 35;] that the defendants accepted such mortgage with a view of obtaining such preference, and that at the time said defendants received such conveyance they had reasonable cause to believe that a fraud on such act was intended, and that said David S. Wing was insolvent. All this as matter of fact is admitted by the stipulation in this case, and the only saving clause is that, "said defendants believed that they were entitled to the preference obtained." In simpler Saxon, they believed that a fraud on the act was intended, and had reasonable cause also to believe in the insolvency of their debtor and that they had a right to commit that fraud on the act because they believed they could. The brief of their learned counsel mistakes in my judgment, when he confounds corrupt motive with their admitted intent. Section 14 of the act preserves the lien of mortgages on chattels made in good faith for present considerations otherwise valid, and passes the title to the assignee of property fraudulently conveyed, who is authorized to assail the bankrupt's fraud. The stipulation necessarily admits that this mortgage lien is not thus preserved. The debtor has been adjudicated a bankrupt and no question arises as to him.

These creditors intended what they did. See reasoning of Woodruff, J., in 4 N. B. R. 79, [Hardy v. Bininger, Case No. 6,057.] And so Hall, J., and other judges have repeatedly held. The belief of a man that he may do what the law forbids, does not cure the illegality of the act. It may, however, save him from the charge of corruption. Before the heavenly vision, Saul believed conscientiously that he might persecute and slay the disciples. On the way to Damascus he learned that this belief furnished no justification. Kohlsaat v. Hoguet, [Case No. 7,919,] was, I apprehend, an action by the assignee to recover the amount of the preference. Blatchford, J., after stating the intent and the doing or suffering by the debtor, says: "the elements on the part of the creditor are the receiving or being benefited by such thing, the having reasonable cause to believe the insolvency of the debtor, and the having reasonable cause to believe that a preference is intended. These six elements must co-exist, but nothing else is necessary to make the transaction void, if challenged by the assignee in due time." The question submitted is, whether the defendants, having taken such a preference in this manner, have a right to surrender it after suit brought by the assignee to challenge it and before answer. No question is made as to the time in which this action is brought. It must be observed in respect to involuntary bankruptcy that by section thirty-nine, what enables the assignee to recover the property conveyed, assigned or transferred, also in express terms declares that the creditor shall not be allowed to prove his debt in bankruptcy, provided such creditor had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent. This case is alleged in the bill to be involuntary, and the stipulation admits it. The stipulation also admits in the language of the section all the proviso requires or declares, and I can discover no escape from the consequence without assuming the function of legislation. It is a penal statute in this behalf, but its language is clear and unmistakable. I never discovered wisdom in attempts on the part of judicial tribunals to wrest the language of a statute to meet a real or supposed difficulty or hardship. I remember that at an early day in England, the statute of limitations was considered by the courts a hard statute. In the time of Croke James decisions were made frittering away some of its provisions. The cooler and wiser judgment of other judges in England and this country construed and gave effect to the statute as it was, and held it to be a statute of repose. I pass on this section as I read it. It interprets itself. It applies in terms to such a creditor as the section itself defines, and relates to involuntary proceedings only. See section thirty-nine and In re Evans [Case No. 4,552.] Why this distinction exists in the act, it is neither my duty nor my prerogative to enquire. Statutes are arbitrary, and when the language is free from all ambiguity and is within the power of the law giver, ita lex scripta est is the only answer the judicial mind can give to criticisms upon it. I think the admitted allegations of the bill bring this case directly within the language and spirit of the act, and that these defendants are therefore not allowed to prove their debt in bankruptcy and the complainant is entitled to the relief he seeks. If they desire to surrender for any other purpose I see no objection to it. I return herewith a stipulation, which, in connection with the bill of complaint, is the testimony in this case.

BINGHAM, (SHEARMAN v.) See Cases Nos. 12,732 and 12,733.

BINGHAM, (SHERMAN v.) See Case No. 12,762.

Case No. 1,416.

BINGHAM v. WILKINS.

[Crabbe, 50.][1]

District Court, E. D. Pennsylvania. Aug. Sess., 1836.

PAYMENT—DISCONTINUANCE—PRACTICE—BAIL.

1. Where suit has been brought in a state tribunal, and discontinued, this court will sustain a libel for the same cause of action.

2. A voluntary discontinuance, by a party plaintiff, is not satisfaction of the debt or cause of action.

[See Latapee v. Pecholier, Case No. 8,101.]

3. Satisfaction of a debt is not ground to quash the proceedings in a suit thereon.

[See Holmes v. The Lodemia, Case No. 6,642.]

4. The court will not suffer a party to be held to bail in two places at one time, for the same cause of action.

In admiralty. Libel [by Delucena L. Bingham against Job W. Wilkins, late owner and master of the schooner Hero] for wages, with a capias against the master. The libellant commenced suit against the respondent, on the 21st May, 1836, before an alderman of the city of Philadelphia, for the same cause of action. The warrant was returned, and the parties appeared, on the 11th August. After a partial hearing, the suit was adjourned till the 27th August, but was immediately discontinued by the plaintiff, who, on the same day, after the discontinuance, filed his libel, and issued a capias against the respondent, from this court. Special bail was given on the 3d September. On this state of the facts, Fallon, for respondent, obtained a rule, on the 5th September, to show cause why the proceedings should not be quashed. [Rule discharged.]

Mr. Fallon, for respondent.

The acts of libellant, before the magistrate, amounted to a satisfaction of the debt, or to a barring of the institution of a suit in this court, or, at least, destroyed his right as against respondent; the libellant, having elected to institute his suit before a state magistrate, is barred from his suit here. Act of 24th September, 1789, § 9, [1 Stat. 76;] 1 Story, Laws, 56. A defendant cannot be twice arrested for the same cause of action, "Nam nemo debet bis vexari pro eâdem causâ;" except, among other cases, where the first suit is discontinued before the second is commenced. But the discontinuance must be compulsory, as, from a defect in the first suit; and the libellant cannot discontinue his suit wrongly and voluntarily, for the mere purpose of taking it up to another court. 1 Sell. Pr. 42, 43; Bates v. Berry, 2 Wils. 381; Grubb v. M'Cullough, 1 Yeates, 193; [Grubb v. Grubb,] 2 Dall. [2 U. S.] 191, 192; Horn v. Roberts, 1 Ashm. 45. In this case the parties appeared, the hearing commenced, and was adjourned for further hearing. In the mean time, the case was discontinued. This amounts to satisfaction of the debt. A discontinuance will not be allowed after a juror has been sworn. Before a magistrate, where there is no jury, the rule applies to a hearing.

Mr. Grinnell, for libellant.

The application came too late. The bail and stipulation have been given to the court, before the application was made. It should have been alleged, by a plea in abatement, that another action was pending. If respondent has been held to bail, pending another suit, where bail has been given, the court will not quash the proceedings, but will only discharge him on common bail. 1 Tidd, Pr. 184. This is not twice vexing for the same cause of action. Field v. Colerick, 3 Yeates, 56.

HOPKINSON, District Judge. As to the claim being satisfied, or the debt discharged, by the discontinuance, there is no such law. A discharge from a ca. sa. on a judgment, is a legal satisfaction; but not from mesne process, or by discontinuance of the suit. If the debt were satisfied, it might be ground of final decree in favor of libellant, but not of quashing the suit, even if he could show a receipt or release.

The rule that no one shall be twice vexed for the same claim, applies only to the bail; and does not afford ground to quash the proceedings. On such a hearing, the court will take care that the defendant is not held to bail in two places at one time, but never dismiss the suit. We leave the respondent to his plea. Rule discharged.

[1] [Reported by William H. Crabbe, Esq.]

BINGHAM v. WILLIAMS. See Case No. 1,413.

Case No. 1,417.

In re BININGER et al.

[7 Blatchf. 159;[1] 3 N. B. R. 481. (Quarto, 121;) 1 Am. Law T. Rep. Bankr. 183; 17 Pittsb. Leg. J. 177; 9 Am. Law Reg. (N. S.) 297.]

Circuit Court, S. D. New York. Feb. 11, 1870.

BANKRUPTCY — POWER OF CIRCUIT COURT — WRIT OF PROHIBITION.

1. Under the 14th section of the judiciary act of September 24th, 1789, (1 Stat. 81,) this court has power to issue a writ of prohibition only in cases where such writ is necessary for the exercise of its jurisdiction.

2. Where C. had, jointly with B., his co-partner, been adjudged a bankrupt by the decree of the district court, and had brought such decree before this court for review, and was also prosecuting suits in a state court against B. in respect to the property of the copartnership and the proceedings in the district court: *held*, that this court had no authority to issue a writ of prohibition to the state court from further entertaining such suits.

3. The nature of the superintending or revisory power given to the circuit court over

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

proceedings in bankruptcy, by the 2d section of the bankruptcy act of March 2d, 1867, (14 Stat. 518,) considered and stated.

[Cited in Re Bininger, Case No. 1,418.]

[In bankruptcy. Petition for writ of prohibition to state courts to prevent further proceedings tending to hinder the administration of a bankrupt estate by the district court under the bankrupt law of United States. Denied.]

Francis N. Bangs, for application.

Roger A. Pryor, opposed.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge. A petition is presented to this court by Abraham Bininger, (who has, with Abraham B. Clark, who was his partner in the firm of Abraham Bininger & Co., been adjudged bankrupt by the district court,) and by sundry creditors of said firm, setting forth that, upon the petition of creditors of said firm, the said Bininger and Clark have, by a decree of the district court, been adjudged bankrupt; that the said Clark is now prosecuting in this court, in pursuance of the second section of the bankrupt act, a proceeding for the review of that adjudication; that, prior to the institution of the proceedings in bankruptcy in the district court, the said Clark had filed his bill in the superior court of the city of New York, against his partner Bininger, for an accounting, and for the settlement of the affairs of the co-partnership, the payment of the debts and the distribution of the assets; that a receiver had been appointed in such suit, who was or claimed to be in the possession of the property of the firm; and that, after the proceedings in bankruptcy were instituted, the said Clark commenced successively two actions in the said state court and procured from that tribunal injunctions restraining the petitioning creditors from prosecuting the said proceedings in bankruptcy. The petition gives with much detail facts and circumstances tending to show that the purpose and effect of the prosecution of these several suits in the superior court and of motions therein to enforce obedience to said injunctions, is to defeat the operation of the adjudication of the district court, and to hinder or obstruct the administration of the property of the bankrupts by the district court under the bankrupt law of the United States. It is thereupon prayed, that this court will, pursuant to the 14th section of the act of September 24th, 1789, (1 Stat. 81,) issue a writ of prohibition, addressed to the said superior court and the judges thereof, prohibiting the said court and the said judges from further entertaining the said actions, or from entertaining any other or further proceedings on the petition or application, or at the suit, of the said Clark, for the purpose of interfering with the said adjudication and with the jurisdiction of the said district court, and from interfering with or nullifying the effect of the jurisdiction of this court under the bankrupt act.

It is not suggested that this court has power to issue the writ prayed for, unless the authority is conferred by, or is implied from, some express statute; and, both in the petition and in the brief submitted by the counsel for the petitioners, such power is sought to be derived from the fourteenth section of the said act of 1789. That section provides, that all of the courts of the United States previously mentioned in the act, including the circuit court, "shall have power to issue writs of scire facias, habeas corpus and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." In Ex parte Christy, 3 How. [44 U. S.] 292, the supreme court, referring to this section, and to section thirteen, which gives express power to that court to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, disclaimed, in its opinion, delivered by Mr. Justice Story, any general authority to issue a writ of prohibition, in a case in bankruptcy, to a district court, over whose orders and decrees in such cases the supreme court possessed no revising power, however the district court exceeded its jurisdiction; and the ground stated was, that the district court, by such orders and decrees, did not interfere with, evade or obstruct any appellate authority of the supreme court. Without pausing, then, to inquire, whether, under the said fourteenth section, this court has power, and, if so, in what cases, to issue a writ of prohibition to a state court, it is clear that, if the power exists, the limitation is explicit which confines that power to cases wherein such writ is necessary for the exercise of the jurisdiction of this court; and, since the power is not claimed to exist under any grant of general jurisdiction, or to have been conferred by any other statute, the test of the power to issue the writ now applied for lies in the inquiry, whether, in the case made by the petition, such writ is necessary for the exercise of any jurisdiction now vested in the circuit court, in the matter in litigation, and is agreeable to the principles and usages of law.

What, then, is the jurisdiction which this court has over the proceedings set forth in the petition? By a petition of review, Clark, the plaintiff in the actions in the superior court, has sought in this court a review of the decree of the district court whereby he is adjudged a bankrupt, and, for the purposes of that review, this court has acquired jurisdiction of those proceedings. But, the exercise of that jurisdiction is in nowise obstructed or interfered with by the actions prosecuted by him in the superior

court. He may pursue that appeal to the revisory power of this court, and the respondents therein may here insist upon the correctness of the decree of the district court, and this court will proceed to hear and reverse or affirm that decree, entirely unaffected by the pendency or the prosecution of those actions; and the action of this court in the matter of that review will terminate with such affirmance or reversal. If such decree shall be affirmed, the decree of the district court will stand as the decree of that court and not of this court, to be carried into due execution by that court and not by this court.

The argument of the counsel for the petitioners involves the assumption that, by force of the second section of the bankrupt law, this court possesses, concurrently with the district court, all the powers conferred by the first section of that act upon the last-named court, and that, therefore, whatever impedes the execution of the decrees of the district court or obstructs or interferes with the administration of the estate of the bankrupts by that court, warrants the petitioners in insisting that the exercise of the jurisdiction of this court is obstructed or hindered, and in claiming in this court that the writ of prohibition is necessary. In the first place, this view overlooks the familiar doctrine, that, where the jurisdiction of two courts is concurrent, the one which first obtains jurisdiction of the subject matter and of the parties, by the actual institution of proceedings therein, holds such jurisdiction exclusively of the other. But, in the next place, the act of congress does not thus blend or confound the two courts in the administration of the law. The courts are distinct under that act, as under all others, and exercise a separate jurisdiction, each in its own sphere. This is not supposed to be doubtful in respect to the appellate jurisdiction conferred on the circuit court, by the eighth and twenty-fourth sections of the act, to review, by appeal or writ of error, the proceedings of the district court, or in respect to actions at law or in equity whereof the two courts are declared to have concurrent jurisdiction, as, for example, actions brought by or against the assignee in bankruptcy, as provided in the second section. Nor is it at all to be suggested that proceedings in bankruptcy can be initiated in this court. For that purpose, the jurisdiction of the district court is plainly exclusive.

The provisions of the second section which are relied upon are those which declare that "the several circuit courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity." The claim that the prohibition prayed for in the petition herein is necessary to the exercise of the jurisdiction of this court in the matter of the bankruptcy of Bininger and Clark can only rest upon the ground that, by force of the language above cited, it is competent for the parties to come into this court and seek original orders and decrees, in the due and ordinary course of such proceedings, either to facilitate the completion thereof or to carry them into effect; that, the proceedings having been duly instituted, the parties have an option to apply to either court to expedite or consummate the same; and, in short, that, so soon as such proceedings have been begun, they may be continued in either court or partly in one and partly in the other. And yet, when this claim is thus broadly stated, no counsel will, we think, seriously insist that the section warrants so unprecedented and extraordinary a confusion of jurisdiction. Nevertheless, to insist that this court has jurisdiction, in the proceedings themselves, to make orders in specific execution or enforcement of the decrees or orders of the district court, involves all that is above suggested.

The superintendence and jurisdiction conferred in that clause of the second section are revisory of cases and questions arising in the district court, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which, in a special and, perhaps, more restricted form, was given in the sixth section of the bankrupt act of 1841, [5 Stat. 440,] wherein authority was given to adjourn any point or question arising in any case in bankruptcy into the circuit court, to be there heard and determined; and it may be that, under the present act, the presentation of such questions and the jurisdiction of this court over them do not, as in the former, depend upon the discretion of the district court. As to this it is not necessary to express an opinion; but, in either view, the questions, or the cases presenting such questions, must arise in the district court, and their determination in this court is for either the guidance or the control of the district court. This is not a jurisdiction to assume the conduct of the proceedings, or to specifically enforce or execute the orders or decrees of that court. For that purpose, the district court has ample and exclusive power. This jurisdiction, which is given, for revisory and perhaps advisory purposes, to the circuit court, it can exercise notwithstanding the pendency and the prosecution of the actions mentioned in the petition herein. The exercise of that jurisdiction is not obstructed by any thing shown by the petition. The jurisdiction of this court in the case in question, so far as shown by the petition for the writ of prohibition, arises on a petition for a review of the adjudication made in the district court declaring Bininger

and Clark bankrupts. There is no impediment to the exercise of that jurisdiction. The alleged proceedings in the state court in no wise interfere therewith. A prohibition of such action in the state court as is set out in the petition is not necessary for the exercise of any jurisdiction in the matter of the bankruptcy of Bininger and Clark which this court has acquired. This court can review, in the manner and for all the purposes contemplated by the second section of the act, the orders, decisions and decree already made, and those which may be made in the district court. Such review cannot be rendered inoperative or ineffectual by any action of the state court. It belongs to the district court, and not to this court, to carry into execution the orders and decrees of the district court.

If, therefore, it were to be assumed that a state court stands in such a relation to a federal court, that, agreeably "to the principles and usages of law," a writ of prohibition could be issued by the latter to the former, the petition before us does not present a case in which such writ is necessary to the exercise of our jurisdiction.

We have preferred to place our decision upon the grounds above stated, not only because these questions of the construction of the second section of the act are of immediate practical importance, but, also, because they are directly involved in, and are decisive of, other motions pending before us in the same proceedings in bankruptcy mentioned in the petition.

The application must be denied.

Case No. 1,418.

In re BININGER et al.

[7 Blatchf. 165;[1] 3 N. B. R. 487, (Quarto, 122;) 1 Am. Law T. Rep. Bankr. 186.]

Circuit Court, S. D. New York. Feb. 11, 1870.

BANKRUPTCY—REVISORY JURISDICTION OF CIRCUIT COURT.

The superintendence and jurisdiction conferred upon this court by the 2d section of the bankruptcy act of March 2d, 1867, (14 Stat. 518,) is revisory, and does not confer on this court the power specifically to execute the decrees of the district court, or to assume the primary exercise of the jurisdiction conferred on the district court by the 1st section of that act.

In bankruptcy.

Francis N. Bangs, for the motion.

Roger A. Pryor, opposed.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge. The petitioner, John S. Beecher, assignee in bankruptcy of Abraham Bininger and Abraham B. Clark, applies for an order directing the marshal to take possession of the joint estate and property of the said bankrupts, and restraining and enjoining the bankrupts and certain persons heretofore appointed receivers of the said joint property, in an action pending in one of the state courts between the said bankrupts, for the settlement of their copartnership affairs, from any interference with the said property, to the end that the said property may be brought within the jurisdiction of the district court for the southern district of New York or within the jurisdiction of this court, and that the district court or this court may collect the assets of the said bankrupts, ascertain and liquidate liens, adjust priorities and conflicting interests, marshal and dispose of the funds, so as to secure the rights of all parties, and make due distribution among all the creditors, and directing that thereupon the proceedings on this petition may be continued in the said district court, and restraining and enjoining the said Clark from further prosecuting his said action against Bininger in the state court, and directing him to permit the petitioner, as assignee in bankruptcy, to prosecute such action in the name of the said Clark, and by such attorney as the petitioner may employ, and for such other or further order or relief as may be proper.

The petitioner has wholly mistaken the nature and purpose of the general superintendence and jurisdiction conferred upon this court by the second section of the bankrupt act. In Re Bininger, [Case No. 1,417,] submitted at the time the motion was made for the relief herein prayed for, that subject has been discussed and the conclusions of the court stated, that such superintendence and jurisdiction is revisory, in its nature and purpose, and was not intended to give to the parties an option to come to this tribunal for original orders, in the nature of a specific execution of the decrees of the district court. By the first section of the act, the district courts are constituted courts of bankruptcy and declared to have original jurisdiction in all matters and proceedings in bankruptcy. Such jurisdiction, according to the very terms of the section, extends to and includes the collection of all the assets of the bankrupt, the ascertainment and liquidation of liens, the adjustment of priorities, and the other matters which the petitioner seeks to secure through the order of this court; and it is declared that the said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

In giving a general superintendence and jurisdiction of all cases and questions arising under the act, congress did not intend that the circuit court should assume the primary exercise of that summary jurisdiction thus conferred by the first section on the district

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

courts; and yet that is precisely what is sought by the present petition. The pendency here of the proceedings for the review of the decree by which Bininger and Clark have been adjudged bankrupts has no bearing upon the present motion. Those proceedings bring the decree and whatever orders are involved therein before this court, but do not operate to transfer the entire proceeding in bankruptcy into this tribunal, to be here continued as in a court of first instance.

The motion must be denied.

Case No. 1,419.

In re BININGER et al.

[7 Blatchf. 168;[1] 3 N. B. R. 489, (Quarto, 122;) 1 Am. Law T. Rep. Bankr. 187.]

Circuit Court, S. D. New York. Feb. 11, 1870.

BANKRUPTCY — PROCEEDINGS IN BOTH STATE AND FEDERAL COURTS—ELECTION.

Where C., adjudged a bankrupt by a decree of the district court, was seeking a review of such decree by this court, and was at the same time prosecuting suits in a state court to restrain the proceedings in the district court: *Held*, that this court would not require C. to elect whether to prosecute further such review or the suits in the state court.

[In bankruptcy. Petition by the creditors of Abraham Bininger and Abraham B. Clark, bankrupts, to compel Clark to elect whether to prosecute in the circuit court his petition of review of the adjudication in bankruptcy, or to proceed with certain actions begun in the state courts. Denied.]

Francis N. Bangs, for the motion.

Roger A. Pryor, and Mr. Compton, opposed.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge. In deciding the various motions which have been presented to the court in the above proceedings, (7 Blatchf. 159, 165, [Cases Nos. 1,417, 1,418,]) the facts alleged and the claims of the parties have been more than once recited. For the understanding of the present motion, it will suffice to say, that Abraham B. Clark has brought his petition of review to this court, alleging that the decree of the district court adjudging him and his co-partner, Abraham Bininger, bankrupts, is erroneous and ought to be reversed. He has also commenced actions against the petitioning creditors, in the superior court of the city of New York, complaining of the conduct of those creditors in petitioning for such decree, and alleging that the decree is erroneous in law and in fact, and was sought through improper motives, and by collusion with his late partner, and has obtained a temporary injunction to restrain the prosecution of such proceedings. The petitioning creditors now move that this court, by its order, require him to elect whether he will further prosecute his petition of review in this court, or those actions in the state court, and that, unless he shall elect to abandon and discontinue the latter, his said petition of review may be dismissed.

The second section of the bankrupt act, [March 2, 1867; 14 Stat. 518,] which gives to this court superintendence and jurisdiction of all cases and questions arising thereunder, and declares that the court may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case, does not, it is true, declare, in terms, that the party aggrieved, or any party, shall have the right to invoke that superintendence and jurisdiction; but that is necessarily implied. A court of justice is not at liberty to disown its jurisdiction, or to refuse to entertain parties who apply in due form for the exercise of such jurisdiction. Where the jurisdiction is itself discretionary, it may be declined; and, where parties do not apply in the legal or prescribed manner, or in due season, or are otherwise in fault in the matter of the review sought, doubtless the court may dismiss their application; and the control of the court over frivolous and vexatious appeals of any kind, is not questionable. But we find no warrant for the suggestion, that the court can with propriety impose compulsory dismissal, as a penalty or consequence of alleged or supposed misconduct elsewhere, which has no effect to delay or impede the exercise of the power of the court in the matter of the review sought. If the party who brings his appeal or petition of review to this court, were, by the act of the appellant or petitioner, through the aid of a state court, or otherwise, hindered or delayed in the bringing of the same to a hearing, or in making other disposition thereof, a different question would arise; and the court could require that such appeal or review be brought to a hearing in due season, or be dismissed.

It would not be respectful to the state tribunal to assume that the decree or judgment of the district court, or of this court, would not there be regarded as conclusive for all the purposes for which it is conclusive here. That, however, is not to be discussed on this motion. If the party seeking the review prosecutes it in due form, and be without fault therein, we deem it proper that it should be heard.

We must, therefore, decline to require the petitioner Clark to make the election sought, on pain of a dismissal of his proceedings.

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

Case No. 1,420.

In re BININGER et al.

[7 Blatchf. 262.] [1]

Circuit Court, S. D. New York. June 4, 1870.[2]

INVOLUNTARY BANKRUPTCY — AMENDMENT OF PETITION—MOTIVE OF PETITIONER—ACT OF BANKRUPTCY — INSOLVENCY — APPOINTMENT OF RECEIVER—INTENT.

1. The district court, on the trial before a jury, as to the fact of bankruptcy, in an involuntary proceeding under section 39 of the bankruptcy act of March 2, 1867, (14 Stat. 536,) has power to permit an amendment of the creditor's petition.

[See In re Craft, Case No. 3,316; In re Gallinger, Id. 5,202.]

2. What constitutes insolvency, under section 39 of that act, defined.

[See Warren v. Tenth Nat. Bank, Case No. 17,202.]

3. An order of a state court appointing a receiver of the property of a debtor is "legal process," within the meaning of section 39 of that act. The appointment by a state court of a receiver of the property of a debtor, for the purpose of paying his debts, defeats and delays the operation of that act.

[Cited in Re Stuyvesant Bank, Case No. 13,581; Re Safe-Deposit & Sav. Inst., Id. 12,211; Re Hathorn, Id. 6,214.]

4. Where a debtor voluntarily procures his property to be taken on legal process, and the effect of such taking is to defeat or delay the operation of that act, he must be held to have intended to produce such effect.

[Cited in Warren v. Delaware, L. & W. R. Co., Case No. 17,194.]

5. For a solvent trader to suspend payment and not resume within fourteen days is fraudulent as against his creditors, and is an act of bankruptcy, within section 39 of that act.

[See Vanderhoof v. City Bank, Case No. 16,842; In re Ess, Id. 4,530.]

6. In a proceeding in involuntary bankruptcy against two debtors, where only one of them contests the fact of bankruptcy, it is not proper, the acts of bankruptcy being established, to inquire into the motive of the petitioners in prosecuting the petition, or into the fact of the cooperation of the other debtor with the petitioners, or into his motive for doing so.

[Appeal from the district court of the United States for the southern district of New York.

[In bankruptcy. Petition by William J. Hardy and others to have Abraham Bininger and Abraham B. Clark adjudged bankrupts. Decree for petitioners. Case No. 6,058. Clark petitions for review of the adjudication, which was affirmed.]

This was a review of an adjudication of bankruptcy made by the district court, after a trial by a jury. The charge of the district judge (Blatchford, District Judge) to the jury was as follows: The 39th section of the bankruptcy act [March 2, 1867; 14 Stat. 536] provides, that any person residing within the jurisdiction of the United States, and owing debts provable under the act, exceeding the amount of three hundred dollars, who, after the passage of the act, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall procure or suffer his property to be taken on legal process, with the intent, by such disposition of his property, to defeat or delay the operation of the act, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under the act amounts to at least two hundred and fifty dollars. The condition is then prescribed by the same section, that the petition shall be brought within six months after the act of bankruptcy has been committed.

In the present case, it is alleged in the petition, that Abraham B. Clark and Abraham Bininger, composing the firm of A. Bininger & Co., have, for the period of six months preceding the date of the filing of the petition, resided and transacted business at the city of New York; that the petitioners' demand is provable against them, in accordance with the bankruptcy act; that they owe debts to an amount exceeding the sum of three hundred dollars; and that the petitioners' demand exceeds the sum of two hundred and fifty dollars. The debts due to the petitioners are then set out, being the two promissory notes which have been proved in evidence. The petition then avers, that, on or about the 19th day of November, 1869, which was within six months prior to the bringing of the petition, the said Abraham B. Clark and Abraham Bininger, being bankrupt and insolvent, and in contemplation of bankruptcy or insolvency, did procure and suffer their property to be taken on legal process, to wit, under and by virtue of an order made by one of the justices of the superior court of the city of New York, appointing one Daniel H. Hanrahan receiver of all the property and effects of the said firm of A. Bininger & Co., and which said order was procured by the said Abraham B. Clark to be made in an action in the said court, wherein the said Abraham B. Clark was plaintiff and the said Abraham Bininger was defendant, and that the said receiver was suffered to take possession of said property under said order, with the intent, by such disposition of their property, to defeat and delay the operation of the said bankruptcy act. These allegations are directly within the language of the act.

As to the existence of the formal facts necessary to confer jurisdiction on this court—the residence of the debtors within the jurisdiction of the United States, the owing by them of the required amount of indebtedness, and the presentation of the petition by creditors holding the required amount of indebtedness, to the proper court, and within the six months after the commission of the alleged act of bankruptcy—

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

[2] [Affirming Case No. 6,058.]

there is no dispute. There remain only three questions for consideration: (1.) Were Clark and Bininger insolvent when they committed the alleged act of bankruptcy? (2.) Did they procure or suffer their property to be taken on legal process? (3.) Was the act complained of done with the intent, by such disposition of their property, to defeat or delay the operation of the bankruptcy act?

The word "insolvency," as used in the bankruptcy act, as it has been interpreted, I believe, by all the judges of the courts of the United States who have passed upon it, means, when applied to traders such as these debtors were, simply this—an inability to pay debts, as they mature and become due and payable, in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the laws of the United States, lawful money and a legal tender to be used in the payment of debts, without reference to the amount of the debtor's property, and without reference to the possibility or probability, or even certainty, that, at a future time, on the settlement and winding up of all his affairs, his debts will be paid in full out of his property. Bayly v. Schofield, 1 Maule & S. 338; Thompson v. Thompson, 4 Cush. 127, 134; Lee v. Kilburn, 3 Gray, 594, 600; Herrick v. Borst, 4 Hill, 650, 657; Barnard v. Crosby, 6 Allen, 327, 331; Buckingham v. McLean, 13 How. [54 U. S.] 167; Merchants' Nat. Bank v. Truax, [Case No. 9,451;] In re Gay, [Id. 5,279;] Graham v. Stark, [Id. 5,676.] Under the 11th section of the act, which provides for petitions in bankruptcy by debtors, all that is necessary to enable a debtor to become a voluntary bankrupt is, that he shall reside and owe debts as therein required, and shall apply, by petition addressed to the proper judge, setting forth his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of the act. This inability to pay debts, mentioned in the 11th section, is the same thing as the insolvency mentioned in the 39th section. It means the inability of the debtor, then and there, to pay accruing debts, as they mature, in the ordinary way, in the usual course of the business of trade, in that which is made by the law of the United States a lawful tender in the payment of debts. Nothing else is a legal tender in payment of debts but that which is declared by the law of the United States to be lawful money and such legal tender. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind. Therefore, the amount of the trader's property is of no consequence, if such inability exists to pay matured debts in such lawful money.

In this case, the evidence on the question of insolvency all points to one conclusion. Mr. Clark testifies, not merely that he and his firm had not, on and after the 4th of November, 1869, and down to and including the 19th of November, 1869, the lawful money wherewith to pay the debts of the firm as they matured, but that, after the most earnest and strenuous efforts, he and the firm were unable to obtain such lawful money. Being so without it, he and his co-partner and the firm were insolvent. On the 19th of November the business of the firm as traders was stopped and broken up, and their whole property was put into the hands of a receiver on that day. Under such circumstances, Mr. Clark would have had a right to present a voluntary petition to this court, under the 11th section of the act, either without or in conjunction with his co-partner, setting forth the inability of the co-partners to pay all their debts in full, notwithstanding he or they might have thought that, in the end, such debts would be paid in full out of the property of the debtors. The evidence being all one way, and there being no dispute about the fact of insolvency, on the law as above defined, it is the duty of this court to hold that there is no question of fact for the jury, as to whether the debtors were insolvent or not on the 19th of November. Schuchardt v. Allens, 1 Wall. [68 U. S.] 369. It is perfectly clear that they were then insolvent.

The second question is, as to whether the debtors procured or suffered their property to be taken on legal process, on the 19th of November. The debtor Bininger, by making no answer to the petition, confesses its allegations. As to the debtor Clark, there is no disputed question of fact, on this branch of the case. It appears in evidence, from the written complaint filed by Mr. Clark, in the suit brought by him in the superior court of the city of New York, against his co-partner Bininger, and which is verified by him, that he prayed that court, in such complaint, that a receiver of the property, rights and good will of said partnership might be appointed, with power to dispose of the same for the benefit of all parties entitled thereto, and that the proceeds thereof might be divided among the partners, after the payment of all just debts of such partnership. This was a prayer to the said court, on the part of Mr. Clark, to take possession of the property of the partners by legal process. This action was followed up by an order made by the said court, on the 19th of November, directing that Daniel H. Hanrahan be appointed receiver of all the debts, property, equitable rights and things in action belonging to said partnership, with power to dispose of the same for the benefit of all parties concerned, according to law. It further appears in evidence, that such receiver complied with the requirements of such order, that he should execute and file an official bond, upon doing which he was to be invested with all the rights and powers of his receivership. It also appears, that he has actually taken pos-

session of said property under the order. Such order is legal process. It is process for the taking of property, issued in a legal proceeding, as much as an attachment or an execution. The fact that the act of congress, the paramount law of the land, enacted under the authority of the constitution of the United States, which all judicial officers, federal and state, are bound and sworn, by oath or affirmation, to support—the fact that the bankruptcy act makes, in broad terms, the procuring or suffering property to be taken on legal process, with certain attendant circumstances, an act of bankruptcy, shows, that the circumstance that the property is taken on legal process issued out of a court of a state, furnishes no ground for withholding an adjudication of bankruptcy. On the contrary, in view of the well-known fact, that the mass of civil legal process is issued out of the courts of the states all over the United States —courts of justices of the peace and courts of record—and that the amount of property taken on civil legal process issued out of the federal courts is comparatively very small, it is evident, that congress intended to say, that the taking of property on legal process issued out of a court of a state is an act of bankruptcy, when accompanied by the other conditions specified in the 39th section of the act. The property in this case was taken on the process. This process was issued by a court of justice, and was a legal and proper process. It carried on the face of it a right to the receiver to take possession under it of the property named in it. It was, therefore, in the sense of the act, "legal process." There is, then, no question of fact to be submitted to the jury as to the second head of inquiry.

The next question is, as to the intent with which the procuring or suffering was done. To be within the 39th section, it must have been an intent, by such disposition of their property, to defeat or delay the operation of the bankruptcy act. The matter of intent is illustrated by a familiar principle of law. Where an individual is charged with the offence of assault with a deadly weapon, with intent to kill, if it be shown that he knowingly and voluntarily pointed a loaded pistol at a vital part of another human being, the law declares that the natural, inevitable consequence of that act is to kill, provided the pistol is fired; and the individual cannot be heard to say, that he had no intent to kill, the pistol being so pointed at a vital part, provided he had an intent, with such weapon so pointed, to fire it, and did fire it. The intent must be judged of with reference to the voluntary action of the individual. That is the true rule in all cases of the kind. In the present case, as the necessary and inevitable consequence of the transfer of the property referred to, to the receiver, was to defeat the operation of the bankruptcy act in regard to that property, then, if the debtors voluntarily procured or suffered such property to be so taken on such legal process, when they were sane, when they were not under duress, when the procuring or the suffering was voluntary, the law conclusively presumes that they had the intent to defeat the operation of the bankruptcy act. This must be so; otherwise, no laws, civil or criminal, could ever be administered. Every person is presumed to intend the natural and probable consequences of his own acts, and, if it be shown that the consequences naturally follow the acts, it is competent to infer the intent, in doing the acts, to effect such consequences. Denny v. Dana, 2 Cush. 160, 172; Beals v. Clark, 13 Gray, 18, 21. The rule is thus stated by Judge Hall, of the northern district of New York, in the recent case of In re Smith, [Case No. 12,974:] "Every person of a sound mind is presumed to intend the necessary, natural or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention." There are many decisions by the courts of the state of New York, to the effect that, notwithstanding the denial of an intent to commit a fraud or to produce a forbidden result, such intent will often be conclusively presumed. Cunningham v. Freeborn, 11 Wend. 240; Waterbury v. Sturtevant, 18 Wend. 353; Fiedler v. Day, 2 Sandf. 594; Robinson v. Stewart, 10 N. Y. 189; Barney v. Griffin, 2 Comst. [2 N. Y.] 365; Collum v. Caldwell, 16 N. Y. 484. In the present case, the denial by Mr. Clark of an intent to defeat or delay the operation of the bankruptcy act is of no consequence, provided he had the intent to procure the appointment of the receiver, and procured such appointment, and suffered the property to be taken by such receiver, and did these things knowingly and while he was sane and not under duress. If so, then the law conclusively presumes that he had the intent to effect the result which would necessarily and inevitably follow. That result was a defeating of the operation of the bankruptcy act in respect to such property, if the receivership over it should remain undisplaced.

On the question of intent, the evidence is, that Mr. Clark signed and verified, and caused to be presented, the complaint in the state court, containing the prayer to which I have referred. This, followed by the appointment of the receiver, and by his taking possession of the property, would certainly bring Mr. Clark within the category of suffering the property to be taken on legal process, if it did not bring him within the category of procuring it to be so taken. Mr. Bininger confesses, by his default, that he suffered it to be so taken. The suspension of payment

by the firm occurred on the 4th of November, and the receiver was appointed and took possession of the property on the 19th of November. It appears, therefore, that the period of fifteen days elapsed between the time when the firm became insolvent and the time when its property was taken on the legal process. Mr. Clark testifies that the proceeding for the appointment of a receiver was taken with his knowledge and consent, and that he was told that the receiver would take possession of the property of the firm. The evidence is conclusive that Mr. Clark knew what he was doing, and was of a sound mind, and did not act under any duress. Under such circumstances, the bankruptcy act is plain in its requirements. When a merchant or trader is insolvent, that is, unable to pay his debts, as they mature, in the ordinary course of business, as the term "insolvency" has been interpreted to you by the court, it is his duty to come at once into the bankruptcy court, under the protection of this law, and submit his property to that court for adjudication and distribution; and a mode is provided by the act for bringing in his co-partner who will not come in voluntarily.

It follows, therefore, that there is no question of fact to be submitted to you in this case. On the law, as applicable to the undisputed facts, I can perform my duty in no other way than to direct you to render a verdict for the creditors as to the act of bankruptcy to which I have directed your attention, namely, that these debtors, being insolvent, did, on the 19th of November, 1869, suffer their property to be taken on such legal process, with the intent, by such disposition of that property, to defeat the operation of the bankruptcy act of the United States; and it is your duty to render such verdict. I direct that verdict, accordingly.

The jury having, in accordance with such direction by the court, rendered a verdict for the creditors, as to the act of bankruptcy referred to, and an order of adjudication having been made, Clark brought a petition of review.

Charles F. Sanford and Mansfield Compton, for Clark.

Francis N. Bangs, for creditors.

WOODRUFF, Circuit Judge. Abraham Bininger and Abraham B. Clark composed the firm of Abraham Bininger & Co., who, for many years, carried on business in this city as merchants and traders. On the petition of William J. Hardy and others, creditors of the firm, they were, on the 22d of December, 1869, decreed bankrupt, and Clark has brought into this court for review the proceedings had in the district court upon that petition, and the decree pronounced thereon.

The petition, as originally filed, alleged, as acts of bankruptcy, that Bininger and Clark had fraudulently stopped, and had not resumed, payment of their commercial paper within a period of fourteen days; and that they, on the 19th of November, 1869, did, in substance, effect a transfer of all their partnership property to one Daniel H. Hanrahan, under color of the appointment of said Hanrahan to be a receiver of the property of the firm, procured by Clark in a proceeding instituted in the superior court of the city of New York against Bininger, and suffered by the said Bininger, with intent to hinder and delay the creditors of the firm. Clark alone appeared and answered this petition. By his answer he denied that he or his said firm had "committed an act of bankruptcy set forth in the said petition or otherwise," and demanded a trial by jury. He alleged, in his answer, that neither he nor his said firm were insolvent, but were, on the contrary, fully able to pay all their just debts and liabilities and have a large surplus. He admitted that, on the 19th of November, 1869, he commenced an action in the aforesaid court, against his co-partner, Bininger, praying for a dissolution and an accounting, and for the appointment of a receiver; and that such court did appoint the receiver, and he, on the same 19th of November, took possession of the property of the firm in this city, and was in possession when the petition of the creditors was filed. He further alleged, that such petition was filed by collusion between his co-partner Bininger and their creditors.

On the trial, and upon the examination of Clark on his own behalf, the petitioning creditors obtained leave to add further allegations to their petition, by way of amendment. To the granting of such leave Clark objected and excepted. By the amendment the petitioners further charged, that the debtors, on the 19th of November, 1869, being bankrupt and insolvent, and in contemplation of bankruptcy or insolvency, made a grant, sale, conveyance and transfer of their property, estate, effects, rights and credits to the beforementioned Hanrahan, with intent thereby to defeat and delay the operation of the bankrupt act, and procured and suffered their property to be taken on legal process, to wit, under and by virtue of the before-mentioned order appointing Hanrahan receiver, which was procured by the said Clark, and the said receiver was suffered to take possession, &c., with the intent, by such disposition of their property, to defeat and delay the operation of the said act of congress, and to delay, defraud, and hinder the creditors of the said debtors.

The allegation thus added to the petition, Clark answered by a denial. Bininger thereupon appeared in form by his solicitor, but made no answer to the petition. The trial then proceeded, and, at the close of the testimony, the judge charged the jury, in effect, that the petitioning creditors were entitled to a verdict finding that the debtors, being insolvent, did, on the 19th of November, 1869,

suffer their property to be taken on legal process, with the intent, by such disposition of that property, to defeat the operation of the said act of congress.

(1.) In my judgment, there was no error in permitting an amendment of the petition. It belongs to courts of justice, as the general rule, to permit amendments of proceedings before them, where they have obtained jurisdiction of the person and of the subject-matter; and it would be strange if the district court, in the administration of the bankrupt law, should be held incompetent to allow such amendments. The exercise of the power may often be indispensable to the complete attainment of justice. The general orders in bankruptcy made by the supreme court contemplate the exercise of this power, and are, at least, evidence that the supreme court deemed that such amendments might lawfully be allowed. See General Order 14. Here, Clark answered the amended petition, and the issue thereby created was tried and determined.

(2.) On the question, what constitutes insolvency in a trader, I concur in the views expressed by the district judge on the trial; and they have singular aptness to the present case. The alleged bankrupts owed a very large sum of money. They had been struggling for months, in a condition of great embarrassment, to raise money for the payment of their obligations as they matured. They used means ordinary and extraordinary, until even such means failed to procure them funds, submitting to sales of their own paper at an enormous discount, for that purpose. It is clear that, if they had been able to raise money by continuing to enlarge their liabilities in the future at such a rate, in order to meet their payments, the loss would have absorbed their entire estate. Their real estate in this city was incumbered. They had real estate in Virginia, which they had been long endeavoring in vain to dispose of and convert into some available form; and, at length, they stopped payment, for the want of funds wherewith to pay. This, in my judgment, constituted insolvency, within the meaning of that term, as used in the bankrupt law.

On a question of this kind, in Thompson v. Thompson, 4 Cush. 127, 134, Chief Justice Shaw says: "By the term insolvency, as used in these statutes, we do not understand an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." This is the only construction which I think is adapted to give effect to the act of congress, for the beneficial purposes for which it was designed. Without this, a trader's property may be wasted, preferences among creditors given, and other transfers of his property effected, wholly inconsistent with the intent of the act. To hold that the probability that, if the estate should be judiciously managed, it would, after the lapse of some indefinite time, at prices corresponding with its then present estimated value, produce enough to pay the creditors, if they also would wait and not force sales by judgments and executions, is to constitute proof of solvency, within the meaning of the law, would be neither sensible nor just. The contrary is held in Lee v. Kilburn, 3 Gray, 594, 600; in Shone v. Lucas, 3 Dowl. & R. 218; and in Bayly v. Schofield, 1 Maule & S. 338, 350. The late learned chancellor of this state, I recollect, used to express and apply the rule above stated by Chief Justice Shaw, and the district judge has, in his charge, cited numerous other cases from this and other states, to the same effect.

I have no doubt that the charge of the court below was correct upon that point. By this, however, I do not mean to say, that in every instance of temporary want of money to pay debts coming to maturity, insolvency is to be inferred. This would be tantamount to saying that, whenever a trader suffers a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent. This would be an extreme view. Here, the debtors were shown to be permanently in that condition, and they could not be delivered therefrom, if at all, except by extraordinary means, out of the course of business; and even extraordinary means had been resorted to and had failed.

(3.) The remaining question is, whether, the firm being insolvent, it was an act of bankruptcy to apply to the state court, procure the appointment of a receiver and an order for the delivery of the property of the firm to him, and thereby prevent the operation of the bankrupt law upon the property and the administration thereof.

I concur with Judge Blatchford, that the term "legal process," as used in the bankrupt law, is not to be confined to any particular form of writ, execution or attachment. An order of sale to be executed by a master in chancery is, in a just and proper sense, legal process, though, in a technical sense, writs, executions, attachments and the like, running in the name of the people, and addressed to a sheriff or like officer, are usually meant by that term. The writ, mandate, or order of a court, taking hold of the property, and withdrawing it from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due to them, are each and either of them, within the intent and true meaning of the term, legal process, as here employed.

Was this, then, done, with intent to defeat or delay the operation of the bankrupt act? It is entirely clear that its effect was to do both.

In the discussions of this subject, had before me, it has been, in substance, insisted, that a proceeding in the state court for winding up the business of a co-partnership, settling the accounts between the partners, and paying the co-partnership debts, through a receiver, was the appropriation of the property just as an administration under the bankrupt act would appropriate it; that, therefore, such a proceeding cannot be said to defeat the operation of the bankrupt act; and that, on the contrary, it effectuates the very purpose and object of that act, by paying the creditors without preference. In the first place, it does absolutely defeat the operation of the bankrupt act, by withdrawing the property from any administration under it. Whether some other administration, either through a receiver or a voluntary assignee, is wiser and better or not, whether the end will be the same, if those modes are carried into honest and faithful execution or not, the operation of the bankrupt act is equally defeated. For, be it observed, the statute does not say, with intent to defeat or prevent the result which the bankrupt law is intended ultimately to accomplish, namely, the appropriation of the property to the payment of the debts, but it does say, with intent to defeat or delay the operation of the act. Withdrawing the property from the reach of that law and the means which it provides to secure the intended result, does effectually, in respect of that property, defeat the operation of the act.

The design and purpose of the bankrupt law is, that the property of insolvents shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against devices to establish false claims, fictitious debts and illegal or inequitable preferences, which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors or for the debtors and some of the creditors to say, we can devise a better or safer or more economical mode of reaching the same final result. If it were true, it would be only saying, we will resort to an expedient to defeat the bankrupt law, and our reason therefore is, that we think our plan is wiser and better than that which congress has seen fit to prescribe.

But the administration of the property under a receiver in such a suit does not necessarily accomplish the same result. It is not necessary to enlarge upon this to anticipate all possible differences, but reference may be made to various provisions of the bankrupt law, such as, requiring the surrender of securities as a condition of participation in the bankrupt's estate, (section 20;) excluding claims deemed fraudulent under the act, (sections 22, 39;) denying to creditors who have received or taken securities, with reason to believe in the insolvency of the debtor, and for the purpose of obtaining a preference, any share of the estate, (section 23;) and excluding those who may have received security or property as a consideration for not opposing a discharge, (section 35.) These subjects would find no place in the administration of the estate under the state laws, through a receiver. There are, also, summary means of investigation and enquiry peculiar to the bankrupt law and not known to the other proceeding. So, too, the subject of making dividends from time to time is committed to the determination of creditors, (section 27;) several classes of debts are declared entitled to a preference and to payment in full in priority to others, (section 28;) and special modes of determining disputed claims are provided, (section 6.) There are, doubtless, other differences between the administrations under the bankrupt law and by a receivership under the state laws, but the above are sufficient to show that the two are wholly inconsistent and that the latter defeats the former.

To this it seems hardly necessary to add, that the taking of the property by a receiver for administration delays the operation of the act; for, it cannot reach the property at all as to the co-partnership debts, and, as to individual creditors, if it should turn out that there is any thing for them, they must wait the termination of the entire proceedings under the receivership before the assignee in bankruptcy appointed for them, can reach it. A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction, through orders, appeals, rehearings, &c., is substituted for the summary proceeding which the act of congress provides.

It is claimed, on behalf of Clark, that, although all this may be true, yet this necessary result of his action in the matter was not the motive which influenced him; that it was not for the purpose of accomplishing this defeat of the operation of the bankrupt law that he proceeded to the appointment of a receiver; that other considerations were the moving cause; and that, therefore, it cannot be said that he intended the results pointed out.

It seems unnecessary to say anything in addition to the reasoning of the district judge upon this point, and that of Judge Hall, in the northern district, in the case of In re Smith, [Case No. 12,974,] and to what is said in Denny v. Dana, 2 Cush. 160, 172, and Beals v. Clark, 13 Gray, 18, 21. It is no novel doctrine. The debtor must be taken to know the law, and to know the precise legal effect of his act. He did certainly intend the act and all the legal consequences of the act.

It is easy to confound motive with intent, and that has been done, I think, in the discussion of this case. It was done by the debt-

or, Clark, in his testimony. No doubt he testified truthfully, when he said, in substance, that he did not procure the appointment of a receiver with the intent to defeat the operation of the bankrupt law. I have no doubt he meant by this, that defeating or delaying the operation of the bankrupt act was not the motive which induced him to procure such appointment. He did intend to do the very thing which hinders and defeats that act, and, in judgment of law, he knew when he did it that it would have that effect. Knowing the effect, he must have intended to produce it, when he voluntarily chose to do the act. Whatever his motive was, he acted voluntarily in choosing, and, therefore, in intending all the legal results which would flow from his action in the matter.

There is an alternative view of this subject which would induce me to affirm the decree in this case, if I deemed it doubtful whether a state of insolvency within the meaning of the law existed, and which is so conclusive that a reversal and an order for a new trial would be useless and, therefore, improper. It is alluded to in the charge of Judge Blatchford. If the firm was not insolvent, they had the means of paying their debts. It is now insisted, on that precise ground, that they were not insolvent. If, then, they had such means, it was their duty to use them for the purpose of paying their debts; and, being solvent merchants and traders, they committed an act of bankruptcy by stopping payment, and not resuming payment within fourteen days. Of such an act fraud will certainly be the prima facie import; and the construction given in many cases to the language of the 39th section, makes it an act of bankruptcy to suspend and not resume payment within fourteen days, whether the same be fraudulent or not. Without affirming the construction, I incline very decidedly to hold, that congress intended that, for a solvent trader to suspend payment and not resume for fourteen days, should be deemed fraudulent as against creditors. Doubtless, cases may arise in which solvent traders may be compelled, while acting in the utmost good faith, to suspend payment; and, in consideration thereof, fourteen days are allowed within which they may resume and thereby repel any inference of fraud. But, within that period, if solvent, in the just sense of that term, applied to this subject, they must resume or their continued suspension is, per se, fraudulent.

I have only to add, that the motive of the petitioners in prosecuting the petition, or the co-operation of Bininger, or his motive therefor, can have no possible effect in determining the quality of the acts alleged to be acts of bankruptcy, or the legal consequence of such acts. The rejection of evidence tending to show collusion between Bininger and the petitioning creditors was not erroneous. However fully established, the decree must have followed, as the right of the creditors. If the design was to show a purpose to administer the bankrupt's estate so as to defraud Clark, that design appertains to the future. The means are abundant to protect Clark against any such fraud, and the court and the law are competent in adequacy and power to see that, in the execution of the law, full justice and protection are accorded to all who are interested.

The decree must be affirmed.

Case No. 1,421.

In re BININGER et al.

[9 N. B. R. (1874,) 568.][1]

District Court, S. D. New York.

BANKRUPTCY—POWERS OF REGISTER — ASSIGNEE'S BOND—REVOKING NOTICE.

1. The power of the register to require the assignee to give the bond required by the 13th section of the act upon the written request of creditors who have proven their claim, or to proceed to take testimony for the purpose of ascertaining the amount in which such bond ought to be given. Doubted.

[2. Act March 2, 1867, § 13, (14 Stat. 522,) providing that the judge, upon request, in writing, of any creditor who has proved his claim, shall require the assignee to give bond for the faithful performance of his duty, requires a ministerial act, which the register may perform.]

In bankruptcy.

I, the undersigned register in charge of the above entitled matter, do hereby certify that a petition has been filed with me, on the part of John S. Beecher, Esq., assignee, setting forth that on the 24th day of November, 1871, he was served with a notice, which notice was to the effect that several creditors of the bankrupt who had proved their claims had filed with the register in charge a request in writing that the said assignee, John S. Beecher, be required to give a good and sufficient bond for the faithful performance and discharge of his duty pursuant to the requirements of the 13th section of the act, and that testimony would be taken before said register at his office on the 28th day of November instant, for the purpose of fixing the amount of such bond. The said petition further sets forth that the said assignee has never been served with any copy of the request in said notice referred to, nor with any order of the court requiring him to give a bond, nor with any order of the court authorizing the register to fix the amount of any such bond, nor with any order of the court referring it to said register to take testimony concerning such bond, or the amount thereof, and that as he is informed and believes no such order has been made. And thereupon the said petitioner in and by said petition applies to me, the said register, for "an order revoking, recalling, and countermanding such notice," and the said petition

[1] [Reprinted by permission.]

further asks that in case such application be refused by said register, then he, the said petitioner raises the point that said notice and the taking of testimony under the same are unauthorized by law, and that the register is not authorized by law to issue such notice, nor to proceed in pursuance thereof without a special order of the court. The said petition is accompanied by an order of this court founded thereon, staying all proceedings under said notice and application referred to, until the register shall have certified to the court the point raised by the said petition. Having declined to make an order revoking, recalling or countermanding said notice, I proceed as required in said petition and order to certify to the judge for decision the point whether I am as a matter of law bound to make the order so applied for. And I hereby certify that on the 23d day of November instant, a request, signed by Townsend, Montant & Co., creditors of said estate, who have proved their claims to the amount of $6,493.42; C. Dord & Co., creditors of said estate, who have proved their claim to the amount of $3,341.80; the Ocean National Bank, creditor of said estate, who has proved its claim to the amount of $11,677.02; the Continental National Bank, a creditor of said estate, who has proved its claim to the amount of $12,418.86; James S. Craig, a creditor of the said estate, who has proved his claim to the amount of $13,443.50; and Mansfield Compton, a creditor of the estate of the said A. B. Clark, who has proved his claim to the amount of $1,811.50, asking that the said assignee be required to give a good and sufficient bond as required by the 13th section of the bankrupt act. That thereupon I directed a notice to be given to said assignee and to the said creditors, that for the purpose of fixing the amount of said bond I would take testimony at my office on the 28th day of November instant, at 1 o'clock on that day.

F. N. Bangs, for assignee.

By J. T. WILLIAMS, Register. The language of the 13th section of the act is, "The judge * * * upon request in writing of any creditor who has proved his claim, shall require the assignee to give a good and sufficient bond to the United States with a condition for the faithful performance and discharge of his duties." These imperative words require nothing but a ministerial act. The report of the congressional committee on provisions of the laws, dated February 23, 1871, which was accepted by congress as a legislative construction of the bankruptcy act, has these words: "The theory of the existing law is that every matter of law or fact upon which an issue is framed shall be adjudicated by the district judge as a court of bankruptcy, and that every other matter of administration under the law and the general orders may be disposed of by the register." It is a principle long ago settled, and universally acted upon that whatsoever power is by statute conferred upon an officer, such officer is bound in duty to exercise that power. General order 5 devolves upon the register, "the administrative duties arising under the several cases referred to them." The order of reference under which this case was committed to my charge required me "to take such proceedings therein as are required by the act." I therefore regard it my duty to do in this case, as well as all others, every act which by the bankruptcy act and general orders I may perform. If requiring a bond of an assignee under the circumstances above referred to be not one of the duties enjoined upon a register, I know not by what criterion we shall ascertain what acts he may perform. It is not perceived why the ascertaining by testimony what sum a bond shall be in, before requiring the assignee to execute it is not a duty incident to the requiring of such a bond.

I am aware that the court, Ballard J., in the Case of Dean, [Case No. 3,699,] upon an objection to the fee charged by a register for taking such a bond, says: "I am of opinion that the judge only—that is, the district judge—can require an assignee to execute a bond." But it will be observed that he holds this bond so taken by the register to be valid, and allows the fee charged therefor. It is clear therefore that the remark was obiter, or rather that the decision of the court was contrary to the opinion so expressed. But such dictum is in teeth of the legislative construction of the act above referred to. The words "judge," "court," and "register," are used indiscriminately in the act—the criterion of construction being, "Whenever the judicial power is required to be exercised, it must be by the judge, and when the act is administrative or ministerial, it may be by the judge, or by the register." See Congressional Reports above referred to. Such has been repeatedly the construction the court has given to these words. Take, by way of example, the 23d section of the act, which refers to the first meeting of creditors before the register at his office, where the judge is never present. That section provides that when a claim is presented for proof before the election of an assignee, and the judge entertains doubt of its validity, or of the right of the creditor to prove it, and is of opinion that such validity ought to be investigated by the assignee, he may postpone the proof until the assignee is chosen. Here the word "judge" has uniformly been construed to mean or include register, and could by no possibility have any other construction. See In re Orne, [Case No. 10,581;] In re Herman, [Id. 6,426;] In re Noble, [Id. 10,282;] In re Jones, [Id. 7,447;] In re Stevens, [Id. 13,391;] In re Chamberlain, [Id. 2,574.] But the question presented here is whether the register is bound as a matter of law to grant an

"order revoking, recalling and countermanding the notice" above referred to. It is clear that he is not bound as a matter of law so to do, if the granting or refusing to make such an order is a matter concerning which he may exercise any discretion whatever.

I am requested to make an order revoking, recalling and countermanding a notice, on the ground that I had no statutory authority to entertain such proceedings. But if I had no authority to entertain such proceedings, I am at a loss where to look for authority to make an order revoking such a notice. A notice may be given without authority, statutory or otherwise, by any one who sees fit to give it; but to make an order one must have authority. It was perhaps competent to take such testimony without notice to the assignee. But I know of no law that forbids the giving of such notice. Yet if the taking of such testimony would be an act of supererogation, it would be difficult to see how the assignee could be injured by it, and if not injured by it, how can he be heard to complain of it? Upon the theory upon which the counsel for the assignee asks that the notice be revoked, the testimony when taken would be immaterial and worthless, and consequently in no way injurious to him. He has no right to presume what may be the future action of the register, except to presume that it will be legal. But the only question now presented is, is the register bound as a matter of law to make the order asked for? And I further certify that at the hour in said notice specified counsel for divers creditors appeared at my chambers, to wit: Mr. Marsh, Mr. Blanchard, Mr. Compton, Mr. Corbett and Mr. Cronin, and upon being informed by me of the order of the court staying the proceedings, under said notice, they requested me to state in my certificate to the court, required by said order, that in case your honor should entertain doubts of the correctness of the practice pursued by the register, they desired to be heard before your honor.

All of which is respectfully submitted.

BININGER et al., In re. See Case No. 6,058.

BININGER, (BEECHER v.) See Case No. 1,222.

BININGER, (CLARK v.) See Case No. 2,-815.

BININGER, (HARDY v.) See Case No. 6,-057.

BINNEY, (CHESAPEAKE & O. CANAL CO. v.) See Case No. 2,645.

BINNEY, (HECKSCHER v.) See Case No. 6,316.

BINNEY, (UNION PAPER-BAG MACH. CO. v.) See Case No. 14,387.

BINNEY, (UNITED STATES BANK v.) See Case No. 16,791.

Case No. 1,422.

In re BINNS.

[4 Ben. 152.] [1]

District Court, S. D. New York. May, 1870.

BANKRUPTCY—FRAUDULENT TRANSFER — PETITION TO MODIFY INJUNCTION—PLEADING.

Certain creditors of a bankrupt obtained judgment against him by default. On that judgment execution was issued and a levy made. A petition in bankruptcy was then filed and an injunction granted, staying the sheriff's proceedings. The creditors applied by petition for a vacation or modification of the injunction, so as to allow the sheriff to sell enough of the property to satisfy the execution: *Held*, that the transfer worked by the legal proceedings was, under section 35 of the bankruptcy act, [March 2, 1867; 14 Stat. 534,] prima facie evidence of fraud; that the creditors must rebut this; but that their petition was bad, as it did not negative the circumstances which section 35 declares make the transfer void.

In bankruptcy. This was a petition by James T. Burns and Daniel H. Watson, judgment creditors of [Leonidas Binns] the bankrupt, praying for the vacation or modification of an injunction restraining the sheriff of the city and county of New York, and all other persons, from selling, incumbering, assigning, disposing of, or in any way whatever interfering with, the property of the bankrupt. [Denied.]

The petition set forth, that on December 8th, 1869, an action was commenced, in the marine court of the city of New York, by the petitioners against the bankrupt, for goods sold and delivered, and that, on December 22d, 1869, judgment was entered therein by default for $205.73, and an execution issued and a levy made on certain millinery goods belonging to the bankrupt; that, on December 28th, 1869, a petition in bankruptcy was filed against the bankrupt, and the injunction now sought to be modified was issued and served upon the sheriff; that said action was instituted adversely to said defendant, and was brought on a debt justly due, and said judgment was obtained without fraud or collusion; and that the property levied upon was perishable, and unless sold immediately would greatly deteriorate in value. The prayer of the petition was, that the injunction might be vacated or modified, so as to permit said sheriff to sell enough of the property to satisfy the execution, or for such other or further relief as might be proper. The matter was referred to the register, to take proof of the truth of the matters alleged in the petition, and, on the coming in of the register's report, was brought to a hearing.

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

B. F. Watson, for petitioners.
William B. Nassau, for assignee.

BLATCHFORD, District Judge. The transfer worked by the legal proceedings was, under section 35, prima facie evidence of fraud, not being made in the usual and ordinary course of business of the debtor. The creditor must rebut this. But his present petition is bad. It should negative the circumstances which section 35 declares make the transfer void. The prayer of the petition is denied.

BINNS, (UTTERBACH v.) See Case No. 16,809.

Case No. 1,423.

BINNS et al. v. WILLIAMS.

[4 McLean, 580.] [1]

Circuit Court, D. Michigan. June Term, 1849.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—ATTACHMENT.

1. An attachment issued under a state law which has not been adopted by congress, or by a rule of court, can not be sustained.

2. The acts of congress adopting the state practice, do not adopt future regulations.

[See Ross v. Duval, 13 Pet. (38 U. S.) 45.]

[At law. Action by Binns and Halsted against E. S. Williams. Defendant moves to quash an attachment. Motion granted.]

Davidson & Holbrook, for plaintiffs.
Mr. Douglass, for defendant.

OPINION OF THE COURT. This is a suit commenced by attachment, issued January 24th, 1848, and founded upon an affidavit that the defendant had assigned, disposed of, or concealed his property, with intent to defraud his creditors. The defendant appeared and pleaded to the declaration; and a motion is now made to quash the attachment, on the ground that the court has no jurisdiction over this form of remedy. There was no law in force in Michigan, providing for the remedy by attachment in such a case as that made by the affidavit, until the Revised Statutes of 1846, [p. 513,] which did not take effect until the 1st of March, 1847. It is clear that the attachment law of 1846 has not been adopted by the act of congress of May 19th, 1828, [4 Stat. 278,] and August 1st, 1842, [5 Stat. 499, c. 109,] as those acts were not prospective. Nor has there been any rule for this court adopting it. The acts of the state regulating the process of this court are only in force by the adoption of congress, or by rules of the court. It is probable that this proceeding was commenced under the amendatory attachment act [No. 115, §§ 44, 53] of 1839, [pages 230, 233.] That provides that an attachment may issue on filing an affidavit, "that the defendant is about to assign or dispose of any of his property," and not that he has already assigned, or disposed of any of his property, or that he has concealed or is about to conceal any of his property, as is stated in the affidavit of this case. But if this act would be considered as having been adopted by the act of 1842, its provisions could not be carried into effect by this court. That law is, somewhat, in the nature of an insolvent law, providing that all the creditors of the defendant may become parties to the attachment and that the proceeds of the attached property may be divided ratably between them. Now it would seem, as between citizens of this state, and perhaps others, that the jurisdiction of this court could not be exercised. On the part of the plaintiff it is contended that it is too late to take this objection after a plea to the merits. There would be force in this objection if the jurisdiction was apparent upon the face of the proceedings. But here is a proceeding instituted under a late law of the state, which seems not to have been so adopted as to authorize, in this court, the procedure instituted. The attachment is dismissed.

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

Case No. 1,424.

BINNS v. WOODRUFF.

[4 Wash. C. C. 48.] [1]

Circuit Court, D. Pennsylvania. April Term, 1821.

COPYRIGHT—WHO ENTITLED—PROPRIETOR—ENJOINING INFRINGEMENT.

1. Bill to enjoin the defendant from printing an engraving of an historical print, which the plaintiff claimed to have invented and designed. From the evidence and the plaintiff's bill, it appeared that neither the design nor general arrangement of the print was his invention; but that he had employed and paid the artists who had composed and executed the same. He is not entitled to a copyright.

[Cited in Pierpont v. Fowle, Case No. 11,152; Perry v. Starrett, Id. 11,012.]

2. The person described by the act as the proprietor of the copyright, is one who shall not only invent and design, but who shall also engrave, etch or work the print, to which the right is claimed; or who from his own works and inventions, shall cause the print to be designed or engraved, etched or worked.

3. In the first case the inventor or designer is identified with the engraver, &c. or in other words, the entire work or subject of the copyright is executed by the same person. In the latter the invention is designed or embodied by the person in whom the right is vested; and the form and completion of the work is executed by another. But in neither case can a copyright be claimed by one for a mere invention existing in a form not visible to others. He must not only have invented, but he must have designed or represented the subject in some visible form.

[4. A court of equity will settle a disputed title to a copyright in a suit to enjoin the infringement of such copyright.]

[Cited in Pierpont v. Fowle, Case No. 11,152.]

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

In equity. Bill to enjoin the defendant from printing, engraving, etching, copying, publishing or selling a certain historical print of the Declaration of Independence, which the plaintiff claims to have invented and designed, at April term, 1819. [Dismissed.]

This case was before the court at April term, 1819, and was then dismissed; it having been decided, that, although in patent causes the courts of the United States have jurisdiction when both parties reside in the same state, the same did not exist in cases of copyright. On the 15th of February, 1819, [3 Stat. 481, c. 19,] congress passed a declaratory law, giving original cognizance to the courts of the United States, as well in equity as at law, of all actions, &c., arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, giving authority to grant injunctions according to the course and principles of courts of equity, &c.

C. J. Ingersoll, for the plaintiff, contended that the objection to the jurisdiction of the court being removed by the act of congress, the facts proved in this case establish the plaintiff's exclusive right to the historical print mentioned in the bill, and entitle him to the injunction which is prayed for. See act of 29th April, 1802, c. 296, [3 Bior. & D. Laws, 493; 2 Stat. 171.]

Binney, for the defendant, insisted that the facts proved show that the plaintiff neither invented and designed, engraved, etched or worked, or from his own works and inventions, caused to be designed or engraved, the historical print in question. That according to the true construction of the act of congress, which is, with some slight variations, copied from the statute 8 Geo. II. c. 13, the person claiming the right must design, or in other words delineate, the subject of his invention. It is not sufficient for him to employ artists to delineate, to paint, or to engrave the conceptions of his mind. Blackwell v. Harper, 2 Atk. 92; Jefferys v. Baldwin, 1 Amb. 164. In this case the plaintiff invented and designed nothing. The whole were the works of other persons. The plaintiff has no right, upon another ground, which is, that he has not filed a copy of the engraving in the office of the secretary of state, as he is required to do by the act.

In answer to the second objection it was answered by Ingersoll, that the filing a copy in the office of the secretary of state is merely directory. 2 Atk. 94, 95; Beckford v. Hood, 7 Term. R. 620; 1 Camp. 94; 1 Gall. 433, [Whittemore v. Cutter, Case No. 17,600;] 3 Day, 145. Upon the first point, he cited 9 Johns. 537, which mentions the case of Morse v. Reed, [Case No. 9,860,] decided by Judge Ellsworth.

WASHINGTON, Circuit Justice. This is a bill filed on the equity side of the court, praying an injunction to restrain the defendant from printing, engraving, etching, copying, publishing, or selling a certain historical print of the Declaration of Independence, which the plaintiff claims to have invented and designed. The act of the 31st of May, 1790, c. 15, [1 Stat. 124, § 1,] secures to the authors of maps, charts and books, an exclusive right to the same, for a certain number of years. The supplementary act of the 29th of April, 1802, c. 36, § 2, [2 Stat. 171,] grants a similar right in respect to historical prints, engraved, etched or worked.

The bill in this case states, that the plaintiff, in the month of March, 1816, invented and designed, or caused to be begun to be designed, engraved, and worked, an historical print, and splendid edition of the Declaration of Independence, and in the same year publicly announced his intention of publishing the same, by advertisement in six daily newspapers in Philadelphia, and in many other papers throughout the United States, setting forth "that the design, which is from the pencil of Mr. Bridport, will be executed in imitation of bas relief, and will encircle the declaration as a cordon of honour surmounted by the arms of the United States; immediately under which will be a large medallion of General Washington, supported by a cornucopia, and embellished with flags, spears, and other military trophies. On one side of this medallion, will be a similar portrait of John Hancock, president of congress, 4th of July, 1776, and on the other, a portrait of Thomas Jefferson, author of the declaration. The arms of the thirteen united states, in medallions united by wreaths of olive leaves, will form the remainder of the cordon, which will be further enriched by some of the characteristic productions of the United States, such as the tobacco and indigo plants, the cotton shrub, rice, &c. The fac similes will be engraved by Mr. Valance, who, by permission of the secretary of state, will have the original signatures constantly before him. The portraits will be engraved from original paintings, and the most esteemed likenesses. The arms of the United States and of the several states, will be faithfully executed from official descriptions, and in the manner directed by the most approved authors in the science of heraldry." The bill further states, that the outline of the design was done by Mr. Bird in 1816, when the plate and design were put into the hands of Mr. Murray, the engraver. The documents, containing the official copies and descriptions of the arms of the several

states, were obtained from the respective governors, and were then placed in the hands of Mr. Sully to be painted. That the sums paid to the several artists so employed, and for other expenses attending the execution of this work amounted to about $4,000. The bill, after alleging that the plaintiff has deposited a printed copy of the said print in the clerk's office of the district court of the eastern district of Pennsylvania, and published the requisite legal notice thereof in newspapers, and that as soon as the said work is published, he will cause to be impressed on the face of the said print, the words which by law are directed to be impressed, so as to complete the plaintiff's legal title therein; proceeds to charge the defendant with having engraved, published, and exposed for sale, an historical print of the Declaration of Independence, of a plan, design and engraving, exactly similar to, and copied from that of the plaintiff, by varying from, adding to, and diminishing the main design.

The answer denies that the plaintiff invented, designed, engraved, &c. or that from his own works and inventions, he caused to be designed, &c. the historical print mentioned in the bill. That on the contrary, the said print was invented and designed, engraved, &c. by other persons, and not by the plaintiff. It further denies that the plate which the defendant has prepared for publication, is of the plan, design, or engraving, similar to that of the plaintiff, except so far forth as that the defendant has engraved the Declaration of Independence with an oval composed of the arms of the different states, but surmounted with the heads of the first three presidents of the United States, and not that of Mr. Hancock. That the defendant has not procured fac similes of the several signatures to that instrument, nor has he connected the arms of the states by wreaths of olive leaves, or followed, used, or imitated in any manner the devices, engravings, or etchings of the print mentioned in the bill.

The deposition of Murray states, that early in the year 1816, the plaintiff applied to him to engrave the state arms, and other ornamental parts of a plate which he intended to publish of the Declaration of Independence, which the witness undertook to do. Soon after the plaintiff handed to him a design by Mr. Bridport, which embraced the general arrangement of his intended publication. The drawings of the state arms were also delivered to him at different times, executed by Mr. Sully, and so reduced as to suit the spaces allotted to them in Bridport's design. The witness supposes that the drawing of General Washington's head was taken from Stuart's painting. The arms were engraved from drawings by Sully. Bridport designed the drawings for the ornaments connecting the arms, as well as the cotton, rice and tobacco plants at the bottom, and the devices at the top. The witness expresses his opinion that the whole arrangement, and not the particular parts of the print, constitutes the design, and that in this respect, the defendant's print is a copy of the plaintiff's. That the particular parts of the defendant's print are not correctly copied from the other. The plaintiff paid the artists, who were not concerned with him in interest, and he consulted them about the arrangement, previous to its being done.

The first question which arises upon the facts in this cause is, whether the plaintiff is such an inventor of the print of which he claims to be the proprietor, as the act of congress intended and described? The act of the 29th of April, 1802, enacts that after a certain day, "any person being a citizen of the United States, or a resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions shall cause to be designed and engraved, etched, or worked any historical or other print, shall have the sole right and liberty of printing, re-printing, publishing and vending such print, for the term of fourteen years from the recording the title thereof in the clerk's office, as prescribed by the act of the 31st of May, 1790, in relation to maps, &c., provided he shall perform all the requisites in relation to such print, as are directed in relation to maps, in the third and fourth sections of the said act."

The person then who is intended and described as the proprietor of a copyright, is one who shall not only invent and design, but who shall also engrave, etch, or work the print to which the right is claimed; or who, from his own works and inventions, shall cause the print to be designed and engraved, etched or worked. In the first case, the inventor and designer is identified with the engraver, &c.; or in other words, the entire work, or subject of the copyright is executed by the same person. In the latter, the invention is designed or embodied by the person in whom the right is vested, and the form and completion of the work are executed by another. But in neither case, as we apprehend, can a person claim a copyright for a mere invention, the work of his imagination locked up in his own mind, or existing in a form not visible to others. Neither is he so entitled, unless he has not only invented, but also designed or represented the subject in some visible form. Thus, a man may imagine the order, and all the circumstances of a naval action, and by a painting or engraving executed by himself, may represent the subject of his invention to the view of others. Or he may be able to represent the subject by a drawing, and yet not be able to make an engraving of it, being himself unacquainted with that art. In this latter case, the act provides, that he may cause it to be engraved by an artist, so as to entitle himself to a copyright to the engraving, although not his own work; but then the engraving was executed from his own

work and invention. Thus in Blackwell v. Harper, 2 Atk. 93, the plaintiff not only conceived the idea of making a representation of the medicinal plants, but she also engraved them herself, and the combination of the two afforded the evidence of genius and art which the law intended to encourage. But in the case of Jefferys v. Baldwin, 1 Amb. 164, decided also by Lord Hardwicke, the plaintiff, though he conceived the idea of representing the busses of the society of the British herring fishery, was not considered an object of this encouragement, because the drawings were not executed by himself, but by a person employed by him for that purpose. He neither invented and designed, nor did he cause the representation to be designed or engraved from his own work and inventions. He conceived the idea, but he did nothing himself which indicated genius and art.

If we have correctly construed the act of congress, the next inquiry is, how does it apply to this case? The bill states that the "design" (which phrase, when used as a term of art, clearly means the giving of a visible form to the conceptions of the mind, or, in other words, to the invention) was from the pencil of Bridport; and it then proceeds to describe more particularly all the parts of that design. This allegation is confirmed by Murray, who states, that the design which he was employed to engrave, was the work of Bridport, and that it embraced the general arrangement of the plaintiff's publication; and the same witness, speaking as an artist, says, that the arrangement, which was drawn by Bridport, constituted the design. The design or arrangement is then described in the bill as consisting of the Declaration of Independence, encircled as by a cordon of honour, surmounted by the arms of the United States underneath medallions of three distinguished personages, one of them supported by a cornucopia, and embellished with flags, &c., medallions containing the arms of the several states, united by wreaths of olive leaves, and the whole enriched by certain characteristic productions of the United States. Whether the fac similes formed a part of Bridport's design, does not distinctly appear in any part of the proceedings or evidence. But it is nowhere asserted to be the invention of the plaintiff, and as constituting a part of the general design; and the bill alleges that they were engraved by Valance from the original signatures in the office of the secretary of state. The bill further alleges that the portraits were to be engraved from original paintings; that the arms of the United States, and of the several states, were painted by Mr. Sully, from original descriptions obtained from the governors of states. Murray deposes that Bridport designed the drawings for the ornaments connecting the arms, as well as the characteristic productions of the United States, and the devices at the top of the print.

It is then quite obvious, that neither the design, nor general arrangement of that print, nor the parts which composed it, were the invention of the plaintiff. The former, which constitutes the combination, or arrangement of the parts, owed its conception and delineation to Mr. Bridport, as did also the ornaments, and many other of the parts. The portraits, arms of the United States, and of the several states, were, long before the year 1816, printed or drawn, and were copied by the artists employed by the plaintiff, as were also the original signatures to the declaration. It follows, therefore, that the plaintiff did not design and invent, nor did he, from his own work and inventions, cause this print to be designed and engraved. He is therefore not entitled to a copyright under the provisions of the act of congress.

The opinion upon this point renders it unnecessary to compare the defendant's print with that claimed by the plaintiff, for the purpose of deciding whether the former is such a copy of the latter as was intended by the act. Neither is it necessary to give any opinion upon another question which was much discussed at the bar—that is, whether, to the perfection of the copyright of an inventor, it is necessary that he should lodge a copy of the print in the office of the secretary of state? It may not, however, be amiss to observe that the objection does not arise in this case, since the act gives to the party six months after the publishing of the print, &c., to make the deposit; and it appears by the bill, which is not contradicted by the answer, that, at the time the bill was filed, the print in question was not even prepared for publication.

The case coming on for a hearing, I shall dismiss the bill with costs.

Case No. 1,425.

BIRCH et al. v. BUTLER.

[1 Cranch, C. C. 319.] [1]

Circuit Court, District of Columbia. June Term, 1806.

ATTACHMENT—AFFIDAVIT—PLEADING—AMENDMENT.

1. In order to obtain an attachment under Act Md. 1795, c. 56, it is not necessary that all the plaintiffs should make the affidavit, nor that it should appear that they were citizens of the United States.

[See Kurtz v. Jones, Case No. 7,954; Decatur v. Young, Id. 3,722; Hard v. Stone, Id. 6,046.]

2. The writ of attachment and the capias may be amended by inserting the Christian names of the plaintiffs, by the leave of the court, before condemnation.

Attachment under Act Md. 1795, c. 56, [in suit by Birch & Small against Butler.]

Mr. Morsell and Mr. Dorsey, 1. Objected that the oath was made by Small only. 2.

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

That the Christian names of Birch & Small are not mentioned, either in the writ of capias, or of attachment, nor in the affidavit. 3. That it must appear on the papers that the plaintiffs were citizens of the United States. The act was made for a certain class of people, for citizens of the United States only. If an insolvent law applies only to citizens of Maryland, it must be shown that they are citizens.

THE COURT stopped Mr. F. S. Key as to the 1st objection.

Mr. F. S. Key. As to 2d, the omission of the Christian name does not affect the merits. This objection would not prevail on a motion in arrest of judgment. It could only be taken advantage of by a special demurrer.

THE COURT refused to quash the attachment and suffered the plaintiff to amend the capias and attachment, by inserting the Christian names. They did not think it necessary that the plaintiffs should aver themselves to be citizens of the United States.

Case No. 1,426.

BIRCH v. GITTINGS.

[2 Cranch, C. C. 66.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

REPLEVIN—PRACTICE.

If A. replevies from B., who had replevied from A., the court will quash the 2d replevin, and, upon a motion made for a return of the property in the first replevin, will order it to remain with the person who appears to have the right of possession, according to the Maryland law of 1785, c. 80, § 14.

Birch replevied from Gittings, and Gittings from Birch.

THE COURT quashed the 2d replevin and ordered the possession to remain with Gittings, he having the right of possession when Birch replevied. See Maryland Law 1785, c. 80, § 14.

Case No. 1,427.

BIRCH v. SIMMS.

[1 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. July Term, 1809.

SLANDER—PLEADING AND PROOF.

In slander, evidence of words spoken in the second person will not support an averment of words spoken in the third person.

Slander. The declaration was "he stole." The evidence was "you stole."

THE COURT, upon the authority of Rutherford v. Moore, in Washington county, at December term, 1806, [Case No. 12,173,] and the case of Willis v. M'Kenzie, in this county, July, 1808, [Id. 17,771,] refused to suffer the evidence to go to the jury. Nonsuit.

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

BIRCH, (UNITED STATES v.) See Cases Nos. 14,595 and 14,596.

BIRCHARD v. The GEORGE PRESCOTT. See Case No. 5,339.

Case No. 1,428.

In re BIRD.

[2 Sawy. 33;[1] 4 Am. Law T. Rep. U. S. Cts. 116; 14 Int. Rev. Rec. 13.]

District Court, D. Oregon. May 24, 1871.

ARMY AND NAVY — SENTENCE OF COURT-MARTIAL —EFFECT OF, WHEN REVERSED — TRIAL OF SOLDIER—WHEN MAY TAKE PLACE — DISCHARGE OF SOLDIER—EFFECT OF.

1. Where, by the sentence of a court-martial, a soldier is discharged from the service before the expiration of his term of enlistment, and such sentence is afterward set aside as null and void, the status of such soldier is not affected in any way by such sentence, and he is deemed to have been in the service all the time between the sentence and the order setting it aside.

2. Under article of war 88, it appears that a soldier may be arrested and tried after the expiration of his term of service for a military offense committed during such term of service, so that the order for the court-martial is issued within two years from the commission of such offense.

3. In any view of the matter, a soldier may be held for trial after the term of his enlistment, by military authority, if arrested for the offense before the expiration of his term of service.

[Cited in Barrett v. Hopkins, 7 Fed. 316.]

4. The petitioner, while in fact discharged from the army, but before the expiration of his term of enlistment, having committed a homicide, might be arrested and held for trial therefor by the military authority—the discharge being afterward set aside as null and void, and the petitioner being at the time a soldier de jure.

At law. The petition for the writ [of habeas corpus] was filed May 8, 1871, and on the same day an order was made allowing the writ, as prayed for, returnable before the judge at chambers on May 11. In the petition it is alleged that petitioner [William B. Bird] is confined in Multnomah county jail, by one James H. Lappeus, chief of police of the city of Portland, for the purpose of aiding the officers of the military department of the Columbia to transport petitioner to Alaska, upon the pretence that a crime has been committed by the petitioner against the rules and regulations of the army of the United States; and that the imprisonment of petitioner is illegal in this: that petitioner is a citizen of the United States, and not amenable to said rules and regulations.

On May 11, respondent Lappeus produced the body of the petitioner, as commanded by the writ, and filed a return thereto, stating that the petitioner was placed in his custody on May 7, 1871, by one Lieutenant Dennison of the army of the United States, and the cause of his imprisonment, as he was informed.

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

Thereupon, it appearing from the return of said Lappeus that the petitioner was really in the custody of the military authority for the department of the Columbia, and that said Lappeus only held said petitioner in his custody casually, as a jailer for said authority, it was ordered that petitioner's counsel cause a copy of the petition, writ, return, and this order, to be served upon the general commanding the department of the Columbia, within twenty-four hours, to the end that such officer might take such steps to appear and contest the petition, as he may be advised to be necessary and proper, and that the proceeding be continued until May 15.

On May 15, the parties aforesaid appeared, and also the general commanding the department, by Louis V. Caziarc, A. A. A. G., who then stated in writing that petitioner was a soldier of the army of the United States, and in the lawful custody of the military authority of this department, and as such was held for violations of the rules and regulations for the government of the army; and that since May 8, respondent Lappeus only held petitioner because of the writ herein. On the same day the petitioner demurred to the returns to the writ as insufficient in law to justify the detention.

Thereupon an order was made restoring the custody of the petitioner to the authority of the general commanding the department of the Columbia, to be by him and those acting under his orders or authority, safely kept within the jurisdiction of this court, and produced before the judge thereof on May 18, and that said general then make a return herein in due form of the causes and reasons for detaining the petitioner in custody.

On May 18, respondent Caziarc filed an answer to the petition, and the petitioner replied thereto.

On May 19, the cause was argued and submitted upon the answer and replication and exhibits thereto, and taken under advisement. [Petition dismissed.]

Theodore Burmeister and Charles R. Bellinger, for petitioner.

Louis V. Caziarc, in pro. per.

DEADY, District Judge. From the pleadings and exhibits it appears:

1. That William B. Bird, the petitioner, was duly enlisted as a private in the army of the United States on June 15, 1867, to serve for the period of three years.

2. That at the post of Sitka, Alaska, by the sentence of a court-martial, convened at said post in pursuance of special orders No. 70, dated October 14, 1869, the petitioner, then being a private in battery H, second artillery, was sentenced to three months' hard labor and to be dishonorably discharged from the army; and that about January 23, petitioner was so discharged at the post aforesaid.

3. That the petitioner was tried before said court-martial upon two charges and sundry specifications thereunder, to the effect, that said petitioner, about September 25, 1869, refused to be sworn or testify as a witness before a board of officers convened at the post aforesaid, to investigate certain accusations against sundry citizens and enlisted men, and that on October 18, 1869, he wrote a disrespectful letter to his department commander, General J. C. Davis.

4. On the trial, at Sitka aforesaid, the petioner made the preliminary objection that the court-martial could not lawfully take cognizance of the charges against him, because it was convened by said Davis, who was also his accuser; and on September 24, 1870, the secretary of war, upon the report and opinion of the judge advocate-general, sustained the objection, and set aside the sentence of the court as illegal and void on that account, and also directed that the petitioner "be brought to trial on a charge of manslaughter to the prejudice of good order and military discipline," committed in the killing of Lieutenant L. C. Cowan, of the United States revenue service, as hereinafter stated; and afterwards, on November 10, 1870, the petitioner, by special order No. 150, of headquarters of the department of the Columbia, in pursuance of the aforesaid order of the secretary of war, was "reinstated in his rights, duties, and obligations as a soldier, as if no such proceedings had been taken, and as of the date of the order appointing the court," to wit: October 14, 1869.

5. That on March 8, 1870, by the verbal order of said Davis to Captain Brady, commanding post of Sitka, the petitioner was arrested and confined at said post upon the charge of killing said Cowan, which order was, on June 14, 1870, confirmed and continued by a written order from said Davis to said Brady, instructing the latter to "retain petitioner in custody until further instructions from the proper authority;" and, as appears from the report of a board of officers convened at the post aforesaid, on March 10, 1870, the petitioner, on the night of February 25, 1870, in an unlawful attempt to take the life of his former company commander, Captain Dennison, in a saloon at Sitka, shot and killed said Cowan under circumstances which "showed a perfect disregard of human life," and constituted "an aggravated case of manslaughter."

6. That by a court-martial convened at Sitka aforesaid, November 30, 1870, pursuant to special order No. 149, of headquarters of the department of the Columbia, and afterwards adjourned to Fort Vancouver, Washington Territory, the petitioner was tried and found guilty of the charge of "murder, to the prejudice of good order and military discipline," committed in the killing of Lieutenant Cowan as aforesaid, and by said court was, among other things, sentenced to be

dishonorably discharged from the service of the United States, and to be confined at hard labor for the period of fifteen years in such penitentiary as the commanding general may designate; and on February 24, 1871, said sentence was approved by the general commanding the department of the Columbia, and ordered to be executed in Alcatraz island, in the harbor of San Francisco, until otherwise ordered by the secretary of war

7. That in general court-martial order, No. 3, dated April 11, 1871, the proceedings of the court-martial last aforesaid were "set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial." Such order also stated and directed as follows: "Moreover, the facts disclosed in the evidence show that the homicide was committed in a saloon in the town of Sitka, when the prisoner was de facto a citizen, and held no such practical relations to the military service, as to connect his acts with its good order or discipline. The prisoner will be turned over for trial to the federal judiciary;" and that, in pursuance of such order, the petitioner, at the time of the allowance and service of the writ, was being conveyed to Washington Territory by Lieutenant Dennison aforesaid, to be there turned over to the United States courts for trial therein upon said charge of murder.

Two principal questions arise in this case, and were argued by counsel.

1. Was the petitioner a soldier on February 25, 1870, when he committed the homicide at Sitka? and

2. Can a soldier be detained in custody by military authority, for trial or lawful disposition after his term of service expires, on account of an act committed during such service?

Upon authority and the plainest reason both these questions must be answered in the affirmative. The sentence of the court-martial dishonorably discharging the petitioner from the service was set aside as null and void, because of the want of jurisdiction in the court. The proceedings of the court having been declared by competent authority to have been void ab initio, in contemplation of law, the status of the petitioner was not changed in any particular by reason of it. This conclusion necessarily follows from the premises. The proposition is so axiomatic that it scarcely admits of argument, and needs only to be stated for the truth of it to be perceived. The same rule obtains in relation to the proceedings of all courts, civil as well as military. A void judgment or sentence works no change in the status of the person or thing against or concerning which it is given or pronounced.

A sentence of divorce passed in an inferior court, which is afterward set aside as null and void on appeal, would not affect the status of the parties thereto. They would still be husband and wife, the same as if the sentence of the inferior court had never been pronounced, and that, too, during all the period between such sentence and its reversal.

A judgment convicting a party of a felony, when reversed for error, is considered as never having been given, and does not affect the rights or liabilities of such party, although he may have been imprisoned under it during the interval between its rendition and reversal. It may be said that in some instances this rule works hardly, but the subject admits of no other, and in the great majority of cases it is well adapted to the ends of justice. Upon a second conviction, the punishment upon the first and erroneous one can and should be taken into consideration. Besides, it must be borne in mind that the reversal is procured by the party affected by the judgment or sentence, and for his benefit. If the petitioner had not procured the reversal of the sentence discharging him from the service, his subjection to military authority growing out of his enlistment on June 15, 1867, would have then ceased; but, having procured that sentence to be set aside, upon the allegation not merely that it was erroneous, but null and void, it does not lie in his mouth to say that, nevertheless, the discharge given in pursuance and execution of it was valid, and terminated his contract of enlistment months before the expiration of his term.

True, it may be, as stated in general court-martial order No. 3, that the petitioner at the date of the homicide was a citizen de facto; but it is equally true, and more material, as now known, that he was at the same time a soldier de jure. Being a citizen de facto is nothing more than acting and living as a citizen for the time being for any reason. This might be a good cause, as suggested in said order, why proceedings for the military offense of manslaughter, "to the prejudice of good order and military discipline," committed by the act of unlawful killing, should be postponed or suspended until the petitioner had been proceeded against in the civil courts for the greater and graver offense of murder, committed by the same act.

I have no doubt but that the petitioner was a soldier at the date of the killing of Lieutenant Cowan, and as such liable to be arrested, tried and punished by military authority, for any military offense committed by the same act.

As to the second question: Article of war 88 provides that "No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial; unless," etc.

Congress has full power "to make rules for the government of the land and naval forces." U. S. Const. art. 1, § 8.

This article of war is a statute of limita-

tions, in case of proceedings, to punish persons for offenses "arising in the land * * * forces." As at present advised, I do not see what provision of the constitution, or any statute or principle of the common law, can be invoked to prevent the arrest and trial of a person by court-martial, for a military offense, committed while such person was a soldier or officer of the army of the United States, after the expiration of his term of service, so that the order for the trial is issued within the time limited by the article of war. And so, in principle, it seems to have been held in the Case of Lord George Sackville, as reported by Tytler in his treatise on Courts-Martial. In that case it appeared that, as the defendant had been dismissed from his majesty's service previously to the commencement of the prosecution against him, it was doubted, under the mutiny act, whether he was subject to the jurisdiction of the court; upon which, that question being referred to the twelve judges, they certified that, under the circumstances of the case, they saw no reason to doubt the jurisdiction of the court-martial. In Walker v. Morris, decided by Mr. Justice Wilde, of the supreme court of Massachusetts, with the concurrence of his brother judges, and reported in the April number, for 1830, of the American Jurist, [3 Am. Jur. 281,] it was held that a seaman who had committed a naval offense, and had been arrested therefor on the day preceding the expiration of his term of service, might be detained for trial and punishment after the expiration of such term. In the course of the opinion, the learned judge cites the Case of Sackville, supra, with approval, and upon the general question says: "It is true that a seaman is not bound to do service after the term of his enlistment. But within that term he is bound to observe the rules and regulations provided for the government of the navy, and is punishable for all crimes and offenses committed in violation of them during his term of service. There is no limitation of time within which he is to be prosecuted and tried for such offenses; but if there were, it would be sufficient to show that the prosecution was commenced within the time of the limitation."

It is proper to note that there was an arrest and that charges were preferred in that case during the term of service, and that the conclusion reached was, therefore, irrespective of the question, whether the seaman was liable to arrest and prosecution after his discharge from the service, for an offense committed prior thereto; but the above citation from the opinion, as also the Case of Sackville, goes to sustain the jurisdiction of the naval authorities to arrest and try the offender, as well after the discharge from service as before.

Neither is it absolutely necessary to decide that question in this case; for the fact is, the petitioner was arrested for the commission of two distinct military offenses, before the expiration of his term of enlistment, and so far as I can perceive, both are still pending and undisposed of. An arrest for the purpose of trial is a commencement of a prosecution, without reference to the time when a formal accusation may be preferred. The jurisdiction to try and punish attaches upon the arrest. It is true there has been a trial on both the accusations in this case, but the proceedings having been set aside as being null and void, at the instance of, and for the benefit of the petitioner, are to be regarded, so far as this question is concerned, as if they had never taken place. It is also true that the highest military authority has directed that the petitioner be turned over to the proper civil authority for trial, upon the charge of murder; but this direction, as I understand it, only suspends the prosecution for the military offense, which may still be carried on to a final determination, by the issuing of an order from the proper authority convening a court-martial for that purpose, within two years from the commission of the offenses respectively.

During this period, for aught that has been shown or occurs to me, the petitioner may be lawfully detained in the custody of the military authority for trial by court-martial, or delivery to the civil authorities under article of war 33, as under all the circumstances may be deemed expedient. If there is any unnecessary delay, error of conduct, or abuse of power, on the part of the subordinates charged with the conduct of the affair, the remedy is within the military department, by appeal or petition to the higher authorities, and not without it. For the good of the service, the constitution and laws have entrusted this power to the military authority, as being necessary to maintain the discipline and efficiency of the army. The delays and mistakes which appear to have occurred in the disposition of the charges against the petitioner, are common to like proceedings in all human tribunals. The petitioner voluntarily entered the army, and must submit to the necessary consequences of that act, and the relation created thereby.

In this view of the matter, it is unnecessary to consider whether the petitioner is held in custody merely for the purpose of being turned over to the civil authority, or whether it is proposed to turn him over to the proper civil authority or not. For his conduct in these particulars, the respondent is only responsible to his military superiors, according to the military law. The order to deliver the petitioner to the civil authority may be countermanded to-morrow, and it would be the duty of the respondent to act accordingly. No application has been or can be made for the delivery of the petitioner by, or on behalf of, the party injured by the commission of the crime, as specially provided in article of war 33. His voice is hushed in the silence of the grave upon the distant and unknown shore of Alaska. The delivery of the peti-

tioner to the civil authorities must ultimately depend upon the fact of an application therefor, by some public officer or body entitled to prosecute for offenses against the particular civil society injured by the act of the petitioner.

Upon deliberate reflection and consideration, I see no reason to question the authority of the respondent to detain the petitioner in custody, as a person amenable to military law upon the charge preferred at Alaska, in 1869, as well as the military offense of manslaughter, "to the prejudice of good order and discipline," committed in the killing of Lieutenant Cowan.

Let the petition be dismissed, and the petitioner remanded to the custody of the respondent.

Case No. 1,429.

BIRD v. COCKREM.

[2 Woods, 32;[1] 1 Thomp. Nat. Bank Cas. 284.]

Circuit Court, D. Louisiana. April Term, 1874.

BANKS AND BANKING—ACTION AGAINST RECEIVER OF NATIONAL BANK — REMOVAL TO FEDERAL COURT.

Receivers of national banking associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from state courts to the United States courts.

[See note at end of case.]

[At law. Action by the executors of Stephen Bird against John Cockrem, receiver of the New Orleans National Banking Association, for not surrendering property alleged to belong to plaintiff.] This cause was heard upon the motion of defendant to vacate the order removing the case from the fifth district court of the parish of Orleans. [Order vacated.]

J. Ad. Rosier and Geo. W. Race, for plaintiffs.

J. D. Rouse, for defendant.

BRADLEY, Circuit Justice. It is unnecessary to decide the question raised by counsel, whether the act of July 27, 1868, (Rev. St. § 640,) allows all corporations, or only corporations of the United States, when sued, to remove their causes into the United States courts, since banks of the United States are excepted in any case; and also, since this is not a case against a corporation, but against a receiver, and the case is not within the 57th section of the national banking act [of June 3, 1864,] (13 Stat. 116,) which gives state courts concurrent jurisdiction with the courts of the United States, in suits against any association under the act, inasmuch as this is not a suit against the association. It is simply a suit against the receiver, for not surrendering property alleged to belong to the plaintiffs. Now unless a receiver, as such, has the privilege in all cases of being sued in the United States courts, I can see no ground for the removal of this cause from the state court. I am not aware of any such prerogative which a receiver of a national bank has over other persons. Officers and agents acting under authority of the United States, in making arrests, seizures, etc., during the war, may remove all suits brought against them for such cause, into the United States courts. But this is not one of that class of cases. The order for removal must be vacated, and the cause remanded to the state court.

[NOTE. Under Acts March 5, 1875, c. 137, § 2, (18 Stat. 470,) and Aug. 13, 1888, c. 866, § 2, (25 Stat. 434,) suits of a civil nature, involving matters in dispute exceeding $500, exclusive of costs, and arising under the constitution and laws of the United States, may be removed to the circuit courts.

[A matter in dispute arises under the constitution and laws when "it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction." Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28; Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437. It is sufficient that the question arises irrespective of the question of citizenship. Wilder v. Union Nat. Bank, Case No. 17,651. And the record must show that the case involves a federal question. Seattle & M. Ry. Co. v. State, 52 Fed. 594, distinguishing Union Pac. Ry. Co. v. City of Kansas, and Same v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135; Tennessee v. Davis, 100 U. S. 257; Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 199; Nashville v. Cooper, 6 Wall. (73 U. S.) 247.

[In Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, it was held, on the authority of Osborn v. Bank of U. S., 9 Wheat. (22 U. S.) 817, that corporations created by and organized under acts of congress are entitled to remove suits brought against them in the state courts, by virtue of the act of 1875, on the ground that such suits "arise under the laws of the United States," as such corporations derive their existence, their powers, functions, and duties, and a large portion of their resources, from those acts, and by virtue thereof sustain important relations to the government of the United States. Since these acts, it seems to be settled that suits against receivers of national banks, where the defense rests upon authority of the laws relating to such banks, may be removed. Sowles v. Witters, 43 Fed. 700; Same v. First Nat. Bank, 46 Fed. 513. And see, as to receivers appointed by federal courts, Evans v. Dillingham, 43 Fed. 177; and see, also, note to Sawyer v. Parish of Concordia, 12 Fed. 760. Act March 3, 1887, (24 Stat. 554,) § 4, provides that the jurisdiction of the federal courts in respect to national banks shall be the same as in the case of individual citizens.]

BIRD, (HALL v.) See Case No. 5,926.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Case No. 1,430.

BIRD v. PENN MUT. LIFE INS. CO.

[33 Leg. Int. 54;[1] 1 Law & Eq. Rep. 505; 2 N. Y. Wkly. Dig. 83; 11 Phila. 485; 2 Wkly. Notes Cas. 410; 5 Ins. Law J. 449; 23 Pittsb. Leg. J. 112; 5 Bigelow, Ins. Cas. 487.]

Circuit Court, E. D. Pennsylvania. Feb. 7, 1876.

INSURANCE—CIVIL WAR — NONPAYMENT OF PREMIUM — TENDER — WAIVER BY NOTICE OF FORFEITURE—REINSTATEMENT.

1. A life insurance for a year was effected in 1847 at a certain premium, with the privilege of continuing the insurance from year to year on payment of a premium of equal amount before the end of each year; and it was provided that if any annual premium should not be paid within the time limited, the insurers should not be liable to pay the sum insured, and the policy should determine, &c. The insured paid the premiums yearly till 1861. He was an inhabitant of Virginia. The insurers were incorporated by the legislature of Pennsylvania, in which state their business was transacted. The Civil War which broke out in 1861 disabled them from receiving, and the insured from paying, the premiums in that year and until 1865. Upon the termination of the hostilities, he inquired of them by letter what steps he must take to continue his insurance. They answered that it was forfeited for non-payment of the premium in 1861, and that it would not be revived by them. *Held*, that this answer dispensed with an actual tender of the premiums, and that the question of his right to continue the insurance ought to be decided as if he had tendered them with interest.

[See Blight v. Ashley, Case No. 1,541.]

2. It seems that a court of equity should relieve him against the forfeiture, and reinstate him in the insurance on his making compensation by payment of all the premiums with interest on each.

[See New York Life Ins. Co. v. Statham, 93 U. S. 24; Hancock v. New York Life Ins. Co., Case No. 6,011.]

[See note at end of case.]

3. Life insurance distinguished, as to such a question, from fire insurance.

4. Quaere, whether his representatives would have been relievable if he had died before the end of the Civil War, so that his option to continue the insurance could not have been exercised before the absolute termination of the risk insured against.

5. The cases of Mutual Life Ins. Co. v. Hamilton, and Tait v. New York Life Ins. Co., (in each of which the judges of the supreme court of the United States were equally divided in opinion,) considered.

[See note at end of case.]

In equity. The defendants are a mutual insurance company incorporated by the legislature of Pennsylvania by a charter under which they carry on their business in the city of Philadelphia. In September, 1847, they executed and delivered to the complainant at Philadelphia a sealed policy of insurance in $5000 upon his life, payable to his wife. The premium paid was $155.50. The insurance was for a year, with the privilege of continuing it from year to year on payment of a premium of equal amount before the end of each year. The policy contained a provision that if the assured should not make the annual payments on or before the several days appointed, then, and in every such case, the defendants should not be liable to the payment of the sum insured or any part thereof, and the policy should cease and determine, and all previous payments made thereon, and all profits for which scrip should not have been issued, should be forfeited to the defendants. The complainant continued to pay the annual premiums punctually at Philadelphia until 1861, when the whole sum thus paid had amounted to $2177. He was a resident of the state of Virginia. The Civil War, which broke out in April, 1861, prevented him from paying the premiums in September, 1861, and subsequently; and made it unlawful for the defendants to receive any such payment during the continuance of the hostilities. The defendants, from time to time, declared certain dividends payable to their policy holders. In the year 1859, the complainant had borrowed from the defendants $600, when they took from him the policy and a pledge of the accrued and accruing dividends as their security for the loan. At various times he made payments on account of this loan until it was reduced, in the spring of 1861, to $250, for which balance they held his note payable on 27th April, 1861. The defendants, being in possession of the policy, treated the insurance as ended by reason of the nonpayment of the premium in September, 1861; and wrote upon the policy that it was "forfeited" and "cancelled," obliterating the signatures of their officers. In 1862 they closed his accounts on their books by crediting on account of the note, $52.73, which was due to him on their deposit book, and applying $210 of the dividends accrued, to the payment of the balance of the note with interest. This left in their hands about $620 of dividends unpaid. Independently of any question as to termination of the insurance, the further dividends on the policy from January, 1862, to January, 1866, would have been about $320, making, in the whole about $940, after deducting the $210. On the termination of the hostilities, the complainant, by a letter of 31st May, 1865, inquired of the defendants whether any profits of his life insurance were in their hands, and also expressed a desire to know what steps he must take to continue his insurance. On 9th June, 1865, they wrote in answer stating that on the former account they held $620, subject to his order; and added, "The policy of insurance was forfeited for non-payment of premium in 1861, and will not now be revived by the company." In a subsequent correspondence, the complainant contended that the defendants ought to have applied the dividends in payment of accruing premiums. The defendants insisted that the insurance was absolutely forfeited, and, throughout the correspondence, treated the dividends as a distinct matter. In October, 1866, the

[1] [Reprinted from 33 Leg. Int. 54, by permission.]

account as to the dividends prior to the Civil War was settled by the complainant with the defendants on the footing dictated by them. He thereupon received from them on this account $591.20. In the following year, he renewed the correspondence, urging his right to be reinstated in the insurance, but resting the claim upon considerations which were honorary rather than legal. He seems to have supposed that he had no legal right, but a strong moral claim on their liberality. They repeated, and never in anywise qualified, their original declaration that the insurance was forfeited. The correspondence was closed in December, 1867.

The bill was filed on 2d July, 1874. Its purposes were that the policy, &c., still in the possession of the defendants, should be exhibited by them, that the complainant should be permitted to pay all the accrued premiums which are unpaid, that the policy be declared valid and to have remained in force, and that the defendants should account for all the dividends which had been, or ought to have been, declared upon it, deducting the $591.20 received as above in 1866.

The defendants, by their answer, and in argument, insisted that the insurance had been forfeited in 1861, that the accounts of all dependencies then outstanding were adjusted and finally closed by the settlement of 1866, that the complainant had never made any tender of the premiums in question, and that his delay to institute the present proceedings ought to preclude him from relief if he were otherwise equitably entitled to it.

Mr. E. F. Pugh, for the complainant, cited many authorities, relying principally upon New York Life Ins. Co. v. Clopton, 7 Bush, 179; Manhattan Life Ins. Co. v. Warwick, 20 Grat. 621; Cohn v. New York Mut. Life Ins. Co., 50 N. Y. 610; Sands v. Mutual Life Ins. Co., Id. 626; Hillyard v. Mutual Ben. Life Ins. Co., 35 N. J. Law, 415, affirmed in court of appeals, (Feb., 1875,) 4 Ins. Law J. 127, (and see Am. Law T. Rep. June, 1875;) Hancock v. New York Life Ins. Co., [Case No. 6,011;] New York Life Ins. Co. v. White, 4 Bigelow, Ins. Cas. 471; Hamilton v. New York Mut. Ins. Co., [Case No. 5,986,] affirmed on appeal by the supreme court of the United States, the judges being equally divided in opinion.

Mr. S. B. Huey, for the defendants, cited Dillard v. Manhattan Life Ins. Co., 44 Ga. 120, and other cases, relying principally upon Tait v. New York Life Ins. Co., [Case No. 13,726,] affirmed on appeal by the supreme court of the United States, the judges being equally divided in opinion. [See note at end of case.]

CADWALADER, District Judge. If the complainant were otherwise entitled to be reinstated in the insurance, he ought not to lose the right merely because, at a former time, under a mistake, he supposed the contrary. Nor should he suffer because he, at one time, erroneously supposed that the defendants ought to have applied the dividends in payment of accruing premiums. This was a mistake on his part, even upon the supposition that the dividends were of sufficient amount, and that he would, in ordinary times, have had an option to continue the insurance annually by such an application of dividends. The position would, even in that view of the case, have been erroneous, not only by reason of the effect of the hostilities, but also because a declared exercise by him of the option would have been indispensable. The defendants were certainly right in treating the dividends as a matter wholly distinct from the question of termination of the insurance. The defendants are, however, for this very reason, in the wrong, if they insist that the settlement with them by the complainant of the account as to the dividends ought to be deemed a waiver of his demand to be reinstated in the insurance. The two subjects are, I repeat, wholly distinct. This being so, it was, according to his own theory of his case, necessary that, on the termination of the hostilities, he should tender the accrued premiums to the defendants, unless they dispensed with such a tender. There was no actual tender of the premiums with or without interest. But an actual tender was, in effect, dispensed with by the defendants' answer to one of his inquiries in the letter of the 31st of May, 1865. This inquiry was, what steps he must take to continue the insurance? The answer was, that the insurance had been forfeited for non-payment of the premium in 1861, and would not be revived by them. This meant that no tender to renew or continue it would be accepted. Such a tender would afterwards have been a purely idle formality. The case, therefore, is to be decided as it ought to have been if he had made an actual tender of the proper amount, whatever it may have been. The question is, whether such a tender, not made until the return of peace, would have been too late to avail him. Did an insured inhabitant of one of the revolted southern states, who was prevented by the Civil War from paying the annual premium to insurers in a northern state, lose at once and irrevocably his option to continue the insurance?

The rules which determine whether impossibility to perform a contract will excuse its non-performance are not always applicable to questions of relief against forfeitures incurred through non-performance of conditions. There was no contract of the complainant that he would continue the insurance by payment of the annual premium before the end of the first, or before the end of any subsequent year. Any such payment on his part was optional. Until his election to make such payment within such limited time or times, there could not, on the other side, according to the form of the contract,

be any ascertained conventional obligation of the defendants to continue the insurance beyond the end of a current year. The conventional continuance of the insurance depending upon this optional payment by the complainant within the year, such payment, within this limited time, was a condition precedent to such continuance. 9 Ch. App. 502; and see L. R. 9 Eq. 705; L. R. 17 Eq. 316-320. The decision of the case depends, therefore, upon rules of legal and equitable jurisprudence on the subject of conditions precedent.

Impossibility to perform a condition precedent does not, at law, prevent the loss of that which depends upon performance. It is, therefore, unnecessary to consider whether, if the present suit had been upon the law side of this court, compensation for the non-performance could be estimated by a standard of sufficient legal certainty, or to consider whether a court of law would be able to regulate properly the application of such a standard. Independently of any such question as to compensation, there was an absolute forfeiture at law from non-payment within the time limited. If this had even been otherwise, it would have been impossible, on the law side of the court, to disregard the express provision of the policy upon the subject.

But the question here to be decided arises on the equity side of the court. A court of equity, in certain cases, disregards express provisions imposing forfeitures for breaches of conditions precedent or subsequent. Such a court considers not the form of words used, but the differences in the nature of the conditions. But the court will not relieve against any breach of a condition of either kind unless the sufferer has lost something really valuable, and the party who would be substantially benefited by the forfeiture can be adequately compensated, so that both parties may be put in the same situation as if the condition had been performed: 1 Salk. 231, 232; 2 Vern., 338, 339, 344; 1 Vern. 223; 1 Brown, Ch. 168.

We may therefore inquire, first, whether such loss has been incurred, and secondly, whether such compensation can be made.

Under the first of these inquiries, there is, in principle, no resemblance to a question upon the renewal of an insurance against fire. Fire insurance and life insurance are so far alike that each is an aleatory contract. But in fire insurance there is uncertainty both as to time, and as to event. Fire is not inevitable. Moreover the inanimate subject of insurance against fire may, for the practical purposes of the contract, be considered normally unchangeable, both in value, and as to hazard. Usually the party insured for a limited period against fire has no exclusive option to renew the insurance. When renewable, it can be renewed only by mutual consent. Even if this were conventionally arranged otherwise, and the option were exclusively his own, it would be an option of no appreciable value. The risk and the market rate of premium being both, from year to year, normally the same, the expense of making an independent new fire insurance with other insurers, does not normally exceed that of the renewal of a former insurance, except in the mere cost of a new policy, and of a stamp where the law requires one. But in the case of a life insurance, the event is not uncertain except only as to the time of its occurrence. Death at some time is inevitable. The consequences of this difference are, in many respects, very material. See 15 C. B. 374, 389-392. When there is an option to renew, or, in more proper language, to continue the insurance from year to year, this option belongs exclusively to the party insured. It is a valuable right or privilege; and is of constantly increasing value for two reasons. The first is, that the health of the insured may fail during the first or any other year, so that his life would not, at the end of such year, be insurable at the same rate, or even perhaps at any rate of premium. Nevertheless, he has a right to the benefit of continuing the insurance at the conventional rate. See L. R. 9 Eq. 719; L. R. 19 Eq. 79, 83; also 6 Ch. App. 386, 387. The second reason is, that although he may continue in sound health, he is, at every succeeding instant of time, nearer to death. The market rate of premium for an independent new insurance meanwhile is, for this reason, constantly increasing; but under his policy the conventional rate of annual premium continues to be the same. For this twofold benefit he pays a full, and sometimes more than adequate consideration. In the present case, the insurance had, before the Civil War, been continued more than fourteen years; and the amount of premiums paid, with interest, was, at the commencement of the war, not less than three-fifths of the sum insured. This, if the defence prevails, the complainant loses irrevocably. Moreover, under the most favorable condition of his health, he could not, at the commencement of the war, have effected an independent new insurance at an annual premium of less than almost double the conventional rate of the annual premium fixed in the defendants' policy. These proportions may be, in part, varied in the present case of a mutual insurance company, by dividends of accrued profits. But the difference cannot affect the principle in question. His option to continue the insurance on fulfilling the condition precedent was thus a right of real value. It resembles, in this respect, and in some other respects, a tenant's right of renewal of a lease of land for lives. We may, from judicial precedents on the other side of the Atlantic, take as a pertinent example, a tenancy at a certain rent, for three lives, renewable perpetually at the same rent, on the payment of a fine within a certain limit of time from the fall-

ing in of any life. The so-called fine is not of the nature of a penalty; but is merely a certain sum which, in addition to the rent, is payable on a death, for the renewal of the lease. In some such leases there is, and in others there is not, a covenant of the tenant that the fines shall be paid. In the latter cases the payment is optional with him and his representatives. In these cases the value of the tenancy, in proportion to the annual rent, may be considered as constantly increasing. It is the ordinary purpose of such leases to encourage the erection of buildings, or to promote the improvement of agriculture; and the right of perpetual renewal induces expenditures for such permanent objects. But the value of unimproved land may continue the same, or it may deteriorate; and therefore perhaps, in the absence of an express covenant to build or otherwise improve, the increase in value from such causes may be considered merely contingent. However this may be, the amount of the tenant's investment is absolutely and permanently increased by his first and every subsequent payment of a fine upon the falling in of a life. This appreciable increase of his investment attendant upon the exercise of his option to renew, directly resembles the effect of the payment of annual premiums for the continuance of a life insurance. The option is, in each case, a valuable right.

The second inquiry is, whether compensation can be made. This inquiry may always be understood as impliedly including the first, because where compensation is required, the subject must be of some value. In many cases where the subject is of real value, there is no practicable standard for equitable compensation, even though the condition may be a subsequent one. See these cases reviewed in 2 Price, 200; and see 10 Ch. App. 626. But there can be no such difficulty where performance would have consisted in the payment of a certain amount of money, and the only subject of ultimate forfeiture would also be money. In the present case, the complainant, if otherwise relievable, can make adequate equitable compensation by paying the annual premiums with interest upon each of them. In the cases already mentioned of leases for years renewable forever, there was a difficulty in making compensation to the landlord, where, after the falling in of a life, a lapse of the right of renewal at law had occurred from nonpayment of the fine within the time limited. The difficulty arose upon considering that, on the falling in of a life, such a postponement by the tenant of the nomination of a new life, postponed, in effect, the chance of another death, and thus diminished the probable frequency of the payment of the fines attendant upon deaths. The difficulty was overcome by estimating seven years to be, according to known analogies, the reasonable average duration of every such life as the tenant might have named in due season. The compensation, where relief could otherwise be given, was, therefore, computed as including the first fine, and an estimated additional fine of equal amount at the end of every seven years of the whole interval elapsed; and interest was charged as on the first fine, and every additional septennial amount: Sweet v. Anderson, (A. D. 1772,) 2 Brown Parl. Cas. 257, (430,) cited with approval by Lord Mansfield, in 1 Ridg. App. 137, and by Lord Redesdale in 2 Schoales & L. 686. In the present case there cannot be any such difficulty. The premiums are of invariable amount, and of stated annual recurrence. In language of Lord Wensleydale, "the liability of the insurer" is "constant and uniform to pay an unvarying sum on the death of the cestui que vie, in consideration of an unvarying and uniform premium paid by the insured. The bargain is fixed as to the amount on both sides." 15 C. B. 389. If it be objected that the defendants were entitled to use the premiums in their current business of insurance, and that they might, through such use, have made profits exceeding the interest—the answer to the objection is that interest is estimated an equivalent for speculative compensation where a cognizable equity would otherwise be defeated. See Story, Eq. Jur. § 1316 in the note. If this were at all doubtful, it might be added that against the chance of greater profit was the hazard of more than proportionate losses, and that, in this particular case, the complainant would be entitled, on the principles of mutual insurance, to his own due proportion of accrued profits. Under contracts to pay money, interest does not accrue while war suspends payment of the principal debt. The rule ought to be different in defining the measure of compensation to relieve against a forfeiture occurring, as this did, through postponement of the right of election. Unless interest, or a sum equal to it, were allowable, full compensation would not be made. Whether, if the complainant is relievable in the present case, he should be required to pay such interest for the period since the defendants' letter of June, 1865, will depend upon the effect of this letter; and may perhaps be a question of some difficulty hereafter. But independently of this question, a sum equal to full interest on each premium ought certainly to be added.

The case, therefore, is one in which, if relief would otherwise be proper, adequate compensation can be made. In 1 Vern. 223, Lord Keeper Guilford said that "in all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief." There is, however, the following important difference, in this respect, between the breach of a precedent, and that of a subsequent condition. In the latter case, relief may be given where compensation can be made, although the non-performance of the condition has occurred through mere negligence of the suffer-

er, unless it has been wilful or perverse neglect. But a court of equity does not, in any case, relieve against losses consequent at law upon the non-performance of a condition precedent where such non-performance occurs through neglect alone, or other fault of the sufferer. A reference to authorities on this point may elucidate the general subject. They are found in decisions upon cases already more than once mentioned, of the forfeiture of rights of renewal of leases for lives through non-payment of a fine by the tenant within the appointed period after the occurrence of a death. We have seen that if a lapse occurs through such omission, there is, on the one hand, a forfeiture of a valuable right, and there can, on the other hand, be adequate compensation. An existing tenancy under a lease renewable forever is very like a present fee, and the loss which the tenant would incur at law, through such a lapse, has no small resemblance to some other forfeitures which may occur through non-performance of conditions subsequent. The resemblance does not suffice to make the condition a subsequent one. Payment of the fine is clearly a condition precedent to the legal right of renewal. But there can be no supposable case of breach of a precedent condition which would be more entitled to favorable consideration. Thereupon arose the question whether equity would relieve where the lapse had occurred through the tenant's own mere neglect, or mere insolvency. The English chancery and exchequer, as courts of original equitable jurisdiction, have uniformly refused to give relief in cases of this kind. See the case, A. D. 1738, Fonbl. Eq. 425n; also, 3 Brown, Ch. 529; 3 Ves. 295, 690; 11 Price, 3; and 13 Price, 694, McClel. 464. Irish courts of equity have, on the contrary, relieved against the legal consequences of such lapse where the default has occurred through mere neglect without any fraud. But these Irish decisions were overruled, and two of them reversed by the house of lords in England in 1776 and 1779. Kane v. Hamilton, 1 Ridg. App. 180; Bateman v. Murray, 5 Brown, Parl. Cas. 20, 1 Ridg. App. 187. The latter of these judgments of reversal was followed in 1780 by the enactment of an Irish statute, known as the "Tenantry Act." 19 & 20 Geo. III. c. 30. This act was partly declaratory and partly remedial. See the statute itself, and 2 Schoales & L. 681. It restored for Ireland what has been there called the local equity, or the old equity of the tenants in cases of neglect without fraud, unless it should appear that the landlord had demanded the fine or fines, and that the same had not been paid within a reasonable time after such demand. Some subsequent decisions in Ireland, if not reversed on appeal, might have induced an erroneous belief that under the so called "old equity" as revived by the act, the tenants had "a right to delay the renewal of their leases as long as they pleased." But these decisions have been reversed in England by the house of lords. See the review of these cases in Sugden on the Law of Property, as administered by the house of lords, (pages 556–570.) Out of Ireland it is not a cognizable equity; and neither these Irish decisions since the tenantry act, nor the judgments on appeal from them, are of any importance out of that country. In the present case the complainant, therefore, by non-payment of the premium within the year ending in September, 1861, would have lost irrevocably the option to continue his insurance if the payment had not been unavoidably prevented. See Edwards v. Warden, 9 Ch. App. 502, and the case in the house of lords, mentioned in L. R. 19 Eq. 608–610, 612. But the payment of this, and of the subsequent premiums, within the times limited, was unavoidably prevented; and there was, in fact, no negligence whatever on his part. Where the breach of a condition precedent is excusable, and compensation can be made, the general rule of equity is to relieve against a forfeiture.

But what will make the breach excusable? If the condition is annexed to land, or to some other specific subject, a very indulgent latitude of excuses appears to have been allowed. Recurring once more to leases for lives renewable forever, we find opinions of Lord Thurlow in the house of lords, (1 Ridg. App. 202,) and of Lord Alvanley at the rolls, (3 Ves. 693,) that any disabling accident, misfortune or surprise, or ignorance not wilful, which prevents the tenant from applying at the stated times for renewal according to the terms of his lease, will afford sufficient reason for giving relief to him in equity against the lapse at law. Relief has even been given where performance had been prevented by so called impossibilities which were not absolute, but only relative. Lord Mansfield said in the house of lords in 1776, that the decision of such cases depended upon their peculiar circumstances. 1 Ridg. App. 185. He said this with reference to previous cases in the house of lords in which relief had been given. In one of those cases, payment had been delayed by an unavoidable uncertainty whether a life had in fact fallen in or not. The decision was that, assuming the death in question to have happened in this interval of uncertainty, and the lapse to have occurred, the tenant was nevertheless relievable. Sweet v. Anderson, (A. D. 1772,) cited above. Where nothing specific has been forfeited at law, but the ultimate forfeiture would be only that of a right to a certain sum of money, there is not sufficient reason for such indulgent relief, though, as we have seen, compensation can more readily be made. The abstract principle of equity is, indeed, the same; but its application is restrained and qualified by practical considerations. In cases of life insurance, under this and other heads, we find the law of conditions modified by such considerations. See 12

East, 183, 186, 187. In the absence of a strong equitable necessity, there should be nothing precarious in this part of the business of insurers. They have a right to insist on the utmost practicable punctuality in the fulfilment of every condition upon which a risk is to be incurred or continued. Contingent relative impossibilities, if always recognizable as excuses, would render the option to renew or continue the risk from year to year too uncertain a part of the contract of life insurance. We may, therefore, discriminate between relative and absolute impossibilities. But in doing so, it is not, for any present purposes, necessary to define precisely the equitable standard of sufficiency of an excuse for lapse from delay in the payment of the annual premium. Assuming that nothing short of absolute impossibility should be admitted as an excuse, the temporary impossibility was, in the present case, absolute. A court of equity ought certainly to recognize the sufficiency of such an excuse. Let us, for example, suppose that, through a judgment under a quo warranto, the charter of the defendants had been forfeited in 1861, that the judgment of forfeiture had been reversed in 1865, and that consequently, during this interval, their corporate faculties had been suspended, so that there was no person capable of receiving the premiums. In such a case, the disability would, in itself, create an equitable excuse. In the present case we may further consider the peculiarity of the cause of the impossibility. Its cause was the suspension of conventional relations, and the unlawfulness of intercourse between enemies. In addition to the disability of the insured as an enemy to make payment, it was, during the war, unlawful for the insurers to receive any payment from an enemy. Their corporate faculties were, in this respect, suspended, as it were, so that if he had been able to offer payment, it could not have been accepted by them. But it has been suggested that the cause of this temporary disability was the Civil War, which, in its penal effects, made the excuse of impossibility inadmissible here, though it would otherwise have been a sufficient excuse. If we were to trace a succession of causes immediate and remoter, it might, perhaps, be said that the cause of the forfeiture was the absolute impossibility of payment of the premium within the limit of time; that the cause of this impossibility was the suspension of intercourse and of conventional relations between enemies; and that the war was the cause of the non-intercourse, and of the suspension of conventional relations. But this would be over-nice reasoning. The suggestion is that the subject is not thus divisible, and that the war, in itself, was the proximate cause, or, practically speaking, the only cause. If so, what was its effect? Did it produce or occasion any forfeiture whatever?

In time of war, between enemies, new conventional rights are not acquirable, and new obligations are not incurrable. Moreover, any rights or obligations which existed at the commencement of the war may, by confiscation, be extinguished. But in the late Civil War there was neither legislative nor judicial confiscation of the present subject of controversy; and, where confiscation is not actually enforced, pre-existing rights and obligations are not extinguished by war. They are only suspended until peace. The rules of law are the same as to a rebellion so organized as to create a temporary state of war. Therefore, the war was not a cause of any forfeiture. None was incurred in addition to that incurred at law through the mere non-payment of the premium. The impossibility of payment of it was thus in equity a sufficient excuse for non-performance of the condition in question. The complainant thus appears to be entitled to an interlocutory decree for an account of his share of the profits of the defendants' business since those credited in their settlement with him, which resulted in the payment of $591.20. Whatever he may be entitled to under this head should be deducted from the amounts of the premiums of 1861, and the subsequent years, with interest. When the interest should cease may be a deferred question. Upon his payment of the balance, when ascertained, to the defendants, or if they will not receive it, into the registry of the court, the final decree should reinstate him in the insurance, and direct the policy now in their possession to be returned to him, with as beneficial effect as if it had not been cancelled or defaced; and they should be prohibited from pleading, in any future action upon it, either that it is not their deed, or that any premium or premiums thus paid under the decree were not paid within the times respectively limited.

The subject has been considered almost wholly upon original grounds, because in cases more or less like the present, the conflict of opinion, since the war, has been apparently quite irreconcilable. It will not be necessary to mention any of the opposing decisions of state courts. On 6th of April, 1874, the judges of the supreme court of the United States, being equally divided in opinion upon two cases which had been very fully argued, affirmed in each case the judgment of a circuit court of the United States, without giving any reason except the division of opinion. In each case a policy of life insurance had contained a provision like that of which the effect is here in question. The decision below in one of these two cases (Hamilton v. Mutual Life Ins. Co.) is reported in [Case No. 5,986.] The insured had survived the war. So soon as the insurers, upon the return of peace, could lawfully receive any payment from him, he had tendered to them the amount of all the annual

premiums for the period of the war. The tender was not accepted. He afterwards died; and, under proceedings in equity at the suit of his executor in the circuit court for the southern district of New York, the complainant was reinstated in the insurance. According to this decision of the circuit court, the present complainant should have relief. In the other case (Tait v. New York Life Ins. Co.) [Id. 13,726] the party insured had not survived the Civil War, but had died in the early part of it, after non-payment of a single annual premium. On the termination of the hostilities, his representatives tendered to the insurers the unpaid premium, and afterwards brought a suit in equity against them in a court of the state of Tennessee. The suit was removed into the circuit court of the United States for the western district of Tennessee. On examination of the printed record in the supreme court, it appears that the proceedings in the circuit court were such, that the counsel, on each side, doubted whether the hearing or trial was to be on the law side or on the equity side of the court. But all difficulty under this head was removed by an agreement which became part of the record. The decision of the circuit court was that the plaintiffs had no right of action at law or in equity. The opinion of that court is in 2 Ins. Law J. 861, and 4 Bigelow, Ins. Cas. 479n, [Case No. 13,726,] without a sufficiently full prefatory statement of the case. As between the parties litigant, and as to all persons privy in interest, the affirmance of these two judgments by an equally divided appellate court, was not less conclusive than if a majority of the court of appeal had concurred in the judgment of affirmance. But the supreme court of the United States have more than once intimated that such a decision is not, in that court, considered as a judicial precedent, establishing authoritatively any principle as applicable to subsequent cases of a like character between other parties: [Etting v. Bank of U. S.,] 11 Wheat. [24 U. S.] 59, 78; [Durant v. Essex Co.,] 7 Wall. [74 U. S.] 107, 113. A dictum of Judge Grier, (Id. 109,) attributing greater force to it, as an authoritative judicial precedent, must therefore be disregarded. But the authority of a decision of a circuit court cannot, after such an affirmance, be disregarded in the same or in other circuit courts, until a subsequent decision of the supreme court to the contrary. This remark might apply to either of the two decisions now in question if the other one had not also occurred. This introduces an inquiry, whether the two decisions in the circuit courts are irreconcilably conflicting. The judicial reasoning which appears by the reports to have induced the respective decisions cannot be reconciled. But the points which were actually decided may reasonably consist with each other. The difference between the cases has already been stated. It is that, in the Tennessee case, the person insured had not, as in the New York case (and in the present case) survived the war, and elected to make compensation. In the Tennessee case, therefore, compensation, if made, could not continue an insurance. The insurance had been upon a life which was ended. There was not, as in the other cases, a continuing risk; nor was there an option to be prolonged. The option was already gone. The offer of compensation could only in substance and effect be a proposed credit in reduction of the amount of money insured. There could be no absolute certainty that, if there had been no war, the person insured would have elected to pay the premium in 1861. His former motives for insuring might have ceased to exist; but, on his death, his representatives could not, if they had a continuing right of election, have any possible motive to forbear the exercise of it. Such cases have been compared to an option to buy a lottery ticket, where the election to buy is not made until after the ticket has drawn a prize, (9 Ch. App. 503,) or to buy the haul of a seine, where the election is deferred until after the net has been drawn in. The distinction is neither strengthened nor weakened by the decisions which have arisen in the course of proceedings to wind up insolvent insurance companies under the English statute of 1862, called the "Companies Act." Under such proceedings all the business of an insolvent English company terminates, and all the funds and assets pass into the hands of an official liquidator. The effect of the statute is to determine for certain purposes, the rights of all parties with reference to the time of the commencement of the proceedings to wind up the business. The interest of every party insured on which he may claim a dividend is the estimated value of his insurance, when he makes his proof. The continuance of such a transmuted interest cannot depend upon payment by him of premiums which it would have been necessary for him to pay in order to continue the insurance if the proceedings to wind up had not been instituted. Therefore, no such payment is required. L. R. 9 Eq. 705, 706. If he is alive, the valuation of his interest is the amount of money which, at his increased age, and in his actual state of health, good or bad, he would be obliged to pay, at this time, in order to effect an equally beneficial insurance on his life with a solvent insurance company. L. R. 9 Eq. 716–719, 14 Eq. 79, 83; 6 Ch. App. 386, 387. If he dies before making proof, his representatives may claim; and the value may then be estimated as equal, or approximately equal, to the sum insured, less the amount of any premium or premiums which would have been payable for continuing the insurance if the company had not been wound up. But in the latter case, the death does not create a claim to this

difference, otherwise than as it happens to be a proper method of approximately adjusting the valuation. L. R. 9 Eq. 711, 719, 721. It includes no claim to the sum insured as such. There is thus no proper analogy, in principle, to the distinction in question. This distinction has, however, to some extent, a support from English opinions upon policies which allow days of grace for the renewal or continuance of insurances in cases of lapse through default in payment of premiums within the stated periods. During the days of grace, after the expiration of the time otherwise limited, the insurer, if living, may, on payment of the premium, under certain conditions, purge his default so as to be reinstated in the insurance. But what if he dies during the same interval, without having been reinstated? After his death, can his representatives, within the days of grace, purge the default with like effect by payment of the premium and fulfilling the other conditions? On this point there have been English opinions of a strongly negative tendency. It is true that these opinions were founded, in great part, upon the language of the clause in each policy which gave the time of grace. But they were also founded, in part, upon reasons derived from considerations of the nature of contracts of life insurance. See 12 East, 183, 187; 3 C. B. (N. S.) 633, 637, 638, 640, 643, 644; also, 2 C. B. (N. S.) 257, 295, 296, which last case, however, arose upon an insurance against accidents. To avoid the effect of these opinions, an express provision has been inserted in recent English policies, that "in the event of the assured dying within the days of grace, and before payment of the premium, the policy will be held valid and effectual, and the premium will be deducted from the sum insured." See L. R. 9 Eq. 704. This may seem to imply that without such an express provision the law would be otherwise. It is not necessary to intimate an opinion as to the soundness of the distinction. We have seen that if it were necessary to reconcile the two adjudications of the supreme court as authoritative precedents, this could be done so far at least as to enable this court to follow the decision of the New York circuit court in a case precisely like it until the subject shall have been considered anew by the supreme court.

It has been suggested for the defence, but not much pressed, that there has been culpable delay on the part of the complainant, in bringing the present suit. Until his death, no definitive right of action will have accrued; but in the meantime, his invocation of the exercise of equitable jurisdiction has become proper, by reason of the forfeiture at law, and of the cancellation of the policy by the defendants, and their accountability for dividends of profits, which accountability complicates the question of equitable compensation. Therefore even if the policy had not been, as it is, a sealed one, the suit would not have been too late.

But it is not improbable that, at the present session of the supreme court, the question or questions upon which the judges were equally divided in opinion in 1874, may be authoritatively decided. This cause, if neither party shall show reason to speed it, may therefore stand over for the present, without any formal entry of a decree.

[NOTE. The affirmations of Hamilton v. Mutual Life Ins. Co., Case No. 5,986, and Tait v. New York Life Ins. Co., Case No. 13,726, in the supreme court of the United States, by a divided court, as stated in paragraph 5 of the syllabus, in the brief submitted on behalf of the defendant, and in the opinion, do not appear to have been reported. The decisions of the courts of a number of the states of the Union, as to whether or not the failure to pay premiums, where, by reason of war, the insured has been precluded from making such payments, authorizes the insurer to forfeit the policy, are not uniform. In Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614; Mutual Ben. Life Ins. Co. v. Atwood, 24 Grat. 497; New York Life Ins. Co. v. Clopton, 7 Bush, 179; Statham v. New York Life Ins. Co., 45 Miss. 581; Hamilton v. Mutual Life Ins. Co., Case No. 5,986; and Martine v. International Life Ins. Co., 53 N. Y. 339,—it was held that failure of payment from such reason did not justify forfeiture of the policy, while the contrary doctrine prevails in Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372; Dillard v. Manhattan Life Ins. Co., 44 Ga. 119. See, also, cases cited in briefs of counsel. But the question has been decided in favor of the right of the insurer to declare the policy forfeited by the supreme court of the United States in the cases of New York Life Ins. Co. v. Statham, New York Life Ins. Co. v. Seyms, and Manhattan Life Ins. Co. v. Buck, 93 U. S. 24, where it was held that, notwithstanding civil war between the sections of the country wherein the insurance company was situated, and the insured resided, respectively, so that payment of premium could not be made, the company might insist on the condition and forfeit the policy for nonpayment, the relief of the insured being confined to a recovery of the equitable value of the policy.]

BIRD v. UNITED STATES. See Case No. 1,428.

BIRD, (UNITED STATES v.) See Case No. 14,597.

BIRDE, In re. See Case No. 1,428.

Case No. 1,431.

The BIRDIE.

[3 Ben. 273.] [1]

District Court, S. D. New York. June, 1869. [2]

SALVAGE—CORPORATION—CONCEALMENT.

1. Where a brig was driven ashore, on the south side of Long Island, and the officers of a corporation in New York city, incorporated for wrecking purposes, heard of the fact, but concealed their knowledge of it, and, not having at hand any tug of their own, chartered another tug, at $12 per hour, without telling her owners

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

[2] [Modified in Case No. 1,432.]

the service for which she was required, and sent their agents on her to the brig, and they were unable to get her off by the means which they then had, and had to send for another tug belonging to the corporation, and, after her arrival, got the brig off, and brought her to New York, and libels were filed, both by the corporation and by the owners of the chartered tug, to recover salvage: *Held*, that the corporation should be awarded compensation for the use of their own tug at the rate of $15 an hour, and that the owners of the chartered tug should be awarded compensation at the rate of $12 an hour.

2. That the conduct of the superintendent of the company, in concealing the fact of the brig's being ashore, was to be reprehended.

In admiralty. These were two libels for salvage, one filed by the Coast Wrecking Company, a corporation incorporated for wrecking purposes, and one filed by John Clough and others, owners of the steam-tug William Fletcher, against the brig Birdie and her cargo. The libel of the Coast Wrecking Company alleged, that, on the 3d of March, 1868, the brig Birdie, which, with her cargo of flour, was worth about $30,000, went ashore on the south side of Long Island; and that the company, hearing of the wreck, dispatched two steam-tugs to her, on the 4th of March, which reached her about 9 P. M. of that day, finding her deserted, and got her off about 9 o'clock the next morning, and brought her to New York, for which service the libel prayed compensation. The libel of the owners of the Fletcher set up substantially the same facts. The answer of the owners of the brig and her cargo averred, that the brig was driven ashore by the ice, and her master left her, on March 4th, to get assistance, returning to her that night; that, while he was away, the officers and crew left her temporarily, on account of the intense cold, and had not deserted her; that the Coast Wrecking Company knew, on the morning of March 4th, that the brig was aground, but concealed the fact from others engaged in the business, in the hope of making more profitable arrangements for getting her off, and employed the Fletcher, without disclosing to her owners the object for which she was wanted; that such owners had other and better means of getting vessels off, which they would have dispatched to the assistance of the brig, if they had known her situation; and that, but for such concealment, the brig would have been got off before she was.

C. A. Hand, for Coast Wrecking Co.

Beebe, Donohue & Cooke, for Clough and others.

G. M. Speir, for claimants.

BLATCHFORD, District Judge. I award to the Coast Wrecking Company, for the services of their steamer, the Relief, in towing the brig from off the place where she grounded and to New York, the sum of $240, being $15 per hour for the sixteen hours during which she was employed in the service, from five o'clock in the afternoon of one day, until nine o'clock in the morning of the next day. I cannot forbear, however, remarking upon the very reprehensible conduct of the superintendent of the libellants, in obtaining information that the brig was ashore, and studiously concealing it from all persons, so as to endeavor to make it impossible for any but the libellants to render her any assistance. His motive in doing so is shown in the fact that, on his way down to the brig, he told the captain of the hired tug, which was conveying him, that he was afraid that the captain of the brig had come to the city after the rival company, the Atlantic Submarine Wrecking Company, and that he wanted to reach the brig first. When he reached the brig, he found that it required two tugs, instead of one, to pull her off, and he was obliged then to go after the libellants' tug, and thereby lost six hours of time. It is in evidence that other adequate tugs might have been procured in the city, to go to the relief of the brig, if it had been known that the brig was ashore. The libellants and their superintendent, and they alone, so far as appears, knew the fact, and they studiously concealed it, with the view, as it would seem, not that the vessel should be promptly relieved, but that she should not be relieved unless they relieved her. And this they did, when they had no tug of their own in the city, and none, so far as appears, nearer than Fire Island, forty miles outside of Sandy Hook, and fifteen miles beyond where the brig was, and when they were obliged to hire a tug to carry their superintendent to the brig, and when their services were volunteered and not solicited, they having obtained their information by means of a telegraph of their own from the coast. In view of all these facts, I have had serious doubts whether I ought not to dismiss the libel; but, as the case is one of work and labor, it must be paid for at the proper rate. That rate is, I think, on the evidence, $15 per hour. There was no risk or exposure, or hazard to life or property, beyond what occurs in an ordinary towage service. As the libellants claim no particular sum in their libel, and as the answer denies that any thing ought to be paid, I cannot withhold costs from the libellants.

Let decrees be entered in favor of the Coast Wrecking Company, for $240, with costs; and in favor of Clough and others, for $288, (being at the rate of $12 an hour for the twenty-four hours during which their tug was employed in rendering service to the brig,) with costs.

Case No. 1,432.

The BIRDIE.

[7 Blatchf. 238.][1]

Circuit Court, S. D. New York. May 9, 1870.[2]

SALVAGE—CORPORATION—COMPENSATION.

1. Services rendered by a steam tug, owned by a corporation engaged in the wrecking business, in rescuing a vessel in distress, *held* to be a salvage service in respect to the interest of the corporation, and salvage compensation awarded to the corporation, in that respect, in a suit brought by it alone against the vessel, in admiralty.

[Cited in The Plymouth Rock, 9 Fed. 417.]

2. The district court having awarded $240, this court awarded $1,200.

3. While a share in the property saved is awarded in a case of this kind, being a compensation larger than for mere labor and service, the amount awarded is to be adjusted in conformity rather with the claims of an owner of property put at risk, than with the claims of salvors claiming for the exhibition of personal courage and heroism.

[Approved in Ehrman v. The Swiftsure, 4 Fed. 467. See, also, Union Tow-boat Co. v. The Delphos, Case No. 14,400; The J. F. Farlan, Id. 7,313; The Stratton Audley, Id. 13,529; The Camanche, 8 Wall. (75 U. S.) 448; The Egypt, 17 Fed. 359; The Sterling, 20 Fed. 751.]

[4. Cited in The Sandringham, 10 Fed. 575, to the point that a narrow escape from a subsequent storm by means of the forecast, skill, and expertness of salvors, is to be considered in salvage cases.]

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libels, one by the Coast Wrecking Company, and the other by John Clough and others, owners of the steam tug William Fletcher, against the brig Birdie and her cargo. Decree for libellants in the district court. Modified.]

Clifford A. Hand, for libellants.

Gilbert M. Speir, for claimant.

WOODRUFF, Circuit Judge. I presume the amount awarded by the district court to the libellants in this case for the services of their steam tug Relief, in getting off the brig when grounded on the shore off Long Island, and bringing her to New York, was largely influenced by the decisions of the circuit and district courts for this district in the case of The Morning Star, [Case No. 9,818,] in which Judge Betts held that salvage ought not to be awarded to a corporation. The decree in that case, allowing what was deemed a reasonable compensation for the time and labor and use of the libellants' vessel, was affirmed in this court, Mr. Justice Nelson expressing an inclination, at least, to concur in the opinion of the district judge. If the authority of that case were now unaffected by other decisions, I should be disposed to defer thereto, notwithstanding my own opinion that it ought not to prevail. It is clear, and was so before that decision, that, where salvage service was effectually rendered by a vessel to another vessel in distress, it was not the services of the master and crew alone of the saving vessel that were considered in determining the amount of salvage, or in making distribution thereof. The danger encountered by the saving vessel herself, her detention or deviation to render aid, the risk she encountered, and her important contribution in making the personal service and danger incurred by her master and crew effective, were and are properly to be taken into account, and an allowance therefor made to her owners. If this be so, then the circumstance that her owner is a corporation appears to me to be wholly immaterial.

But the question seems to be put at rest by the decision of the supreme court in the case of The Camanche, 8 Wall. [75 U. S.] 448, in which the decree of the circuit court of the United States for the district of California, awarding compensation as salvage, was affirmed. In delivering the opinion of the court, Mr. Justice Clifford discusses the question at great length, and shows that neither reason nor authority requires that, for salvage service, corporations should be denied salvage compensation. Authorities in England and in this country are largely collected, and the affirmance of the decree is stated, without an intimation that any member of the supreme court dissented.

The only questions, therefore, which I regard as open, are, whether the circumstances in which the service was rendered in this case entitled the rescuers of the brig to salvage, and whether a reasonable amount was awarded.

Upon the first question there is no room for hesitation. The brig had been carried ashore by ice, and lay helpless, exposed to a heavy wind, at a time when, by the intensity of the cold, her crew had been compelled to leave her and go ashore to save their own lives. Her master had gone to the city for assistance. Although there was at the time no violent storm, she was not protected from the consequences of a gale, which was liable to occur at that season of the year—early in March—and, though not in immediate peril of destruction, her need of very early assistance was most obvious. The libellants having, through their own peculiar facilities and arrangements, obtained very early information that a vessel was ashore, despatched their superintendent in a steam tug, hired by his direction, and he reached the brig before her crew had left, and made an effort to haul her off, but found that tug inadequate, whereupon he went fifteen miles, to the place where their own powerful tug was lying, took her to the brig, arriving at about eight or nine o'clock at night, found that the crew had then left, and, by the combined power of the two tugs, the brig was drawn off shore and brought to Jersey City in safe-

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

[2] [Modifying Case No. 1,431.]

ty and uninjured. No great difficulty and no great danger to life or property were encountered, though the witnesses state that, on the return, much ice impeded their progress, and it was necessary that the libellants' powerful tug should lead the way, breaking the ice in her path, at some risk of injury to herself. The value of the libellants' tug, with her equipment, is stated to be $80,000. The value of the brig and cargo saved was admitted to be $19,000. The district court allowed the hire of the steamboat employed by the libellants, namely, $12 per hour, for the 24 hours she was engaged, ($288,) and allowed to the libellants $15 per hour for 16 hours, the period of the actual service of their tug, the Relief, ($240,) in all amounting to $528 to the two. I cannot doubt that these amounts were fixed as mere compensation for an ordinary service, since, as to the one boat, the allowance was at the precise sum at which she was hired by the libellants, and, as to the other, it was proved that, for ordinary wrecking, they would let their boat to a third party for a fixed compensation of $15 per hour.

Although the amount to be allowed as salvage depends upon many circumstances, it is not to be reduced to actual cost, or to the just sum at which the owners would permit their boat to be used, even in the same service, where they have a guaranty that so much at least will be certainly paid. Here, the libellants not only took the risk of injury to their boat, but encountered the service in a day and a night of extreme cold, and at the hazard of receiving neither reimbursement of expense, nor compensation for service or injury, if unsuccessful, or if any other vessel was earlier on the spot, prepared to render the needed assistance.

The conduct of the libellants in concealing the fact that they had received intelligence that a vessel was ashore on Long Island, was insisted upon as reprehensible, and as a reason for withholding a more liberal compensation. It is quite true that the agent of the libellants did not disclose the fact, and that his motive was to secure to the libellants the first chance of rendering aid, and so of securing compensation, and that, on his passage to the brig, he expressed his eagerness to get there before a rival company should do so. There was, at that time, in this city, another wrecking company, and he unquestionably acted under some apprehension that, if he published the intelligence, that company might endeavor to reach the place before him. The lives of persons on board of a wreck, and the property which is in danger of destruction, are not to be trifled with, and the peril needlessly protracted, for the private gain of others desiring to profit even by efforts for their deliverance; and yet it is going far to say, that persons who, in their desire to render the earliest possible assistance to vessels which may come to peril along the coast, establish lines of communication and create facilities for gaining the earliest possible intelligence, and are ready and willing instantly to act thereon in giving the necessary aid, are bound to publish that intelligence, when received, in order to enable a less active and less efficient rival in the business to avail himself of their superior means of knowledge, and, perchance, to deprive them of the fruits of their activity and vigilance. Competition in the very matter of obtaining such information from points along the coast, is of great value to the commercial community, as well as to the persons whose lives may be in danger, and we should be careful lest, by pronouncing such information common property, and by requiring its instant publication, we should take away the motive to its acquisition, and, as a result, by the discontinuance of such special means of early knowledge, protract the peril to life and property when in danger. In the present case, the other wrecking company had no steam tug in port, and the activity of the libellants did, in fact, bring deliverance to the brig sooner than, without their instrumentality, it could have been rendered.

I think the libellants entitled to a larger compensation. But their service was attended with little actual danger, and their hazard was chiefly the risk that their assistance might be declined, or that some other casual steam tug would first reach the brig and relieve her. On that ground, the compensation, although awarded as salvage, should be moderate, and yet sufficient to encourage the business to which the libellants have devoted their capital, and in which they are shown to have employed facilities and skill of great value for emergencies to which all vessels on the coast are at times exposed.

It is not unimportant to add, that, in fixing this reasonable allowance, it is proper, also, to recur to the ground and foundation upon which the allowance of extraordinary compensation has always been made to salvors, and the chief motive to that allowance, namely, the personal risk and hazard of life, volunteered for the relief of the distressed and the preservation of property in peril, and the policy of encouraging parties to incur such hazard, to the end that relief may be prompt and efficient. Assisted by all the aids and appliances which capital and skill can supply, there is still room for the exhibition of personal courage and daring, which, in the distribution of salvage money, are largely considered and liberally compensated; and, therefore, although the owners of property employed and put at hazard in the service are permitted to be sharers in the salvage, and are esteemed meritorious contributors to the saving, they lack this prime element in the motive to the allowance—the heroism, courage, and daring which are promoted by allowances to the living actors, in the endeavor to save life and property. Nothing in the decision of the supreme court, in the case before referred to, forbids the proper recogni-

tion of this distinction. The libellants, so far as is disclosed by the evidence, have hazarded property, and property only. Their great efficiency and usefulness are to be recognized and encouraged, but their share in the property saved is to be measured by a just estimate of the nature of their risk, and not necessarily by the standard which might govern an award to individuals who had voluntarily encountered the greater hazard of their own lives in the service. While, therefore, a compensation larger than is ordinarily due for labor and service is to be made, and they are to be adjudged to share in the property saved, the amount is to be adjusted in conformity rather with the claims of an owner of property put at risk, than with the claims of salvors whose personal courage and heroism are entitled to larger consideration.

In my judgment, twelve hundred dollars is a suitable sum. Let the decree be modified so as to award to the libellants that amount.

BIRDSALL v. ASHLAND MACH. CO. See Case No. 1,434.

Case No. 1,433.

BIRDSALL v. HAGERSTOWN AGRICULTURAL IMPLEMENT MANUF'G CO.

[1 Ban. & A. 426;[1] 6 O. G. 604.]

Circuit Court, D. Maryland. Sept., 1874.

PATENTS—INFRINGEMENT — PRELIMINARY INJUNCTION—FORMER ADJUDICATION—EVIDENCE.

In another suit, against other defendants, but in which these defendants contributed to the defence, the complainant's patent had been sustained. Upon a motion, in this suit, for a preliminary injunction, the defendants claimed to be able to produce, if the opportunity were given, additional witnesses to establish the contrary of some of the facts found in the other suit, which would invalidate the complainant's patent, by showing its want of novelty: *Held*, that whatever may be the effect of the additional testimony upon the case at the final hearing, the complainant ought now to have the benefit of his adjudicated rights, and is entitled to an injunction.

[In equity. Bill by John C. Birdsall against the Hagerstown Agricultural Implement Manufacturing Company for infringement of letters patent No. 35,209, granted to complainant May 13, 1862. Complainant moves for a preliminary injunction, which motion was granted.]

Fisher & Duncan, for complainant. A. Stirling, Jr., for defendants.

BOND, Circuit Judge. This is a motion for a preliminary injunction. The complainant has, heretofore, in the circuit court of the United States for the northern district of Ohio, had all the material facts alleged in his bill, adjudicated in his favor, in a suit against other defendants, [Birdsall v. McDonald, Case No. 1,434,] and it is admitted that the defendants in this suit are using the same machine that, in that case, was determined to be a violation of the complainant's patent. The defendants allege, however, that, if an opportunity be given, they can produce additional witnesses to establish the contrary of some of the facts found by the court in the Ohio suit, which would overthrow complainant's patent altogether, by showing its want of novelty. The complainant, however, is certainly now entitled to the benefit of the adjudication already had; and, though the defendants in this suit was not a party to the record in the various suits brought in other of the courts, where the validity of this patent was in controversy, yet, they contributed to the defence of such suits, and it would not be equitable, now to allow them to proceed to manufacture this patented article, because, they say, in their answer, they can produce more witnesses to testify to a particular fact already determined, which was in controversy, and touching which, they have already examined witnesses. Whatever may be the effect of this additional testimony, upon the case, at the final hearing, the complainant ought to have the benefit of his adjudicated rights, now. The injunction will be ordered, as prayed.

[NOTE. Patent No. 35,209 was granted to J. C. Birdsall May 13, 1862. For other cases involving this patent, see Birdsall v. McDonald, Case No. 1,434; Perrigo v. Spaulding, Id. 10,994. For subsequent proceedings, to punish for a contempt in violating the injunction, see Case No. 1,436.]

Case No. 1,434.

BIRDSALL v. McDONALD.

SAME v. ASHLAND MACH. CO.

[1 Ban. & A. 165; 6 O. G. 682; Merw. Pat. Inv. 450.][1]

Circuit Court, N. D. Ohio. April Term, 1874.

PATENTS—ABANDONMENT—FORFEITURE BY PUBLIC USE — REISSUE — CONCLUSIVENESS OF COMMISSIONER'S DECISIONS — IMPEACHMENT FOR FRAUD — SEED HULLING MACHINE — LEGITIMATE COMBINATION—PROOF OF NOVELTY.

1. A patentee cannot be charged with having abandoned his invention, where the application was not filed in the patent office, for more than two years after it was sworn to, during all which time the solicitors had the application, model, and requisite funds in their hands, but neglected to file the application, and the patentee was ignorant of such neglect.

[Cited in Henry v. Francestown Soapstone Stove Co., Case No. 6,382, 2 Fed. 81.]

2. Public use in good faith, for experimental purposes, and for a reasonable period, more than two years before applying for a patent, cannot affect the rights of the inventor. The objection rests upon the principle of forfeiture, and is not to be favorably regarded. Every rea-

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

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 450, contains only a partial report.]

sonable doubt should be raised against it. But if clearly established, it is fatal.

[Followed in Henry v. Francestown Soapstone Stove Co., Case No. 6,382.]

[See Sisson v. Gilbert, Case No. 12,912; Jones v. Sewall, Id. 7,495; Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Id. 8,453; Henry v. Francestown Soapstone Stove Co., Id. 6,382; Sinclair v. Backus, 4 Fed. 539; Roberts v. Schreiber, 2 Fed. 855; Campbell v. Mayor, etc., 9 Fed. 500; Railway Reg. Manuf'g Co. v. Broadway & S. A. R. Co., 22 Fed. 655; Innis v. Oil City Boiler Works, 41 Fed. 788; Stanley v. Hewitt, Case No. 13,285; McMillan v. Barclay, Id. 8,902.]

3. The decision of the commissioner of patents, in awarding a reissue is prima facie correct in all cases, and it is conclusive, unless impeached for fraud, or unless it is clear, upon the face of the several specifications, that the reissue is not for the same thing as the original patent.

[See Allen v. Blunt, Case No. 217; Swift v. Whisen, Id. 13,700; Jordan v. Dobson, Id. 7,519; American N. Pavement Co. v. Elizabeth, Id. 311; Klein v. Russell, 19 Wall. (86 U. S.) 433; American M. P. Co. v. Atlantic Milling Co., Case No. 306; Miller & Peter's Manuf'g Co. v. Du Brul, Id. 9,597; Flower v. Rayner, 5 Fed. 793.]

4. A reissued patent can be impeached on the ground of fraud, only by bill in equity in an independent proceeding had directly for that purpose, in the name and by the authority of the United States. Citing Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 788; Mowry v. Whitney, 14 Wall. [81 U. S.] 434.

5. A combination is legitimate, when all the elements co-operate in producing a result, and are necessary to it, though their several functions are not performed simultaneously, but in immediate succession.

[Cited in Stilwell & Bierce Manuf'g Co. v. Cincinnati Gaslight & Coke Co., Case No. 13,453; National Progress Bunching Mach. Co. v. John R. Williams Co., 44 Fed. 192. See, also, Forbush v. Cook, Case No. 4,931; Swift v. Whisen, Id. 13,700; Hoe v. Cottrell, 1 Fed. 597; Hoffman v. Young, 2 Fed. 74; Wood v. Packer, 17 Fed. 650; Bradley, etc., Manuf'g Co. v. Charles Parker Co., Id. 240.]

6. The superiority of an alleged invention in utility and effect, over what had gone before it, is proof, tending to establish the fact of novelty.

[See Judson v. Cope, Case No. 7,565; Smith v. Nichols, Id. 13,084; Eames v. Cook, Id. 4,239; Many v. Sizer, Id. 9,056.]

7. The reissued patent granted to John C. Birdsall, numbered 1,299, *held* valid.

[In equity. Bills by John C. Birdsall against A. McDonald, and by the same against the Ashland Machine Company, for infringement of letters patent No. 20,249, and reissue of the same, No. 1,299, granted, respectively, to complainant May 18, 1858, and April 8, 1862, and of letters patent No. 35,209, granted to complainant May 13, 1862. Decree for complainant.]

S. S. Fisher, for complainant.

George Willey and George Rix, for defendants.

Before SWAYNE, Circuit Justice, and WELKER, District Judge.

SWAYNE, Circuit Justice. These are suits in equity founded upon certain patents issued to complainant, touching machinery for getting out clover-seed. Except in one particular, hereafter mentioned, the bills in both cases contain the same allegations. The parties agree as to the state of the art, down to the period of the alleged inventions of the complainant.

Before that time clover-heads were detached from the stems, preparatory to hulling, by the tramping of horses, by thrashing with flails, by cutting with cradles, (the two first fingers being covered with canvas and the heads cut off near the place of their attachment to the stems,) by removing the heads in the field by an instrument known as a stripper, and, after mowing, by ordinary thrashing machines. The heads were also sometimes detached by a machine designed specially for that purpose. Hulling out the seed was a distinct process. This was usually done by a machine used for that purpose alone. Machines for thrashing and those for hulling were frequently worked at the same time, side by side.

These instrumentalities were irrespective of the machines to which our attention has been called by the learned counsel for the defendants. They were intended, it is claimed, each to combine the processes of detaching the heads, hulling out the seeds, and removing the chaff, without the aid of any other instrumentality.

In regard to the date of the complainant's original invention, the proofs satisfy us of the following facts: He made his first combined thrashing and hulling machine in the summer, or fore part of the fall, of the year 1855. It was not entirely successful. It cut the seeds to some extent, and had other defects subsequently corrected. He made one or two more machines in the year 1856. His model for the patent office was completed about the 1st of December, 1855. He made oath to his application for a patent January 19, 1856. He exhibited a machine at the State Fair at Buffalo in 1857, and took the first premium.

There is some conflict in the testimony as to this branch of the case, but it is much less than is usual where the invention involved is so important, where the adverse interests are so numerous and potent, and where the preparation for the defense has been so thorough. The effect of the evidence is such as to leave no doubt in our minds upon the subject.

There is no foundation for the objection that the invention was abandoned to the public. The measures taken by the complainant to procure a patent, and its subsequent issue, are conclusive against the proposition. It is true the application was not filed in the patent office until the 3d of February, 1858, more than two years after it was sworn to; but the delay was owing to the remissness of the agents, to whom the business of procuring the patent was confided. They had the application, the model, and the requisite funds in their hands

during all the intervening time. The complainant was ignorant of their neglect, and should not be held responsible for the delay that occurred. He sold no machine prior to two years before the filing of the application. He used the one first made publicly, but to what extent and under what circumstances, is not clearly shown by the evidence. It is shown that the use, whether more or less, was tentative, and that, by the light of experience thus acquired he made the subsequent and better ones. Public use in good faith for experimental purposes and for a reasonable period, even before the beginning of the two years of limitation, cannot affect the rights of the inventor. The objection rests upon the principle of forfeiture, and is not to be favorably regarded. Every reasonable doubt should be raised against it. But where either of the facts of this class, specified in the statutes, is clearly made out, the result is as if there had been the failure of condition precedent, and the defect is fatal to the patent. Neither a court of law nor a court of equity has any dispensing power. It is alike the duty of both to give full effect to the law. Neither can interpolate a qualification with which congress has not seen fit to temper the rules prescribed. The complainant is not barred by laches or acquiescence. The facts disclosed in the record are not such, we think, as to take away his right to maintain these suits. The complainant's bill against McDonald and others is founded upon two patents, reissue No. 1,299 and the original patent, No. 35,209. The bill charges the defendants in that case with infringing all the claims, three in number, of the reissue, and the third claim of the original patent.

As regards the reissue, the case is the same as to the defendants in both suits. The third claim of No. 35,209 is as follows: "The spiral conveyer W' in combination with the hulling cylinder, for distributing the tailings from the elevator uniformly to the feed rolls and hulling cylinder."

As to this claim, we deem it sufficient to remark that the evidence has failed to satisfy us of its originality with the complainant, or its infringement by the defendants, as alleged.

The subject is of little importance as compared with the issues arising under the other patent. We shall, therefore, say nothing further upon the subject. The bill must be dismissed as to this claim.

In the specifications of the original patent No. 20,249, issued May 18, 1858, of which No. 1,299 is a reissue, the invention is described as consisting of "certain new and useful improvements in machines for thrashing and hulling clover." The claim is as follows: "Having thus described my invention, what I claim therein as new and desire to secure by letters patent, is the arrangement of the slatted belt b b, with the bolt B B', table T, thrashing cylinder D, hulling cylinder L, and fan F, the whole operating in the manner and for the purpose substantially as set forth."

In the specifications of the reissue the patentee says: "Be it known that I * * * have invented a new and useful machine for thrashing clover, to separate the seed, hull, and clean it at one operation, or in one machine. Prior to my invention, clover was thrashed by a machine which only separated the seed, with the hulls on it, from the straw and heads, and the seed was taken by manual labor, and put into another machine of a different construction, to remove the hulls and cleanse the seed. The object and purposes of my invention and improvements have been to make a machine, which would thrash the clover and separate the seed from straw or stalks and heads, remove the hulls from the seed, and clean it ready for use or market. And I have succeeded in making a machine which will thrash, hull, and clean more than twice, and nearly three times, as fast as it has been done heretofore, with the same or a given quantity of labor and power. The nature of my invention and improvements in machines for thrashing clover, and hulling and cleaning the seed, consists in arranging and combining in one machine the cylinder which thrashes the bolls and seed from the straw or stalks, and the cylinder which hulls the seed, so that the bolls and seed thrashed may be separated from the straw or stalks, and conveyed from the thrashing to the hulling cylinder, and the seed hulled before it passes out of the machine; and in combining with the above a bolting or screening and conveying apparatus, to separate the bolls and seed from the straw or stalks, and deliver them to the hulling cylinder; also in combining with the thrashing and hulling cylinders a screening and fanning apparatus, to separate the hulls or bolls, and clean the seed after it leaves the hulling cylinder."

He then proceeds to give a full and clear description of the machine and of the mode of constructing it, and concludes as follows: "I will now state what I desire to secure by letters patent, to wit: I claim the arranging and combining in one machine the cylinder which thrashes the bolls and seed from the straw or stalks, and the cylinder which hulls the seed; so that the bolls and seed thrashed may be hulled before it (the seed) passes out of the machine. And in combination with the thrashing and hulling cylinders, above claimed, I claim the bolting or screening and conveying apparatus, which separates the bolls and seed from the straw or stalks and delivers them to the hulling cylinder. And in combination with the thrashing and hulling cylinders, I claim the screening and fanning apparatus, which separates the hulls or bolls, and cleans the seed, after it leaves the hulling cylinder."

It is objected that the reissue is broader than the original patent, and, therefore, void.

The commissioner of patents awarded the reissue. The subject was placed by the law within his jurisdiction. His decision is to be held prima facie correct in all cases, and

it is conclusive, unless impeached for fraud, or unless it is clear upon the face of the several specifications, that the reissue is not for the same thing as the original patent. Where a remedy is sought for fraud, it must be in an independent proceeding had directly for that purpose by a bill in equity in the name and by the authority of the United States. Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 788; Mowry v. Whitney, 14 Wall. [81 U. S.] 434.

Inventors are a meritorious class of men. They are not monopolists in the odious sense of that term. They take nothing from the public. They contribute largely to its wealth and comfort. Patent laws are founded on the policy of giving to them remuneration for the fruits, enjoyed by others, of their labor and their genius. Their patents are their title deeds, and they should be construed in a fair and liberal spirit, to accomplish the purpose of the laws under which they are issued. We have examined carefully the specifications of both patents, and are satisfied that the commissioner decided correctly.

It is further objected that the reissue is for a mere aggregation of old things—that the aggregation involved nothing of invention, and was without merit, and, therefore, not patentable.

The slightest examination of the specifications, the model, and the evidence will at once dispose of this illusion. The machine, though made up of several elements, is a unit. Its purpose is to get out clover seed and prepare it for use. All its parts co-operate for that result, and are necessary to that end. Without either there will be a failure to the extent of the function which it performs, and the work intended to be accomplished would be imperfectly done. It is not necessary that every function should be performed simultaneously. Their connection and operation, as in this case, in immediate succession is sufficient. There is no analogy between this case, and the one relied upon by the counsel for the defendants as authority upon the subject.

In order to consider intelligently the questions of novelty and infringement, it is necessary to determine, in advance, the proper construction of the patent. It is for improvements upon pre-existing machines. This is its most prominent point. The improvements are in the combinations described. The parts are old. There is nothing new in any of them. The novelty lies in combining them in the manner set forth, and in the striking and valuable effects thus produced. We agree with the counsel for the defendants, that we are to look to the body of the specification for the intermediary and auxiliary means of giving to the things claimed as the complainant's invention, operative effect, but we do not agree with them in the inference they draw from this proposition.

The specific claims set up are: 1. The combination of thrashing and the hulling cylinders. 2. In combination with these, the bolting, screening, and conveying apparatus, which, operating between the thrashing and the hulling cylinder, supplies the latter with the material upon which its function is to be wrought. 3. In combination, also, with the two cylinders, the screening and fanning apparatus.

If any machine, of practical success and value, having these combinations, was "known and used by others before" the complainant completed his invention, then his patent is void. If, on the other hand, there had been no such machine, his patent is valid; and, in such case, every machine since constructed, having substantially the same combinations, though not using the same instrumentalities, but, instead of them, mechanical equivalents older than the invention, is a violation of his rights. This proposition assumes that the machine of the complainant was a success. The proof shows that it was a great and brilliant one. The result of his invention was his, and another cannot appropriate it, by merely changing the form and shape of the appliances employed. That these appliances had long been known in the state of the art, and that those employed by the patentee are of the same character, is immaterial. It is the combinations, and their new effect, that are to be regarded. Any change merely colorable, involving no new idea, requiring not invention, but only mechanical skill, to make it, a change which retains the idea of the patentee and the substance of his invention, notwithstanding the different drapery in which that substance is clothed, cannot avail to protect a party charged with infringement.

The superiority of an alleged invention in utility and effect, over what had gone before it, is proof tending to establish the fact of novelty.

If the views we have expressed as to the construction of the patent, and the rules we have laid down upon the subject of infringement, are correct, it will hardly be denied, if the patent is valid, that the defendants have offended as charged in the bills.

Viewing the subject from this standpoint, no question was raised by the counsel for the defendants in the discussion before us. The main stress of their argument was upon two propositions: That the patent was void for want of novelty: that if it were not void, the patentee having used instrumentalities, all of which were old, in making his combinations, the defendants had a right to use other and different old instrumentalities in the same way and for the same purpose.

We shall forbear to examine in detail the evidence relating to the second proposition. In our view it supports fully the complainant's allegations, and brings the case within the rules we have laid down upon the subject. The question of novelty is the only one about which we have felt any difficulty. At first the defence struck us as formidable.

Reflection and a full examination of the evidence has removed all doubt from our minds and enabled us to reach a satisfactory conclusion. It is insisted that the complainant's alleged invention, was anticipated by what was designated in the argument as: The machine of Hizer: the machine of Rowe: the machine of Mathews & Hale: the machine of Hathaway; the machine of Keezler.

The argument before us was directed chiefly to the two machines first mentioned, and our remarks will be confined to them. The question relating to the Hizer machine was before the commissioner when he granted the reissue. His opinion upon that occasion is in evidence. He says: "It only requires an inspection of these (the model and drawing) to show that this machine never had, and never was intended to have, a thrashing cylinder. The Hizer machine was designed to take the clover heads, after they had been separated from the straw, and hull them. It was a huller, and not a thrasher and huller."

A large number of witnesses were examined on both sides. This view, we think, is sustained by a very decided preponderance of the evidence. France testifies that the upper cylinder was a picker with wooden pins, and merely picked the chaff apart. He and thirteen others testify that the heads were tramped or thrashed off before they were fed to the machine. None of the witnesses examined had better means of knowledge or are more trustworthy than these. Ten of them testify that they saw the machine in use, and that it had but a single cylinder. The machine was used for one of them—Patterson. He saw the first combined machine he ever saw, the October before his deposition was taken.

Crites, another of them, says, he ran a machine on shares with Hizer two seasons—1847 and 1848. He says the heads were thrashed or tramped off and fed to the machine with a scoop or shovel. He never knew of Hizer building a machine with two cylinders, and he never saw a machine with two cylinders, until the Monday before he was examined.

C. H. Lizor furnished Hizer with money to enable him to get his patent, and got one of the machines. It had but one cylinder. George H. Lizor helped Hizer to make his model. It had one cylinder. He first heard of a combined machine two years before he testified.

Heck manufactured the machines in the summer and fall of 1847. They had one cylinder. They did not prove successful, and the manufacture was abandoned. Allen Smith worked with Heck, and his testimony is to the same effect. He first heard of a combined machine in 1858 or 1859.

Knox saw a picker on the machine. Hizer took it off and laid it away before the machine was used. Mowray testifies that the picker was a failure, and was removed. Mrs. Hizer, the widow of the patentee, was well acquainted with the machine. Her testimony is clear upon the subject. She says: "The first machine had a roller on top, a picker they called it. Well, then the clover got tangled with the roller on top, so they could not work with that on. Then it worked and cleaned the seed after he took that off." By that she says she means the picker. She says further, that the picker was taken off the day Hizer began to use the machine.

Comment is unnecessary. There is some conflicting evidence, but it fails to neutralize the effect of that to which we have adverted.

The patent issued to Rowe is in evidence. It is dated April 30, 1861, nearly three years after the emanation of the patent to the complainant. The defendants rely, of course, not upon the patent to Rowe, but upon machines used by him at different periods from 1845 to 1857. The complainant's counsel admit, that, during that time, Rowe did make and use two or three machines with two cylinders, but he insists that they were both hullers; that neither was a thrasher; that the machines were experimental, were failures, and that they were finally abandoned. The defendants examined eleven witnesses, and the complainant fifteen. We shall advert to only so much of the evidence taken, as we deem material for the purposes of this opinion, giving the names of the several witnesses in connection with a brief resumé of their testimony, respectively.

Henry C. Smale, age 63, farmer in West Virginia, had a Rowe machine to thrash clover seed for him in 1855 and for two or three years thereafter. The machine was run by Bender & Hyeronymous. It did not work at all. He had a great deal of trouble with it. It left about one-third of the seed in the straw. The clover was gathered with a cradle which had three fingers and a trough.

John B. Tites had a Rowe machine thrash for him in 1852. It had two cylinders. It thrashed slow, gave trouble about choking, and ground the seed. The first day it thrashed three and a half bushels. Don't know whether this was an average day's work. The best and plumpest of the seed were broken and of no account.

Jacob Wolf saw the Rowe machine in 1847. First had a single huller. First change Rowe made was by adding the screen; then the second cylinder or stemmer that knocked the seed off the straw. Heard Colonel Lucas tell Rowe, when he attached the second cylinder, to get out a patent. Rowe said he did not want a patent as the machine then was. An average day's work, before the extra cylinder was added, was from three to five bushels. After the second cylinder was added, the machine did not thrash so much. The upper cylinder hulled out considerable seed when the clover was dry.

A. J. Read.—He used one of Rowe's machines in 1850. It had two cylinders. The

machine separated the hulls from the straw. The second cylinder hulled the seed. Some days the machine thrashed twelve bushels, but the seed was dirty and had to be sifted; he never saw any clean seed from the machine. Some days it did not thrash more than a bushel; some days the machine thrashed without breaking the seed; some days they were broken very much. Rowe often said he did not consider the machine "a genuine one," but expected to perfect it. The clover was sometimes prepared by stripping and sometimes by cradles.

Michael Wolf.—He tried a Rowe machine in 1848, and could not make it work. The seed was broken so much that Rowe would not let him hull any more. He finished that job, and several others that had been begun, with a Fitz machine with one cylinder.

George W. Spotts knew of one of Rowe's double cylinder machines in 1855. The machine was taken to Scavel's, and left there to rot. "Rowe was most invariably altering his machines, and often told me he could perfect a better machine. The war broke out and broke the old gentleman up. He never succeeded."

B. W. Kanode.—The Rowe machine got out from four to six bushels of seed per day. The seed was cut.

Samuel Walton.—Rowe stated that the machines he had been working, up to the time he got his patent in 1861, were experimental. Did not consider them perfect. That he had made numerous changes in that time. He said that he did not consider any of his machines, up to that time, worth getting a patent for.

Hiram King.—Resides at Hagerstown, Maryland. Is a wheelwright. Became acquainted with Rowe in 1847 or 1848. He was then running a huller. Worked for him in 1847 in repairing an old two-cylinder machine. Worked for him again in 1858 upon an old machine, and assisted him in building a new one. "Q. 45.—Do you know anything of the practical working of the old two-cylinder machine? A. I do; as far as my judgment about machinery, they were not practical machines."

There is other testimony, more favorable to the machine, but it fails to repel the force of that to which we have referred. There is also proof of the defective working of a two-cylinder Rowe machine reproduced, and expert testimony taken by the complainant. We do not deem it necessary particularly to advert to either.

Let the Rowe machine, as described by all the witnesses, be contrasted with the machine of the complainant. The latter is capable of thrashing and hulling out, and cleaning and preparing thoroughly, the seed for the market. Its superiority lies alike in the quantity and the quality of the work which it performs. We think the Rowe machine was experimental, imperfect, and of no practical value.

The line of demarkation between the Birdsall machine and those that went before it, is that which separates success from failure. There can be no better proof of this than the crowd of imitations which have followed the invention of the complainant.

There is less ground for claiming that either of the other machines, which have been mentioned, is a defence for the defendants, than that those are, which have been considered. The testimony of Davis and Schuyler, under the circumstances, requires no remark. We hold that the attack on the patent for want of novelty has failed.

It appears in the evidence that there was a struggle between these parties upon this question, before the commissioner, when the patent was extended. The proceeding was ex parte. We have considered the case as if no such contest had occurred.

A decree will be entered in each case in favor of the complainant, in the usual form, for an injunction, for an account, and for costs.

[NOTE. Patent No. 20,249 was granted to J. C. Birdsall, May 18, 1858; reissued April 8, 1862, (No. 1,299.) For other cases involving this patent, see Birdsall v. Hagerstown Agr. Imp. Co., Cases Nos. 1,433, 1,436, and 1,437; Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244; Birdsall v. Perego, Case No. 1,435; Perrigo v. Spaulding, Id. 10,994.]

Case No. 1,435.

BIRDSALL v. PEREGO.

[5 Blatchf. 251.] [1]

Circuit Court, N. D. New York. Aug. Term, 1865.

PATENTS—ACTION FOR LICENSE FEES.

1. Where the patentee of a machine grants an exclusive right, under his patent, to make and sell machines in a given territory, for a specified fee to be paid to him for each machine made and sold, and brings a suit against the grantee to recover fees due and unpaid for machines made and sold, it is no defence, by way of special plea in bar of the action, that the plaintiff has infringed such exclusive right.

[Distinguished in National Manuf'g Co. v. Meyers, 7 Fed. 357; Hubbell v. De Land, 14 Fed. 472.]

2. Nor is it a defence, by way of plea in bar, that the plaintiff was not the first and original inventor of what his patent claims.

[Distinguished in National Manuf'g Co. v. Meyers, 7 Fed. 357; Hubbell v. De Land, 14 Fed. 472. Cited in McKay v. Smith, 39 Fed. 557. Distinguished in Mudgett v. Thomas, 55 Fed. 647.]

3. In an amended declaration, it is proper to state the citizenship of the parties in the present tense, without stating such citizenship as existing at the time of the commencement of the suit.

[Disapproved in Laskey v. Newtown Min. Co., 56 Fed. 630.]

At law. Demurrer to pleas. The declaration, which was an amended one, set out that

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

the plaintiff [John C. Birdsall] "is a citizen of the state of Indiana," and that the defendant [William Perego] "is a citizen of the state of New York." It then averred, in substance, that the defendant entered into a contract or agreement in writing with the plaintiff, in and by which the plaintiff agreed to allow, and did allow and transfer, to the defendant the exclusive right to manufacture and sell a certain clover machine, (for which patents had been issued by the United States to the plaintiff, on the 18th of May, 1858, [No. 20,249,] and on the 13th of December, 1859, for the period of fourteen years from the dates of said patents respectively,) for the supply of the territory of the eastern part of the state of New York, as described, until the said patent should expire; and in and by which the defendant did undertake and agree with the plaintiff, to pay the plaintiff, for such exclusive right to manufacture and sell such clover machines, the sum of thirty-five dollars for each and every machine manufactured and sold by him for the supply of the territory aforesaid, one half thereof to be paid on the sale of each machine so sold by him, and the balance in six months after such sale; that the defendant, on the 30th of November, 1863, manufactured and sold a large number, to wit, thirty-eight, of said clover machines, whereby the defendant became, and was, on the 1st of June, 1864, indebted to the plaintiff in the sum of $1,338, to be paid, &c. It also averred a request of payment, and that such debt was unpaid, &c. The contract was made with the defendant and one Spencer, his then partner, but, by its terms, it became the separate contract of the defendant, on the subsequent dissolution of the firm. This appeared on the face of the declaration. The defendant pleaded nil debet and three or more special pleas. By his third plea, he alleged, in substance, that, after the alleged making of the agreement declared on, and before the alleged manufacture and sale of any of said clover machines by the defendant, to wit, on the 31st of December, 1861, and at divers other times both before and after that day, without the consent and against the will of the defendant, the plaintiff, by himself, and by and through his authorized agents, manufactured and sold one hundred of said clover machines, for the supply of the district and territory described in said contract and declaration; that all of said machines were so manufactured and sold by the plaintiff and his authorized agents, for use, and were, in fact, used, with the knowledge and consent of the plaintiff, within and for the supply of said territory, contrary to the intent and meaning of the contract, and in violation thereof, &c., by means whereof the defendant did not, on the 1st day of January, 1862, nor at any other time thereafter, have or enjoy the exclusive right of manufacturing and selling said machines, for the supply of the said territory or any part thereof; and that the defendant was, at all times, ready and willing and able to manufacture and sell said machines for the suply of said territory, and to pay the plaintiff thirty-five dollars on each and every machine thus manufactured and sold by him for the supply of said territory, if the plaintiff would have allowed and secured to the defendant the exclusive right of manufacturing and selling said machines for the supply of said territory, but which the plaintiff neglected and refused to do. To this third plea the plaintiff demurred, and assigned, as special cause of demurrer, that said plea was double, in this, that it contained several and distinct matters of defence. By a fourth plea, the defendant alleged, in substance, that the patents mentioned in the agreement set out in the amended declaration were void, because the plaintiff was not the first and original inventor of the improvements therein claimed as the plaintiff's invention, and, also, because each of the patents was for more than was the invention of the plaintiff. This plea then concluded as follows: "Wherefore this defendant says, that, if any such contract or agreement was ever in fact made or entered into by the said defendant and the said Samuel Spencer with said plaintiff, as is in that behalf alleged in said amended declaration, the same was void and of no force or effect, for want of consideration therefor," &c. To this fourth plea the plaintiff demurred, assigning for special cause of demurrer, that such plea was argumentative. [The demurrer was sustained.]

HALL, District Judge. The opinion of this court on the defendant's demurrer to the original declaration in this case, would seem to be decisive, so far as this court is concerned, of the principal question raised by the demurrer to the third plea. The contract of the parties, as set forth in the original declaration, was substantially the same that is set out in the amended declaration, with the exception that, in the latter, it is alleged, that the plaintiff "agreed to allow, and did allow and transfer, to the defendant, the exclusive right," &c., while, in the former, it was only alleged, that he "agreed to allow" such exclusive right; and it was held, under the former demurrer, that no averment or full performance on the part of the plaintiff was necessary. If this conclusion is correct, the third plea would seem to be bad in substance, as being no sufficient answer to the plaintiff's amended declaration. Selden v. Pringle, 17 Barb. 458; Thomas v. Quintard, 5 Duer, 80.

The third plea, as pleaded, admits the transfer to the defendant, of the exclusive right mentioned in the declaration,—Washburn v. Gould, [Case No. 17,214,]—and if, after such transfer, the plaintiff infringed that exclusive right, the defendant would have a right of action for such infringement. It would not, however, be a defence to this

action for the recovery of the sum agreed to be paid as a license fee for the machines which the plea admits were made and sold by the defendant. Even if such damages could be deducted from the plaintiff's demand, by way of recoupment, the facts alleged would furnish no sufficient defence, by way of special plea, in bar of the plaintiff's action; for, recoupment is a matter which, it is said, is never pleaded in bar. Nichols v. Dusenbury, 2 Comst. [2 N. Y.] 283, 286. And, if such a matter could be pleaded in bar of the action, it would be necessary to aver that the defendant's damages were at least equal to the damages of the plaintiff; for, otherwise, the plea would not answer the whole action, and would be bad for that reason. But it is not matter for a plea in bar, under any circumstances, (Id. 286;) and, whether the defendant claims damages for an infringement of the exclusive right transferred to him, or for the violation of the plaintiff's agreement to allow him the exercise of that exclusive right, the rule of law and of pleading is the same.

The demurrer to the fourth plea presents a more doubtful question. The plea alleges no fraud on the part of plaintiff, in obtaining the contract, there is no express warranty, and, for aught that appears, the plaintiff supposed, when the contract was made, that he was the original and first inventor of the machines specified, and that his patents were legal and valid. The plea does not allege that the defendant has been disturbed in the enjoyment of the exclusive right which the plaintiff assumed to transfer, by any person holding a paramount title, or aver even the existence of any such paramount title. Nor does it allege a re-transfer of the alleged right, while it in effect admits the manufacture and sale of the thirty-eight machines, as alleged in the plaintiff's declaration, without the defendant's having rescinded the agreement on the ground of an entire failure of consideration, because the plaintiff had in fact no exclusive right under his patents. The defendant has made and sold machines during the existence of the agreement, and while that agreement could have been set up against the plaintiff, if he had brought a suit against the defendant for an infringement of his patents. I am of the opinion that this fourth plea is bad in substance, as not forming any defence to the plaintiff's action. Kinsman v. Parkhurst, 18 How. [59 U. S.] 289, 293; Wilder v. Adams, [Case No. 17,647;] Pitts v. Jameson, 15 Barb. 310; Thomas v. Quintard, 5 Duer, 80; Brooks v. Stolley, [Case No. 1,962.]

But, it is insisted, on the part of the defendant, that the declaration is bad in substance, because it states the citizenship of the parties in the present tense, instead of stating such citizenship as existing at the time of the commencement of the suit, it being insisted that this allegation of the amended declaration relates to the date of the filing of that declaration, and not to the time of the commencement of the suit. This objection must be overruled. The averment is substantially in the form used in all cases where suits are commenced by capias, or by the service of a declaration; and it is clear that the amended declaration is not bad for the cause alleged.

On the whole case, the plaintiff must have judgment on the demurrer, with leave to the defendant to amend within twenty days, on payment of costs.

[NOTE. For other cases involving this patent, see note to Birdsall v. McDonald, Case No. 1,434.]

Case No. 1,436.

BIRDSELL v. HAGERSTOWN AGRICULTURAL IMPLEMENT MANUF'G CO.

[1 Hughes, 59;[1] 2 Ban. & A. 519; 11 O. G. 420; 4 Cent. Law J. 211; 9 Chi. Leg. News, 186.]

Circuit Court, D. Maryland. Jan., 1877.

PATENTS—INJUNCTION—CONTEMPT—EVIDENCE OF VIOLATION.

1. On a motion for commitment for contempt for violating an injunction issued upon a patent, the question as to whether the machine constructed is the same as the old one enjoined, is one of fact, to be determined on the evidence.

[Cited in U. S. v. Anon., 21 Fed. 767.]

2. In determining this question, accurately constructed models of the two machines are the best means to enable the court to judge whether one machine differs in principle and mode of operation from the other.

3. In the absence of models, the testimony of experts who have examined the two machines is controlling.

4. The rule is, that courts of equity will never attach unless the violation of the injunction is plain and clearly proven to the court.

[Cited in Smith v. Halkyard, 19 Fed. 602.]

5. Birdsell's invention construed to be for the combination of a pure threshing cylinder with a pure hulling cylinder, and defendant's present machine for the combination of two hulling cylinders, and although the first cylinder in the present machine may separate the straw from the heads by a rubbing action, it is not a pure threshing cylinder, and, therefore, not an infringement of Birdsell's claim.

A motion for an attachment to commit defendants for contempt of court.

In 1874 the complainant [John C. Birdsell] sued the defendants for infringing upon his reissued patent, granted April 8th, 1862, as a reissue of the patent originally granted him May 18th, 1858, for improvement in machines for threshing and hulling clover-seed. This patent had been sustained in a very extended litigation in the northern district of Ohio by Justice Swayne, and the defendants in those cases had been enjoined. [Birdsall v. McDonald, Case No. 1,434.] Thereupon the present suit was brought, and it appearing to the court that the defendant used substantially the same devices as the defendants in the

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Ohio cases, a preliminary injunction issued against them under the patent in the fall of 1874. [Birdsall v, Hagerstown Agr. Imp. Manuf'g Co., Id. 1,433.] Afterwards they constructed a machine to accomplish the same purpose as the old one which had been enjoined, to wit, to pull out the seed. It was constructed, however, with certain changes, and the question heard by the court on the motion for commitment was, whether or not the changes that had been made by the defendant carried the machines outside the Birdsell patent.

Birdsell's patent had three claims, as follows: "1st. I claim the arranging and combining in one machine, the cylinder which threshes the bolls and seed from the straw or stalks, and the cylinder which hulls the seed so that the bolls and seed threshed may be hulled before it, the seed, passes out of the machine. 2d. In combination with the threshing and hulling cylinders, I claim the bolting, or screening, and fanning apparatus, which separates bolls and seed from the straw or stalks and delivers them to the hulling cylinder. 3d. In combination with the threshing and hulling cylinder, I claim the screening and fanning apparatus, which separates the hulls or bolls, and cleans the seed after it leaves the hulling cylinder."

It will be observed that the first claim was for the combination on one machine of a threshing cylinder to thresh the bolls from the straw; with the hulling cylinder, to hull the seed out of the bolls after they had been threshed from the straw. The second claim included this threshing cylinder and hulling cylinder as part of the elements claimed, adding other elements to them. This is also true of the third claim. The question was, therefore, raised on the first claim of the patent, the defendants claiming that they did not take the threshing cylinder contemplated by the Birdsell patent, it being conceded that they had the other parts. As this threshing cylinder was one of the elements of each claim of the patent, it was conceded that if they did not have this they did not infringe.

It appeared that, in the cases at Cleveland, [Birdsall v. McDonald, Case No. 1,434,] wherein Birdsell's patent was first sustained, the defendants had set up in defence a machine made by one Rowe, in Virginia, before the date of Birdsell's invention. At the hearing of those cases, Birdsell's counsel claimed that the Rowe machine was not an anticipation of Birdsell's invention, for the reason that although it had two cylinders, yet the first cylinder was not a pure threshing cylinder; that it differed from Birdsell's in the following particulars: 1st. That the spikes on the cylinder were bearded for the purpose of grinding or tearing, whereas the spikes on the Birdsell cylinder were smooth, for the purpose of knocking off the bolls by a knocking action. 2d. That the cylinder of the Rowe machine was covered with punched sheet-iron for the purpose of assisting in tearing off the hulls from the seed, whereas the cylinder of the Birdsell machine was smooth, so that it might not operate in this manner. 3d. That the concave underneath the cylinder of the Rowe machine was lined with punched sheet-iron to assist in the hulling operation, whereas the concave of the Birdsell cylinder was smooth. 4th. That the concave in the Rowe machine extended around far under the cylinder, so that the action of the cylinder and concave upon the seed might be kept up for some time during the progress of the bolls between the cylinder and concave, whereas the Birdsell concave was very narrow, so that the operation of hulling might not be performed, and that the result of these differences in construction was that the first cylinder of the Rowe machine hulled more seed than the second cylinder.

Now the defendants, the Hagerstown Company, in constructing their new machine, had departed from their old one in the same direction that the Rowe machine, earlier than Birdsell's, departed from the Birdsell. They had introduced into its first cylinder hulling devices, so that it hulled seed at the same time that it threshed the bolls from the straw. It was not the same cylinder and concave that Rowe had. It was a better one, and covered by patents recently granted to the Hagerstown Company, yet it had roughened spikes, a roughened concave, and a broad concave. It was therefore contended by the defence that this cylinder was not a threshing cylinder, but a hulling cylinder, as those terms are employed in the art of clover hulling, and that Birdsell in his case at Cleveland, in attempting to avoid the Rowe machine, had limited the claim to the first cylinder, constructed with purely threshing devices, and without hulling devices; and that, now his patent had been sustained, he could not extend it over a machine, the first cylinder of which was constructed with hulling devices.

The defendants contended that it appeared from the evidence that defendant's machine took the long straw with the clover on into the machine, and threshed the bolls from the straw, and hulled out the seed in one operation; and that it therefore accomplished the same purpose as Birdsell's, and that inasmuch as the first cylinder was so constructed that it was capable of threshing the bolls from the straw, it made no difference if, in addition to that, it also hulled out considerable seed. A large number of affidavits of experts were introduced on either side as to the operation of the machines.

Leverett Leggett, Wells Leggett, and Mortimer D. Leggett, for complainant.

Archibald Sterling, Robert H. Parkinson, and John E. Hatch, for defendants.

BOND, Circuit Judge, and GILES, District Judge. The injunction in this case

was to restrain the defendant from making, or using, or vending any combined machinery for threshing and hulling clover-seed, made in accordance with any of the inventions specified or claimed in any of the claims of the complainant's reissue patent 1,299, or such as they have heretofore made and sold.

Petition now is for an attachment against defendant for violating this injunction by making and selling machines containing a threshing and a hulling machine combined, as patented to complainant in the first claim of his patent.

The defendant denies that it has done this, but claims that the machines made and sold by it are substantially different from what it made before the issuing of said injunction, and from the machine described in complainant's patent, No. 1,299.

This is largely a question of fact, and many affidavits have been submitted to the court by the counsel for the respective parties.

The complainant has filed the affidavits of Frank Millward, an expert, Joseph W. Dougall, John C. Birdsell, complainant, and Hiram King, four in all. The defendant has filed affidavits of William C. Dodge, J. F. Reigart, L. W. Downing, Jacob Downing, Jacob W. Zantzinger, John Weller, S. C. Dowin, and A. Miller, eight in all.

In considering the question of a violation of an injunction, the court cannot but regret that they have not been furnished with models of the machine patented by Birdsell, and the machine which he alleges to be a violation of the first claim of his patent. The court can always best judge from models whether one machine differs in principle and mode of operation from another. In the absence of such evidence the court must look to the testimony of the experts who have examined the two machines. Now, it is a rule governing courts of equity in such cases that they will never attach a defendant for contempt where the violation of the injunction is not plain, and proved to the satisfaction of the court. So far from a violation being proved in the case, the evidence of the witnesses clearly shows to this court that the two machines are different in their mode of construction, and it is for the court to decide whether there is a substantial difference in the principle upon which they act. Now, the expert produced by complainant swears that they are substantially the same, but the two experts on behalf of defendant, Reigart and Dodge, both men of great experience in such matters, testified that the machines now made by defendant do not contain a feature of Birdsell's first claim. This, the court thinks, is fully sustained by the written evidence in the case. Birdsell's patent is for a combination of a pure threshing cylinder with a pure hulling cylinder; the defendant's machines contain a combination of two hulling cylinders, and although the upper cylinder may in some measure separate the straw from the head by rubbing or threshing, it is not a pure threshing cylinder; this has been done in machines made and patented before the date of Birdsell's patent, as will be seen by the diagrams I, K, and L attached to the deposition of Dodge, filed in this case. The court will therefore dismiss the motion for an attachment in this case.

[NOTE. For cases involving the same patents, see note, Case No. 1,434.]

Case No. 1,437.

BIRDSELL v. HAGERSTOWN AGR. IMP. MANUF'G CO.

[1 Hughes, 64;[1] 11 O. G. 641.]

Circuit Court, D. Maryland. March Term, 1877.

PATENTS—RESTRAINING ACTIONS FOR INFRINGEMENTS—JURISDICTION.

Where a suit upon a patent is pending against the defendant, who is manufacturing and vending an article claimed to be an infringement of the patent, and it appears to the court that the defendant is responsible for such profits and damages as may be assessed against him as the result of the suit, the court may, in its discretion, enjoin the complainant from bringing suit against the vendees of defendant. This is true, although the complainant enjoined may not be within the district at the time of the injunction, as by reason of bringing the suit he has given the court jurisdiction over him for such purposes as may be necessary to do full equity between the parties in relation to the subject-matter of the suit.

[Cited in Booth v. Seevers, Case No. 1,648a; Allis v. Stowell, 16 Fed. 788; National Cash Reg. Co. v. Boston Cash Indic. & Rec. Co., 41 Fed. 52; Kelly v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

Motion to enjoin complainant [John C. Birdsell] from bringing suits against the defendants' vendees.

In this case an injunction had been issued restraining defendants from infringing on the reissued patent granted complainant May 18th, 1858, [No. 20,249,] reissued April 8th, 1862, [No. 1,299,] for an improvement in machinery for hulling and threshing clover. The defendants afterwards changed the construction of their machine, and proceeded to sell clover hullers of the changed construction. On a motion made by complainant to commit them for contempt of court, for violating the injunction issued against them, by selling machines of this changed construction, the court held that on the showing made the machines were substantially different from Birdsell's patent machine, and therefore dismissed the motion. See Off. Gaz. March 13, 1877, [Birdsell v. Hagerstown Imp. Manuf'g Co., Case No. 1,436.] Thereafter, complainant notified several of the vendees of defendants, some of whom were using the original machine that had been enjoined, and some of whom were using the machine as it had been changed, that unless settlement was

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made with him forthwith, suit would be brought against them. Defendants thereupon moved, upon a cross petition filed in the original case, for an injunction to issue against the complainant, restraining him while the original suit was still pending against them, under which damages and profits could be collected for all the machines that they made and sold, from bringing any suit or threatening to bring any suit against any vendees of theirs, based upon a user of a machine that might become subject of account in the original case.

Counsel for defendants, seeking the injunction against complainant, based their motion upon the general equity jurisdiction of the court; that inasmuch as complainant had submitted himself to the jurisdiction of the court to obtain relief against the defendants, he was also subject to the order of the court in relation to any matter relating to the granting of that relief; that the defendants were thoroughly responsible, and that upon the original suit being carried on to completion, if recovery was made, the complainant would recover in that suit all the profits that defendants had obtained from the wrongful manufacture, and the damages that he had suffered by reason of the wrongful manufacture, and that complainant would therefore be put in the same position as if he had originally sold all the machines. That this being the case, he ought not to be allowed to interfere with the vendees of defendants while the suit against them was pending. In support of their position they cited the decrees of Judge Drummond in the case of Barnum v. Goodrich, [Case No. 1,036,] wherein the complainant having brought suit against the defendant, and obtained an order for defendant to keep an account of the sale of the devices alleged to be an infringement, was enjoined from prosecuting suits already begun by him in other circuits against the defendant's vendees, and from bringing any further suits against defendant's vendees; also the decree entered by the Hon. H. H. Emmons, United States circuit judge, and Hon. P. B. Swing, United States district judge, in the circuit court of the United States for the southern district of Ohio, in the case of Smith v. Fay, [Case No. 13,045,] restraining the complainant from bringing suit against the defendant's vendees in other circuits, the complainant in this case having obtained an interlocutory decree, and a reference to the master, and the suit being at that time pending before master on the question of the account.

The defendants relied upon the fact that the complainant was a resident of Indiana, and not before the court, and had sought the jurisdiction of the court for the purpose of bringing the suit, and for no other purpose. He was not therefore subject to any order upon him, that the court could not enforce an order if it made one, and it would not do an idle thing. Respondents insisted that the order could be enforced by dismissing the suit, by a fine, or, if complainant should afterwards come within the district, by imprisonment. [Motion granted.]

The respondents asking the order were represented by A. Sterling, Esq., and Hatch & Parkinson, of Cincinnati; the complainant by M. D. Leggett & Co., of Cleveland.

Before BOND, Circuit Judge, and GILES, District Judge.

The following was the decree entered by the court:

BOND, Circuit Judge. This cause coming on, etc., on petition of defendant for injunction against complainant, to restrain him from prosecuting or threatening to do so, suits against any vendee of defendant for use or sale of clover hullers made by defendant, and sold by them, and it appearing to court that complainant has threatened to bring such suits, while suit is pending by him in this court against defendants, the manufacturers, the court doth order that complainant be restrained from commencing prosecution, or threatening so to do, any suit against any vendee of defendants, for an alleged infringement of the letters patent involved in this case, and on which this case is brought, based on any user or sale by said vendee of any clover machine purchased of defendants. Provided, defendants within thirty days file a bond in the sum of $5000, with security to be approved by the court, for payment of any damages that may be adjudged against defendants in this suit, and shall also file a sworn monthly statement of the number of clover machines hereafter made and sold by them.

Both judges concurred in this.

[NOTE. For other cases involving the same patents, see note to Birdsall v. McDonald, Case No. 1,434.]

BIRDSEYE v. LAKE SUPERIOR SHIP CANAL, R. & I. CO. See Case No. 13,643.

Case No. 1,438.

BISCHOFF et al. v. MAXWELL.

[4 Blatchf. 384;[1] 19 How. Pr. 191.]

Circuit Court, S. D. New York. Oct. 15, 1859.

CUSTOMS DUTIES—TARIFF ACT JULY 30, 1846—UNDERVALUATION—PENALTY.

1. Under the 8th section of the tariff act of July 30th, 1846, (9 Stat. 43,) where goods are imported by their manufacturer, they are not subject to an additional duty or penalty of 20 per cent. of their value, for undervaluation in the invoice.

2. But, in such case, they are subject, under the 17th section of the tariff act of August 30th, 1842, (5 Stat. 564,) to a penalty of 50 per cent. of the duty.

At law. This was an action [by Christopher Bischoff and others] against [Hugh Max-

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

well] the collector of the port of New York, to recover back a penalty of 20 per cent. on the value of the goods, exacted, under protest, for the undervaluation of silks, on their entry at the custom-house. It was claimed, that the imposition of the penalty, which amounted to $598.20, was warranted by the 8th section of the act of July 30th, 1846, (9 Stat. 43.)

Almon W. Griswold, for plaintiffs.

Charles H. Hunt, Asst. Dist. Atty., for defendant.

NELSON, Circuit Justice. The ground upon which this suit is sought to be sustained is, that the goods were imported by the manufacturers, and that the case is, therefore, not within the 8th section of the act of July 30th, 1846, as that is limited to importations of goods purchased. The fact appears, from the oath of one of the plaintiffs, on the original invoice, certified by the counsel, that they were the manufacturers, and must have come under the notice of the collector, and the appraisers at the customs must be deemed to have been advised of it. It is, also, fully confirmed by the evidence on the trial. Protest was duly made against the payment of the penalty, and the exaction was, therefore, not warranted by law. But the case falls within the 17th section of the tariff act of August 30th, 1842, (5 Stat. 564,) which imposes, for undervaluation, a penalty of 50 per cent. of the duty. The plaintiffs are, therefore, entitled only to the amount exacted, after deducting the 50 per cent. penalty, with interest. The clerk will settle the amount for which judgment is to be entered, if it be not agreed on by the counsel.

Case No. 1,439.

In re BISHOP.

[1 McA. Pat. Cas. 519.]

Circuit Court, District of Columbia. March 31, 1857.

PATENTS FOR INVENTIONS — COUPLING BUMPERS — PATENTABLE NOVELTY AND UTILITY.

[1. A sliding block, for use in connection with a bumper, having formed in its end a V-shaped chamber for the purpose of guiding, centering, and holding the links in a horizontal position, possesses no element of patentable novelty or utility, in view of the patent issued October 2, 1849, to Warren D. Hatch, and the rejected application of James McCullum, filed January 23, 1854.]

[2. A claim of utility by reason of a certain vertical motion which the block is capable of, not made before the commissioner of patents by the specification, can have little influence in determining the question of the novelty of the form and effect on which the applicant relies on his appeal from the commissioner's decision.]

[Appeal from the commissioner of patents.

[Application by George S. Bishop for letters patent for a sliding block, for use in connection with a bumper, having formed in its end a chamber for guiding and holding links in a horizontal position. From a decision of the commissioner of patents denying an application for a patent, the applicant appeals. The decision was affirmed.]

J. H. Merrill, for appellant.

MERRICK, Circuit Judge. This case having been appealed to me, one of the assistant judges of the United States circuit court for the District of Columbia, the 20th day of March, at 10 o'clock a. m., was fixed as the time, and the chancery room at the city hall as the place, of hearing said appeal; at which time and place the applicant, by his attorney in fact, J. H. Merrill, appeared, and further time was given him—until Tuesday, 24th of March—when the applicant and his said counsel appeared at my chambers, and were heard upon their whole case, and in explanation of the models and drawings by them presented, as well as upon those relied upon and exhibited by the office. The whole case has been duly considered, and every paper filed in it has been carefully read by me and the models and drawings examined.

The specification claims as the special point of novelty in the proposed arrangement of machinery "the placing within the bumper, or securing thereto, a sliding block, the same having formed in its end a V-shaped chamber for the purpose of guiding, centering, and holding the links in a horizontal position." Upon comparing the claim with that embraced by the patent of Warren D. Hatch, of October 2d, 1849, and the rejected application of James McCullum, filed January 23d, 1854, it is apparent that all the forms of machines are substantially present in their machines, which are exhibited by the applicant; nor is there any new effect produced by his invention. The sliding block is common to all the machines. In the two cases of Hatch and McCullum it has superadded a combination of spiral spring to operate its automatic movement. The party does not claim that dispensation with automatic movement is any part of his improvement. It would certainly not in a case like this be a novelty or an invention. The novelty is in the production, not the absence of automatic force. Now, the automatic principle being out of view, we find the sliding block common to all the cases, and operating simply to hold up the coupling-pin when adjusted, and to let it drop into the link when removed by propulsion from the end of the link already attached to another car, which is to be coupled to the one having either of the machines in question attached to it. The claimant has urged in his arguments that a certain vertical motion which his block is capable of (being much smaller in its vertical dimension than the space inclosing it) is an element of patentable novelty and utility; but whatever his argument, no such claim was made before the commissioner by his specification, and its utility can have little influence in determin-

ing the question of novelty of those forms and effects on which he relies. The claimant further relies upon the V-shaped chamber of the block as novel. Its whole novelty, of course, consists in its adaptation as a guide of the link to its place where it must receive the falling coupling-pin. The wedge-like flaring or V-shape of the sliding block is present in Hatch's machine, differing from the present in being applied vertically instead of horizontally; but the principle of applying the sloping surface to guide the impinging body to its proper place is manifest; and if there were any special novelty in applying such a guiding surface laterally instead of vertically, that also is anticipated by the machine of McCullum, not, indeed, upon the block itself, but to the outer adit—the sides of the opening in the bumper head. McCullum, in his specification, calls for the adit opening to be "flared," as he terms it, both vertically and horizontally, for the purpose of guiding the link. Now, the V-shape in the block is the same shape as the flared or wedge shape on the bumper of McCullum, and its transfer or prolongation into the block produces no new effect, nor calls for the exercise of any inventive faculty; it is a familiar device used to produce an obviously familiar result.

Finding in the case and the reasons of appeal no ground to impeach the correctness of the conclusions which have been reached by the acting commissioner, his decision rejecting the application for a patent, as set forth in the specification, is affirmed; and this, my opinion, is accordingly hereby certified to the commissioner of patents this 31st day of March, A. D. 1857.

BISHOP, The MARIA. See Case No. 9,077.

BISHOP, (ARNOLD v.) See Case No. 552.

BISHOP, (GOODYEAR v.) See Cases Nos. 5,558 and 5,559.

BISHOP, (GREENE v.) See Case No. 5,763.

BISHOP, (JOHNSON v.) See Case No. 7,373.

Case No. 1,440.

BISHOP v. STOCKTON et al.

[1 West. Law J. 203.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1843.[1]

CARRIERS—INJURY TO STAGE COACH PASSENGER—INTOXICATION OF DRIVER.

Held, that the proprietor of a stage coach is liable for an injury done to a passenger by upsetting, in consequence of the driver being intoxicated, although his reputation as a driver was until then of the highest character, and he had never been known to be intoxicated before.

[See Stokes v. Saltonstall, 13 Pet. (38 U. S.) 181; McKinney v. Neil, Case No. 8,865; Maury v. Talmadge, Id. 9,315; Peck v. Neil, Id. 10,892.]

[See note at end of case.]

At law. The action was brought to recover damages for injuries sustained by Miss [Harriet] Bishop by the upsetting of a stage of the defendants [Lucius W. Stockton and Daniel Moore,] in January, 1842. The upset occurred 1½ miles east of Uniontown, Fayette county. Both parties agreed that the stage was upset, that Miss Bishop's arm was broken, her elbow badly strained or bruised, her face cut or scratched, in several places, a wound in the scalp two inches long, and the upper lip cut and swollen so as to produce some deformity which is gradually subsiding.

Miss Bishop was first treated for her injuries by Dr. Campbell in Uniontown. About thirty-six hours after the injury, she left Uniontown and travelled by stage to Wheeling, thence by steamboat to Marietta, Ohio, and up the Muskingum to McConnelsville, where she was attended by Dr. Thompson, for about eight weeks.

The plaintiff's counsel asked not only compensatory but exemplary damages, charging the accident to the drunkenness of the driver. The driver, James Corbin, took the box at Farmington, 10 miles east of Uniontown; then, according to the testimony of James McCaully, (the driver who delivered the passenger to him,) he was duly sober. Mr. Bishop, brother of the plaintiff, and Mr. Wadsworth, testified that the driver stopped at Snyder's, three miles from Farmington. Snyder swore that he was drunk when he came into his house; he asked for liquor and was refused; two miles further he again stopped at Downer's tavern, went into the house three times, remaining altogether about 15 minutes; here he was overtaken by another stage driver, James Smith. Smith testified that Corbin was drunk, staggering; and that each of them watched the horses while in turn they went in to drink. Smith observing Corbin's condition told him to drive slow. Corbin answered: "If you expect to keep up with me you must drive damned fast," mounted his box, cracked his whip, shouted, and in three minutes was out of sight. Here the descent of the Laurel hill commences; the passengers say that up to this time their ride was agreeable, but now became extremely rough and rapid. They descended the mountain, however, passed along the level below, ascended a little hill, descended it at a trot, and somewhere near the bottom struck a log, were upset, and Miss Bishop injured as before described, the other passengers escaping unhurt. Corbin fell under the stage, and was considerably injured. Corbin was sworn, and he also proved that he was drunk when the injury happened—that he remembers nothing that took place from the time he left Downer's, the last stopping place. He denied to Stockton and his agent that he was

[1] [Affirmed by the supreme court in Stockton v. Bishop, 4 How. (45 U. S.) 156.]

drunk, and even denied it lately to Mr. Lausen. He has not been in the employ of Stockton since.

The defendants proved that Corbin was a sober, trust-worthy man, never known to be drunk, scarcely ever seen to drink--one of the best drivers on the route—a crack driver—and their counsel labored to discredit his testimony against himself before the jury; he took the pledge a year ago, and is now, at least, a sober man. Defendants proved that Stockton, who resides in Uniontown, is more than usually attentive to his coaches, and watchful of the security of his passengers, and their counsel insisted that exemplary damages could not be given against a stage proprietor who exerted all due diligence, care and attention for the safety of his passengers; that exemplary or vindictive damages are given only to punish neglect, incompetency and heedlessness, but their client was proved derelict in nothing that could be required from human skill and care. They seemed to concede that, as the law stands, stage owners are answerable in compensatory damages for injuries sustained by passengers, though they result from accident to which no blame attaches. They ascribed the upset to the darkness of the night (happened between 5 and 6 o'clock in the evening) and the log which was proved to be lying endwise over the summer road, reaching nearly if not quite to the macadamized part of the turnpike. The counsel for the plaintiff relied upon the testimony of the two male passengers, Snyder, Smith, and Corbin himself, for the proof that he was drunk, and from the fact that the log is lying on the same place still that it could not be in the road of stages, or occasion danger to a sober and capable driver.

The defendants urged that the greater part of the pain and injury to the arm was occasioned by Miss Bishop's traveling home before it was healed.

The plaintiffs answered that she was a stranger, poor, and likely to suffer more from distress and anxiety abroad, sick, than by traveling home at the time she did. Dr. Campbell advised that it was better for her to travel by easy stages immediately after the accident than after the bone would commence to knit. When she arrived at home in Ohio, the arm was crooked, the bandage disarranged, and the elbow joint very painful; the joint is now perfectly restored, and the arm well and strong, but an inch shorter than before. The fracture was an oblique one.

Miss Bishop's friends asked Stockton at Uniontown, the day after the injury, to refund so much of the fare as they had paid, for the proportion of the route from Uniontown to Wheeling, (they had paid their passage from Hagerstown through) so that they might leave the road at Brownsville, and go down the river by steamboat from that place—he refused, but gave them a stage to themselves, under their own direction, with the privilege of keeping it a week, if they pleased, on the road to Wheeling, (a distance of sixty miles.) They actually made the journey in one day—and that the second day after the accident, the gentlemen supporting the sufferer to protect her from the jolting of the stage,—her sister-in-law was in company

Biddle & McCandless, for plaintiff.

Washington, Mahon & Loomis, for defendants.

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

BALDWIN, Circuit Justice, charged the jury at great length upon the law of the case. He instructed the jury that the case concerns the public as well as the parties. That all stage proprietors, owners of vessels, steamboats, railroad cars, &c., are bound to provide vessels, vehicles, &c., every way fitted to encounter all the ordinary perils of the journey, but are not accountable for accidents against human foresight, skill, and care. That common carriers, such as transporters of merchandise, are absolutely liable for all accidents; but stage proprietors are liable for any want of proper care in providing and conducting their vehicles. That the whole machinery, animate and inanimate, are the agents of the proprietor, and for each and all he is answerable. That these principles ought to be rigidly enforced, but at the same time both cautiously and truly applied to the facts of the case. It is as much a duty to protect the owners who do their whole duty, as it is to protect passengers and the public. The mere fact of an upset raises a legal presumption of negligence—it supposes a default and supplies, (in legal contemplation,) the evidence of such negligence and unskilfulness as makes the owners responsible in damages. This presumption may be met and refuted by the circumstances of the case; the presumption is then destroyed, and the plaintiff must prove such default. If there is no default on the part of the defendants the plaintiff cannot recover in this action.

The proprietor of a stage coach does not warrant the security of his passengers, absolutely, as in the case of a common carrier, and is not responsible for mere accidents. He warrants their safety so far only as human vigilance and care can go. If the driver was drunk at the time of the accident, but up to that time was trustworthy and sober, the proprietor is responsible; no previous care or caution of the proprietor will excuse him; the liability of the defendants depends upon the conduct as well as upon the character of the driver. If the defendants have failed to account for the accident in such a way as will entirely justify them and their agents, then the enquiry will be what amount of damages shall be given? Shall they be compensatory or exemplary? Compensatory damages are given to restore or make

whole again, or make reparation for loss, injury, or suffering, past and future. In estimating damages, more than the expenses of the plaintiff are to be included; pain, whether bodily or mental, may be allowed for. When a woman is injured or deformed, the injury to her personal appearance may properly be considered in the verdict. All injuries, whether to the person, mind, or pocket, may be taken into account; even the position of the complainant and her condition in life may, also, be considered. The extent of the damages is in the discretion of the jury. Thus far, damages are merely compensatory. But further vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs. Contracts for carrying passengers are made not only with the party to the transaction, but they are also made with the public as strongly as if they were so expressed and signed and sealed. But to justify exemplary damages, the injury must be more than a mere private loss or injury, it must have been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public.

The circumstances to be considered here in this case are the drunkenness of the driver, his conduct before, at the time of the accident, and afterwards. Circumstances both before and after the disaster may either mitigate or aggravate the injury, and ought to be so considered. If the owner was in fact ignorant of the driver's intemperate habits, this fact might lessen the verdict so far as vindictive damages are concerned, although in law the owner is the driver, and he is just as responsible for the act of his agent as for his own. The fact of the plaintiff's leaving Uniontown before her arm was healed up, I think ought not to lessen your verdict; her remaining there was perhaps as perilous to her as her traveling homeward when she did. If the defendants have performed all their duty they are not liable. The facts are for you, it is for the bench to lay down the law which governs the case.

The jury returned a verdict for the plaintiff for $6,500, and costs of suit.

NOTE [from the original report]. I know of no legal matters in which the public at large are more interested, than those which relate to the safety of passengers and property, in the various modes of transportation now in use. Hence I have transferred the report of the above case, at length, from the newspapers to the pages of this journal. From the same source I learn that, at the United States circuit court recently sitting in Rhode Island, the captain of a steamboat was sentenced to pay a fine of $300, for not having the requisite safety boats, as provided by the act of congress. Also, that a captain of a steamboat was recently tried, in Philadelphia, on charge of manslaughter, for running down a small boat in the Delaware river, whereby a man was drowned; but the proof of negligence was not strong enough to procure a conviction.

[NOTE. On writ of error by defendants, the supreme court, in 4 How. (45 U. S.) 155, affirmed the judgment of the circuit court, upon the ground that, according to "the right of the cause and matter of law" as appeared by the pleadings and the verdict, judgment was properly rendered for the plaintiff below.

[For proceedings in the supreme court to quash a writ of fieri facias issued in the court below, after a writ of error had been sued out, see Stockton v. Bishop, 2 How. (43 U. S.) 74.]

BISHOP, (STONE v.) See Case No. 13,482.

Case No. 1,441.

BISPHAM v. PATTERSON et al.

[2 McLean, 87.][1]

Circuit Court, D. Indiana. May Term, 1840.

PARTNERSHIP—DISSOLUTION—EVIDENCE—ADMISSION BY LATE PARTNER.

1. By the English rule, the admissions of a late partner, are evidence to charge the firm. A different rule has been established in New York. And the supreme court seem inclined to adopt the New York rule.

2. Under the authority of this intimation, it is *held* that a letter of one of the defendants, admitting the account, on which the action was brought, cannot be received to bind the firm, the partnership having been dissolved before the admission.

[Cited in Draper v. Bissell, Case No. 4,068. See, also, Howard v. Cobb, Id. 6,755; Thompson v. Bowman, 6 Wall. (73 U. S.) 316.]

[At law. Action by Samuel Bispham against Patterson & Walter. Defendant Patterson moved to set aside a verdict for plaintiff. The motion granted, and a new trial ordered.]

Fletcher & Butler, for plaintiff.

Stevens & Barbour, for defendants.

OPINION OF THE COURT. This is an action of assumpsit, brought against the defendants as partners. The writ was served on Patterson, but the marshal returned non est as to Walter.

The plaintiff introduced, as evidence, the letter of Patterson, acknowledging the justice of the account on which the action was brought. This was objected to as evidence, on the ground that the letter was written after the dissolution of the partnership, and that it is not, therefore, evidence to establish a partnership demand. But the circuit judge observed that the evidence would be received as competent, and the point would be considered, if necessary, on a motion for a new trial. The jury found a verdict for the plaintiff, and the question of the admissibility of the evidence is now brought before the court, on a motion to set aside the verdict.

It is a general principle that, in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the suit. 1 Phil. Ev. 92; 11 East, 589. So, in an action by sev-

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

eral partners, the admission by one is evidence against all. 1 Maule & S. 249. And where an action is brought against partners, the fact of partnership being proved, the admissions of any one of the defendants are evidence to charge the firm. 1 Phil. Ev. 92; 1 Starkie, N. P. 6, 81; 4 Conn. 338; 15 Johns. 409; 2 Wash. C. C. 390 [Corps v. Robinson, Case No. 3,252]; 2 Har. & J. 474, 477; 3 J. J. Marsh. 498, 500. And, in England, it is held that the admission of a partner, though not a party to the suit, is evidence against another partner, who is sued as to joint contracts, during the partnership, whether made after the determination of the partnership, or before. 1 Phil. Ev. 93; 1 Taunt. 104; 2 Doug. 661; 2 H. Bl. 340; 2 Johns. 667; 1 Gall. 630 [Van Reimsdyk v. Kane, Case No. 16,872]; 1 Barn. & C. 169; 2 Barn. & C. 29; 2 Bing. 306; Cady v. Shepherd, 11 Rich. [11 Pick.] 400. And, in the case of Pritchard v. Draper, 1 Russ. & M. 191, which was decided by Lord Brougham, it was held that, though the admission of one of the partners be not only made after the dissolution, but be of a payment, which was made to him after the dissolution, the evidence may be received to bind the other partner. No rule of evidence seems to be better settled, in the English courts, than this; and it is conceived to be settled on sound principles.

The dissolution of the partnership cannot affect the relation which the firm bears to its creditors. The individuals composing it are liable as partners; and, if they are thus bound, why should not the demand be established by the same evidence, as before the dissolution? The partnership continues in all its force, as it regards the particular transaction; and it would seem to be an anomaly, that the act of the parties, defendants, should change the rule of evidence on which their liability is to be established. It is argued, that it would be dangerous to the interests of partners, if, after the dissolution, the admissions of one, in relation to a prior and partnership transaction, should be evidence against the firm. That, on this ground, it would be in the power of each individual that composed the late firm, to make it responsible for his private debts. If there be any force in this argument, it goes against the principle, which admits the confessions of one partner, as evidence to bind the others, during the partnership. Now, this rule is believed to be no where controverted. It has been found safe in practice. But, if there be danger in receiving the admissions of a late partner, as evidence, in relation to a partnership transaction, the danger must be much greater to receive such admissions, as evidence, during the partnership. In the latter case, the admissions may go to create an obligation on the firm, for an individual transaction; whilst the former can only relate to transactions prior to the dissolution. Admissions, under such circumstances, could rarely, if ever, go to prejudice the rights of the late firm. A bona fide individual transaction, originally, could not easily, by the confession of a late partner, be established against the firm. The danger consists in the power of the individual, at the time of the transaction, to give it a form which shall bind the firm. But this is a question to be decided by the force of authority, and not of reason. The weight of American authority is against the English rule on this subject. In the cases of Hackley v. Patrick, 3 Johns. 536; Walden v. Sherbourne, 15 Johns. 409; Shelton v. Cocke, 3 Munf. 191; Walker v. Duberry, 1 A. K. Marsh, 189, 9 Cow. 57; Baker v. Stackpoole, Id. 420, 434; Chardon v. Oliphant, 2 Tread. Const. 685; White v. Union Ins. Co., 1 Nott & McC. 561; Fisher's Ex'rs v. Tucker's Ex'rs, 1 McCord, Eq. 171, 172; Ward v. Howell, 5 Har. & J. 60; 2 Blackf. 372,—the rule seems to be settled that, after the dissolution, the admissions of a partner are not evidence to charge the late firm. And in the case of Clementson v. Williams, 8 Cranch [12 U. S.] 72, the court held that the acknowledgment of one partner, after the dissolution of the partnership, is not sufficient to take a case out of the statute of limitations. And, in the case of Bell v. Morrison, 1 Pet. [26 U. S.] 373, the court held that, after a dissolution of partnership, no partner can create a cause of action against the other partners, except by a new authority, communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be supposed a pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. The case of Bell v. Morrison [supra] presented the question, whether, after the dissolution, the acknowledgment of a partner took the case out of the statute of limitations; but Mr. Justice Story, who delivered the opinion of the court, considers the case very much at large, and takes occasion to say, that the New York doctrine was well founded. He, it is true, remarks that, whether the confessions of a late partner can, for any purpose, be admitted as evidence to charge the firm, was a question not before the court, though it had been discussed by the counsel on both sides; but, as its determination was not necessary in the case, it would not be decided. But the course of his reasoning has so direct a bearing on this question, and so clearly shows the view of the court, that, unless we close our eyes, we cannot escape from the effects of it. I have read this opinion more than once, under the strongest conviction in favor of the English rule, and with a sincere desire to follow it, but the language of the opinion is so decisive and authoritative that I am forced to adopt the New York rule. The court do not, in technical language, adjudge that the admissions of a late partner cannot be received as evidence, but they say that

the New York rule is a sound one, and they sustain its reasonableness and propriety. And this rule was shown to be the foundation of all the American decisions on the question. I looked to this opinion with the more earnestness, as my Brother Story, in the case cited from Gallison [Van Reimsdyk v. Kane, Case No. 16,872], had followed the English rule; the judgment in which case was taken to the supreme court, and affirmed. [Clark v. Van Reimsdyk, 9 Cranch (13 U. S.) 153.] This point, however, though made, does not seem to have been expressly decided by the supreme court. There were several other points on which the case turned; but it is difficult to perceive how the judgment could have been affirmed, without ruling this point.

A distinction is drawn by the supreme court between receiving the admissions of a late partner, to take the partnership debt out of the statute, and as merely evidence of the debt. That, to take a case out of the statute, a new obligation must be imposed on the late firm, which can not be done by the acknowledgments of a late partner. In England, it is said the courts, on recent occasions, have been in the habit of considering that the effect of an acknowledgment of the debt, made by the defendant, is to create a fresh promise, and not to revive the promise which is barred by the statute. 1 Phil. Ev. 138; Tanner v. Smart, 6 Barn. & C. 606. But a contrary doctrine is held in Pittam v. Foster, 1 Barn. & C. 248; Hurst v. Parker, 1 Barn. & Ald. 93; Ayton v. Bolt, 4 Bing. 105; 3 Bing. 329, 638. In the cases of Shelton v. Cocke, 3 Munf. 191, and Smith v. Ludlow, 6 Johns. 267, it was held that the admission of a debt by one of several partners, made after the dissolution, will take the debt, so admitted, out of the statute of limitations, though the original debt can not be so proved. In the case of Fisher's Ex'rs v. Tucker's Ex'rs, 1 McCord, Eq. 169, the court say, the admission or promise of a surviving partner, will not even take the debt out of the statute of limitations, as to the estate of the deceased partner; much less, would it prove an original debt. Amidst this conflict of authority, I yield my conviction in favor of the English rule, to the authority of the case of Bell v. Morrison [1 Pet. (26 U. S.) 373].

The verdict is set aside, and a new trial granted.

Case No. 1,442.

BISPHAM v. POLLOCK.

[1 McLean, 411.] [1]

Circuit Court, D. Indiana. May Term, 1839.

INTEREST—CUSTOM AND USAGE.

1. It being the custom in Philadelphia to sell [certain kinds of] merchandise on a credit of six months, and from that time to charge interest until payment, the jury may give interest after six months, as a part of the damages.

[See Barrow v. Reab, 9 How. (50 U. S.) 366; Killingly v. Taylor, Case No. 7,766.]

2. An open account does not carry interest, but it may be given where, under the circumstances of the case, the jury think the plaintiff is entitled to it.

[At law. Samuel Bispham against James T. and Samuel Pollock upon an account. Judgment for plaintiff.]

Fletcher & Butler appeared for the plaintiff, and the defendants being in default, a judgment by default was entered, and a writ of inquiry of damages was awarded.

OPINION OF THE COURT. An open account was given in evidence, which was proved to have been presented to and admitted by, one of the defendants, they being in partnership. The account was for merchandize sold in Philadelphia, and the plaintiff proved that it was the custom in that place to sell such merchandize on a credit of six months, and to charge interest on the account, after six months; and the court instructed the jury that if they were satisfied it was the custom as represented, to sell on a credit of six months, and then charge interest, that they might presume, if the facts proved warrant it, that the defendants had notice of such custom, and might in the exercise of their discretion, be made to pay interest on the account, after six months. That an open account does not draw interest; but where there has been a delay of payment, in violation of the contract, the party failing should, in justice, be made to pay interest, as a part of the damages assessed by the jury. Interest is given by statute, and does not depend upon any principle of the common law. And although no interest be given by the statute on an open account, yet it may well be included in the verdict of the jury as a part of the damages, which, under the circumstances of the case, the plaintiff has a right to recover.

A verdict was rendered, including interest, after the expiration of the credit, and a judgment was entered on the verdict.

Case No. 1,443.

BISPHAM v. TAYLOR.

[2 McLean, 355.] [1]

Circuit Court, D. Indiana. May Term, 1841.

UNITED STATES MARSHALS — REPLEVY BOND—ACTION ON — DECLARATIONS — INSUFFICIENT SURETIES.

1. Where the defendant may replevy the judgment, and suspend the execution for six months, a declaration against the marshal and his sureties, which avers that he neglected to make the money, is defective.

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

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

2. In such a case the marshal is not required, absolutely, to make the money.

3. He must make it, unless the judgment shall be replevied. The declaration must negative every presumption of duty on his part.

4. On the replevy bond the marshal is required to take one or more sufficient freehold security. Freehold surety, therefore, must be taken, or the marshal will be liable.

5. If the sureties be not freeholders, however ample they may be considered by the marshal and the public, the marshal is responsible on their failure.

6. In this respect, the statute must be pursued, and, by examining the records, the marshal may ascertain the sufficiency of the sureties offered. To make this examination, would not impose on the marshal an unreasonable diligence.

7. An averment in the declaration that the marshal took insolvent sureties, and not freeholders, sufficient to charge him.

[S. Explained and distinguished in Wetmore v. Rice, Case No. 17,468, upon the question of jurisdiction.]

[At law. Action by Samuel Bispham against Taylor and others upon a bond executed by the defendant Taylor, as marshal, and by the other defendants as his sureties. Defendants demur to its declarations. Demurrer overruled, and leave given to plead over.]

Butler & Morrison, for plaintiff.
Smith & Bright, for defendants.

OPINION OF THE COURT. This action is brought on the bond given by the defendant Taylor, as marshal, and signed by the other defendants, as his sureties. The condition of the bond was, that he would well and faithfully discharge his duties as marshal, &c.

The first count in the declaration, after stating the appointment of Taylor as marshal for the district of Indiana, and the giving of the bond for the faithful discharge of his duties, sets out the obtainment of a judgment by the plaintiff, &c., against Lemuel Pollock, for the sum of seven hundred and three dollars and forty cents, with costs. That the judgment remaining unpaid and in full force, the 29th May, 1839, the plaintiff issued a fieri facias, directed to the marshal aforesaid, commanding him, &c., returnable the first Monday in August ensuing; that, on the execution, the clerk indorsed the same was repleviable, at the time it was issued; which writ was delivered to the marshal in due time; and that, although there was then, and afterwards, at all times before, and until the return day of the writ, divers goods and chattels, lands and tenements of the said Pollock, within the district, whereof the said Taylor, as such marshal, could and might and ought to have made the money so commanded to be made in and by the said writ, of which he had notice, yet he, not regarding the duties of his office as marshal, but contriving, and wrongfully and unjustly intending to injure, &c., the said plaintiff, &c., did not, nor would, at any time before the return of said writ, according to the mandate thereof, cause to be made the said sum of money, in said writ named, &c., but neglected and refused, &c., to wit: on the 5th August, 1839, falsely and deceitfully returned the said writ, &c.

The second count stated the judgment and execution, &c., as in the first count; averred that the marshal, not regarding his duty, wilfully, fraudulently and unlawfully, suffered and permitted the said Pollock to replevy and stay execution upon the judgment, for the term of six months, from and after the date thereof, and accepting from the said Pollock a certain pretended replevy bond, which he then and there offered and tendered to the said Taylor, as marshal, aforesaid, with James T. Pollock and James Murry, as his securities, in the penalty of fourteen hundred dollars, made payable to the said plaintiff, conditioned for the payment of the full amount demanded by the said last mentioned writ, together with the interest and costs, &c., at or before the expiration of six months from, &c., which, said writ, was returned the 5th August, 1839. By which proceeding, the execution upon the judgment was stayed, &c. And the plaintiff, in fact, says that said James T. Pollock and James Murry, at the time of the said taking of the said replevy bond by the said Taylor, marshal, &c., were not, nor have they since been, nor are they now, sufficient freehold securities for the purpose of replevying said judgment; but, on the contrary, they and each of them were, and ever since then have been, and still are, wholly insolvent, &c.

The defendants filed a general demurrer.

This replevy bond was taken by the marshal under the 14th section of the act of Indiana, entitled "An act to subject real and personal estate to execution," approved February 1, 1831; which provides that the officer, issuing the execution, shall indorse thereon—repleviable; and the defendant may replevy the same, by tendering to the officer, having such execution in his hands, a bond with one or more sufficient freehold securities, made payable to the execution plaintiff, in a penalty of at least double the amount demanded by such execution, &c. This bond, from its date, has the form and effect of a judgment, and is required to be recorded by the clerk.

The first count in the declaration is, clearly, bad. The marshal was not bound, absolutely, to make the money, and the count is framed upon the hypothesis that he was so bound. He was required to make the money on the execution, unless the defendant replevied it under the statute cited. Now it does not appear, from the first count, but that a replevy bond was given, which would postpone the execution, and all action on the judgment, for six months. And this is not a matter of defence, merely, but of averment in the declaration. The law gave the

right to the defendant to replevy; and to take this bond, and suspend all action on the execution, became as much the duty of the marshal as to make the money, if no bond was tendered. Suppose the execution, upon its face, commanded the marshal to make the money or take the replevy bond, or to make the money, unless the replevy bond should be tendered by the defendant, would an action lie against the marshal without averring, in the alternative, that he had neither made the money nor taken the bond? Either would satisfy the execution, and, consequently, to show a neglect of duty by the marshal, the one alternative, as well as the other, must be negatived. The 14th section of the statute, being binding, is as much a part of the execution, as if its provisions were incorporated in it. And in this, as in every other action founded upon the nonfeasance or misfeasance of a public officer, the declaration must show the right of the plaintiff, and the liability of the defendant.

It is insisted that the second count is, also, substantially defective; that it is not sufficiently averred in it—First: that the original judgment remains unsatisfied; second: that the replevy bond has not been paid; third: that the sureties in the bond are insufficient; fourth: nor that the marshal had notice of the insufficiency or insolvency of the security.

There is no ground for the first and second objections, above stated. The second count, after alleging the material facts in the case, avers that, by reason of which said premises, the said Samuel Bispham has been, and is, wholly deprived of the benefit of the said last mentioned writ and of his said judgment, and of the power and means of collecting the money due thereon, &c. This negatives any presumption of payment, either of the original judgment, or the replevy bond. In fact, the demand is the same on both, and the payment of either would satisfy the plaintiff. The averment would be untrue, if the plaintiff had received the amount of the replevy bond, for that would be a payment of the judgment.

Nor does there seem to be any ground for the third objection to the averment, of the insufficiency of the sureties. The averment is in the words of the statute, that the said James T. Pollock and James Murry, at the time of signing the bond, were not, nor have they since been, nor are they now, sufficient freehold securities, &c.; that they were, and ever since have been, wholly insolvent. It is not perceived how the averment, in this respect, could have been more full than it is. Was it necessary, as insisted in the fourth objection, for the plaintiff to aver that the marshal had notice of the insufficiency of the securities? Under this head, it is contended that the marshal was not bound to warrant the sufficiency of the sureties in the bond; that, if he acted in good faith in receiving those who were apparently sufficient, having no knowledge to the contrary, he is excused. To sustain this position, the decision in the case of Hindle v. Blades, 5 Taunt. 225, is cited. That was an action against the sheriff for taking irresponsible sureties on a replevin. The statute of 2 Geo. II. c. 19, § 23, required the sheriff to take two responsible persons. And, it was contended, that it was incumbent on the sheriff to select sufficient sureties. The case of Saunders v. Darling, Bull. N. P. 60, where the court say, in such action against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof upon the sheriff; for the sureties are known to him, and he is to take care they are sufficient. Mansfield, C. J., said: "I can not think the statute meant to throw on the sheriff this onus. Suppose the sheriff had taken an eminent banker, as surety, a week before his bankruptcy, when no one in the world had the slightest reason to suspect his circumstances. According to the same doctrine, the sheriff would have been liable for taking him as surety." And Mr. Justice Dallas said: "The question is, whether the sheriff, who is bound to take two responsible sureties, has not done so? He makes proper inquires, and finds that these are considered as responsible persons. Is not this sufficient? It can not be that the sheriff should be bound to know that which nobody else knows; and, if the rest of the world trust the surety, it is a sufficient justification to the sheriff." In the case of Scott v. Waithman, 3 Starkie, 168, Chief Justice Abbott said: "The principal question is, as to the responsibility of Maberly. He assented to the law, as stated, that the sheriff was justified in taking a person, as surety, who appeared to the world to be a person of responsibility; but that, if he actually knew that the party was not responsible; or if, having the means in his power of informing himself upon the subject, he neglected to use them, then, notwithstanding appearances, he took the consequences upon himself, and was responsible in the event of the insufficiency of the surety." It would seem from the above cases that, under the British statute, if the sheriff uses the means in his power to ascertain the sufficiency of the sureties, (and they are so generally esteemed,) he is not responsible for their performance. And this, perhaps, is the correct rule on the subject. But, if the sheriff have a knowledge of any facts which should create suspicion of their sufficiency; or, if he neglect to make the necessary inquiries, he will be held liable.

The Indiana statute is, in one respect, materially different from the British statute. By the former, the marshal is required to take one or more sufficient freehold securities. The surety, then, must be a freeholder; and, if the marshal take a man who is not a freeholder, and he shall become insolvent, the marshal will not be exonerated, however sufficient the surety might have been held at the time.

As land titles are required to be recorded,

it is in the power of the marshal generally, if not universally, by examining the proper record, to ascertain who are freeholders, and what liens exist on the real property of the persons offered as sureties. Indeed, it would seem that, by such an examination, it is always in the power of the marshal to take sufficient sureties. The bond, itself, operates as a judgment, and, of course, creates a lien on the real estate of the sureties. To require this examination, would not require from the marshal greater diligence than the rule laid down by Chief Justice Abbott. But, however this may be, it is very clear that it was not necessary for the plaintiff to aver, in his declaration, that the marshal had notice of the insufficiency of the sureties, as contended.

As the second count in the declaration is held to be good, the demurrer must be overruled.

On motion, leave given defendants to plead.

[For the trial, verdict, and judgment in this case, see Case No. 1,444.]

Case No. 1,444.

BISPHAM v. TAYLOR et al.

[2 McLean, 408.] [1]

Circuit Court, D. Indiana. May Term, 1841.

UNITED STATES MARSHALS — INSUFFICIENT BAIL — ACTION AGAINST — MITIGATION OF DAMAGES — INSOLVENCY OF DEBTOR — SUPERSEDEAS.

1. Where a marshal takes insufficient appearance bail, he is only responsible for the actual injury sustained by the plaintiff in the execution.

[See Pierce v. Strickland, Case No. 11,147.]

2. In such a case the insolvency of the defendant may be shown in mitigation of damages.

3. But the rule is different where securities are taken under the replevin law of Indiana.

4. The act requires "sufficient freehold securities," and the bond operates as a judgment, and suspends the original judgment.

5. Under this act the marshal is liable, unless he takes freehold securities, whose unincumbered lands, at the time, at a fair estimate, are equal in value to the amount of the judgment.

6. The officer has the means of ascertaining the sufficiency of the sureties, and he is bound to use them.

[At law. Action by Samuel Bispham against Taylor and others upon a bond executed by the defendant Taylor as marshal, and by the other defendants as his sureties. Judgment for plaintiff.

[For decision overruling a demurrer to the declaration, see Case No. 1,443.]

Fletcher, Butler & Yandis, for plaintiff.

Mr. Brice, for defendants.

OPINION OF THE COURT. This action is brought against Taylor and his sureties, as marshal, for taking insufficient bail under the act of Indiana, "to subject real and personal estate to execution." The defence set up is that the defendant, in the execution under which bail was taken, was insolvent, and that, consequently, the plaintiff was not injured.

The 14th section of the above act provides, "that when execution of any kind may issue upon any judgment upon which no stay of execution may have been taken, under the 13th section of the same act, the officer issuing the same shall indorse thereon that the same is repleviable, and, also, the date of the rendition of such judgment; and the person against whom such execution may have been issued may replevy the same, &c., by tendering to the officer having such execution in his hands, a bond with one or more sufficient freehold securities, made payable to the execution plaintiff, in a penalty of at least double the amount demanded, by such execution and conditioned for the payment of the full amount demanded by such execution, together with the interest and costs accruing and to accrue, &c., which bond shall be returned to the clerk to be recorded, &c., and such bond shall be taken as and have the force and effect of a judgment confessed in a court of record against the persons executing the same and against their estates, and execution may issue thereon accordingly." This bond suspended all action on the original judgment for the time stated in the statute. In effect, the new judgment was substituted for the prior one. The insolvency of Pollock, the defendant in the execution, is admitted, and the question is raised whether this does not excuse the marshal, or mitigate the damages in the case. The defendant's counsel insists that it does. That the plaintiff can only recover damages for the injury done by the misfeasance of the officer; and that the defendant being insolvent no injury was suffered by the plaintiff.

It is a well settled principle, that where an action is brought for an injury done, whether in the discharge of official duty or otherwise, the damages are measured, generally, by the extent of that injury. As, for instance, if a sheriff or marshal levy upon property and through negligence suffers the property to be destroyed, or to be taken back by the defendant, the officer is only liable for the value of the property. And insufficient appearance bail, taken on mesne process, will only subject the officer to nominal damages, if he shall prove that the defendant in the process was, at the time, insolvent. The object of such bail being to coerce the appearance of the defendant, and subject his person and property to the judgment of the court, the inquiry is what damage has the plaintiff sustained by the nonappearance of the defendant. 3 Starkie, Ev. 1341, note; 11 Mass. 89, 207; 10 Mass. 470; 2 Bac. Abr. 263. But the case under consideration is wholly different.

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

The replevin bond operates as a judgment, and is, in fact, a substitute for the judgment on which the execution was issued. If it does not nullify it suspends such judgment. And the statute, to produce this effect, very properly requires "one or more sufficient freehold securities." Of their sufficiency the officer, serving the execution, is bound to judge. And if he be culpably negligent he is justly responsible.

The replevin bond is for the payment of the judgment. It is in fact and in law a judgment under the statute; consequently it is subject to no collateral condition. The officer, by using ordinary diligence, may always ascertain the sufficiency of the security. Before he takes the bond he may require the most satisfactory evidence on this subject. He may demand the certificate of the recorder of deeds, showing the extent of the real estate of the sureties, and, also, whether there be any liens upon it. Similar evidence may be required from the clerks of courts as to any judgment liens. And this he may require the defendant, in the execution, to procure without any labor or expense on his part. The value of the estate may be estimated by judicious and disinterested men in the neighborhood. If this precaution be taken, which may be reasonably required, and by a great and unexpected fall in the value of property it may be insufficient, the officer would not be liable. If the property of the sureties was sufficient to answer the requisitions of the statute, at the time the bond is taken, no subsequent change can attach liability to the officer. 1 Johns. 215; 7 Johns. 189; 2 Term R. 132; 2 Greenl. 46.

The real estate of the sureties was embarrassed by judgment and mortgage liens; and they owed other debts. Evidence has been heard as to the amount of their personal property, not as constituting any part of the sufficiency contemplated by the statute, but to show that they had the means of discharging, to some extent, the demands against them. But the marshal was bound not only to see that the sureties were freeholders, but freeholders of unincumbered real estate, at least sufficient, at a fair valuation, at the time the bond was executed, to pay the judgment for which they were bound. And if the jury shall find, from the evidence, that the lands held by the sureties, at a fair estimate, the time they became bound, after deducting all liens upon them, were of less value than the amount of the judgment, they will find for the plaintiff such difference in damages. And if they shall find that the liens were equal to the full value of the lands, then they will find for the plaintiff the full amount of the judgment with interest.

The jury found for the plaintiff a part of the amount of the judgment. A motion was made for a new trial, which was continued under advisement and afterwards overruled.

Case No. 1,445.

BISSELL v. BUGBEE.

[8 Cent. Law J. 272;[1] 7 Reporter, 550.]

Circuit Court, D. Indiana. March Term, 1879.

MORTGAGES—ASSUMPTION OF MORTGAGE BY GRANTEE—FORECLOSURE—DECREE FOR DEFICIENCY—LIABILITY OF GRANTEE TO CREDITOR OF GRANTOR.

[1. The promise of a grantee of land to his grantor, to pay a mortgage thereon, inures to the benefit of the mortgagee, who, in proceedings to foreclose, is entitled to a decree against such grantee for any deficiency after sale of the mortgaged premises.]

[See Hayden v. Drury, 3 Fed. 782; Twichell v. Mears, Case No. 14,286.]

[2. The bringing of the suit is a sufficient acceptance of the grantee's promise by the mortgagee.]

[See New York Life Insurance Co. v. Aitkin, 26 N. E. 732, 125 N. Y. 660; Hayden v. Snow, 14 Fed. 70; Baer v. Knewitz, 39 Ill. App. 470; Lowe v. Hamilton, 31 N. E. 1117, 132 Ind. 406; Rouse v. Bartholomew, 32 Pac. 1088.]

In equity.

Harrison, Hines & Miller, for complainant.

A. B. Young, for defendant.

GRESHAM, District Judge. After executing the notes and mortgage described in the bill, Bugbee conveyed the premises to Rust; Rust conveyed to Kellogg, and Kellogg to Price, each successive purchaser assuming the payment of the mortgage-debt by stipulation contained in the deed accepted from his grantor. Price erased from Kellogg's deed to him, before it was recorded, the stipulation to pay the complainant's debt. Prayer for foreclosure and a decree against Price for payment of any deficiency after sale of the mortgaged premises. Price demurs to the bill for want of equity.

For a consideration moving from Kellogg to Price, the latter agreed to pay the complainant's debt. This agreement in equity inured to the complainant's benefit, and being in a court of equity, Price is liable directly to the complainant. Kellogg is the surety of Price, and might have filed a bill against him and the complainant to compel Price to pay the debt directly to the complainant, or so much of it as might be left after exhausting the mortgaged premises. Price owes the money, and common sense and common honesty require that he should pay it directly to the creditor. The parties are all before the court, and instead of sending the money from Price around the circuit to the creditor, he will be required to pay it directly to the person ultimately entitled to receive it. It is now well settled that where the purchaser of land promises the grantor to pay off a specified mortgage or other incumbrance on the land, this obligation inures for

[1] [Reprinted from 8 Cent. Law J. 272, by permission.]

the benefit of the mortgagee or incumbrancer who may in equity compel such purchaser to respond directly to him. Story, Eq. Jur. (11th Ed.) § 1016d; Miller v. Billingsley, 41 Ind. 489; Marsh v. Pike, 10 Paige, 595; Crawford v. Edwards, 33 Mich. 354; Bishop v. Douglass, 25 Wis. 696; Bowen v. Kurtz, 37 Iowa, 239; Crowell v. Currier, 27 N. J. Eq. 152; Klapworth v. Dressler, 2 Beas. [13 N. J. Eq.] 62. The case of Second Nat. Bank v. Grand Lodge [98 U. S. 123] is cited in support of the demurrer. That was an action at law, and the supreme court held that where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability for it, there being no novation, he has a right of action against the promisor for his own indemnity, and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. In actions at law on contracts, the rule is that where there is no privity or novation, the action cannot be maintained, and that, I think, is as far as the supreme court intended to go in this case. In equity, the creditor is entitled to the benefit of all obligations for the payment of his debt, whether they be direct or collateral.

It is further urged that the complainant had no right of action against Price when the suit was commenced, because he had not notified Price of his acceptance of the promise to pay the debt. Price's agreement with Kellogg to pay the debt was not rescinded; it remained in full force for the complainant's benefit; it was to the complainant's interest to accept it; there was no reason why he should not accept it, and I think the bringing of the suit was a sufficient acceptance. It is hardly necessary to say that Price's mutilation of the deed by erasing the promise to pay the mortgage debt, without the knowledge or consent of Kellogg, left his obligation unimpaired.

Demurrer overruled.

BISSELL (DRAPER v.). See Case No. 4,068.

Case No. 1,446.

BISSELL v. FARMERS' & MECHANICS' BANK OF MICHIGAN.

[5 McLean, 495.] [1]

Circuit Court, D. Michigan. June Term, 1853.

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — WITNESS—COMPETENCY—INTEREST.

1. The brother of the complainant owed the defendant a debt exceeding five thousand dollars, for which he had given a mortgage on certain lands in Ohio, and a lien on twenty-two shares of railroad stock in the Erie and Kalamazoo road. The bank proposed to its debtor, Edward Bissell, that he should substitute mortgages on property in the state of Michigan for the Ohio mortgages. The debtor proposed to give the bank a mortgage on a farm in Lenawee county, which was owned by his brother, the complainant, but the title was held in trust by Edward. The bank acceded to the proposition, and a mortgage was executed by the complainant and his brother. And it was afterwards agreed that so soon as a claim, under an attachment, should be removed from the Lenawee farm, a deed should be executed for it to the bank, and the bank should transfer to the complainant the Ohio mortgages, and transfer the railroad stock. The substance of this agreement was drawn up in writing, and was left, with other papers, in the hands of Mr. Walker, to be delivered to the respective parties, on the embarrassment on the title being removed. A motion was made to set aside the attachment, which failed. On this, Mr. Walker delivered up the papers. The bank afterwards applied to be put in possession of the farm, to defend the suit against the attachment claim. On which defense the claim was held void. The bank remains in possession, receiving rents and profit. The complainant filed his bill for a specific performance. The court decreed a specific performance—requiring complainant to pay costs on attachment and ejectment.

2. Also that the statute of frauds does not apply.

3. That Edward Bissell was a competent witness, &c.

[See Harrison v. Evans, Case No. 6,135; Scott v. The Plymouth, Id. 12,544; Stump v. Roberts, Id. 13,561.]

[In equity. Bill for specific performance by Leverett Bissell against the Farmers' & Mechanics' Bank of Michigan. Decree for complainant.]

Mr. Campbell, for complainant.

Barstow & Lockwood, for defendant.

OPINION OF THE COURT. This is a bill for a specific performance. In May, 1838, Edward Bissell, a brother of the complainant, being indebted to defendant in the sum of $5,634 21, gave a mortgage on certain property in Toledo, and a pledge of stock in the Erie and Kalamazoo Railroad Company. In December of the same year, the defendants being anxious to have Michigan securities, as they represented, rather than the securities on Ohio property, proposed to Edward Bissell to give them security on a farm in Lenawee county, Michigan, which was held in his name, but which belonged to complainant, and was held in trust for him by Edward. That Edward Bissell informed the agents of the bank, John A. Wells, the cashier, and Henry N. Walker, that the title to the above land was as stated, but that he thought his brother would agree to let him mortgage it for the debt due the defendant, if defendant would assign to him the other securities, the Ohio mortgage and stock, in exchange. The bill further states that defendants, by their agent, agreed to the proposition, as soon as it could be ascertained that a valid title could be made for the farm, on which an attachment against Edward Bissell had been laid, the validity of which was in dispute, and, accordingly, a mortgage

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

was made and delivered to defendant. And it is stated that defendant further agreed, that if the attachment proceedings could be set aside or declared void, they would receive the fee of the Lenawee farm, and transfer the securities above stated. That in pursuance of this agreement a deed in fee was made, afterward, in due form, for the farm, and placed as an escrow, in the hands of Henry N. Walker, to be delivered to defendant whenever the attachment proceedings should be set aside or declared void. At the same time, with the deposit of this deed, the defendant executed an agreement in writing, and put it in Mr. Walker's hands, agreeing to transfer the securities named to complainant, in case the title to the Lenawee farm should prove good, and deposited as an escrow, at the same time, the necessary transfers and papers to be delivered to complainant in that event. After this motion was made to set aside the attachment proceedings in the name of Edward Bissell, the defendant, which failed; and immediately afterward the defendant applied to Mr. Walker for a return of the papers, and he, supposing that the matter would not be further litigated, delivered them up to the bank, and the deed he destroyed or returned to Edward Bissell. Subsequently, and by advice of counsel, defendant determined to make another effort to try the validity of the attachment, and applied to complainant to be put in possession of the farm, and the possession was given to the bank. An action of ejectment was brought against it on the title obtained under the attachment, and the case, by writ of error, was carried to the supreme court of the state, and that court held the attachment proceedings were void, by which the title made to the defendant was valid. After this procedure the complainant alleges that he repeatedly offered to make to the defendant a full and perfect title to the Lenawee farm, and requested from the bank a transfer of the Ohio mortgage and the railroad stock, and in all things to carry out the agreement on his part; but the defendant refused, although it retained possession of the farm, and for several years has enjoyed the rent and profit. And a specific execution of the contract is prayed.

The defendant denies that the complainant had any interest in the Lenawee farm, and alleges that the claim was set up to save the property from Edward Bissell's creditors. The giving of the mortgage is admitted by Edward, but he denies the conditions—the attachment is admitted, &c. Defendant neither denies nor admits the placing of the deed for the farm as an escrow, but denies the placing of the agreement in the hands of H. N. Walker, to transfer the Ohio and railroad security. Denies the application, as charged, for the papers, admits the possession, the action of ejectment, and the decision of the court, as stated in the bill. Answer admits that Edward Bissell stated the nature of the title to the farm, that defendant has refused, as charged, admits rents, &c. Defendant states that being dissatisfied with the Ohio securities and railroad stock, it caused Edward Bissell to be arrested in New York, and that the mortgage on the Lenawee farm was given in consideration of a discontinuance of the suit, and the release of Bissell from arrest. That defendant has paid taxes on the Ohio lands, and counsel fees on the ejectment suit. That the Lenawee farm has depreciated, and is not full security for the money and interest due.

As the decision of the case turns upon the testimony, about which the counsel differ, it is necessary to give a condensed statement of it: Edward Bissell says, about the 9th of December, 1836, he was requested by the cashier of the Farmers' and Mechanics' Bank to furnish securities for the payment of the above debt, situated in the state of Michigan. The cashier expressed dissatisfaction with the security given on property in the state of Ohio, and preferred property in Michigan. The witness informed the cashier that there was a farm in Lenawee county, state of Michigan, to which the witness held the title as trustee to his brother, Leverett Bissell, the complainant. That he presumed his brother would consent, that said farm should be pledged to the bank, on condition that it would transfer to him the securities which it then held for the payment of the debt. A negotiation was finally concluded between the witness and the cashier on that basis, or upon the understanding, that when the bank should recover an unembarrassed title to the Lenawee county farm, it should receive the same in full payment of the debt, and transfer to his brother Leverett the mortgages on the city lots and tracts of land in Ohio, and the stock in the Erie and Kalamazoo Railroad. This understanding was reduced to a written agreement, and signed by the cashier, and deposited with Mr. Walker, the attorney for the bank, as an escrow. In pursuance of said understanding, subsequently a deed was executed by the witness and his brother, Leverett Bissell, and his wife, for the land in Lenawee county, to the bank, and was deposited with Mr. Walker. An assignment was also executed by the bank of the mortgage and railroad stock above stated, which was also deposited with Mr. Walker as an escrow. The consummation of the contract was postponed until the validity of a claim under an attachment, which had been laid on the property, could be ascertained. The witness had no interest in the Lenawee farm, but held it simply in trust for his brother. The witness executed a mortgage on the same to the bank. On cross-examination, the witness corrected his memory as to the time the written agreement was entered into, which was sometime after the parol agreement. Mr. Walker states that sometime after the execution of the Lenawee

mortgage, and before the complainant had recognized the validity of said mortgage, a negotiation was entered into between the complainant and defendant to the effect that, if the attachment which had been laid upon the farm could be set aside, so as to make the title to the said land good, then the defendant would, upon the complainant's releasing all equity of redemption in said land, transfer to him the mortgage or mortgages on the lots in Toledo, and the lands near that place, and assign and transfer the railroad stock taken of said Edward Bissell. This agreement was reduced to writing, and signed by the bank and the complainant. The complainant executed a deed with Edward Bissell, in whom was the fee of said land in Lenawee county, conveying the same to the bank. Assignments were prepared in due form, which either were or were to be executed by the bank, as soon as the validity of the attachment could be decided. All these papers were placed in the hands of the witness as escrows, to be delivered to the proper parties on the conditions stated. Witness thinks the written agreement was executed some eighteen months or two years after the original agreement. Mr. Wells, the cashier, states that it was agreed that Edward Bissell should, at his own expense, remove the attachment and perfect the title to the farm, upon doing which the bank agreed to assign the mortgages upon the lands in Ohio to Leverett Bissell, the complainant. This agreement was one or two years after the mortgage on the Lenawee farm was executed. The witness says that about the month of March, 1842, assignments of the Toledo mortgage and of the twenty-two shares of railroad stock were prepared in form, but not executed, and also a memorandum or stipulation setting forth the agreement as before recited, as near as witness can recollect—the latter, the witness thinks, was executed, and his impression is that all these papers were left in the hands of Henry N. Walker, the attorney of the bank, for the purpose of being surrendered to the complainant, upon the title of the Lenawee farm being freed from all embarrassment. The attachment, it is proved, was the only embarrassment in the title. When the motion to set aside the attachment failed, Mr. Walker gave up the papers, supposing that no further efforts would be made. But, afterwards, on application, the bank was put in possession of the premises, and in the supreme court, the title under the attachment was held to be void. The facts in the bill are substantially proved by the evidence. In his cross-examination, Edward Bissell corrected his memory, as to the time the papers were prepared and placed in the hands of Henry N. Walker, as escrows. This was merely a matter of time, and does not, in the least, affect the credibility of the witness. All the witnesses agree that the bank was desirous of exchanging its Ohio securities for a lien upon real property in Michigan. And it was agreed that a mortgage should be taken on the Lenawee farm, in Michigan, and that so soon as the title to it was cleared of all embarrassment, the arrangement should be perfected, by a deed for the farm, and a transfer of the Ohio securities and the railroad stocks to the complainant.

There is no force in the objection, that the Lenawee farm was not identified. For aught that appears, the name might have been a sufficient identification. But it was the farm on which an attachment had been laid, as the property of Edward Bissell; and, in addition to this, the bank was put in possession of the farm, on its own application, and has remained in possession ever since, enjoying the rents.

Nor is there any difficulty as to the election of Leverett Bissell, the complainant. The title to the Lenawee farm was held by his brother Edward, in trust for him; he united in the mortgage, and in the deed that was placed in the hands of Mr. Walker, as an escrow, and in addition to these acts, he has filed this bill, praying a specific execution of the contract.

The principal ground assumed is, that the original contract was limited to a certain time, within which the arrangement was to be completed, which has long since transpired, and that, consequently, the complainant is not entitled to a specific execution of the contract. In the first place, the evidence does not prove such a limitation, and if it did, the subsequent acts of the bank showed that it was waived. After the motion failed to set aside the attachment, at the instance of the bank, and by the advice of its counsel, it was put in possession of the farm, to try the validity of the title under the attachment. This, it is said, must have been under a new agreement, different from that set forth in the bill. This is a mere supposition against the nature and extent of the agreement proved. The agreement was, that the deed should be delivered, and the transfer, as soon as the title to the farm should be clear of dispute. And, it is admitted, there was no objection to the title, except the claim under the attachment. Now the agreement to have the title made clear, not only embraced the motion to set aside the attachment, but also the other steps taken by the bank in entering into the possession, and defending the title against that founded upon the attachment. This course was successful, and it was clearly within the agreement as proved. Why then should a supposition be raised, that this proceeding was under a different contract from that proved?

But the statute of frauds is interposed, to defeat the complainant's bill, on the ground that the agreement was not in writing. The substance of the agreement was in writing, as proved by the cashier

of the bank. The transfers of the Ohio mortgages, and of the railroad stock, by the bank, were prepared and placed in the hands of Mr. Walker, but were not executed, as the cashier of the bank states; but he says a "memorandum, or stipulation, setting forth the agreement with Bissell, as before recited, as near as witness can recollect, was executed."

Now it must be observed that the complainant consented to relinquish the Lenawee farm, provided the mortgage on the Ohio real property and the twenty shares of railroad stock should be transferred to him. The bank has the advantage of this exchange, is in possession of the farm, enjoying the rents and profits, and it would seem that, having realized the contemplated advantage of an exchange of the securities first taken, by a surrender of the right of the complainant to the Lenawee farm, it would be inequitable to withhold from him the consideration on which he sanctioned the exchange. The agreement in writing was delivered up by Mr. Walker, to the bank, on the failure of the motion to set aside the attachment. The bank, or its agent, is presumed to have possession of this paper. The agreement, as proved, being substantially in writing, the statute of frauds can have no application to the case, and the objection is limited to the parol proof of an agreement in writing.

Parol proof was properly heard of the agreement to explain the first mortgage and show the nature of that transaction. And in regard to the parol proof of the contents of the written agreement, without calling on the defendant to produce it, is an objection to the competency of evidence. And here it may be proper to remark, that the objection, on the argument of the case, is made too late. The defense was, that there was no written agreement, and when the evidence overcame this objection, by proving the contract in writing, it is objected that before this can be done, there should have been a notice to produce the writing served on the bank. This objection should have been made when the parol evidence was offered. No such objection appears to have been made at that time, but it is urged on the hearing, when the complainant has no means of removing the objection by a continuance of the cause, or giving notice to produce the paper. It would be a surprise on the party to withhold the objection when the parol testimony was offered, and urge it on the hearing. We suppose that on this ground alone the objection must be overruled.

But there are other reasons. The delivery of the written agreement to the bank, by its agent, Mr. Walker, was premature, as is shown by the further and successful opposition of the bank to the attachment title. This, as has been shown, was within the agreement, and the removal of the title under the attachment was the condition on which the papers in the hands of Walker were to be delivered, fully executed. The papers, therefore, surrendered by Mr. Walker, to the bank, through mistake, have been wrongfully withheld by the bank. Under such circumstances it may well be doubted whether, if the objection to the parol proof had been made when it was offered, it could have been sustained. The written agreement being in possession of the bank or its agents, the contents must be presumed to be known to it, and, consequently, the parol proof can cause no surprise. "The rule which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, has been made with good reason; in order that the party may not be taken by surprise, &c. But this reason will not apply to cases where, from the nature of the proceedings, the defendant has notice that the complainant means to charge him with the possession of the instrument." 4 Phil. Ev. 441. As against the statute of frauds the defendant could not but know the written agreement proved would be relied on. In this view, this agreement must be considered as the foundation of the action. But this agreement has been substantially executed. A valid mortgage has been executed to the bank on the Lenawee farm to secure the debt due to it by Edward Bissell, and for some years the bank has been in possession of the farm, enjoying its rents and profits. Here is a writing which explains the nature of the transaction. This security was received on the application of the bank, on the condition that the relinquishment of the Ohio lands and the railroad stock should be made to the complainant by the bank. This was the consideration on which the complainant relinquished to the bank the Lenawee farm. For all the purposes of the debt, the bank has received the farm, and shall it take refuge under the statute of frauds, and refuse to pay the consideration? This would make an application of the statute, in violation of its language and intention. It would, in fact, protect fraud. Can an individual purchase a farm, and secure the right to it, and then refuse to pay for it, because the contract is not in writing? The contract is executed. The consideration may be proved by parol. The assignment of the securities, in this case, is no more than the indorsement of the notes for the mortgaged money, which carries with it the mortgage as an incident, and the transfer of the stock is personal property. In no point of view can the statute of frauds avail the bank, as set up in defense.

The objection to Edward Bissell as an incompetent witness is the only point now to be considered. And it may be remarked that, however this may be decided, it can not affect the decision of the case. The material facts are sufficiently established by the testi-

mony of the cashier of the bank and Mr. Walker. Edward Bissell owes the bank, and if the Lenawee farm shall be received by the bank he will owe his brother. In this view he has no interest that would go to his competency. It is only a question whether he shall owe the one party or the other. If the Ohio securities should be retained by the bank, and also the railroad stock, to satisfy any balance on the bank debt, after the sale of the Lenawee farm, his debt to his brother would be increased, as the property named would not be applied in discharge of it. In this view, the decree in this case would increase or lessen the debt of the witness to the complainant. But at the same time it would lessen or increase in the same proportion, his balance due the bank. In this respect there would be no preponderance of interest in the witness. Upon the whole, his testimony will not be excluded.

The equity of the complainant is sustained by the evidence, and he is entitled to a decree. It is therefore ordered and decreed, that the plaintiff shall execute a good and sufficient deed of general warranty to the bank for the Lenawee farm, in payment of the debt secured by the mortgage dated 25th December, 1830; and that defendant pay the costs of this suit. It is further decreed that the defendant shall assign the mortgage on the Ohio property, dated 18th May, 1838, and the note secured thereby shall be delivered up to the plaintiff; also, that the twenty-two shares of stock in the Erie and Kalamazoo Railroad shall be transferred by the defendant to the plaintiff. It is further ordered and decreed, that the complainant shall pay to the defendant, the amount of counsel fees and other costs in resisting the attachment and defending the action of ejectment, mentioned in the bill of complaint.

Case No. 1,447.

BISSELL v. HENSHAW et al.

[1 Sawy. 553.] [1]

Circuit Court, D. California. April 12, 1871.[2]

LIMITATION OF ACTIONS—MEXICAN GRANTS—LIMITATION ACT OF 1863, CALIFORNIA—WHAT FINAL CONFIRMATION—JURISDICTION — GENERAL LAND OFFICE—SURVEY BOGA GRANT—JURISDICTION—FINAL LOCATION—ESTOPPEL BY MATTER IN PAIS—PROCEEDINGS UNDER ACT 1860—JUDICIAL—IN REM, WHO MUST COME IN — TWO GRANTS LOCATED ON SAME LAND.

1. Section 7, of the statute of limitations of California, as amended in 1855, has no application to actions for the recovery of land. Section 6 is the only one applicable to such actions.

[See U. S. v. The Science, Case No. 16,239.]

2. Under the proviso to section 6, a party claiming title under a Mexican grant, can commence his action to recover the land at any time within five years after the final confirmation of the grant.

3. The said proviso to section 6, refers to plaintiff's, not the defendant's, title.

4. The provisions of section 6, of the statute of limitations of 1863, are, substantially, the same on this point as section 6 of the act of 1855.

[Cited in Palmer v. Low, Case No. 10,698.]

5. The issuing of the patent is the final confirmation within the meaning of the statute of 1855, in all cases where the survey is not confirmed by the district court, in pursuance of the act of congress of June 14, 1860 [12 Stat. 34, § 5]; but, in those cases wherein the survey is confirmed under the provisions of said act of congress, the date of final confirmation is the date when the decree of the court approving the location becomes final.

[Cited in Le Roy v. Carroll, Case No. 8,266; Southern Pac. R. Co. v. Dull, 22 Fed. 496.]

6. These definitions of final confirmation were adopted in express terms in section 7 of the statute of limitations of 1863.

7. The commissioner of the general land office has jurisdiction to revise or set aside a survey of a Mexican grant, made by the United States surveyor-general for the state of California, under the act of congress of March 3, 1851 [9 Stat. 632].

8. The survey of the Boga grant having been made and approved by the United States surveyor-general for California, and returned into the district court prior to June 14, 1860, and the said survey being on that day pending in said court, for the purpose of contesting or reforming the same, it is one of the cases made subject to the provisions of the act of congress of June 14, 1860 [12 Stat. 33], relating to the subject, and the district court had jurisdiction to revise said location.

9. But, conceding that the district court had not jurisdiction, then the issuing of the patent is the final location, and the statute of limitations did not begin to run till the date of the patent, October 5, 1865. In either case the action was commenced in time.

[Cited in Hayner v. Stanly, 13 Fed. 226.]

10. The government having finally located the Boga grant, so as to include the lands in question, against the protest of the claimant, Larkin, the former selection by said Larkin of other lands, and disclaimer as to these, do not now estop him or those in privity with him, from setting up the title derived under their patent, as against the claimants under the subsequent grant to Fernandez, located on the same land after said selection and disclaimer, and before the final location of the Boga grant.

11. Proceedings to confirm surveys of Mexican grants by the United States district court under the act of congress of June 14, 1860, are judicial in their nature; and the judgments therein are conclusive upon all parties thereto, and those who are required to make themselves parties.

[Cited in Manning v. San Jacinto Tin Co., 9 Fed. 730; Mora v. Nunez, 10 Fed. 634.]

12. The proceedings under said act of June 14, 1860, are in the nature of proceedings in rem, and all parties claiming any interest must intervene for the protection of such interest, or be concluded.

[Cited in Southern Pac. R. Co. v. Dull, 22 Fed. 496.]

13. There were two Mexican grants of land within the same exterior boundaries, one for five leagues, made February 21, 1844, and the other for four leagues, made June 12, 1846. The former was presented to the board of land commissioners for confirmation March 24, and the latter, March 19, 1852. The decree of con-

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

[2] [Affirmed by supreme court in 18 Wall. (85 U. S.) 255.]

firmation became final in the former, February 9, and in the latter, March 2, 1857. The location of the junior grant was made by the surveyor-general, and approved by the commissioner of the general land office, and became final by the issuing of the patent, October 14, 1857. The elder grant was located by the district court under the provisions of the act of congress of June 14, 1860, and became final June 26, 1865, and the patent issued October 6, 1865. The two patents overlapped to the extent of one square league. *Held*: that the patentees under the elder grant, though it was the last finally located and patented, have the better title.

[See note at end of case.]

At law. This was an action [of ejectment] to recover a league of land. It was tried by the court without a jury. The following is a summary of the facts condensed from the findings filed by the court: The plaintiff [George B. Bissell] claimed title under a Mexican grant of five leagues of land, made to Charles William Flugge, which was duly presented to the board of land commissioners, finally confirmed and patented to Thomas O. Larkin. The land granted is called the Boga Rancho. The defendants [J. M. Henshaw and others] also claimed title under a Mexican grant to Dionisio and Maximo Fernandez, of four leagues of land, the same being commonly called the Fernandez grant. This grant was also duly presented to the board of land commissioners, confirmed and patented. The patents overlap to the extent of one league—the north league of the Boga grant, the land patented to Larkin, being coincident with the south league of the land patented to Fernandez and others.

Both of the original grants called for a specific quantity of land within designated boundaries, and both diseños cover, in part, at least, the same general tract of land. The plaintiff's grant for five square leagues bears date February 21, 1844, and purports to have been approved by the departmental assembly, June 13, 1845. The defendants' grant for four leagues bears date June 12, 1846, and has no approval of the departmental assembly. The latter was presented to the board of land commissioners March 19, and the former March 24, 1852. Both grants were confirmed by the board of land commissioners on the same day, July 17, 1855. An appeal having been taken in the case of the Boga (plaintiff's) grant, it was dismissed, and the decree of the board confirming said grant became final, February 9, 1857. An appeal in the case of the Fernandez (defendants') grant having also been taken, the decree of confirmation was affirmed by the district court, March 2, 1857, which decree became final March 9, 1857. The survey of the Fernandez grant was approved by the United States surveyor-general of California, May 29, 1857, which survey having been approved by the commissioner of the general land office, became final, and the patent of the United States duly issued in accordance therewith, October 14, 1857. The survey of the Boga (plaintiff's) grant having been afterward made and approved by the United States surveyor-general, March 26, 1858, said survey was set aside by the commissioner of the general land office as erroneous, and a new survey ordered.

A second survey having been made and approved by the United States surveyor-general, October 4, 1859, the United States contested said survey, and on application of the United States district attorney, made on the same day, the district court of the United States for the northern district of California, directed the said surveyor-general to return said survey into said court, and said survey having been returned into court, in pursuance of said order, such proceedings were subsequently therein had, under the act of congress June 14, 1860, that a survey of said grant was approved by said district court, January 15, 1863, which said survey became final by dismissal of the appeal, June 26, 1865, and afterwards, a patent of the United States issued in accordance with said final survey, October 5, 1865. Thus it will be seen; that the plaintiff claims under the elder grant; that the junior grant of defendants was first presented to the land commission; that the decree of confirmation of the elder grant first became final, and that the survey of the junior grant was first made, and first became final, and the patent in accordance therewith first issued, the defendants' grant being thereby first finally and definitely located and segregated. The plaintiff's grant had been twice located by the surveyor-general after confirmation, and, also, preliminarily, before confirmation, so as not to interfere with the final location of the defendants' grant, with all of which locations the claimants thereunder were satisfied; but said locations were changed, on the motion of the United States against their opposition, and finally located against the wishes and opposition of the claimants, so as to include the south league of the land already covered by defendants' location and patent. Flugge, in his petition, asked for a tract of land "situate on the western side of Feather river, and stretching along the said river from 39 degrees 33 minutes 45 seconds north latitude, to 39 degrees 48 minutes 45 seconds, and forming on this line a square one league in breadth. It is called Boga, as it is rendered manifest by the annexed sketch." The diseño annexed to the petition, which is an unusually accurate one of the territory embraced in it, lays down the line of latitude, as intended for the first parallel mentioned, and the surrounding country, as it stands related to the parallel. The grant was made in accordance with the petition, making the first named parallel, as located, the "first boundary." It turned out that the line, as laid down on the diseño, is not the true location of the parallel of latitude 39 degrees 33 minutes 45 seconds—the

true location of that parallel being several leagues to the northward of the line, as located on the diseño. There could be no difficulty in locating the grant, after ascertaining the southern boundary, for it was to stretch along the western side of Feather river, five leagues in length, by one league in breadth. Larkin claimed, and the surveyor-general, who first located the Boga grant, supposed, that the true location of the parallel, 39 degrees 33 minutes 45 seconds, must be taken as the southern boundary, and the grant was first located in conformity with that view.

This view, however, evidently located the grant entirely beyond the limits indicated on the diseño, and was erroneous. U. S. v. Sutter, 21 How. [62 U. S.] 176; Id., 2 Wall. [69 U. S.] 585. But it was so first located. The Fernandez grant had been already located to the southward, and in part, at least within the diseño of the Boga grant. The commissioner of the general land office, and afterwards the district court, held that the parallel of latitude, as laid down on the diseño of the Boga grant, with reference to other unmistakable natural objects must control, rather than the true location of the parallel as designated by the number of the degree. But before the decision, the Fernandez grant had been finally located and patented, and the Boga grant was subsequently located by the decree of the district court, mostly to the southward of the Fernandez location, but overlapping it on its southern part to the extent of one league. The second survey of the Boga grant, made under the instructions of the commissioner of the general land office, approved by the surveyor-general, October 4, 1859, and which was ordered to be returned into the district court, was located entirely to the southward of the location of the Fernandez grant, and included none of the land covered by the latter, as finally located. The monition mentioned in the findings issued after the return of said survey into the district court, and default was entered against those failing to appear, before said survey was modified as finally approved. The claimants under the Fernandez grant did not appear in answer to said monition in any of said proceedings in the district court.

Wm. H. Patterson and Chas. H. Sawyer, for plaintiff.

R. Aug. Thompson and P. Ord, for defendants.

SAWYER, Circuit Judge. The question is, which grant takes the land? Some questions raised by counsel, not wholly depending upon the several grants and patents, will be first considered; and firstly, it is insisted that the action is barred by the statute of limitations.

If I understand the argument of counsel, it is claimed that section 7, and not section 6, of the statute of limitations, as amended in 1855 (Stat. 1855, p. 109, §§ 1 and 2), before its repeal, applied to the case; that section 6 of the act of 1863, carries out the same idea in its second proviso (Stat. 1863, p. 327, § 6); and that the statute commenced to run from the time of the final confirmation of the defendants' grant, they having been in adverse possession under their grant from the year 1852.

In this view, I am satisfied, counsel are in error. It is settled by the supreme court of California, that section 7 of the statute of limitations, as it existed prior to the amendment of 1863, had no application whatever to actions for the recovery of lands; and that section 6 was the only section applicable to such actions. Richardson v. Williamson, 24 Cal. 299; Hibberd v. Smith [39 Cal. 145].

Under section 6, a party claiming title derived from the Spanish or Mexican government, can maintain his action, if commenced at any time within five years after the final confirmation of his grant by the government of the United States. Id.; also, Davis v. Davis, 26 Cal. 46; Reed v. Spicer, 27 Cal. 58.

The proviso to the 6th section refers to the plaintiff's title, and says nothing about the defendant's title. Under this provision it matters not how long the defendants may have been in possession, or under what character or title they claim, if the plaintiff commences his action within the time prescribed after a final confirmation of his own title. And there is nothing in section 6, of the act of 1863, to change the aspect of the question.

The second proviso in that section covers the ground of the provisos of both sections 6 and 7 of the statute of limitations, as they before existed. Stat. 1863, p. 327, § 6. The proviso is as follows:

"Provided, further, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto; and provided, further, that nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory."

It is settled by the supreme court of California that final confirmation, as used in the statute as amended in 1855, in cases where the survey is not confirmed by the district

court, under the act of 1860, is the issuing of the patent, and that the statute commences to run only from the date of the patent. Johnson v. Van Dyke, 20 Cal. 229; Davis v. Davis, 26 Cal. 46; Reed v. Spicer, 27 Cal. 58; Beach v. Gabriel, 29 Cal. 584.

But where the survey was finally confirmed by the courts, under the act of congress of June 14, 1860, the final confirmation was held to be the date when the decree of the court approving the location became final. Mahonby v. Van Winkle, 33 Cal. 457; Hibberd v. Smith [39 Cal. 145].

Section 7 of the act of 1863, adopted by express provision these definitions, thus laid down by the court, of the term "final confirmation," as used in the statute. It provides, that final confirmation shall be deemed the patent, or the final determination of the official survey under the act of congress of June 14, 1860.

In this case, the decree of the district court confirming the location of the Boga rancho became final, June 26, 1865, and the patent issued October 5, 1865.

Supposing either of these dates to be the date of their final confirmation, there was no final confirmation of the survey of the Boga grant, until long after the passage of the act amending the statute of limitations in 1863; and, at the date of the passage of that act, the statute had not begun to run. If the district court had jurisdiction of the survey, the first would be the date of final confirmation, otherwise, the second.

The plaintiff, under the proviso of that act, consequently, had either five years from the passage of the act (April 18, 1863), as some maintain, or five years from final confirmation—that is to say, either from June 26, or October 5, 1865, within which to commence his action. The action was commenced on the fifteenth of May, 1867, within the time, whichever of these dates is assumed as the correct one, from which the statute began to run.

It is, also, insisted by defendants' counsel, that under the act of congress of 1851 [9 Stat. 633], creating the board of land commissioners, the surveyor-general was the party authorized to locate the land; that the commissioner of the general land office had no authority to revise or control the location so made by the surveyor-general; that the location of the Boga grant, approved by J. W. Mandeville, March 26, 1858, was final; that the subsequent setting aside of said location by the commissioner of the general land office, and all subsequent locations, and proceedings by the surveyor-general and district court are void for want of jurisdiction; and that the statute of limitations began to run from said March 26, 1858.

But it is sufficient to say that, in Castro v. Hendricks, 23 How. [64 U. S.] 440–443, the supreme court of the United States held otherwise—a case in which the point is directly involved, and decided.

This case is not overruled in U. S. v. Sepulveda, 1 Wall. [68 U. S.] 104, as counsel claim, but on the contrary it is affirmed on this point, for it is expressly stated by the court that the commissioner of the general land office is invested with a "supervision over the acts of all subordinate officers charged with making surveys." Id. 107. And again, in the same case: "If the survey does not conform to the decree of the board, the remedy must be sought from the commissioner of the general land office before the patent issues." Id. 109.

I know of no subsequent case which calls this view in question. It is, therefore, conclusive on this court, whether right or wrong, but I think it clearly right.

It is also insisted that the district court had no jurisdiction to order the cause into court, or to take any of the subsequent proceedings had in that court, which resulted in the survey, as finally approved by that tribunal, and in the patent issued in accordance with said approved survey. The survey was, doubtless, ordered to be returned into the district court, upon the supposition that the jurisdiction of the court over such matters had been determined by the supreme court, in the case of the U. S. v. Fossatt, 21 How. [62 U. S.] 445, and the approval of this decision in Castro v. Hendricks, 23 How. [64 U. S.] 442.

As the decree from the appeal of the board of land commissioners had been dismissed, and the case was no longer pending in the district court, at the time the plat and survey was ordered to be returned into court, it would seem, from the case of U. S. v. Sepulveda [supra], that the matter was not, at the time the order was originally made, within the jurisdiction of that court. But the order had, in fact, been made, and the plat had been returned into the district court, and the proceeding to rectify the survey was actually pending in that court, June 14, 1860, when the act of congress of that date entitled "An act to amend an act to define and regulate the jurisdiction of the district courts of the United States in California, in regard to the survey and location of confirmed private land claims," was passed, and took effect.

Section 6 of said act provides as follows: "And be it further enacted, that all surveys and locations heretofore made and approved by the surveyor-general of California, which have been returned into the said district courts, or either of them, or in which proceedings are now pending for the purpose of contesting, or reforming the same, are hereby made subject to the provisions of this act, except that in the cases so returned or pending, no publication shall be necessary on the part of the attorney-general." 12 Stat. 34, § 6.

This case comes within the express provisions of that section. It was a case in which the survey had been "made and approved by the surveyor-general of California," and it had "been returned into the district

court," and proceedings were then "pending for the purpose of contesting, or reforming, the same," and it is, therefore, one of the cases "made subject to the provisions of this act." It is one of the exceptions referred to by the court in U. S. v. Sepulveda.

Jurisdiction to proceed was given by the act, and the subsequent proceedings were in accordance with its provisions. It was so held by the supreme court in a similar case. U. S. v. Halleck, 1 Wall. [68 U. S.] 453.

But even if it were not so, the survey had not been submitted to the commissioner of the general land office, and had not received his approval, and the survey and plat finally approved by the district court, was approved and duly authenticated by the surveyor-general, transmitted by him to the commissioner of the general land office, and by him acted upon as correct, and adopted, and the patent issued in accordance therewith, this being the only survey and plat ever approved by that officer.

Therefore, aside from the action of the district court, the survey did not become final till the patent issued, within the meaning of the statute of limitations, as settled by the supreme court of California, and the construction of that court of a statute of California, is conclusive upon this court. Whether the action of the district court was efficacious or not, the survey approved by the court was adopted by the commissioner of the general land office, and became final by his action, if it was not so before.

The plaintiff is not estopped by the acts of Larkin in making his selection and claiming his land where it was first located, or any other of his acts connected with that location.

The land was located twice, besides the preliminary location, by the surveyor-general, without interfering with the location of the Fernandez grant, either of which locations he would have accepted, and he each time opposed the change, but it was finally located by the district court, upon a contest by the government, and against the claimants' opposition, as it was patented, and so as to conflict with the prior location of the Fernandez grant.

There is nothing in this case upon the question of estoppel, to take it out of the rule as indicated in Moore v. Wilkinson, 13 Cal. 488; Boggs v. Merced Min. Co., 14 Cal. 279; and Davis v. Davis, 26 Cal. 40.

We come now to the great and highly important, as well as interesting, question in the case—a question likely to arise in other cases, involving large amounts of property, to wit: Which grant, under the facts of the case, carries the title to the land covered by both patents?—the elder grant, last presented to the board of land commissioners for confirmation, and last located and patented, though first confirmed, or the junior grant, first presented for confirmation, and first finally located and patented?

Although there are many decisions bearing more or less directly upon the question, this is the first time, so far as I am aware, that this precise question has been presented for determination in an action of ejectment between two conflicting patents, issued upon confirmed Mexican grants, in the national courts. Under the authorities, as they now stand, the question is one of great embarrassment and difficulty. Indeed, I find it no very easy task to reconcile all the views expressed in different cases, having reference to different states of facts bearing upon the question. The claimant, under one or the other of these grants, must lose a league of land, and although it is not easy to determine which has the better right, yet I think principles may be extracted from the cases, which should control the action of this court.

On the part of the defendants, it is insisted that where a grant was made by the Mexican government of a definite quantity of land, without specific boundaries, within a larger area, the right of location remained with the government; that the government was not precluded from making a subsequent grant, with specific boundaries, within the larger area; that such subsequent grant with specific boundaries would take precedence of a prior unlocated grant; that when one of two grants of a specific quantity within a larger area has been located by the government, the grant becomes specific and attaches to the land; that, upon the cession of California to the United States, the right of location of such general grants passed to the United States, and is to be executed according to the laws of the United States; that the grant first located, even if the junior grant, becomes specific by the location, and the title to that specific tract of land vests absolutely in the grantee; that the patent takes effect by relation from the filing of the petition for confirmation with the board of land commissioners; that the grants in question are grants of that kind; that the defendants, having first filed their petition, and secured the first final location, their grant became specific, and attached to the land embraced in their patent, and having the elder patent, taking effect by relation, from the filing of the petition, it is conclusive; and that the plaintiffs are not "third persons" within the meaning of the fifteenth section of the act of congress of March 3, 1851, and are therefore not in a position to dispute their title. The case of Waterman v. Smith, 13 Cal. 407, and the cases therein cited from the United States Supreme Court Reports, of which Fremont's Case, 17 How. [58 U. S.] 558 is one, are relied on as sustaining their view.

On the part of the plaintiff, it is argued that a different rule, or at least a modification of the rule, was laid down by the same court, in the subsequent cases of Leese v. Clark, 18 Cal. 537, 20 Cal. 387, and Teschemacher v. Thompson, 18 Cal. 26; and that

under the rule, as thus established, the elder patent in this case takes the land; and, it is claimed, also, that this view is sustained by the cases of Beard v. Federy, 3 Wall. [70 U. S.] 479; Rodrigues v. U. S., 1 Wall. [68 U. S.] 582; and the cases of Treadway v. Semple, 28 Cal. 652, and Semple v. Wright, 32 Cal. 659, decided upon the authority of Rodrigues' Case.

In Leese v. Clark [supra] the court held that a patent issued upon a confirmed Mexican grant is to be regarded in two aspects: "Firstly—As a deed of the United States. Secondly—As a record of the government, showing its action and judgment with respect to the title of the patentees at the date of the cession." The court say: "As to the operation and effect of the patent, there can be no question. It is the last act of a series of proceedings taken for the recognition and confirmation of the claim of the patentees to the land it embraces, the first of which was the petition to the board of land commissioners. With respect to such proceedings, it takes effect by relation at the date of the first act. As the deed of the United States, it is to be regarded as if it had been executed at that time. It passes whatever interest the United States may then have possessed in the premises." 18 Cal. 570, 571. And again: "Treated as the simple deed of the United States, we admit that the operation of the patent is only that of a quitclaim deed, or rather of a conveyance of such interest as the United States possessed, the deed taking effect by relation at the date of the presentation of the petition of the patentees to the board of land commissioners." 20 Cal. 421. "But the patent is not merely a deed of the United States; it is a record of the government; of its action and judgment with respect to the title of the patentee, existing at the date of the cession. Again, the patent is the evidence which the government furnishes the claimant, of its action respecting his title. Before it is given, numerous proceedings are required to be taken before the tribunals and officers of the government; and it is the last act in the series, and follows as the result of those previously taken. It is, therefore, record evidence of the government's action. By it, the government, representing the sovereign and supreme power of the nation, discharges its political obligations under the treaty and law of nations. By it, as we have said in the case already cited, the sovereign power which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and as correctly located by the new government, so as to embrace the premises, as they are surveyed and described." Id. 423; and [Teschemacher v. Thompson] 18 Cal. 26.

In the latter aspect, then, as a record of the government, according to the view thus expressed, the patent is evidence, not only of the grant, but also, that the land has been "correctly located"—that is to say, that it conveys the very land originally intended to be granted, and it necessarily relates to the date of the original grant.

In Teschemacher v. Thompson [supra] the same court says: "The patent, it is true, as a deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the board of land commissioners. * * * But as the record of the government, of the evidence and validity of the grant, it establishes the title of the patentees from the date of the grant," etc. And in Stark v. Barrett, 15 Cal. 366: "In addition to this being conclusive upon the question of the existence and validity of the grant, it (the patent) necessarily establishes the title of the patentees from the date of the grant."

The character and effect of the patent, as thus stated, in Leese v. Clark [supra], has also been adopted, and the principle stated, in language almost precisely the same, by the supreme court of the United States, in the case of Beard v. Federy, 3 Wall. [70 U. S.] 491, 492. The court in that case, says: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant, as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them, to the same extent as under the former government. The treaty of cession, also, stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recog-

nition, the government acts and issues its patent to the claimant. The instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it, the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises, as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government, that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country, could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor."

Upon the provision of the fifteenth section of the act of [March 3] 1851, providing that the decrees of the courts, or patent issued under the act, "shall be conclusive between the United States and said claimants, only, and shall not affect the interest of third persons;" the court in Beard v. Federy [3 Wall. (70 U. S.) 492] further observes, that "the third persons," as there used, does not embrace all persons other than the United States, and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property. This, also, is but adopting the language of the supreme court of California in Waterman v. Smith, 13 Cal. 420; Moore v. Wilkinson, Id. 488; Boggs v. Merced Min. Co., 14 Cal. 362, and other cases.

In Waterman v. Smith, the court say: "The third persons * * * are those whose title is, at the time, such as to enable them to resist successfully any action of the government in respect to it. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute third persons." 13 Cal. 420. And, again, in Teschemacher v. Thompson, 18 Cal. 27, the court say that the "third persons" referred to "are those whose title accrued before the duty of the government and its rights under the treaty attached." Again, they "are those whose title to the premises patented not only accrued before the duty of the government and its rights under the treaty attached, but whose title to such premises was, at that date (the date when the duty of the government attached, or date of the treaty), such as to enable them to successfully resist any subsequent action of the government affecting it." Leese v. Clark, 18 Cal. 572. And this is repeated in the same case, on a subsequent appeal. 20 Cal. 412, 413.

And the court further say, in Leese v. Clark: "Unless the government interferes in the matter, the defendants, as junior grantees, are remediless. Their title to the premises was not such, at the date of the treaty, as to enable them to resist the action of the government in the location of the elder grant. They are not, therefore, 'third persons,' within the meaning of the fifteenth section of the act of congress." 18 Cal. 575.

The opinion in Beard v. Federy [3 Wall. (70 U. S.) 492] was delivered by the same learned judge, who, as chief justice of the supreme court of California, delivered the opinion from which the foregoing quotations are made; and the language of that opinion was, doubtless, intended to embody the same idea in the definition of "third persons" therein adopted. According to this comprehensive definition of the learned judge, and the court for which he speaks, as understood and maintained by the defendant, then, no one is a "third person," within the meaning of the said act of congress, except a party who not only holds a Spanish or Mexican grant, but, also, whose grant or title was such at the date of the treaty that he could successfully resist any action of the government in regard to its location, or in any way affecting it. That is to say, no one who, at the date of the treaty, did not have a complete, and in every particular perfect, title to a specific, finally segregated and located tract of land, with all the formalities, including the act of juridical possession, is a "third person," as that term is used in the act of congress, or, in other words, has a status that will enable him to question the conclusiveness, either as to the validity of the grant, or the correct location of the land, of a patent issued upon a confirmed Mexican grant. No party having an inchoate Mexican grant, at the date of the treaty, is a "third person," or has such status; and every such patent is conclusive upon every party whose title was inchoate at the date of the treaty.

The defendants invoke this doctrine, and say that the plaintiff's grant was inchoate; that the plaintiff could not successfully resist the action of the government in respect to his grant, or its location, at the date of the treaty; and that the plaintiff, not being a "third person," the defendants' patent being the elder patent, founded upon a grant first located, though issued to perfect a junior grant, is conclusive.

But under this same rule, thus broadly stated, the plaintiff, with equal force, says that the defendants' grant was inchoate; that defendants' title was not such at the date of the treaty as to enable them to resist the action of the government, affecting

plaintiff's elder grant, or its location; and, therefore, that defendants are not "third persons," with reference to his patent, within the assumed definition of that term; and that plaintiff's patent, issued upon a confirmed elder grant, is conclusive upon defendants for that reason.

Both patents were issued upon grants which were inchoate at the date of the treaty, but nevertheless, both patents cannot be conclusive upon the claimants under the conflicting patents. Both cannot take the land.

It seems evident, therefore, that the problem involved in this controversy must be solved upon some other principle than the doctrine, alone, of "third persons," as thus broadly laid down in the decisions referred to, and as thus understood.

But it is evident that this comprehensive definition of "third persons" was given with reference to the facts of the cases then under consideration, which were actions in which but one of the parties claimed under a patent issued upon a confirmed Mexican grant, and the other set up against the patent, either an unconfirmed and unlocated, or an unlocated confirmed grant, or a claim under the pre-emption laws of the United States, or under some state law alone, or a state law in conjunction with some act of congress, by which some right was claimed to have attached in favor of the party since the date of the treaty with Mexico.

I find no case wherein the question is considered between parties claiming under different patents, issued upon different confirmed Mexican grants, finally located upon the same land; and it, doubtless, never occurred to the court, when considering the question, that such a case would arise. With reference to such a case, it would seem that the construction on this point of the fifteenth section requires some limitation, and a limitation is clearly and expressly recognized in the case of Rodrigues v. U. S., 1 Wall. [68 U. S.] 582, which will be more particularly referred to in a subsequent part of this opinion, and by implication, at least, in other cases.

But to return to the cases of Waterman v. Smith [13 Cal. 420], and Leese v. Clark [18 Cal. 572, 20 Cal. 412, 413], and the different rules supposed to be adopted in other particulars, in these cases, and other cases of a similar character, invoked by the respective parties.

It will be observed that, in none of those cases, did the question arise between two patents founded upon confirmed Mexican grants, located by the tribunals, or officers of the United States government, upon the same land.

In Waterman v. Smith, the contest was between the patentee of a confirmed and located grant on one side, and the holder of an unlocated grant, on the other. One of the grants was for four leagues within a tract of eight or nine leagues, and the other for three leagues, within an area containing twenty leagues. 13 Cal. 383.

No one line in either was fixed, from which the measurement must necessarily commence. The grants were of a certain quantity, without any indication of location, except certain outer boundaries, and one was to join with the other. They were emphatically floating grants, and only one had been located and patented, while the other was still unlocated and afloat, and liable to be located anywhere within the larger area embraced within the diseño, and might, and probably would, be located outside of the land covered by the patent. And, in fact, it was so subsequently located, as will hereafter be seen.

It was with reference to this particular state of facts, that the questions were discussed, and the rule laid down. The patent was simply held conclusive, as against the still unlocated and floating grant. It was nowhere said or intimated that if both grants had been located upon the same land, and patented, the first located, without reference to the priority of the grant, would have been preferred, and the instructions considered and approved, are very carefully limited to the case of a located and patented grant, against one that is unlocated.

Thus, the seventh is as follows: "That the patent in evidence by plaintiffs is conclusive as against the defendant, unless there is evidence that the defendant has a title superior to the title of said patent to the land in controversy, under a confirmed Mexican grant, located under the Mexican government, or under the United States government." [Waterman v. Smith] 13 Cal. 421. See, also, 8th and 9th instructions, Id.

These instructions imply, that if the defendant's grant had been located, either by the Mexican or United States government, the plaintiff's patent issued upon the junior grant, might not have been conclusive. Both parties, then, would have had a title from the same "source of paramount proprietorship" (Id. 419), and the question of superiority might be open. Fremont's Case, also, cited in that case from 17 How. [58 U. S.] 542, was a grant of ten square leagues, to be located in a district of country which contains above one hundred leagues." Id. 573. So the case of Rutherford v. Green [2 Wheat (15 U. S.) 196], and the other cases cited from the United States supreme court, are all essentially floating grants, with no one point fixed with reference to which the land must be located, without leaving any room for the exercise of discretion by the government. The strongest case therein cited, so far as the present question is concerned, seems to be Ledoux v. Black, 18 How. [59 U. S.] 475. But, in that case, the grant was also vague and uncertain, and "one location would answer the calls and descriptions as well as the other." Id. The defendants claimed under an entry made, and patent of the United States issued under acts of con-

gress before the passage of the act of congress under which plaintiff's grantor presented his claim, and the act subsequently passed, under which it was finally confirmed. The court, in that case, only recognize the validity of a sale of a "part of the land not necessarily embraced within the tract confirmed." In all of those cases in which the court was called upon to decide between two claimants, and a patent prevailed, the opposing claim was but a floating one, or the tract claimed and confirmed had not been patented, and did not necessarily include the land embraced in the opposing patent.

The cases of Waterman v. Smith and Leese v. Clark [supra], when considered with reference to the facts of the respective cases, and the questions to be determined, do not appear to be in conflict. In the former, it was only necessary to consider the patent in one of the aspects in which it is said it must be regarded, namely, as a quit-claim deed of the United States, taking effect by relation, at the date of the presentation of the petition, and it was in that aspect alone, that it was, in fact, considered. In that, and similar cases, it was unnecessary to carry the relation further, or to consider whether the patent would take effect by relation to the date of the grant.

In Leese v. Clark, the court evidently does not consider itself as advancing any view in conflict with the decision in Waterman v. Smith. On the contrary, it recognizes that case as correctly decided, and says that while the patent, as a deed of the government, is to be regarded as taking effect by relation at the date of presenting the petition to the board of land commissioners, it is also to be regarded in another aspect, viz: as a record of the government, of its actions, etc., as before stated in this opinion, and in this aspect, that the patent is evidence as to a junior grantee—which was the case then under consideration—of the validity of the grant, of its correct location, and that it relates to the date of the grant. The facts in the case required a consideration of the patent in this aspect—as a record of the action and adjudication by the government—and it was only upon this view that the decision was put by the court, or that it can be sustained. The question was directly involved and decided. The action was ejectment, and the case was this: In 1839, Governor Alvarado granted to Leese and Vallejo a tract of land situate at the "landing place of Yerba Buena," two hundred varas long, by one hundred varas wide. Leese v. Clark. The description was uncertain, as will be seen by an examination of the grant, and it was so held by the court. "That there was such uncertainty in the bounds of the tract as described in the grant in question, is manifest. The location of the line running from the disembarcadero, or landing place, to the playita, or little beach, is one source of uncertainty. That line might be run in several different directions, materially varying from each other, and yet run, in each instance, in a northerly course from the starting point. There are other sources of uncertainty. A delivery of juridical possession was therefore necessary. This proceeding involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement—in other words, a location of the land. The power of locating the land as a preliminary to its formal delivery, belonged to the government, and could not be exercised by the grantees, at least, so far as to bind the government. * * * It does not appear from the record whether the government ever acted in the matter. Assuming that it did not, the right and power passed to the United States, and could be exercised by them in such manner and at such time as they might deem expedient." [Leese v. Clark] 18 Cal. 574.

This grant was, therefore, inchoate. The description was uncertain, and it was susceptible of different locations, and, like other uncertain grants, required a survey to attach it to any specific tract of land. The grant was made by the governor, directly, and not by the pueblo authorities; and it was therefore held that it was necessary to present it to the land commissioner in the name of the claimant. It was so presented, confirmed, duly surveyed, and, in 1858, patented. Plaintiffs claimed under the patent. The opposing claim was under grants from the alcaldes of San Francisco, made in the month of February, 1847,—[Leese v. Clark] 20 Cal. 396,—before the treaty with Mexico, by which the territory was acquired by the United States. It is settled by numerous cases, that at the date of these grants the alcaldes of San Francisco had power to grant. This power is assumed in the case for the purposes of the decision. It is said, it is true, that this power was granted to the alcalde by the governor and territorial deputation. But so far as the present question is concerned, it matters not from what source the power was derived, if it existed, so the governor derived his power to grant, from some superior source. Both had power to grant, provided the land was subject to grant. The alcalde's power to grant lands within the pueblo, not before granted, was unrepealed, and while so existing, his grant was as effective as that of the governor. The governor himself could no more have granted land, previously granted, without a proper denouncement, than the alcalde. Both, at the time, were empowered to grant lands that were open to grant. At the time that these alcalde grants were made, that portion of the pueblo lands had been laid off into streets, blocks and lots, the lots being fifty varas square, and said fifty-vara lots were designated on said plat by numbers; and grants were made of such lots by their numbers, in accordance with said plat. These alcalde grants were so made, and the

grants being for such fifty-vara lots by their numbers, in accordance with such plat, were, necessarily, of specific and certain tracts of land. They were, necessarily, located and could apply to no other land. The alcalde grant, then, was of a specific tract of land, located by the very act of making the grant, and it required no further action of the government. On the second trial, the judge of the district court acted upon this theory, and assuming that the elder grant, which had been confirmed and passed into a patent, was inchoate, uncertain and unlocated; that the junior grants by the alcalde were of specific tracts and located, and, therefore, first segregated from the public domain, and that the case was entirely similar to the case of Waterman v. Smith [13 Cal. 420], charged the jury in accordance with the law, as he supposed it to be laid down in that case (see [Leese v. Clark] 20 Cal. 394, 396) regarding the patent simply as the deed of the government, etc., but disregarding the other aspect of the patent, as a record of the government, etc., as stated in the same case by the supreme court on the first appeal, and also in the prior case of Teschemacher v. Thompson, 18 Cal. 26.

On the second appeal, the supreme court say, that the district court, among other things, "disregarded the decision as to the operation of the patent as a record of the government, with respect to the title of the patentees at the date of the cession, and declared that the patent had no greater effect or operation than a simple deed of the United States." [Leese v. Clark] 20 Cal. 416.

The supreme court, also, subsequently admit, that if this latter proposition "can be sustained, the other questions become immaterial;" and, although regarding the first decision as conclusive in that case, yet, in order to correct any error the court might have fallen into in reference to future cases, elaborately re-examined the question, and reached the same conclusion as that attained on the former appeal. 20 Cal. 420 et seq. In the course of this re-examination, the court say:

"Treated as the simple deed of the United States, we admit that the operation of the patent is only that of a quitclaim, or rather of a conveyance of such interest as the United States possessed; the deed taking effect by relation at the date of the presentation of the petition of the patentees to the board of land commissioners. We have never asserted any other efficacy to the instrument, as a deed. As a deed, its operation is like that of any other grantor; it passes, and can only pass, such interest as the grantor possessed. But the patent is not merely a deed of the United States, it is a record of the government." Id. 421.

By it, the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the laws of nations, and stipulation of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described." Id. 423. See, also, [Leese v. Clark] 18 Cal. 571, 572.

It will be seen, then, by careful examination of the case, that the invalidity of the alcalde grant was not put upon a want of power in the alcalde to grant, but a want of power to make a grant, that should affect the title of one who had a prior grant to the same land, or that might be located on the same land—that the subsequent grantee must take his grant, subject to the liability of having a prior grant not yet definitely attached to the specific tract located upon it. It will be seen, also, that it is still held that the doctrine of Waterman v. Smith is correct, so far as it goes—that is to say, as applicable to the facts of that, and similar cases, where a junior grant has been located, and an elder unlocated grant, not necessarily embracing the same land, is still afloat.

But, under the new state of facts involved in that case, when both grants have become specific, and located upon the same land, other principles are involved, and the patent is to be considered in the other aspect as a record of the government, and that as such, it is evidence of the validity of the grant, that it is correctly located, and takes effect from the date of the grant.

The case of Teschemacher v. Thompson, as I understand the case, was decided upon precisely the same principle, and established the same rule, as to the effect of a patent issued upon a confirmed Mexican grant, regarded in the aspect of a record of the government. The plaintiff claimed under a patent, issued under a confirmed Mexican grant, which covered the premises.

The demanded premises were alleged in the answer, and assumed by the court, to have been always, before and at the date of the admission of California into the Union, below the ordinary high tide water mark in the bay of San Francisco. Defendants claimed that the title was, therefore, in the state of California, and not in plaintiffs. For the purposes of the decision, the court assumed that the grant upon which the plaintiff's patent issued, "was only for a specific quantity lying in an area of larger extent; * * * that it conveyed only an interest requiring further action of the government, and that such action was not had previous to the cession; in other words, that it conferred a merely equitable title, which was never perfected under the former government." 18 Cal. 24.

This being so, of course, it was subject to be located differently by the government within the external boundaries indicated in the grant, the full quantity being given. It might have been located wholly aboye

high tide, excluding the premises in question, and upon the simple theory of the case of Waterman v. Smith, that the Mexican government might have made another grant to other parties of a specific tract of land, within the same external boundaries, it might have made a specific grant of land below high water mark to a third party, and, subsequently, have located plaintiff's grant upon the land above high water mark, and the grantee could not complain. In that event, as the defendants' counsel in the case now under consideration claim, the first grant that became located, even if the junior grant, would take the land. What the Mexican government might have done, the United States, its successor in interest, might do at any time before filing a petition for confirmation. And so the cases cited from the Reports of the U. S. supreme court in Waterman v. Smith, seem to hold.

The United States only covenanted in the treaty to protect the interests of citizens as they existed, not to give them greater rights than they already had under the Mexican government. The United States simply took the place of that government, and succeeded to all its rights and all its obligations respecting those lands.

By the admission of California into the Union, it became, by virtue of its sovereignty, entitled to all the lands below ordinary high water mark, according to Pollard v. Hagan, 3 How. [44 U. S.] 212, and other cases. Whether the transfer of title, which was before in the United States, to the state, is by implied grant or relinquishment, or in what precise way the transfer was effected, does not very clearly appear. But the title is recognized to have become vested in the state by virtue of its admission. And the land to which the title thus passes, is specific, because it is all the land lying below ordinary high tide, and the ordinary line of high tide is a well-marked natural object, which only requires observation to ascertain. The court, however, held in this case, as in Leese v. Clark [18 Cal. 572, 20 Cal. 396], that the state took the title subject to such location as the government should make of the Mexican grant under which the plaintiff claimed, and that this grant having been finally located so as to embrace the premises in question, although it was below ordinary high water mark, and upon land which would otherwise have passed to the state upon its admission into the Union, the patent, "as the record of the government of the existence and validity of the grant, establishes the title of the patentees from the date of the grant." [Teschmacher v. Thompson] 18 Cal. 26. See, also, Stark v. Barrett, 15 Cal. 366.

As I understand these decisions, then, where there are two grants from the paramount source of title, and both have become attached to a specific piece of land, and a patent has been issued by the United States to the elder grantee, in pursuance of a decree of confirmation, under the act of [March 3] 1851, and locations made in pursuance of the acts of congress, the patent under the elder grant carries the superior title.

These cases, it is true, are but decisions of a state tribunal, and are of themselves not controlling authority in the national courts. But the learned chief justice who so elaborately and ably discussed the question in the cases cited, is now a justice of the supreme court of the United States, and, as we have seen, that tribunal, in an opinion delivered by him in Beard v. Federy, 3 Wall. [70 U. S.] 491, 492, has laid down the same rule, in language almost identical.

In speaking of the patent as a record, the court, in that case, say: "This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it, the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and it is correctly located now so as to embrace the premises as they are surveyed and described." Id. 492.

The case of U. S. v. Armijo, 5 Wall. [72 U. S.] 444, was an appeal from the final survey of one of the grants involved in Waterman v. Smith—the grant which was unlocated at the time of the trial of that case. The claimants under the Armijo grant, insisted that it was the elder grant, and, that being so, they were entitled to have it so located, that it should embrace a portion of the land already patented to the holders of the Solano grant. To what end, if the grant first located would necessarily take the land? But the priority, in fact, only related to the former title papers. There had been a prior provisional grant to Solano, see Waterman v. Smith, 13 Cal. 375. And, although the formal grant to Armijo was first in date, it referred to the Solano rancho in terms. Solano's rights were recognized in it. And in view of his elder equitable right, the court say:

"There can be no doubt, as observed by the district judge, that under the circumstances the rights of Solano, according to the Mexican usages, would have been recognized as superior to those of Armijo in any contest, notwithstanding the formal title issued first to Armijo." [U. S. v. Armijo] 5 Wall. [72 U. S.] 448.

The court refused to allow the location upon the land before patented, because the parties were not entitled to have it so located, for the reason that Solano had the prior equity, as well as the prior location. But it was nowhere intimated that if it should be so located, the location would be fruitless, because the Solano grant had been first segregated and made specific, as is claimed to have been held between those very grants, in Waterman v. Smith. This omission to intimate any such result, in the opinion by the

same learned judge who rendered the decision in Waterman v. Smith, is, under the circumstances, significant. If he had supposed such consequences would necessarily follow the desired location, he would scarcely have failed to suggest them. But the case of Rodrigues v. U. S., 1 Wall. [68 U. S.] 591, bears directly upon the question. That was an appeal from a decree of the district court, making a final location of a confirmed grant under the act of June 14, 1860. Rodrigues claimed under a grant to one Sanchez, made provisionally in 1838, and ratified by Governor Micheltorena in 1848. In 1842, one Castro obtained a grant which had been finally confirmed, and before the passage of the said act of 1860, finally located and patented. Rodrigues' grant was afterwards surveyed so as not to interfere with Castro's grant as located; but his survey was set aside by the district court, and, under the direction of the district court, another was made and confirmed, which included a large portion of the land before patented to Castro under the decree confirming his grant made in 1842. Rodrigues appealed, and the principal ground of error relied on was, that his grant was so located as to include a large portion of the land already patented to Castro's representatives. If so located, he supposed himself liable to lose the land on that ground; hence his appeal. But the supreme court, on that point, say (page 591):

"It is objected to this location of the grant, that it places it on land which has already been confirmed, surveyed and patented to the representatives of Castro. The answer to this is, that we are called on in this proceeding to determine where the grant to the present claimant ought, rightfully, to be located, who was not a party to any of the proceedings by which Castro's claim was confirmed, surveyed or patented, and is not, therefore, bound or concluded by either the decree, survey or patent, as expressly enacted by the fifteenth section of the act of [March 3] 1851; for Castro's survey was made before the act of [June 14] 1860, and there was no opportunity for this claimant to contest its location. And lastly, it may be added, that the holder of the Castro claim has made himself a party to the present proceeding, and must be bound by its result."

The very point in the case was, as to the propriety of locating a prior inchoate grant, uncertain as to its exact location, upon land already appropriated to a subsequent inchoate grant in terms covering the same land, but first finally located and patented. And the court unanimously held that it must be so located, and declared that the claimant under the elder patent, being a party to the proceeding, "must be bound by its result;" thereby holding that the claimant under the elder grant, although inchoate, and not such as would enable the grantee, at the date of the treaty, to resist any action of the government affecting its grant or location, is not bound or concluded by the former confirmation, survey or patent, and is, therefore, a "third person," within the meaning of the fifteenth section of the act of 1851. The grant is thus adjudged to be properly located, and the result declared to be conclusive upon the prior patentee—that is to say, that in this instance the elder grant, though subsequently located upon land already confirmed, and patented to the holder of a junior Mexican grant, carries the superior title. And this is the most direct expression of the judgment of the supreme court, affecting the question involved in the case now under consideration, that has thus far been made. The further views as to the character of the patent in the aspect of a record of the government, expressed in Beard v. Federy [3 Wall. (70 U. S.) 491], go to the same result; and these cases both arose under Mexican grants of a similar character in California, and under the same acts of congress, relating to the same subject, and therefore are more important and reliable as authorities than those cases arising under other acts, containing very different provisions, and prescribing very different modes of proceeding relating to lands in Florida, Louisiana, Missouri, and other states formed out of territory acquired from foreign nations.

In U. S. v. White, the supreme court, also, as well as in Rodrigues' Case, recognize the view that any parties claiming under a Mexican grant, though inchoate, are "third persons;" for, in speaking of the conflicting claims which were the subject of observation in that case, the court remarked that the patent issued in that case would only be conclusive on the United States, and would not affect the interests of third parties. 23 How. [64 U. S.] 253. Suppose each claimant in that case had presented his grant independently, and they had both been confirmed and patented, would not the question of title have been open to investigation between them, or would the first grant presented and located, even though the junior grant, have been conclusive on the other?

In the cases of Treadway v. Semple, 28 Cal. 655, and Semple v. Wright, 32 Cal. 666, the question arose in the state courts between two Spanish grants, both confirmed, located, and patented, so as to cover the premises in controversy in those actions. The senior grant was first presented for confirmation, but the junior grant was first located and patented. The final locations were both confirmed by the decree of the district court, the respective claimants being parties to the proceedings.

Citing and following the opinion of the United States supreme court in Rodrigues v. U. S. [1 Wall. (68 U. S.) 591], the supreme court of California held the determination of the district court to be conclusive upon the proper location of the elder grant, and that it took the land, although the junior grant was first located. In the former case the court

say, with reference to the proceedings to locate the grant under the act of 1860 [supra]:

"The proceedings had under this act, after the return of the survey and plat, are strictly judicial in their character. The parties interested have an opportunity to be heard, and those appearing actually are heard, and their rights litigated and adjudicated; and when thus finally determined, we see no reason why the matters determined should not, like all other judicial determinations upon points directly in issue, be regarded as res adjudicata, and be final and conclusive upon the rights of the parties." [Treadway v. Semple] 28 Cal. 659.

It was held that action of the district court was a conclusive adjudication, that the elder grant was properly located and took the land.

This, also, seems to be in strict accordance with the views expressed in Rodrigues' Case. That the proceeding is judicial, there can be no doubt. Under the fourth section proofs are to be taken, "and on hearing the allegations and proofs, the court shall render judgment thereon." These proceedings were also held to be judicial in the Fossat Case, 2 Wall. [69 U. S.] 712.

In the case now under consideration, like Rodrigues' Case, the junior grant under which defendants claim, was first located and patented, and these acts were both accomplished before the passage of the act of [June 14] 1860, so that the plaintiff, who holds the prior grant, was not and could not be in any way a party to the confirmation, location or patent; and, in the language of the supreme court, in Rodrigues' Case, he is "not, therefore, bound, or concluded by either the decree, survey or patent, as expressly enacted by the fifteenth section of the act of [March 3] 1851; for Castro's (in this instance, Fernandez's) survey was made before 1860, and there was no opportunity for this claimant to contest its location." 1 Wall. [68 U. S.] 591.

The plaintiff's (Boga) grant was finally located by the district court under the act of 1860, and the only difference between this and the Rodrigues Case, and the other cases cited from the California Reports is, that the defendants, claimants under the Fernandez grant, did not, in fact, come in and make themselves parties, as they were entitled to do under the act of 1860. But the third section provides, "That before proceeding to take testimony, or to determine on the validity of any objection so made to the survey and location as aforesaid, the said courts shall cause notice by public advertisement, or in some other form to be prescribed by their rules, to all parties in interest, that objection has been made to such survey and location, and admonishing all parties in interest to intervene for the protection of such interest." 12 Stat. 34, § 3.

The monition was duly published in this case, and the default of all parties not appearing entered, in pursuance of the usual practice of the court. This gave the court jurisdiction, the cause being already pending in the court on the passage of the act, and it was properly proceeded with thenceforward under the sixth section.

The proceeding is one somewhat of the nature of a proceeding in rem under the statute, in which all parties were bound to intervene and protect their interests. If not there could be no object in this provision of the act. The proceeding of giving the admonition required would be in vain, if the parties interested were not bound to act upon or notice it. And it is not to be presumed that congress required a vain thing to be performed.

This proceeding by monition and default is recognized by the supreme court in U. S. v. Halleck, 1 Wall. [68 U. S.] 454, and in U. S. v. Estudillo, Id. 716. In the latter case, the district court refused to set aside the default on the application of a party who had neglected to appear in answer to the monition, and, on appeal, the supreme court held that the action of the district "court in this respect is not subject to revision, the opening of the default being a matter resting in its discretion." Id.

This is a recognition of the validity of the default, and, by implication at least, that the parties failing to answer to the monition are bound by the judgment. The court could have no discretion to act in relation to a void thing.

But the defendants say that the survey, when ordered into court, did not touch the land patented to them, and that they, therefore, had no interest in the matter. But they were interested in opposing the very change which the United States, the party at whose instance the survey was ordered into court, sought to have made. The exceptions filed before the monition issued, and the consideration of which was the object sought, particularly pointed out that the survey was erroneous in this, that it did not locate the land, so as to embrace that already patented to defendants. Thus, the exceptions to be considered, did directly affect the defendants' interest, as much as the interests of plaintiff; and it might as well be said, that Larkin had no interest in the matter, as that the defendants had none. Without the exceptions to the survey, there was nothing to consider. They were the very subject-matter upon which the court was called upon to act, and the exceptions specially insisted that the grant should be so located as to cover the land patented to defendants. The defendants were more interested in opposing the exceptions than Larkin himself. The defendants, therefore, were parties in interest, and they were admonished to appear "for the protection of such interests." Having failed to appear, after being regularly summoned in the mode prescribed by the statute, and their default having been duly entered in pursuance of the practice of the court assuming it

to be competent to acquire jurisdiction in this mode, I do not perceive why they should not be bound by the judgment in the same manner, and to the same extent, as if they had appeared.

The plaintiff's grant is the elder grant. The judgment of the district court is, that it is properly located, as designated in the decree and embraced in the patent. The patent is intended to give effect to the grant, and it relates to the date of the grant, and overreaches the defendants' patent and grant.

Had defendants appeared, this judgment and patent would have been conclusive upon them, unless the Rodrigues Case is to be overruled.

If they were bound to appear in answer to the monition to protect their rights, the result must be equally conclusive; and that they were bound to appear, I think there can be little doubt.

But suppose, in consequence of defendants not appearing, the judgment locating plaintiff's land, and the patent in pursuance of such location, are not conclusive, then it follows, under the decision in Rodrigues' Case, that neither patent is conclusive; for, if the location of Castro's grant in that case did not affect the holders of the elder grant to Sanchez, because they were not parties to the proceeding, then, for the same reason, the prior location of Fernandez's grant cannot affect the rights of plaintiff, who was not a party to their proceedings.

In that view it might be necessary to determine, anew, whether there was error in the location of the Boga rancho by the district court; for, if correctly located, the patent issued upon it being upon the elder grant, would, upon principles of the cases cited, constitute the superior title. If, as the supreme court say, the court is called upon "to determine where the grant to the present claimant ought rightfully to be located," it must be because he is entitled to have the particular land upon which it is "rightfully located"—the land which it was intended he should have when the grant was made.

Upon the question of the rightful location of the Boga grant, no facts were proved on the trial affecting it, other than such as are expressed in the findings; and upon those facts, it does not appear to me that any party uninfluenced by a desire to conform to the prior selection of the claimant, or to avoid locating the grant upon lands already assigned to another grant, would have located it otherwise than it was located by the district judge.

I have examined the opinion of the district judge, given in deciding the question of location, and the reasoning seems to me to be conclusive upon the question. The grant and diseño are so specific that little latitude is left for the exercise of discretion in the location. The diseño is by far the most accurate plat of the county embraced in it, of any diseño that has ever been brought to my notice. It is understood to have been made by General Bidwell from the map of Vioget, the principal surveyor in the country at that time. But this does not appear in the evidence. Since it is a remarkably accurate one, it is not important who made it, or from what data. The only marked inaccuracy appears to be the giving of the wrong number to the parallel of latitude laid down in the diseño. The Sutter Case throws some light on the cause of this error. The adoption in the preliminary survey of the designation of the degree, instead of the actual location of the parallel with reference to surrounding objects, by Larkin and the first surveyors engaged in making the preliminary location of the grant, doubtless gave rise to the subsequent difficulties as to the location of the respective grants. The petition of Flugge asks for a tract of land situate "on the western side of Feather river, and stretching along the said river from 39 degrees 33 minutes 45 seconds, north latitude, to 39 degrees 48 minutes 45 seconds, and forming on this line a square one league in breadth, * * * as it is rendered manifest by the annexed sketch."

The quantity of land is not mentioned in the petition, but it is asked from one line of latitude, as shown by the diseño, to the other, "one league in breadth."

The order for the grant limits the quantity to five square leagues, "its first boundary to be from 39 degrees 33 minutes 45 seconds, northern latitude;" and the formal grant is for five square leagues on the western side of Feather river; "the first boundary to be from 39 degrees 33 seconds, 45 minutes, as the respective sketch explains," in the language of one translation, or of another, "having its first boundary from latitude 39 degrees 33 minutes 45 seconds north, as appears from the corresponding plan." The northern boundary is not indicated, either in the order or grant.

It was manifestly intended to adopt the parallel of latitude, as it was laid down on the diseño. The decree of confirmation, also, directs the land to be "located in accordance with the calls of the grant, and the boundaries as delineated on the map accompanying the espediente to which reference is made. The southern boundary line indicated on the said map by the line marked 39 degrees 33 minutes 45 seconds; and the northern boundary by the line marked 39 degrees 48 minutes 45 seconds, north latitude," etc. Thus, according to the grant, the "first boundary," that is the southern line of the land granted, is to be the parallel 39 degrees 33 minutes 45 seconds, as laid down on that map; that is to say, the line so designated on the plat, but, as it is thus located, the northern line is not mentioned. Feather river is to be the eastern boundary. Two boundaries are, then, determined. The petition asks that the land may be one league in breadth, and this is generally regarded as allowed, when nothing

is said in the grant to the contrary. The land is then limited to five square leagues, which would require the tract to be five leagues in length to make the quantity. It is only necessary to find the point on the river, where the line, as laid down on the map, crosses it, and project the parallel from that point, to obtain the southern boundary, and we then have all the elements to make a certain location.

Few Spanish grants point out the land intended to be granted with so much certainty as this one. It admits of but one general location, unless the "first boundary" is wholly abandoned, and this cannot rightfully be discarded, either under the grant or decree. If this boundary can be properly located on the land, then upon the principle of the maxim, "Id certum est quod certum reddi potest," the location is certain; for it will be a tract of land having the parallel as located for its southern, and Feather river as its eastern boundary, and be one league in width and five leagues long, and that tract can occupy but one general location. This comes very near being the grant of a specific tract. As said in Fossat's Case, there is "no sobrante here," where two lines are given, and the data for finding the others. 2 Wall. [69 U. S.] 715, 716.

By an examination of the diseño, it will be seen that the Sacramento, Feather and Yuba rivers, Arroyo de Honcut and Los Picos, all well-known and striking physical landmarks, are very accurately laid down, as well as a very large number of particular, and less prominent objects; and the parallel "marked 39 degrees 33 minutes 45 seconds," and the Boga rancho, located with reference to these objects. By comparing this diseño with the plat of Feather river and the Boga rancho, as finally located and patented, constructed from actual survey, it will be seen, on following the line of the river, laid down on both, that the same bends in the river are found in the corresponding plats, and that the southern line in the actual survey of the rancho, as finally located, is drawn just below a bend in the river corresponding with a similar bend on the diseño, immediately below which, in a corresponding position, the parallel marked "39 degrees 33 minutes 45 seconds," is drawn. So, also, the Arroyo de Honcut, or Honcut creek, is found on the opposite side of the river, in the same relative position with reference to the southern line on both plats, the said creek flowing into Feather river about the same apparent distance from the southern line as indicated on both plats—the plat of the survey as finally located, and the diseño. So far as I am able to judge, therefore, from the two plats, the southern line is located by the final decree, in the same position as on the diseño. It is plain, also, by mere mathematical calculation, that there is but one quarter of a degree (15 minutes) in latitude embraced in the diseño to the Boga rancho; and, since the tract embraced in it is but one league in breadth, there is not enough land within the diseño to satisfy the two grants, five leagues for the Boga, and four for the Fernandez grant—nine leagues in all—and that the Fernandez grant could not be located within that diseño without necessarily interfering with the Boga grant, supposing the southern line of the Boga grant to have been correctly located. It is true, that one witness testified generally, that there was enough land within the diseño to satisfy both grants, but this was, manifestly, on an erroneous hypothesis as to the location of the designated parallels. Conceding the southern line of the Boga ranch, as finally surveyed, to be correctly located, it seems manifest, that it would be impossible to locate that grant within the territory embraced in the diseño, without embracing a portion of the Fernandez grant, as patented.

The defendants' counsel have assumed, in their argument, that the southern boundary of the Boga grant is coincident with the northern boundary of the Sutter grant, and that the northern boundary of the Sutter grant is one league below the southern line of the Boga grant, as finally located, and coincident with the southern line of that rancho, as located on the plat which was first ordered into court, and afterward set aside. But the Sutter tract, or line, is nowhere mentioned in the petition, grant, diseño or decree, in the case of the Boga grant. It is not one of the calls, either of the grant or decree. So far as I am able to determine the question from the proofs made on the trial of the case, the final decree of the district court locating the Boga grant, locates it in strict accordance with the calls of the grant, and of the decree of confirmation. And I do not see that it could have been located in any other way, without violating the calls of the grant and decree, unless by a somewhat strained construction, the location should be extended the entire length of the diseño, from the southern line, as actually located, one quarter of a degree north, to the other line laid down on the diseño, marked 39 degrees 48 minutes 45 seconds, diminishing the breadth so as to include only five leagues. But, this, I think, would, manifestly, not be to carry out the intent of the grant or decree; besides, it would embrace much more of the Fernandez rancho than it does as now located. The only other location that could be considered, would be to adopt the true location of the parallels of latitude as designated by the numbers, as was done in the first survey. But this is manifestly inadmissible, as no part of it would then be within the territory laid down on the diseño.

If, then, the question of location could be considered as open to examination, as between the parties to this action, I should still, upon the case as presented, be compelled to hold that the Boga grant is lo-

cated in strict accordance with the calls of the grant, and decree of confirmation. And it does not appear to me to be susceptible of any location within the calls of the grant, or decree of confirmation, as indicated by the diseño, that would not necessarily include a considerable portion of the Fernandez grant as located and patented. But, as before stated, in view of the present state of the authorities, I do not regard the question of location as now open. I think the action of the district court conclusive.

It is further said that the note and stipulation as to third parties in the patent to the Boga rancho, in effect excepts the land to the extent of the interference. But it is, plainly, not an exception of the land. It merely states the fact of the interference, and says in virtue of the act of [March 3] 1851, the patent shall not affect the interest of "third persons," and, "consequently, shall not affect any valid adverse right, if such exists, to such portion of the land as may be covered by the Fernandez rancho, patented as aforesaid," without assuming to determine whether there was any valid adverse right, or to except the land from the patent. The Fernandez patent contains a similar stipulation as to the rights of "third persons," and, if the clause in the Boga patent can be regarded as an exception, the same must be said of the clause in the Fernandez patent. Neither is an exception of the land, but only of any adverse right in the lands, if any there is.

There can be no doubt, I apprehend, that any party acquiring an interest in land from the United States, subsequent to the presentation of a claim under a Spanish or Mexican grant for confirmation, would be concluded by the proceedings, not merely on the principle of the doctrine of relation, as suggested in a number of cases, but also upon the principle that every one who acquires an interest in the subject-matter of the litigation from one of the parties to it, pendente lite, takes it subject to the result of the litigation, and is estopped from again contesting the matter. It may be that this principle, in respect to Mexican grants, may carry the estoppel back to the date of the treaty, so as to apply to all interests acquired from the United States after the nation became the proprietor of the public domain of California; for the United States, themselves, covenanted to protect the interests of Mexican grantees, not to turn them over to be litigated with individual citizens, as assignees of the United States; and the contest between the claimant and the United States may, in a certain sense, for that purpose, be regarded as initiated, or as existing in an inchoate state from the date of the treaty. If so, these parties would take any interest from the government, with the understanding in contemplation of the treaty and public law, that the rights of the claimants under the United States should be represented by the government in the contests to arise under such laws as should be enacted in pursuance of the treaty for procuring a confirmation of existing grants, and be concluded as being in privity with the United States in the proceeding.

The right of grantees under the Mexican government to have their titles ascertained and protected, attached at the date of the treaty. Time was required to provide tribunals, and a mode of proceeding to adjudicate their rights.

Provision was made at an early date to carry out the obligations of the treaty by the act of 1851, and two years were given within which to present claims. It was not contemplated that there should be a race, or a scramble, for the first confirmation, or that one who should be the most expeditious, or find the fewest obstacles to overcome, or be able to throw the most obstacles in the way of his adversary, should thereby gain an unjust priority. It was, on the contrary, designed that each claimant, pursuing his right within the time allowed, should have that which justly belonged to him, whether early or late at the goal of the contest.

I see no good reason, therefore, why, when a claim has once been presented within the time allowed, the presentation should not be regarded as relating to the date of the treaty, when the obligation on the part of the United States attached, and all stand in this particular upon a common footing. The United States assumes the obligation at that point of time, and from that moment the proceeding may well be regarded as in esse, so far as that all parties subsequently acquiring interests from the United States should be bound by the result, leaving the rights of conflicting claimants under confirmed Mexican grants to be determined in the tribunals of the country, in the first proceeding wherein both parties have an opportunity to be heard according to the rights and equities, as they actually existed at the date of the treaty.

But, whatever the principle upon which the conclusions rest, so far as Mexican grants in California, and the treaty and acts of congress especially applicable thereto are concerned, the results indicated appear to me to be clearly deducible from the authorities, as they now stand.

I have examined a large number of cases decided by the supreme court of this state, and of the United States, and endeavored to extract therefrom the principles thus far settled, bearing upon the questions at issue, and to apply them to the facts of this case without advancing any theories of my own. If I have not misapprehended the decisions, they furnish principles either expressly determined, or clearly foreshadowed, sufficient to indicate the judgment that should be entered. But if I have erred in my conception of the law, as laid down by the supreme court, or in the opinions which I have

been called upon to consider, of any of the learned judges now constituting that court, I shall, doubtless, be set right upon a review of the case on writ of error. After giving the case the best consideration I am able to bestow upon it, the following conclusions have been attained:

First—That the plaintiff's cause of action is not barred by the statute of limitations.

Second—That the selection, by Larkin, of the tract as located by the preliminary survey, and by the first survey made after the decree of confirmation became final; his claim of the tract so selected, as the land granted to Flugge, and his acts relating thereto, do not estop said Larkin, or those deriving title through him, from now claiming the land as finally located by the district court and patented.

Third—That the fact that the Fernandez grant was first presented for confirmation, and was first finally surveyed and patented, is not conclusive evidence of title, as against the claimants under the Boga grant.

Fourth—that the holders of the Boga grant, it being the elder grant first finally confirmed, with boundaries, both in the grant and decree of confirmation, so definitely described as to admit of but little variation in the location, and it having been finally located and patented so as to include a portion of the land covered by the patent issued under the Fernandez grant, are "third persons" with respect to the Fernandez grant, within the meaning of the fifteenth section of the act of [March 3] 1851, and they are not concluded by the prior final location and patent of said latter grant.

Fifth—That the survey of the Boga grant having been made and approved by the surveyor-general of California, and returned into the district court, by order of said court, and proceedings for the purpose of contesting and reforming the same being pending in said court, at the date of the passage of the act of congress of June 14, 1860, relating to the subject, the said district court had jurisdiction under said act, to revise said survey, and determine by its judgment or decree, the true location of said grant.

Sixth—That since the exceptions filed to said survey directly affected the interests of the claimants under the Fernandez grant. said claimants were parties in interest, who were authorized and required by the provisions of said act, upon due notice, to "intervene for the protection of such interest."

Seventh—That due notice, admonishing all parties in interest to appear for the protection of their interests, having been given, in accordance with the provisions of said act, and the rules and practice of said court, and the said claimants under the Fernandez grant having failed to appear, and the default of all parties who did not appear having been duly entered in pursuance of the rules and practice of said court, the said claimants are bound by said proceedings in the same manner and to the same extent, as they would have been bound had they intervened in said proceeding.

Eighth—That said proceedings are judicial in their nature, and are conclusive upon the parties in interest appearing, or who, being duly admonished, fail to appear, but make default, and their privies, and the proceedings in this case are conclusive upon the defendants, as to the true location of the Boga grant.

Ninth—That the Boga grant being the elder grant, and being correctly located in accordance with the calls of the grant, and decree of confirmation, the patent is evidence of title from the date of the grant.

Tenth—That at the date of commencement of this action, the plaintiff, by title derived from Thomas O. Larkin, the patentee of the Boga grant, was seized in fee, of an undivided three-fourths part of the premises described in the complaint.

Eleventh—That the defendants had no title, as against the patentees of the Boga grant, and as against said patentees, were in the wrongful possession of said premises, and they wrongfully and unlawfully withhold the same from the plaintiff.

Twelfth—That said plaintiff is entitled to judgment for possession of said premises, and for his costs of suit.

Let judgment be entered for plaintiff for possession of the premises described in the complaint, and for costs of suit.

[NOTE. Affirmed by the supreme court in Henshaw v. Bissell, 18 Wall. (85 U. S.) 255, on the grounds, with others, that, whether or not the grant by the governor of California to Fernandez be treated as one of specific boundaries or of quantity, it could not interfere with and displace the prior grant to Flugge, notwithstanding that it was first surveyed and patented; that the confirmation did not change the character of the grant to Flugge as one of specific boundary, nor that to the Fernandez as one of quantity; that the survey of the Flugge claim under Act June 14, 1860, and the proceedings of the district court therein, made the Flugge grant conclusive as to all adverse claimants under floating grants; that it was no objection to the authority of the district court that the cause was ordered therein before the act went into effect; and that it was immaterial that a different survey had been previously approved by the governor of California; further, that, the present action having been commenced within the time designated after final confirmation of the grant, and before the repeal of the state statute of limitations, it was not barred; that the statute did not run against the plaintiffs while the proceedings for the confirmation of the Flugge claim were pending; and that plaintiffs were not estopped by the fact that Larkin had previously erroneously located the Flugge tract, and had announced that his claim covered the land selected.]

Case No. 1,448.

BISSELL et al. v. HORTON.

[1 Brunner, Col. Cas. 53;[1] 3 Day, 281.]

Circuit Court, D. Connecticut. 1808.

COURTS—JURISDICTION—CITIZENSHIP—WHAT CONSTITUTES.

In an action for ejectment of lands in Connecticut, of which the defendant had disseised the plaintiff eighteen months before, and continued in possession, part of the plaintiffs were described as citizens of Vermont, and part as citizens of Connecticut, and the defendant was described as a citizen of New York, dwelling in Connecticut. *Held*, that the plaintiffs were not citizens of Vermont, nor the defendant a citizen of New York, within the constitution and laws of the United States, and that the cause, therefore, was not within the jurisdiction of this court.

At law. This was an action of ejectment for lands in Hebron, in the state of Connecticut, alleging that the defendant ousted the plaintiffs of the demanded premises eighteen months before the commencement of the action, and had ever since remained in possession.

Dana and Gilbert, of counsel for the defendant, moved to erase this cause from the docket on the ground that from the description of the parties it did not appear to be within the jurisdiction of the court. The plaintiffs were described thus: "Benjamin Bissell, late of Hebron, in the county of Tolland, in the state of Connecticut, now of Saint Johnsbury, in the county of Caledonia, in the state of Vermont, a citizen of the state of Vermont, Abel Bissell, Hezekiah Bissell, Elijah House, Francis Norton, John Thompson Peters of said Hebron, and Asa Willey, late of said Hebron, now of Ellington, in the county of Tolland aforesaid, citizens of the state of Connecticut." The defendant was described as follows: "Elihu Horton of Greenfield, in the county of Saratoga, in the state New York, a citizen of the state of New York, now dwelling in said Hebron." To support the jurisdiction it ought to appear either that the plaintiffs are citizens of Vermont and the defendant a citizen of Connecticut, or that the plaintiffs are citizens of Connecticut and the defendant a citizen of New York. The first part of the alternative is not true, for all the paintiffs except one are described as residing in Connecticut, and are averred to be citizens of Connecticut. The second part of the alternative is equally groundless, for it is averred that the defendant is now dwelling in Hebron, in this state.

J. T. Peters, contra, insisted that as the defendant was expressly averred to be a citizen of New York, he must be so considered, notwithstanding his residence in Hebron at the time of commencing the suit. He might be transiently dwelling there, without any determination to remain there permanently. It will be admitted that he is still a citizen of New York, unless he has become a citizen of Connecticut; but a transient residence here will not make him such. The word "citizens," within the intent and meaning of the constitution and laws of the United States, in regard to this subject, has reference to such persons only as have the rights of freemen, and are eligible to civil offices, within the district where they dwell. But it does not appear that the defendant has any such rights and qualifications in this state.

LIVINGSTON, Circuit Justice. The rights of suffrage and eligibility to office are of no weight in the decision of this point, it is to be determined on other grounds. The plaintiffs are partly in Vermont and partly in Connecticut. They are not, therefore, citizens of Vermont within the constitution and laws of the United States. With regard to the defendant it is admitted that he now resides in Connecticut, and has resided here during the time in which he has been in possession of the demanded premises, which clearly evinces a determination in him to remain here permanently.

PER CURIAM. Let the cause be erased from the docket.

NOTE [from original report]. Jurisdiction—Citizenship Essential to. See Piquet v. Swan [Case No. 11,134], criticizing case in text; Case of Sewing Machine Co., 18 Wall. [85 U. S.] 580, citing the same.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 1,449.

BISSELL et al. v. JEFFERSONVILLE.

[16 Leg. Int. (1859) 110;[1] 6 Pittsb. Leg. J. 411; 3 Wkly. Law Gaz. 279.]

Circuit Court, D. Indiana.[2]

RAILROAD COMPANIES—CORPORATION—MUNICIPAL SUBSCRIPTION—RAILROAD BONDS—ESTOPPEL.

1. In 1854 the common council of the city of Jeffersonville, Indiana, subscribed $200,000 of stock in the Fort Wayne and Southern R. R. Co. It turned out that they had no power under their charter to make such a subscription. At the suggestion of R. R. Co. the common council applied to the legislature for power to ratify the subscription. In 1855 the legislature, by a general law, authorized all cities "which had made any such subscription, upon the petition of three-fourths of the legal voters of the city, to ratify and confirm such subscription." The common council passed an order ratifying this subscription—reciting on their minutes that three-fourths of the legal voters had thus petitioned. Before the bonds in controversy, however, were issued, a large number of the citizens (said to be more than one-fourth of the whole voters) filed before the board a remonstrance against the issue of any bonds, on the grounds that the necessary number of voters had not signed the petition. From the minutes it appeared that such remonstrance was filed, but neither the names of petitioners or remonstrants were set out on the minutes of the coun-

[1] [Reprinted from 16 Leg. Int. 110, by permission.]

[2] [Reversed by supreme court in Bissell v. City of Jeffersonville, 24 How. (65 U. S.) 287.]

cil. The council issued the bonds, $200,000, and delivered them to the Railroad Co., whose officers were cognizant of all that occurred. Some of the bonds were transferred to Bissell & Co. for money advanced to the company, and this suit was upon the coupons attached, and the defence was that the common council had no power to ratify the original subscription of stock, as it was made upon the petition of less than three-fourths of the legal voters of the city. Other grounds were urged by the defendants, such as alleged fraud and collusion between the common council and the railroad company, but the court *held*: That the common council had no power originally, to make the subscription, that the act authorizing the ratification was a special power, and must be strictly executed according to the terms af the act.

2. That they had power to ratify no subscription made except upon the petition of three-fourths of the legal voters.

3. That whether such number had petitioned or not was a question of fact which might be inquired into.

4. That the recital on the minutes of the board did not conclude anybody; they were prima facie only and might be denied.

5. That the minutes of their proceedings were not records in the sense of records of a court of law, which imply absolute verity, and concluded nobody.

6. That the enabling act of the legislature was a public act and was notice to the world, and hence, although the bonds were transferred to third parties, they could not be said to be innocent holders without notice.

7. That the recitals of the board of common council if false rendered the bonds void.

8. That a corporation is not estopped from denying its power to execute a contract.

9. That a special power granted by the legislature to an individual or to a corporation to do a certain act, must be executed strictly in the mode, and upon the terms prescribed in the act.

10. That the defendant could by testimony show the fact that no voters, or less than the number required by the act had signed the petition, notwithstanding the minutes of the board had recited the fact otherwise, and that being done, the plaintiff could not recover.

[See note at end of case.]

[At law. Action by George B. Bissell, David T. Robinson, and Calvin Day against the city of Jeffersonville upon coupons of bonds made and issued by the city of Jeffersonville to the Fort Wayne & Southern Railroad Company. Judgment for defendant.]

[Before HUNTINGTON, District Judge.]

[The opinion is not now accessible, and does not appear to have been anywhere reported in full.]

[NOTE. Reversed by the supreme court on writ of error in 24 How. (65 U. S.) 287, on the ground, with others, that the recital in the bonds that three-fourths of the legal voters of the defendant city had petitioned for their issuance could not be controverted by parol evidence; that the record of the resolution ratifying and confirming the contract, and the recital in the bonds furnished conclusive evidence that the common council readjudicated the question as to whether or not the requisite number of legal voters had signed the petition; and that the corporation was estopped to set up its own conduct to defeat the claims of persons who had relied upon its representations.]

BISSELL (MEISTER v.). See Case No. 9,398.

Case No. 1,450.

BISSELL v. MEPHAM.

[1 Woolw. 225;[1] 2 West. Jur. 268.]

Circuit Court, D. Missouri. Oct. Term, 1868.[2]

PILOTS—WHEN TWO PILOTS ARE NECESSARY, AND WHETHER MASTER MAY ACT AS ONE OF THEM—PAY OF OFFICER DOING DOUBLE DUTY—MASTER'S LIABILITY FOR INJURY TO CARGO.

1. The rules or practice of sea-going vessels do not require two pilots, nor preclude the master from acting as one of two pilots.

[See U. S. v. The Science, Case No. 16,239.]

2. No case establishes a different rule in the navigation of our interior waters.

3. The act of August 30, 1852 (10 Stat. 61), does not establish a different rule.

4. The fact that insurance companies require two licensed pilots as a condition of their issuing policies on vessels navigating our interior waters does not create, in this respect, a public policy having the force of a law.

5. Whether two pilots are necessary, and whether the master may act as one of them, depends upon the requirements of the voyage, and is a question simply of whether the vessel is well manned, officered, and equipped.

6. The rule is sometimes held that an inferior officer, compelled, by an accident to his superior occurring during the voyage, to discharge the duties of the latter, is entitled to no additional compensation. This rule does not apply to the case of parties who, before the voyage, agreed for the double service of master and pilot to be discharged by one person.

7. The storage of the cargo, on steamboats on western rivers, is under the special charge of the mate. By the maritime law, the master is personally liable to the shippers, in many cases, for injury to the cargo, because, in the absence of the owners of the vessel, personal credit is given to him.

8. As between the master and owners, he is liable only for reasonable care and diligence.

[Appeal from the district court of the United States for the eastern district of Missouri.

[In admiralty. Libel by Peter Bissell, for the recovery of pilot's wages, against the respondents, Michael S. and William G. Mepham, owners of the steamboat Iron City. Decree for libellant, reversing the unreported decree of the district court.]

Mr. Leighton, for appellant.

Sharp & Broadhead, for respondents.

MILLER, Circuit Justice. This is an appeal from a decree in admiralty, of the district court for the eastern district, dismissing the libel of Bissell, the appellant.

The appeal was argued and submitted at the October term, 1867; and rather on account of the importance and novelty of the principles than of the amount of money involved in it, has been held under advisement until the present term.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

[2] [Affirmed by supreme court in Mepham v. Biessel, 9 Wall. (76 U. S.) 370.]

The rapid growth of commerce, since the settlement of Idaho and Montana territories, has stimulated the use of steam navigation on 2000 miles of the Upper Missouri river, where heretofore has rarely floated anything more nautical than the fur-trader's Mackinaw. The great length of the river, flowing through an uninhabited region, thus opened to actual and useful steamboat navigation,—a navigation limited to a small portion of the year, and to vessels of light tonnage,—has given rise in the courts to questions in admiralty of much difficulty, and which, in the absence of precedent, demand great circumspection on the part of the courts in their determination.

The defendants were the owners of three steamboats engaged, in the spring of 1866, in the trade from St. Louis to Fort Benton, the extreme point of steamboat navigation. One of these vessels, the "Iron City," made a voyage to that point from St. Louis, which, including twenty-six days during which she was in the service of the United States government, occupied from the 16th of March to the 26th of July of the year mentioned, a period of four months and ten days. During this time, the libellant, by agreement with the owners, acted as master and as pilot, and, according to the testimony, with a single alleged exception, to be noticed hereafter, discharged fully the duties of both positions. The defendants claim that there was a special contract in regard to compensation; but we concur with the judge of the district court, that it is not established by the testimony.

This suit is brought to recover compensation as upon a quantum meruit, for those services as master and pilot. The libel and the answer concur that the services, both as master and as pilot, were rendered, and that they were so rendered according to agreement made between the parties before the boat started on her voyage.

It is now argued that this contract was void, as being a violation of some principle of public policy, or of some rule of law concerning the navigation of such vessels. To sustain this proposition, no reference has been made to any rule of maritime law, to any usage, or to any decided case. The libellant was regularly licensed as a pilot. Besides him there was another licensed pilot on board all the time, whose competency is not questioned. To maintain the ground taken, it is necessary to assume that it is an established rule that two pilots are necessary to a vessel, and also that no one acting as master can fill the place of one of them. There is no such principle in the rules or usages governing the navigation of seagoing vessels. They have no regular pilots while at sea. The course of the vessel is directed by the master, who governs, if he does not actually manage, the wheel. On approaching a port, or in navigating a narrow bay or river, he takes a pilot, to whom, for the time, he surrenders his vessel. But in such case, only one pilot is required. The inference from maritime usage therefore is, that but one pilot is ever needed, and that, in the ordinary direction of the vessel, the master acts as pilot. No case has been decided, so far as we know, which establishes a different rule in regard to the navigation of our internal watercourses.

We are referred to the act of congress of August 30, 1852 (10 Stat. 61), concerning vessels propelled in whole or in part by steam. That act contains, for the construction, equipment, navigation, and control of steam-vessels, a system both minute and comprehensive, designed to secure the comfort and safety of passengers. In a statute of this character, if anywhere, we might expect to find the rules laid down that every vessel shall have two pilots, and that no person shall act as both pilot and master at the same time. But while all pilots are required to be examined and licensed, and a penalty is imposed when any other than a pilot so licensed is employed, neither of these rules is prescribed by the act.

It would appear from the testimony of one of the defendants, that insurance companies require that a vessel should be provided with two pilots, as a condition to the issuing of policies on such vessel or her cargo. He says, that the reason for getting a pilot's license for the plaintiff, which he assisted in procuring, was to satisfy this requirement of those companies. It may be necessary to the proper manning of steamboats that, in long and continuous voyages on our inland waters, they should have two pilots; and until assured that this requirement is answered, insurance companies may very properly refuse to issue policies on such vessels. But this course of dealing, especially as it is aside from the matter of this contract, cannot create a public policy having the force of law. The advantages which these companies, and others connected with trade and commerce, such as railroad and express companies, banks, &c., have over the public, is already sufficient, without giving to the stipulations which, for their own protection, they insert in these contracts, or to the rules on which they conduct their business, a power equal to that of a legislative enactment. The question whether two pilots are necessary to a steamboat is not, therefore, to be settled by reference to any principle adopted by insurance companies in the conduct of their business, nor, indeed, by a regard to the reasons for such a principle, but only by a consideration of the requirements of each particular voyage. At most, the inquiry could be only whether the vessel were sea-worthy, and well manned, officered, and equipped for the service expected of her. If a boat run but from St. Louis to Alton, or any other voyage to be completed in a few hours, or a longer distance with stoppages, during which he may

obtain necessary rest, one pilot is sufficient; but if it be a long voyage of continuous running, then, as the navigation of our rivers requires a skilled pilot to be always at the wheel, two are necessary. So, in determining whether, there being two pilots on board, one may act as master, the real inquiry in each case is, whether the vessel, under all the circumstances, is sufficiently manned, officered, and equipped. In a trade which demands the constant care and vigilance of the captain in person— as, for instance, in voyages where the boat lands every hour or two, to receive or discharge cargo or passengers, requiring each time the attention of the master or his substitute, the mate—one man may be unable to discharge properly the duties of master and of pilot. On the other hand, in a voyage of several thousand miles, during which, between the points of departure and destination, the vessel may have occasion to stop only for fuel, where the crew is small, and their discipline a matter of form, the tonnage of the vessel light, and the cost of freight of necessity burdensome, it may be for the interest of all, the owner of the vessel as well as the shipper of the cargo, to place the command in the hands of one who, by performing also the duties of pilot, can curtail the expense of transportation.

Such a case is the one before us. On that ground, no valid objection to this contract is apparent.

It is, however, insisted, that the libellant, being employed as master, is entitled to no additional compensation for his services as pilot, on the ground that his duty as master required him to supply the deficiencies of all the other officers of the boat; in fact, that in serving as pilot, he was only discharging his duty as master. It is true that there are some cases which hold that when, by the death or illness of the master during a voyage, a mate is compelled to discharge the duties of his superior officer, he is entitled to no additional compensation on that account. These decisions rest on the ground that, having undertaken to discharge all the duties which might devolve upon him as mate, the new duties devolved upon him by accident were included in the undertaking, and are, in contemplation of law, paid for by his wages as mate.

The authorities are not uniform on this point, but those which hold the doctrine place it on the ground mentioned. In the case before us, however, it is agreed that the libellant and the respondents contracted, at the outset, for this double service. They did not, however, agree upon any price for it, nor upon any price for his services in either capacity separately. The libellant was engaged at the start as pilot as well as master, and his services were as necessary in the former as in the latter character. In fact, such services were usually valued higher than those of master. It is not, then, a case of new duty accidentally devolving upon the master by reason of his office; but it is a duty totally distinct from that of master and of a more valuable class, which, by contract made beforehand, he undertook to perform, not as part of his services as master, but as additional thereto. Under such circumstances, there does not appear to be any sound reason for refusing him a reasonable compensation for the double services which he rendered.

It remains to ascertain what should be allowed for these services. We have no positive statement of their value by any witness, except the libellant himself. He estimates them at from $1000 to $1200 per month. The defendant thinks $200 or $300 per month would be sufficient. Fortunately, there are some undisputed facts which enable us to come to a satisfactory result. Besides the parties, the only two witnesses examined are Bush, the mate, and Stone, the other pilot. They both concur in the statement that, besides discharging his duties as master, the libellant did full duty as pilot. It also appears that he was well acquainted with the river for 800 miles between Forts Union and Benton, where Stone, the other pilot, had never been. Stone, who was introduced as a witness by the defendant, also testifies that Bissell did as much piloting as he, and that he also faithfully did his duty as master. Stone, for his services as pilot, according to an agreement which received the approbation of the defendants before the boat left St. Louis, was paid $800 per month. When the boat entered the service of government, Stone left her, and a pilot named Goring was employed at $700 per month. In the settlement made by the respondents with government, $1000 per month was allowed for the libellant's services, and received by the defendants.

From these undisputed facts, it seems fair to conclude that libellant's services as master and pilot should not be rated lower than $900 per month. At this rate, for four months and ten days, they would amount to $3900. From this sum there must be deducted $1000, which the libel admits to have been received on account.

The respondents claim that the further sum of $1000 should be deducted for damages, which, through the libellant's carelessness and negligence in the discharge of his duties as master, occurred to flour during the voyage, and for which they had been compelled to pay. If this allegation be established, the amount paid should be charged against him. But the only evidence tending to support this statement is the fact that one hundred sacks of flour, shipped at St. Louis for Fort Benton, were found, on arrival at the latter place, to be damaged, and that $1000 was allowed the owners for the injury.

The flour was placed on deck by order of the owners. In passing over a sandbar, it, with other parcels of the cargo, was taken

off to lighten the vessel. In reshipping, after the boat had passed the bar, some twenty sacks of it, under the supervision of the mate, and without the knowledge of the master, were stowed in the hold. Besides the libellant, the mate is the only witness who testifies on this subject. He declares that other sacks of flour, not of this lot, which were placed in the hold with these, were not injured. It also appears that the damage was found to exist in other sacks, which were of this lot, but were not placed in the hold. From this testimony, it cannot be presumed that the injury was caused by the stowage in the hold. But if it were so, the custom seems to be settled, that the manner of storing the cargo in steamboats, on the western rivers, is a matter under the special charge of the mate. In this case, at least, it is clear that what was done by him was in violation of the orders, and without the knowledge, of the libellant.

No proof is offered to show that the flour was sound when received, or that the injury was not the necessary effect of the long voyage on some peculiar condition of the flour. Nor is any evidence given of the manner in which the loss was settled with the owners of the flour,—whether by a lawsuit, by arbitration, by the order of the defendants, or of some agent or consignee of their vessel at Fort Benton, or by the libellant or master. In reference to all this we are left to conjecture.

It is certain that no actual carelessness, negligence, or want of attention on the part of libellant is shown. If he is to be held liable at all, it must be upon a principle which would make him liable to the owners of the vessel for every loss for which they or the boat would be liable to shippers or passengers. Can such a principle be maintained? It is undoubtedly true that, by the maritime law, although the master may have no interest in the vessel, he is yet liable to the shippers in many cases where, by the general principles of the common law concerning principal and agent, he could not be held. This personal liability of the master for contracts and obligations which he undertakes as agent or servant of the shipowners, who reap all the profits of the voyage, and pay him only a stipulated compensation, grows out of the fact that while the owners may be unknown, or beyond the reach of the contracting parties, personal credit is given to him by parties who, thus dealing with him, must be protected.

But when the question is one between the master and the owners, it does not seem just that the former should be held to anything more than reasonable care and diligence, and the exercise of such skill as his position may be supposed to require. In other words, while, according to the stringent rules governing common carriers, the owners are liable to shippers, and while the master also may be liable to them to nearly if not quite the same extent, it by no means follows that his liability to the owners is governed by the same rules.

Such a doctrine would make it very unsafe for any responsible man to act as a master, because he would become practically an insurer to his employers, against the rigid obligations which they have assumed to third parties, as common carriers. We are not aware that any such principle has received the sanction of the courts.

Applying these views to the facts of the present case, we do not perceive how the libellant can be held responsible to the respondents for the damage done to the flour, even conceding, what is not proved by the testimony before us, that the injury was suffered during the voyage, and was one for which the boat was liable.

The libellant, therefore, is entitled to a decree for the sum of $3900, less the $1000 paid him, with interest by way of damages on the $2900, from July 1, 1866, to the present time. Judgment accordingly.

[NOTE. This decree was affirmed by the supreme court on appeal. The court (Mr. Justice Swayne delivering the opinion), held, as the damage to the flour arose from inherent causes, and as it was stowed without the knowledge or direction of the master, he is not liable. Mepham v. Biessel, 9 Wall. (76 U. S.) 370.]

BISSETT (KETLAND v.). See Case No. 7,742.

BITTINGER (UNITED STATES v.). See Cases Nos. 14,598 and 14,599.

Case No. 1,451.

BIXBY et al v. COUSE et al.

[8 Blatchf. 73.][1]

Circuit Court, S. D. New York. Nov. 14, 1870.

REMOVAL OF CAUSES — BY TWO OF SEVERAL DEFENDANTS—PETITION.

1. Under the act of July 27th, 1866 (14 Stat. 306 [c. 288]), two out of several defendants in a suit cannot remove the suit, as between the plaintiff and such two defendants, into this court, unless there can be a final determination of the controversy, so far as it concerns such two defendants, without the presence of the rest of the defendants.

2. Under the act of March 2d, 1867 (Id. 558 [c. 196]), all the defendants in a suit, who are not merely nominal defendants, must be citizens of a state or states other than the state in which the suit is brought, and must unite in the petition for removal, or there can be no removal of the suit.

[Cited in Grover & B. S. M. Co. v. Florence S. M. Co., 18 Wall. (85 U. S.) 587; New Jersey Zinc Co. v. Trotter, Case No. 10,167.]

[See Myers v. Swann, 107 U. S. 546, 2 Sup. Ct. 685.]

[At law. Action by Francis M. Bixby and others against Eleazer M. Couse, William H.

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

De Camp, and others. Plaintiffs move to vacate an order of removal from the state court. Motion granted.]

Spaulding & Richardson, for plaintiffs.
Brown & Estes, for Couse and De Camp.
Joseph W. Howe, for other defendants.

BLATCHFORD, District Judge. So far as this case is undertaken to be removed into this court as against the defendants Couse and De Camp, under the act of July 27th, 1866 (14 Stat. 306 [c. 288]), I am not satisfied that there can be a final determination of the controversy, so far as it concerns them, without the presence of the defendants who did not petition for the removal of the cause, being all the defendants except Couse and De Camp. As the case is not here by virtue of any order by the state court for its removal, I must assume that the state court has not determined that it is satisfied that there can be such final determination. Unless there can be such final determination, the removal of the cause cannot be made, as between the plaintiffs, on the one side, and Couse and De Camp alone, as defendants, on the other side.

In regard to the supposed removal of the cause under the act of March 2d, 1867 (14 Stat. 558 [c. 196]), being the act in regard to prejudice or local influence, the proper construction of that act, in analogy to the construction which has always obtained in respect to the 12th section of the judiciary act of September 24th, 1879 (1 Stat. 79), is, that all the defendants in a suit, who are not merely nominal defendants, must be citizens of a state or states other than the state in which the suit is brought, and must unite in the petition for removal, or there can be no removal of the suit. In this case, the defendants other than Couse and De Camp are not shown to be merely nominal defendants, and they did not unite in the petition for removal, and two of them are citizens of the state in which the suit is brought.

The motion by the plaintiffs to vacate the order entered in this court on the 4th of April, 1870, directing that this cause proceed in this court, is granted.

Case No. 1,452.

BIXBY v. JANSSEN et al.

[6 Blatchf. 315.][1]

Circuit Court, S. D. New York. March 13, 1869.

COURTS—JURISDICTION—FOREIGN CONSUL.

Where an action on contract was brought in this court against the persons composing a firm, and the jurisdiction of the court depended wholly on the fact that one of the defendants was a consul in the United States for a foreign power, and it was held that the firm was not liable, but that one of the defendants, other than the consul, was liable, with two other persons, who composed, with him, a former firm: *Held*, that this court had no jurisdiction to give judgment against such defendant.

[Cited in Froment v. Duclos, 30 Fed. 386.]

[See St. Luke's Hospital v. Barclay, Case No. 12,241.]

This was an action on contract [by Francis M. Bixby, survivor of Humphrey & Co., against Gerhard Janssen, Leopold Schmidt, and others, composing the firm of Janssen, Schmidt & Ruperti], tried before the court without a jury. [Judgment was given for the defendants.]

Spaulding & Richardson, for plaintiff.
Henry D. Lapaugh, for defendants.

BLATCHFORD, District Judge. I do not think, on the evidence, that the firm of Janssen, Schmidt & Ruperti is liable to the plaintiff for the claim sued for. I think, however, that the persons who composed the former firm of J. W. Schmidt & Co., on the 23d of February, 1865, are liable for it. Those persons were John W. Schmidt, Edward Vonderheydt, and the defendant Janssen. The defendant Schmidt, who is consul in the United States for the kingdom of Saxony, was not a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865. He became such in March, 1865. It is only by reason of his being a foreign consul that this court has any jurisdiction of this action. The defendant Janssen was a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, and, as such, is liable to the plaintiff for the claim sued for, according to the written memorandum of that date; but, as the firm of Janssen, Schmidt & Ruperti, as a firm, is not liable for the claim, and there can be no recovery in this suit against the defendant Schmidt, the consul, the jurisdiction of the court to give judgment against Janssen fails, he having been properly sued in this court only as a copartner with the defendant Schmidt, and being, in fact, sued only as a member of the firm of Janssen, Schmidt & Ruperti, and his liability as such copartner not being established. Janssen, though liable, as a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, for this claim, must be sued for it in a state court.

I, therefore, find for the defendants.

BIXBY (SAWYER v.) See Case No. 12,398.

Case No. 1,453.

In re BJORNSTAD.

[9 Biss. 13;[1] 18 N. B. R. 282.]

District Court, W. D. Wisconsin. May, 1878.

EXEMPTIONS OF MERCHANTS — CONSTRUCTION OF STATUTE—DISSOLUTION OF PARTNERSHIP — INDIVIDUAL EXEMPTION.

1. The provision in the statutes of Wisconsin providing for the exemption of "the tools and

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

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding $200 in value," applies to merchants.

2. If a partnership is dissolved and the partnership stock is transferred to one of the partners, the right of exemption, under the exemption laws, attaches on the part of such owner of the property, even against partnership creditors.

[See In re Whetmore, Case No. 17,508; In re Robinson, Id. 11,933; In re Parker, Id. 10,724.]

[In bankruptcy. Jorgen Bjornstad, a bankrupt merchant, claims an exemption of stock in trade to the value of $200, under 2 Tayl. St. Wis. c. 134, § 32, subd. 9, which was allowed.

[For proceedings on application for discharge of the bankrupt, see 5 Fed. 791.]

J. H. Carpenter and Rufus B. Smith, for bankrupt.

H. M. & H. A. Lewis, for opposing creditors.

BUNN, District Judge. The facts as stipulated by the parties are these: That in October, 1875, the bankrupt and one Martin Madson formed a copartnership for general merchandising which they carried on until about February 27, 1878, under the firm name of Bjornstad & Co., during which time they contracted debts, which are still unpaid, to the amount of about $5,000; that about February 27, 1878, they dissolved the partnership, Madson selling out his interest in the concern to Bjornstad, who took the stock, amounting to about $2,650, assumed the partnership debts, and thereafter till the time of filing the petition in bankruptcy carried on the business in his individual behalf.

The question submitted is whether the bankrupt is entitled to $200 exemption of the stock in trade, under subdivision 9, § 32, c. 134, p. 1551, 2 Tayl. St. Wis. That subdivision is as follows: "The tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

It is insisted by the attorneys for the assignee that this provision does not extend to merchants, but only to miners and mechanics and to other persons to whom tools and implements are necessary to carry on their business, on the principle of noscitur à sociis; and the argument seems very plausible to say the least. The question is, whether it is conclusive. There is one circumstance which in my judgment should have great weight in determining the question of exemption, and that is the uniform construction that has been placed upon the language of this subdivision in the state. Though, strange to say, the question has never been directly decided by the supreme court of the state, it has been decided again and again in the several circuit courts, and so far as my information goes, always in favor of the more liberal construction that would extend the exemption to merchants as well as mechanics and miners. And I think this has been the general practice and understanding of the courts and of the profession, to allow the exemption.

In some of the circuits at least, of my own knowledge, the statute has been so construed by successive circuit judges for upwards of twenty years, and the rule become well settled and undisputed; and I am informed that such is the case in other circuits.

In the absence of any decision to the contrary by the highest court of the state I think it is not too much to say that the decisions and practice of the circuit courts may be taken as the law. And accordingly it has been the uniform practice in this court, and I understand also in the eastern district, ever since the bankrupt law went into effect, to allow the exemption. This uniform and concurrent practice, acquiesced in for so long a time in the state and federal courts, might be taken as conclusive of the law. But as the question may arise again it may be well enough to look at it a little de novo.

Our constitutional provision is as follows: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure and sale for the payment of any debt or liability hereafter contracted." Const. Wis. art. 1, § 17. It was incumbent on the legislature to carry out this beneficent provision of the constitution, and it did so at an early day, in an enlightened and liberal manner according to the spirit and purpose of the provision.

As the provision is general, applying to all debtors, it is fair to infer in order to carry it out according to its spirit and purpose, that all classes of persons should be recognized, and so far as possible equally provided for, and that in making general provisions for exemptions as the legislature did, it intended to carry out the constitutional provision in a manner to cause its benefits to be shared in as equal a manner as possible by all classes of debtors. And it would seem, if the statute is fairly capable of such a construction, it should be so construed. I am inclined to think it is. The exemption laws are remedial and beneficent acts of legislation, and are to be liberally interpreted and administered to carry out the constitutional provision. Gilman v. Williams, 7 Wis. 329.

Section 23, c. 134, 2 Tayl. St. Wis., exempting a homestead, applies to all classes of debtors.

Subdivisions 1–6, § 32, exempting the family Bible, family pictures and school books, family library, pew in a church, wearing apparel and household goods, apply equally to all classes of debtors.

Subdivision 7, exempting two cows, ten swine, one yoke of oxen and one horse, or

in lieu thereof a span of horses, ten sheep, and the wool from the same, either in the new material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding fifty dollars in value; though in terms applying to all classes of persons, from the nature of the articles exempted, applies to a much larger extent to farmers than any other class, because they are the only persons that ever keep or have any use for many of the articles named as exempt.

Subdivision 8, exempts provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year—and applies to all classes. Then follows subdivision 9, first above quoted, which provides for mechanics, miners, etc., and also in a subsequent part of the subdivision exempts the library and implements of any professional man, not exceeding two hundred dollars. And then follow many specific acts scattered through the session laws, making provisions for certain classes of debtors. One exempts all sewing machines kept for use in families, another all printing materials and press or presses used in the business of any printer or publisher, to an amount not exceeding $1,500 in value.

Another exempts horses, arms, equipments and uniforms of all officers and privates in the organized militia of the state.

Another exempts all books, maps, plats and other papers kept or used by any person for the purpose of making abstracts of title to land.

Another exempts the interest owned by any inventor in any invention secured to him by letters patent of the United States.

Another the earnings of all married persons and all other persons who have to provide for the entire support of a family for sixty days next preceding the issuing of any process of attachment or execution, etc. This provision was undoubtedly intended mainly for the benefit of laborers. There are still other specific provisions which it is not necessary to enumerate.

It will be seen that besides the general provisions which apply to all classes there are specific ones applying to all the leading industrial classes of the community, unless it be the merchant. The farmer, the mechanic, the miner, the professional man, the printer, the military man, the laborer, are all snugly and expressly provided for under the various clauses of the exemption law against the stroke of accident and chance of time.

Now there would seem to be as much reason for making provision for the merchant as any other class. They are certainly quite as likely to be overtaken by misfortune and to need the exemption. It is insisted that while two hundred dollars of tools and stock in trade would be of some use to enable the mechanic to pursue his trade, that two hundred dollars stock in trade would not be enough to set a merchant up in business or be of much practical use to him. But it is submitted that although it would not go far as stock in trade, even so small an amount protected by the beneficence of the law from the rapacity of creditors in the hour of adversity might do something toward keeping starvation from his family, while he should have a little time in which to look about and either make arrangements to continue in business or turn his hand to some other employment.

In the case of Bevitt v. Crandall, 19 Wis. 581, a farmer claimed as exempt under the same subdivision, a grain drill worth eighty dollars. But the court very justly held that although a literal construction would include the farmer, that it never could have been intended to apply to him, because he was specifically and liberally provided for in subdivision 7, which exempts his team and tackle, sheep, cows, swine, the food for a year's support of the same, wagon, cart, sleigh, plow, drag and other farming utensils not exceeding $50 in value.

But, by parity of reasoning, the same provision should apply to the merchant, because he is nowhere else provided for.

When we look at the language of the section and compare it with all the other provisions, keeping in view the presumed intention of the constitution and the legislature to make equitable provisions for all classes, it would seem that there is strong reason for holding that it was intended in this subdivision to provide for merchants.

I am referred to the case of Grimes v. Bryne, 2 Minn. 89 [Gil. 72], as an authority the other way. I am not clear but that case, as well as Guptil v. McFee, 9 Kan. 30, which follows the Minnesota case, is against the construction which has generally obtained in relation to this provision of our statute, and which I am disposed to follow.

But there is one consideration which is very noticeable, and that is, the difference in the language of the two statutes. The provision of the Minnesota statute is: "The tools and implements of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business; and, in addition thereto, stock in trade, not exceeding four hundred dollars in value." The words, "and in addition thereto, stock in trade," would seem to indicate that it was the intention that the exemption of stock in trade should apply only to the same class of persons provided for in the previous part of the section and not merchants to whom tools and instruments are not necessary to their business. And so the court looked upon it, for they say: "In addition to what? Why

manifestly in addition to tools and implements above exempted. The legislature did not intend to leave the tools of the shoemaker or harness-maker in his hands and deprive him of the means of using them. They gave him a stock of material to work upon to render the provisions of exemption of some utility. The two clauses must stand together to bring either in harmony with the spirit of the law. The stock would be worthless without the tools, and the tools idle without the stock."

The language of our statute is different, and I am inclined to think the provision different in substance. The use of the disjunctive "or" in the language, "The tools and implements or stock in trade of any mechanic, miner or other person," would seem to indicate a purpose of providing for two classes of persons: that is to say, for mechanics, miners and others, to the exercise of whose trade or business, tools or implements are necessary; and to another class of persons like merchants, to whose business, stock in trade is essential, but tools and implements are not. I think, at any rate, the language will fairly bear this construction. It is certainly broad enough if interpreted anyways literally, to include merchants, and considering the beneficent purpose of the law to make reasonable and equal provision for all classes of the community, I am disposed to think that the maxim noscitur à sociis should not in this case prevail over all other principles of construction, so as to deny to so large and useful a class of the community an equal participation and enjoyment of the exemption law.

That it should be applied to the extent of excluding farmers and others, who are otherwise specifically provided for as held by Dixon, C. J., in Bevitt v. Crandall, supra, I have no sort of objection. Still, I do not think it requires a resort to that maxim, to hold that this provision was never intended to apply to farmers.

But it is claimed the exemption should not be allowed, because the debts are partnership debts, and that when contracted, the property belonged to the partnership; and there is some show of reason, as well as authority, for this position; but, in the absence of any fraudulent intent, I see no reason why parties may not dissolve the partnership, sever their interest in the property, or one partner sell out his interest to the other, as was done in this case, and the partner continuing the business, and owning the goods, be allowed to claim his exemption, the same as though no partnership had ever existed. This would seem to be in accordance with the principles laid down by Ryan, C. J., in Russell v. Lennon, 39 Wis. 570. If, as is said in that case, each member of a partnership is, in proper cases, entitled to his separate exemption of the partnership property, and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemptions, it would seem to follow as a consequence of this doctrine, that if the partnership is dissolved and the partnership stock transferred to one of the partners, that it is no longer partnership property, and the right of exemption on the part of the owner of the property attaches.

But it is claimed that the joint creditors have a lien on the partnership property for the payment of the joint debts, and this is true in a certain qualified sense. It is clear law that, as between the joint creditors of the partnership and the separate creditors of the individual partners, the joint creditors are entitled to priority of payment from the partnership funds and the individual creditors from the individual funds of the partners. And, in this sense, they are said to have a lien on the partnership property, so that one partner cannot sell out his interest to a third person and prevent the payment of the joint debts; and such transfer conveys only to the purchaser the interest of the partner in the surplus after payment of the partnership debts. Menagh v. Whitwell, 52 N. Y. 146. But the lien is not a lien in the same sense that a mortgage or an execution levied is a lien, by any means. It is not a lien that transfers any title to the property, or any actual interest in it. The partnership creditors have just as much of a lien, and no other or greater on the partnership property, as the creditor of an individual debtor has on his property. Burns v. Harris, 67 N. C. 140.

There is, in short, nothing in such a lien to prevent one partner from selling his interest in the goods to his copartner and conferring a good title, if done in good faith, and with no intent to place the property beyond the reach of creditors.

It is true that at the time of the dissolution, the partnership was in debt, and their liabilities by far exceeded their assets. But there is nothing else tending to show fraud, and this of itself, is not enough.

If there had been any attempt to withdraw the funds and put them in a homestead or otherwise, beyond the reach of creditors, the case might come within the principle of In re Sauthoff [Case No. 12,379]. But, nothing appears to show the transaction was not bona fide.

And, upon the whole, I think the exemption should be allowed.

NOTE [from original report]. A partner withdrawing firm assets, upon dissolution, as his interest in the partnership, takes them subject to the rights of the firm creditors, if the fund remaining is insufficient for the payment of their debts. This is true, even though no fraud is intended, and the partners believed the remaining assets to be ample. And if the retiring partner invest the assets thus withdrawn by him, in a homestead, a court of equity will compel its surrender for the benefit of the creditors. In re Sauthoff [Case No. 12,380]. Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. In re Croft [Id. 3,404].

See, also, Ex parte Robinson [Id. 11,933]. Since the date of the above opinion by Judge Bunn, the supreme court of Wisconsin has held in Wicker v. Comstock, 52 Wis. 315, 9 N. W. 25, that subdivision 8, § 2982, of the Revised Statutes of Wisconsin, which exempts from execution "the tools and implements, or stock in trade, of any mechanic, miner or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value," applies to a stock of goods on sale by a merchant.

Case No. 1,454.

The B. J. WILLARD.

[8 Wkly. Notes Cas. 47.]

District Court, D. Pennsylvania. May 7, 1879.

SHIPPING—CHARTER PARTY—CONSTRUCTION—FAILURE TO PROVIDE MEANS TO LOAD—INCOMPLETE CARGO—LIABILITY OF CHARTERER FOR FREIGHT.

[A charterer agreed to furnish a vessel named "a full and complete cargo of guano in bulk, * * * vessel to be loaded at Serrano Key by its crew, with the assistance of the men on the island." There were no means at the island to transport the guano, and the master of the vessel used the ship's boat until there was danger of rendering it unsafe for the homeward voyage, when, having procured but two-thirds of a cargo, he returned. *Held*, that the charterer's failure to provide means of transportation justified the master, he having no other means at his command, in returning with an incomplete cargo, and rendered the charterer liable for freight on a full cargo.]

[In admiralty. Libel for freight by B. F. Woodbury, master and agent of the schooner B. J. Willard, against Moro Phillips, charterer of the schooner. Decree for libelant.]

The schooner was chartered at the port of Philadelphia, to proceed to Serrano Key, one of the guano islands of the West Indies, there to be loaded with a full cargo of guano, of which respondent was owner, freight payable on right delivery of cargo, etc. The vessel took on board a cargo of only 306 tons, a full cargo being 525 tons, and claimed freight on the difference. The charter-party contained, inter alia, the following clause: "The party of the second part doth engage to furnish and provide to the said vessel a full and complete cargo of guano in bulk. * * * It is agreed that the vessel is to be loaded at Serrano Key by the vessel's crew, with the assistance of the men on the island. * * * The cargo or cargoes to be received and delivered according to the customs and usages of the ports of loading and discharging—say within reach of the vessel's tackle. * * * Vessel to take on board two small lighters, etc., to be discharged at Serrano Key free of freight." The libellant contended that it was impossible to load a full cargo, because the guano was not ready mined; that it was the duty of respondent to have the required amount of guano ready mined, and it was shown that the lighters referred to in the charter-party had not been furnished. Additional facts are discussed in the opinion of the court.

Henry Flanders, for libellant.

The agreement was to load a full cargo, and the respondent is responsible for all contingencies that prevented this. Kirk v. Gibbs, 1 Hurl. & N. 810; Clark v. Crabtree [Case No. 2847]; Carr v. Petroleum Co., L. R. 1 C. P. 636; Barker v. Hodgson, 3 Maule & S. 267.

John G. Johnson, contra.

By the charter-party the vessel's crew were to mine and load the cargo, and the master acquiesced in this. Moreover, he was himself to furnish the lighters, but sailed away without them.

THE COURT (BUTLER, District Judge). By charter-party, dated August 25, 1875, between B. F. Woodbury, master and agent of the schooner B. J. Willard, and Moro Phillips of Philadelphia, the latter agreed to furnish the vessel named a "full and complete cargo of guano in bulk," and pay $4.75 per ton of 2240 pounds, on delivery in Philadelphia—the vessel to be loaded at Serrano Key (a guano island) by its crew, with the assistance of the men on the island. A printed form in blank was used in preparing the contract; and the agreement, taken literally, would seem to require that the cargo was to be received "within reach of the vessel's tackle." This, however, is probably the result of negligence in filling the blanks, and failing to observe what was printed, rather than of design. The understanding of the parties, as is shown by their subsequent conduct, was different; and the contract may be read, therefore, as if this provision were omitted.

The vessel proceeded to the island and, loading 306 tons of guano, brought it to the port of delivery. A "full cargo" would have been 525 tons; and freight on this quantity is charged, on the allegation that a full cargo could not be obtained by reason of fault in the respondent: First, in failing to have the proper quantity "mined;" and, second, in failing to furnish lighters to convey it to the vessel. The island is covered with guano. No "mining," in the ordinary sense of the term, is necessary. On scraping away a covering of rubbish, the guano is ready for shovelling into carts, or other means of conveyance. A part of 306 tons brought away was so uncovered when the vessel arrived at the island, and the balance was uncovered by the master and crew. Whether it was the duty of the respondent to have the required amount ready for loading is, in our judgment, unimportant. We do not think his failure in this, if such was his duty, would justify the libellant in coming away without a cargo. This obstacle could readily have been surmounted, and if it was the only one, should have been, and the respondent looked to for compensation. Such, doubtless was the master's view of his duty, for his testimony shows, as we have seen, that

he proceeded to uncover the guano, and would have loaded a full cargo, as he says, if the means of conveying it from the shore to his vessel had been sufficient for the purpose. He declares, distinctly and emphatically, that the reason he came away without a full cargo was, that the boat belonging to his vessel (without which it would have been unsafe to go to sea) was so injured that he could use it no longer for loading, without danger of its complete destruction, and that there was no other on the island; and thus we are brought to the question presented by the libellant's second position, to wit, that the respondent failed to furnish the necessary lighters. Was it the respondent's duty to do this? An examination of the testimony satisfies us that it was. It is not expressed in the written contract, nor is it, as we have seen, that the libellant was to transport the guano from the shore to the ship. But it was fully understood by the parties; and the written contract must be read with the reference to, and in connection with it. That he did not furnish them is undisputed. The single boat which he sent out proved to be wholly worthless. The master testifies that he condemned it before starting for home, but says he hoped to make it serviceable by repairs at the island. The respondent's counsel has suggested, with some force, that if the respondent was to furnish lighters, it is singular the vessel sailed without them. But, on the other hand, if the libellant was to provide them, it is just as singular that he sailed without doing so. The evidence shows that he applied to the respondent for them, and after failure to obtain any other than the worthless boat referred to, he sailed, depending, as it would appear, on the use of his own boat, and the hope of being able to render the other serviceable by repairs. Notwithstanding this failure of duty on the part of the respondent, however, the libellant was not justified in coming away from the island without a full cargo, unless it was virtually impossible to obtain it with the means at his command. If, by prolonging his stay for a few days, the required amount could have been loaded, it was his duty to remain, and look to compensation for the delay, and consequent loss thus sustained. Under such circumstances he could not come away empty, and subject the respondent to the much heavier loss consequent upon paying freight on a cargo not carried. Could he have obtained a full cargo? A careful examination of the testimony has satisfied us that he could not, without serious danger of rendering his own boat unfit for use on the passage home. And this risk he was not required to run. Indeed, his duty to himself and the crew forbade it.

The libellant being free from fault, as is thus seen, he is entitled to the freight which the respondent contracted to pay. The respondent's failure to receive "a full cargo" results entirely from his failure to observe his contract; and he cannot, therefore, justly complain.

A decree will be prepared against the respondent for $879.50, the difference between the freight on a full cargo and the amount on what was carried, with interest from date when the same should have been paid.

Case No. 1,455.

BLABON et al. v. HUNT et al.

[2 N. J. Law J. (1879) 179; 26 Pittsb. Leg. J. 180.]

District Court, D. New Jersey.

BANKRUPTCY — JUDGMENTS AND LIENS — ILLEGAL PREFERENCE — WARRANT OF ATTORNEY TO CONFESS JUDGMENT — FAILURE TO RECORD.

[1. Judgments and liens under execution, acquired before a petition in bankruptcy by or against the debtor, are prima facie good and enforceable in favor of vigilant creditors, unless an illegal preference has been obtained, or an intent to evade the provisions of the bankrupt act is manifest.]

[2. The concurrence of the following facts are necessary to constitute an illegal preference within the act: The debtor must be insolvent, or acting in contemplation of insolvency; his purpose must be to give a preference, or, when the preference has been obtained by means of legal process, the seizure or attachment must have been procured or suffered by the debtor; the creditor must have reasonable cause to believe the debtor to be insolvent; he must know that the seizure is fraudulent as against the bankrupt act; and in voluntary cases the preference must have been given within four months of filing the petition in bankruptcy.]

[3. The giving by a debtor for a consideration of equal value of a warrant of attorney to confess judgment is not an act of bankruptcy, though the warrant is not recorded, but kept in the creditor's custody, unknown to others.]

[4. In such a case the creditor may enter judgment, issue execution, and sue when insolvency is apparent, provided he is not assisted by the debtor.]

NIXON, District Judge. The bankrupt law does not avoid all liens. Nay, it recognizes and preserves those which are honestly acquired before the petition in bankruptcy is filed. Judgments and liens under execution are prima facie good and enforceable in favor of the vigilant creditor, unless, in acquiring them, he has obtained an illegal preference, or has manifested an intent to evade the provisions of the act, and the burden of proof is, ordinarily, upon the party contesting the validity of the lien.

The defendants being acknowledged to be bona fide creditors of the bankrupt, the case falls within the provisions of section 5128 of the Revised Statutes, as amended by section 11 of the supplement of June 22, 1874, under which there must be the concurrence of the following facts to avoid an illegal preference: 1. The debtor must be insolvent or acting in contemplation of insolvency. 2. His purpose must be to give a preference. 3. When the preference has been obtained by means of legal process, the seizure or attachment must have been procured or suf-

fered by the debtor. 4. The creditor must have reasonable cause to believe the debtor to be insolvent. 5. He must know that the seizure is a fraud on the provisions of the bankrupt act; and 6. In voluntary cases, the preference must have been given within four months of filing the petition in bankruptcy. A failure on the part of the general creditors to establish any one of the foregoing facts leaves the second [secured] creditors in the position of the advantages which by their superior diligence they have gained.

The supreme court in some recent cases has given a construction to the above recited section, different, in many respects, from what was formerly understood to be its meaning, and different—it is stated with great deference—from what seems to have been its own judgment in the case of Buchanan v. Smith, 16 Wall. [83 U. S.] 277. It may now be assumed that something more than non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence; that though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act; and that a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment; and, further, that the giving by a debtor for a consideration of equal value of a warrant of attorney to confess judgment is not an act of bankruptcy, though such warrant or confession of judgment be not entered of record, but on the contrary be kept as such things often or ordinarily are, in the creditor's own custody, and with their existence unknown to others; and that the creditor may enter judgment of record on them when he pleases, even upon insolvency apparent, and issue execution and sell, such action being valid and not in fraud of the bankrupt law, unless he is assisted by the debtor. Wilson v. City Bank, 17 Wall. [84 U. S.] 473; National Bank v. Warren, 96 U. S. 539; Clark v. Iselin, 21 Wall. [88 U. S.] 360; Watson v. Taylor, Id. 378.

The debtor's petition in bankruptcy was filed December 18th, when, as it clearly appears from his schedule, he was largely insolvent. All the judgments except one were entered of record only eight days before, and the exception was signed December 6th. It is not pretended that he had any extraordinary or serious losses between these dates, and hence it must be inferred that he was insolvent when the judgments were entered. But whether the defendants had reasonable cause to believe the debtor was insolvent is not a material fact, if the obtaining of the judgments and executions were the acts of the creditors without any procurement on the part of the bankrupt. And it is here, in my opinion, that the complainant's case fails. The testimony has been examined, and it does not authorize me to assert that they have shown that collusion existed between the bankrupt and the judgment creditors in regard to the entry of these judgments. They are all made witnesses by the complainants, and they all circumstantially and specifically deny it, and there is no evidence rising higher than a grave suspicion that the debtor had any knowledge of the intention of his creditors to enter the judgments or to issue the executions until after they were entered and issued. It is the misfortune of the complainants that they have been compelled to turn to the defendants to make out their case, and that their testimony concludes them in the absence of the existence of facts which show that they are not worthy of belief. I find no such facts, and the order requiring the sheriff to hold the proceeds of sale until the further order of this court is vacated, and the officer is left to execute his writs as required by the laws of the state.

Case No. 1,456.

BLACHLY et al. v. DAVIS et al.

[1 McLean, 412.][1]

Circuit Court, D. Indiana. May Term, 1839.

COURTS—JURISDICTION—PROOF—GENERAL ISSUE—DEFECT OF JURISDICTION IN PLEADINGS — REMEDY.

[1. Plaintiff need not prove that defendants served within the state are residents thereof where such defendants have pleaded the general issue.]

[2. A defect of jurisdiction appearing in the pleadings may be taken advantage of by motion in arrest of judgment, or by writ of error.]

[At law. Action by Blachly, Strong, and Simpson against Davis and Moon. Defendants move to dismiss for failure to prove that they are citizens of the state. Motion denied.]

Mr. Pettit moved the court to instruct the jury that the plaintiffs cannot recover, unless they shall prove that the defendants are citizens of this state.

But THE COURT said, it is never necessary, under the general issue, which has been pleaded in this case, to prove the citizenship of either party. It was formerly held in the circuit court of the United States, in Pennsylvania, that the plaintiff must prove his citizenship as averred in his declaration, or he failed in his action. But this decision has been long since overruled in that court. The rule is well established, that if the defendant wishes to deny the citizenship of the plaintiff, he must plead it specially, and issue is joined on the fact, which is, generally, tried by the jury, before the merits of the cause are investigated. And so if a defendant has been sued in a district where the court has no jurisdiction, he must plead the

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

matter specially. If there be a general plea to the merits, it is an admission of the jurisdiction; both as to the plaintiff and defendant. In this case the writ has been duly served on the defendants within this state, as appears from the return of the marshal. And by filing the general issue, the defendants are precluded from raising this objection. If the defendants did not live in the district, they were not amenable to the jurisdiction, under the law which declares no individual shall be liable to be sued out of the district in which he resides, or in which the process is served; but this matter to be available in defence, must be pleaded. The return of the officer who served the process, will always be received as prima facie evidence, that it was properly served, and that the defendants are citizens of the district in which they were found.

Where a defect of jurisdiction appears in the pleadings, advantage may be taken of it by motion in arrest of judgment, or by writ of error.

Motion overruled and judgment.

Case No. 1,457.

In re BLACK et al.

[2 Ben. 196;[1] 1 Am. Law. T. Rep. Bankr. 39; 1 N. B. R. 353 (Quarto, 81).]

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

INSOLVENCY—INTENT TO GIVE PREFERENCE—SUFFERING PROPERTY TO BE TAKEN — ORDINARY COURSE OF BUSINESS—ACTION BY ASSIGNEE.

1. Where a firm, which owed debts which it was not able to pay, owed money to the brother of one of the partners, which they were desirous of securing to him, and the two brothers consulted a lawyer as to how that could be done, who declined to advise them both, but sent away the partner, and then, in behalf of the creditor, brought suit against the firm to recover the debt, the summons being served on the creditor's brother alone, on which service judgment was entered by default against the firm, and execution was issued to the sheriff, who levied on the firm property, whereupon proceedings in involuntary bankruptcy were taken against the firm, and they were adjudged bankrupts without opposition, and, on the application of the judgment-creditor, the sheriff was directed to sell the property and retain the proceeds to abide the order of the court, and proof was ordered to be taken of the facts attending the entry of the judgment, and, on those proofs, the assignee in bankruptcy applied for an order directing the sheriff to pay to him the proceeds of the property in his hands: *Held*, that, on the facts, the firm was insolvent, and suffered its property to be taken on legal process, with intent to give a preference to the judgment-creditor, and that he had reasonable cause to believe that the firm was insolvent.

[Cited in Vogle v. Lathrop, Case No. 16,985; Martin v. Toof, Id. 9,167; Re Chamberlain, Id. 2,574; Re Gallinger, Id. 5,202; Beattie v. Gardner, Id. 1,195; Kohlsaat v. Hoguet, Id. 7,919. Approved in Haskell v. Ingalls, Id. 6,193. Cited in Re Lord, Id. 8,503; Re Heller, Id. 6,337; Re Craft, Id. 3,316; Re Black, Id. 1,458; Wadsworth v. Tyler, Id. 17,032; Re Wright, Id. 18,071.]

2. That, therefore, under the thirty-ninth section of the bankruptcy act [of 1867] the firm had committed an act of bankruptcy, and the assignee in bankruptcy was entitled to recover back the property so taken.

[Cited in Martin v. Toof, Case No. 9,167; Beattie v. Gardner, Id. 1,195; Kohlsaat v. Hoguet, Id. 7,919. Approved in Haskell v. Ingalls, Id. 6,193. Applied in Re Lord, Id. 8,503. Cited in Re Craft, Id. 3,316; Re Black, Id. 1,458; Wadsworth v. Tyler, Id. 17,032; Re Wright, Id. 18,071.]

3. That the word "insolvency," as used in that section, has a different meaning from the word "bankruptcy," as used in the second section of the bankruptcy act of 1841, and means a simple inability to pay, as debts become payable.

[Cited in Re Walton, Cases Nos. 17,128 and 17,130; Re Kingsbury, Id. 7,816; Graham v. Stark, Id. 5,676; Rison v. Knapp, Id. 11,861; Martin v. Toof, Id. 9,167; Hall v. Wager, Id. 5,951; U. S. v. Pusey, Id. 16,098; Re Craft, Id. 3,316; Re Hanibel, Id. 6,023.]

4. That, if the act of a bankrupt does in fact give a preference to a creditor, it is competent to infer an intent on his part to give such preference, unless he prove to the contrary.

[Cited in Martin v. Toof, Case No. 9,167; Re Seeley, Id. 12,628.]

5. That, on the facts, there was, also, a transfer of property to the creditor, in violation of the thirty-fifth section of the act.

[Cited in Tuttle v. Truax, Case No. 14,277; Haskell v. Ingalls, Id. 6,193; Wadsworth v. Tyler, Id. 17,032; Re Wright, Id. 18,071.]

6. That, as the creditor had submitted himself to the jurisdiction of the court, there was no need of an action by the assignee to recover the property, but the court would order the sheriff to pay over the proceeds to him.

[7. Cited in Re Dunkle, Case No. 4,160, as to the distinction between procuring and suffering property to be taken on legal process.]

[In bankruptcy. In the matter of James Black and William Secor, involuntary bankrupts. Decree directing the sheriff to pay over to the assignee in bankruptcy the proceeds of a sale on execution against the bankrupts.]

Charles H. Smith, for assignee in bankruptcy.

H. P. Townsend, for Thomas P. Secor.

Brown, Hall & Vanderpoel, for sheriff.

BLATCHFORD, District Judge. The petition, in this case, was one in involuntary bankruptcy, and was filed on the 22d of June, 1867. The acts of bankruptcy alleged in the petition were, that Secor, acting for the firm of Black & Secor, composed of the debtors, procured and suffered the property of the firm to be taken on legal process in favor of Thomas P. Secor, on a judgment entered in the supreme court of New York, June 5th, 1867, for $2,879.78, in favor of Thomas P. Secor, against the debtors, and procured and suffered said judgment to be entered, and an execution to be issued thereon to the sheriff of the city and county of New York, against the property of the debtors, and such property, consisting of goods

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and chattels, to be taken by the sheriff by virtue thereof; and that Secor procured and suffered said property to be so taken, with intent to give a preference to Thomas P. Secor, as a creditor of the firm, and with intent to defeat and delay the operation of the bankruptcy act; and that the debt on which the judgment was entered was not a bona fide debt; and that the judgment was so procured and suffered with intent to hinder, delay, and defraud the creditors of the firm; and that the firm was wholly insolvent, and had been so for more than a year then last past, and was so at the time of the commission of the alleged acts of bankruptcy. On the 1st of July, 1867, on proof of due personal service on the debtors of a copy of the petition and of an order to show cause, no opposition being made, an order was made by the court adjudging the debtors to be bankrupts, according to form No. 58.

On the filing of the petition, on the 22d of June, 1867, an order was made by the court, under section forty, that an injunction issue restraining the debtors and all other persons, and especially the sheriff of the city and county of New York, from transferring or disposing of, or interfering with, the property of the debtors. The injunction was issued and served.

On the 25th of October, 1867, an order was made by the court, on the application of Thomas P. Secor and of the sheriff, referring it to the register in charge of the case, to take proof of the facts as to whether the bankrupts, or either of them, procured or suffered the judgment referred to to be entered, and execution to be levied, with intent to give a preference to Thomas P. Secor, or any other person, or with intent to defeat the operation of the bankruptcy act, and whether Thomas P. Secor, or any person for whose benefit, in whole or in part, the judgment was entered, had reasonable cause to believe that a fraud on the act was intended, or that the debtors were insolvent, and also whether the judgment, execution, and levy were valid as against the assignee in bankruptcy, and to report the proofs so taken. The order also provided, that the sheriff be permitted to sell the goods levied on by him, and that he hold the net proceeds subject to the further order of this court, to be made on the application either of the assignee or of Thomas P. Secor, on notice to the other party and to the sheriff.

The register has taken the testimony and reported it to the court. The net proceeds of sale in the hands of the sheriff are $1,957.17, and the assignee in bankruptcy now applies to the court, on the proofs taken before the register, and on notice to Thomas P. Secor and to the sheriff, for an order that the proceeds of sale be paid over to the assignee in bankruptcy.

It appears, from the proofs, that the judgment was obtained against the bankrupts as partners and joint debtors, on service of process on Secor alone. Such service was made on the 15th of May, 1867, and the judgment was entered by default, on the 5th of June, 1867, which was the earliest day on which it could be entered in due course of law. Black knew nothing of the suit or of the judgment until after the judgment was entered. Thomas P. Secor was represented by counsel on the taking of testimony before the register. The witnesses examined were Mr. Townsend (the attorney for Thomas P. Secor in obtaining the judgment), Mr. Dewhurst (a creditor of the firm), and James Black (one of the bankrupts). Neither Thomas P. Secor nor William Secor was examined. The amount of assets of the firm which has come to the hands of the assignee in bankruptcy is less than $100, the amount of the individual assets of Black which has come to his hands is less than $500, and no individual assets of Secor have come to his hands.

The testimony shows that, shortly before the suit was brought, Thomas P. Secor and William Secor came together to Mr. Townsend, the attorney; that Thomas then, in the presence of William, said that he had come to consult Mr. Townsend in regard to a claim which he had against Black & Secor, and that it was due, and he wished to get his pay or be secured, and was willing to give time, but felt that he ought to be secured; that Thomas then asked Mr. Townsend how he could be secured, and Mr. Townsend told him there was great difficulty in doing it; that William then told Mr. Townsend that the affairs of the firm were sound, and they would be able to pay their creditors, and said he was willing to secure Thomas in any way it could be done, and that his debt should be paid; that, in reply to an inquiry by both of the parties as to how William could give security, Mr. Townsend told them that he knew of no way in which a security could be given that would be good to Thomas; that Mr. Townsend then told William that he wanted nothing to do with him, and did not wish to advise with him in the matter, and that, if he was to act for Thomas, he could not act for him; that Thomas then said he wanted Mr. Townsend to act for him; that Mr. Townsend then desired William to leave the office, and told him that he could not have anything to do with him or his business; that William withdrew and Thomas remained; that Mr. Townsend then told Thomas that he knew of only one course to pursue in the matter, and that was to sue the firm, and to proceed with all diligence in doing it; that he wanted nothing from the firm, but that they would take their own course, and collect the debt, if possible, according to process of law; that Thomas then asked Mr. Townsend what he would advise him to do, and Mr. Townsend told him he would advise him to sue as soon as possible; and that Mr. Townsend then took

from Thomas a statement of the claim, and drew the summons and complaint. During the conversation referred to, Thomas suggested that he might have a confession of judgment, and Mr. Townsend told him that he could not. William said, in the conversation, that he was anxious to secure Thomas' debt. William and Thomas are brothers. Throughout the interview, William maintained that the firm could pay everything, if they had time.

The testimony of Black is express to the point, that the firm was insolvent at the time the judgment was obtained and the levy was made, and there appear to have been a series of efforts and propositions in regard to securing Thomas' debt, in which both of the bankrupts and Thomas were engaged, prior to the bringing of the suit, none of which resulted in anything. The plan of bringing the suit was then adopted, under the circumstances detailed, all knowledge of it being kept from Black. The evidence is also entirely satisfactory, that Thomas had reasonable cause to believe the firm to be insolvent at the time the judgment was recovered and the levy was made. Upon the question of insolvency and of Thomas' knowledge of it, the absence of any testimony from either Thomas or William is a very strong circumstance unfavorable to the bona fides of the transaction.

The thirty-ninth section of the bankruptcy act provides that, if any person residing within the jurisdiction of the United States, owing debts, provable under the act, exceeding the amount of three hundred dollars, shall, after the passage of the act, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, make any transfer of property, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, he shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereinafter prescribed, shall be adjudged a bankrupt. The section then goes on to provide, that, if such person shall be adjudged a bankrupt, the assignee may recover back the property so transferred contrary to the act, provided the person receiving such conveyance had reasonable cause to believe that the debtor was insolvent. These provisions of the thirty-ninth section, as applied to the facts of the present case, are simply to the effect, that, if William Secor, when the firm of Black & Secor was insolvent, or in contemplation of its insolvency, made a transfer of the property of Black & Secor, or suffered it to be taken on legal process, with intent to give a preference to Thomas P. Secor, as a creditor of the firm, the assignee in bankruptcy of the members of the firm (they having been adjudged bankrupt as such members, and the firm being thus adjudged bankrupt) may recover back the property so transferred contrary to the act, provided Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

Now, it clearly appears, from the evidence, (1.) That the firm of Black & Secor was insolvent; (2.) That William Secor, a member of the firm, suffered the property of the firm to be taken on legal process; (3.) That he did so with intent to give a preference to Thomas P. Secor, as a creditor of the firm; (4.) That Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

(1.) In regard to the question of insolvency, the provisions of the bankruptcy act of 1841 were very different from those which are found in the act of 1867. The second section of the act of 1841 declared void all transfers of property made by the bankrupt in contemplation of bankruptcy, and for the purpose of giving a preference to any person over general creditors, and all transfers of property made by the bankrupt in contemplation of bankruptcy, to any person not a bona fide creditor, or a purchaser for a valuable consideration without notice, and authorized the assignee in bankruptcy to recover the property transferred; but it expressly provided, that all dealings and transactions by and with any bankrupt bona fide, made and entered into more than two months before the filing of the petition in bankruptcy, should not be invalidated or affected by the act, provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act. It was decided by the supreme court, in Buckingham v. McLean, 13 How. [54 U. S.] 150, 167, that the words "contemplation of bankruptcy," in the second section of the act of 1841, did not mean contemplation of insolvency—of a simple inability to pay, as debts should become payable, whereby the business of the debtor would be broken up—but meant that the debtor must have contemplated the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be decreed a bankrupt. The view of the court was, that, under the act of 1841, something more than the insolvency of the debtor was required to render void a security given to a bona fide creditor more than two months before the filing of the petition, and notice to the creditor of something more than such insolvency; that the word "bankruptcy," as used in the act, meant a particular legal status, to be ascertained and declared by a judicial decree; that a person might contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy; and that, as the contemplation of insolvency was not in fact the contemplation of bankruptcy, the phrase, "contemplation of bankruptcy," did not include the contemplation of mere insolvency. In these particulars, the thirty-ninth section of the act of 1867 differs widely, and with a manifest purpose, from the act of 1841. The words of the

thirty-ninth section, in defining the act of bankruptcy, are "bankrupt or insolvent, or in contemplation of bankruptcy or insolvency." If the debtor is in any one of those conditions when he makes the transfer of his property, or procures or suffers his property to be taken on legal process, with intent to give a preference to a creditor, he commits an act of bankruptcy thereby, and is liable therefor to be adjudged a bankrupt; and the assignee may recover back the property so transferred contrary to the act, provided the person receiving the conveyance had reasonable cause to believe that the debtor was insolvent. The words "insolvent" and "insolvency," as used in the thirty-ninth section and elsewhere in the act of 1867, are not synonymous with the words "bankrupt" and "bankruptcy," if the latter words have, in that act, the meaning which the supreme court, in Buckingham v. McLean, affixed to them as used in the act of 1841. The former words, in the view of such meaning of the latter words, mean something different, and something less restricted. The word "insolvency," as used in the act of 1867, means what the court, in Buckingham v. McLean, held the word "bankruptcy" did not mean, and the word "insolvency" did mean—a simple inability to pay, as debts shall become payable, whereby the business of the debtor will be broken up, without any contemplation of the commission of an act for which he can be put into involuntary bankruptcy, and without any contemplation of an application by himself to be decreed a bankrupt. But, if the words "bankrupt" and "bankruptcy," as used in the thirty-ninth section of the act of 1867, do not mean what they meant in the act of 1841, as interpreted by the supreme court in Buckingham v. McLean, but mean, in view of the relationship in which they are placed, in that section, to the words "insolvent" and "insolvency"—"bankrupt or insolvent, or in contemplation of bankruptcy or insolvency"—the same thing as the words "insolvent" and "insolvency," they must have the meaning which, in Buckingham v. McLean, the supreme court discarded as belonging to them, and the meaning which that court in that case assigned to the words "insolvent" and "insolvency." In either view, the decisions of the courts under the act of 1841, as to what transfers of property made by a bankrupt before the commencement of proceedings in bankruptcy were void under the second section of that act, and the decisions of the English courts as to the meaning of the words, "bankrupt" and "contemplation of bankruptcy," have very little, if any, application to the act of 1867.

(2.) So, also, in regard to the question of suffering property to be taken on legal process, the language of the thirty-ninth section is, "procure or suffer his property to be taken on legal process." There was no such language in the act of 1841. It was, by the first section of that act, made an act of bankruptcy for a person to willingly or fraudulently procure his goods to be taken in execution. The word "suffer," in this connection, was not used in the act of 1841. There is a clearly recognized legal distinction between "procuring" and "suffering." The act of 6 Geo. IV. c. 16, § 3, provided, that if any trader should suffer himself to be arrested for any debt not due, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, he might be brought into bankruptcy. In Gibson v. King, 1 Car. & M. 458, a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and an execution had been issued on it, on which the bankrupt's goods had been taken, and the question arose, whether suffering the judgment to go by default in the action, and suffering the goods to be taken on the execution on the judgment, was procuring the goods to be taken in execution, within the statute. The court held, that the bankrupt had suffered the goods to be taken in execution, but had not procured them to be so taken. The same view of the distinction between the two words in the English act was taken in Gore v. Lloyd, 12 Mees. & W. 463. The distinction there maintained by Baron Alderson was, that the bankrupt procured his goods to be taken in execution, when the initiation of the proceeding came from him, when he was the person who began to procure, when he caused the thing to be done, in the ordinary sense of the word; but that the signing reluctantly, and under strong pressure from a creditor, of a warrant to confess a judgment, under a stipulation that the warrant should not be unnecessarily put in force, was suffering, and not procuring, goods to be taken in execution, which were taken on an execution issued on a judgment entered up on the warrant. The English and other decisions as to pressure by a creditor, and as to what it is to procure, have no application to the question of suffering. Denny v. Dana, 2 Cush. 160, 170.

(3.) As to the question of intent on the part of the debtor to give a preference to the creditor. The intent to prefer is essential; but every person is to be presumed to intend the natural and probable consequences of his own acts, and, if such acts do, in fact, give a preference, it is competent to infer the intent. Denny v. Dana, 2 Cush. 160, 172; Beals v. Clark, 13 Gray, 18, 21.

Where the act which is made the act of bankruptcy is a passive act, such as that of suffering property to be taken on legal process, when the debtor is insolvent or in contemplation of insolvency, with intent to give a preference to a creditor, if the natural and probable consequence of the act of sufferance is to give the preference to the creditor, it will be inferred that the debtor had such intent, unless he shows the contrary; and

the burden will be upon him to show the contrary. In the present case, the act of suffering Thomas P. Secor, the creditor, to obtain his judgment, and take the property of the firm on legal process thereunder, could have no other effect, if not thwarted, than to give to Thomas P. Secor a preference, as such creditor, over other creditors of the firm, and, therefore, William Secor would be held to have intended to give such preference. But, in addition to that, the evidence is such as to show affirmatively that he intended that his suffering the judgment to be recovered should effect the preference. He could have prevented the preference, by filing his voluntary petition in bankruptcy, for an adjudication of bankruptcy against the firm, and bringing in his copartner. Being able to prevent the preference, he must, not having prevented it, be held to have suffered it, within the meaning of the act.

(4.) As to the question whether Thomas P. Secor had reasonable cause to believe that the firm was insolvent, the evidence leaves no fair ground for doubt on the subject.

The same results that follow from the application of the provisions of the thirty-ninth section of the act to this case, follow also under the thirty-fifth section. The two sections are in pari materia, and must be construed together. There is, however, no conflict between them, and they are of the same purport and tenor. Under the thirty-fifth section, if William Secor, his firm being insolvent, did, within four months before the filing of the petition against his firm, make any transfer of any part of the property of the firm to Thomas P. Secor, he being a creditor of the firm, with a view to give a preference to him, and if Thomas P. Secor, being the person receiving the transfer, or to be benefited by it, had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act, the transfer was void, and the assignee may recover the property, or its value, from Thomas P. Secor. The thirty-fifth section also provides, that, if the transfer was not made in the usual, or ordinary, course of business of the debtor, the fact shall be prima facie evidence of fraud. The act of suffering the creditor to take the property of the firm on legal process, the firm being insolvent, when such taking could have been prevented by an application in voluntary bankruptcy, was a fraud on the provisions of the act, and was a transfer of the property of the firm to the creditor, within the meaning of the thirty-fifth section, and must be held to have been a transfer made by the debtors, and with a view to give a preference to the creditor. The creditor was to be benefited by the transfer, and had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act. The transfer was not made in the usual, or ordinary, course of business of the debtors. Therefore, it was void, and the assignee in bankruptcy is entitled to recover from Thomas P. Secor the property transferred, or its value. There is no need of a new action for such purpose. Thomas P. Secor has submitted himself to the jurisdiction of this court in the premises. It was on his application that the order was made, referring the matter to take testimony as to the facts involved, and directing the proceeds of the property transferred to be held by the sheriff, subject to the further order of this court, to be made on the application of either party, on notice to the other.

The act of 1867 is much more extensive and far-reaching, in its provisions respecting transactions by a debtor with his creditors, than the act of 1841 was. In respect to the act of 1841, the supreme court, in Shawhan v. Wherritt, 7 How. [48 U. S.] 627, 644, said: "The policy and aim of bankrupt laws are, to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency," that is, the acts which are made, by the statute, acts of bankruptcy, "has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference, to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and, therefore, equitably." These doctrines, thus held to be applicable to the act of 1841, are much more applicable to the act of 1867. And congress, in view of the provisions of the act of 1841, and of the decisions of the supreme court under it, in regard to the meaning of the words "bankruptcy" and "contemplation of bankruptcy," and of the decisions of the courts in the United States and in England in regard to the meaning of the words "procure" and "suffer," and in regard to the effect of pressure or suit by a creditor upon the question as to whether the debtor procures to be done the act which secures the preference to the creditor, must be regarded as having intended, by the use of the words "insolvent," and "contemplation of insolvency," and "suffer," in the connection in which they are found in the act of 1867, to strike at the root of all preferences obtained by a creditor, where his debtor is insolvent, or in contemplation of insolvency, by the taking of the debtor's property on legal process, whether the taking be by an act of procurement, or an act of sufferance, on the part of the debtor, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent.

An order must be entered, that the sheriff pay over to the assignee in bankruptcy the net proceeds of the sale of the property in question.

[NOTE. For subsequent proceedings to determine the validity of certain executions and levies as against the assignee in bankruptcy, see the following case, Case No. 1,458.]

Case No. 1,458.

In re BLACK et al.

[2 N. B. R. (1874) 171 (Quarto, 65).] [1]

District Court, S. D. New York.

BANKRUPTCY—SUFFERING EXECUTION—PREFERENCE—SHERIFF—POUNDAGE.

Creditors taking out executions against property of debtors not having reasonable cause to believe him insolvent, such executions are valid. A sheriff is entitled to poundage on a levy at the time he makes the levy.

[In bankruptcy. In the matter of James Black and William Secor, involuntary bankrupts. Proceedings to determine the validity of certain executions and levies as against the assignee in bankruptcy.

[For decree requiring the sheriff to pay over the fund in his hands, realized on execution against the bankrupts, to the assignee, see Case No. 1,457.]

BLATCHFORD, District Judge. This case comes before the court on testimony taken by the register, under an order of reference, on the questions as to whether certain executions issued against the bankrupts and the levies thereunder are valid as against the assignee in bankruptcy, and whether such executions are liens entitled to preference in payment out of certain funds in the hands of the late sheriff of the city and county of New York. Within the principles laid down by this court in its decision in this matter, made March 10, 1868 (1 N. B. R. 81, Quarto [In re Black, Case No. 1,457]), in regard to the execution issued on the judgment recovered by Thomas P. Secor against the bankrupts, there is no room to doubt, on the evidence, that the levies under the two executions issued on the two judgments recovered by Dean and Caldwell, are void as against the assignee in bankruptcy. At the time the executions were issued the judgments were owned by and had been assigned to A. Stuart Black, and he caused the executions to be issued. The facts established which makes the levies [void] under these executions are: 1. That the judgment debtors were insolvent when the executions were issued. 2. That they suffered their property to be taken by the sheriff on these executions with an intent to give a preference to A. Stuart Black. 3. That A. Stuart Black had reasonable cause to believe at the time that the debtors were insolvent and that a fraud on the bankruptcy act was intended. As to the execution on the judgment, there is not sufficient evidence to show that the creditors had reasonable cause to believe that the debtors were insolvent. The levy under that execution was, therefore, not invalid. That execution bound the property from the time it came to the hands of the sheriff, and when the prior invalid levies are set aside it comes into full operation. I allow the sheriff's bill, as proved, at eight hundred and fifty-six dollars and forty-nine cents. On the decisions made by the state courts, the sheriff is entitled to poundage on a levy at the time he makes the levy. The order disposing of the fund in the hands of the sheriff, in accordance with this decision, will be settled on notice to all parties interested.

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Case No. 1,459.

In re BLACK et al.

Ex parte SKILTON et al.

[17 N. B. R. 399.] [1]

District Court, D. Massachusetts. April 3, 1878.

BANKRUPTCY—FRAUDULENT PREFERENCE—RECOVERY BY ASSIGNEE—PROOF OF CLAIM.

[1. Act Cong. June 22, 1874, § 12, allowing assignees in bankruptcy to recover back moneys paid contrary to the bankrupt law, provided the person receiving such payments had knowledge of the fraudulent intent, and providing that such person, if a creditor, should not, in cases of actual fraud on his part, be allowed to prove more than a moiety of his debt, limits the disability to cases of actual fraud, and not to cases of mere knowledge that a preference was intended.]

[Cited in Re Graves, 9 Fed. 821; Re Aspinwall, 11 Fed. 138; Re Cadwell, 17 Fed. 694. Followed in Re Kaufman, Case No. 7,627.]

[2. The amendment enlarges the right of proof, and applies to cases pending in bankruptcy at the time of its passage.]

[In bankruptcy. Proceeding to prove debt against Black, Currier & Osgood, bankrupts. Debt admitted to proof.]

E. Avery, for creditors.

S. K. Hamilton, for assignees.

LOWELL, District Judge. Skilton & Dole, creditors who had been preferred by the bankrupts, offer the same debt for proof, the preference having been recovered of them by the assignees and paid on execution. The circumstances of the bankruptcy were peculiar. The bankrupts undertook to pay all their creditors fifty per cent. upon their respective debts, out of court, and paid a few of them, and became bankrupt with no assets. There were two theories as to the cause of the failure to carry out the informal composition: One was, that the bankrupts had concealed the joint assets; and the other, that they had failed through inability to pay so large a proportion as they had offered. Different juries adopted both theories. One gave a verdict against these creditors for the fifty per cent., on the ground of an inability which they found to have been known to the preferred creditors; and another convicted one of the bankrupts of concealing assets, upon which he was duly sentenced to imprisonment. The preference was given and the bankruptcy occurred before December 1, 1873, and, of course, before the act of June 22, 1874 (18 Stat. [181]), was

[1] [Reprinted by permission.]

passed; but the cases were disposed of, and the judgments obtained and satisfied after the latter date.

The statute of 1874 (section 12), providing for proceedings in involuntary bankruptcy, declares that the assignees may recover back money paid contrary to the act, that is, to the bankrupt law, into which this section is incorporated, provided the person receiving such payments had knowledge of the fraudulent intent, and then says: "And such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy." The section for which this section 12 is substituted, provided, that if the assignees recovered back a preference, the creditor should prove no part of his debt. This provision gave the courts some trouble, because by another section it was declared that a preferred creditor should not prove any part of the preferred debt, that is, any amount above the payment, unless he surrendered the money or other property improperly paid him; which, of course, implied that if he did surrender, he might prove. Some judges thought the inconsistency might be reconciled by applying one to voluntary and the other to involuntary bankruptcies, but this was seen to be unjust and was overruled, and congress, in the amendment, expressly says, that it shall apply to both. The courts had already settled, by a great preponderance of decisions, that, considering the different language of the two sections, a surrender by the preferred creditor should mean a voluntary giving up of his preference, in which case he might prove; but if he chose to contest the assignees' title, and judgment was recovered against him, and levied, he should not prove; though he might, by permission of the court, even after an opinion had been given against him, and the charge was ripe for judgment, pay back the amount due, and the costs, and prove his debt. The effect of the amendment, in cases to which it applies, appears to be to adopt the decisions which apply the section to voluntary as well as involuntary cases; but to modify the statute itself by providing that the disability to prove a preferred debt, after a recovery of the assignees, should depend on actual fraud on the part of the creditor, which must mean something more than mere knowledge by him that a preference was intended, else it would be no amendment, and the change of language would be unexplained. Judge Blatchford, reconsidering a former opinion of his own, has decided that after a recovery against a preferred creditor, he can prove no part of his debt under any circumstances. In re Stein [Case No. 13,352]. His reason is, that "surrender" still means a voluntary act by the creditor. If the construction of that word decided the question, I might agree to this result; but the very section which declares that the creditor shall prove only a moiety of his debt, if he, himself, has been fraudulent, is one which relates to a recovery by the assignee, and it is impossible, I think, to sever the connection and say that a penalty which has been repealed, excepting in certain cases and to a certain extent, remains in full force. The meaning of the statute appears to me to be plain, that after a recovery of the damages and costs, the creditor may prove his debts, if he has not actively assisted in the fraud. This corresponds with the general practice in bankruptcy, which has always admitted such debts to proof But does this case come within the amendment? The amendment appears reasonable, because the creditor who receives payment of his debt may be guilty of the merest technical fraud, and one which is not a fraud unless the debtor becomes bankrupt within a short time; and therefore, I consider the amendment a wise and expedient one and to put the matter on its just footing. It says, in effect, that the penalty for honestly defending an action shall be, as in other cases, the damages and costs, and not an added loss, having no natural connection with that defence.' The statute is just, and also remedial, because it enlarges the rights of honest creditors to prove their debts, cutting off only those who have attempted to commit an actual fraud.

The decisions, so far as there are any, hold that statutes, enlarging rights of proof, apply to cases pending in bankruptcy at the time of their passage; but if there were no cases, I think the principle is so. The argument was forcibly pressed, that the section itself says it shall apply to cases begun since December 1, 1873; but the words of that part of the section are "all cases of compulsory or involuntary bankruptcy commenced" since that time; and the part now under consideration says it shall apply to voluntary as well as involuntary cases; which, I think, shows that the former clause refers to proceedings in compulsory bankruptcy, which are the principal burden of that section, and in which great changes were made not properly applicable to pending cases, and not to this clause, which is a provision of a general character, intended to regulate the right of proof in both classes of cases, and, therefore, is independent of the limitation expressly adapted to involuntary cases.

Debt admitted to proof.

BLACK (HOLBROOK v.). See Case No. 6,590.]

Case No. 1,460.

BLACK et al. v. HUBBARD et al.

[3 Ban. & A. 39;[1] 12 O. G. 842.]

Circuit Court, N. D. New York. Aug. Term, 1877.

PATENTS—INFRINGEMENT—ASSIGNEE OF LICENSEE.

1. The agent of the patentee authorized H. & Co., for a valuable consideration, to construct a furnace, involving the patent, for use at their tannery. The furnace was constructed there by H. & Co., in pursuance of the license, and the defendants afterwards acquired it from them: *Held*, that the patentee, who was the complainant's intestate, had no right or interest in respect to the furnace so built, or to the use of it in the place where it was so built, during the term of his original patent, and acquired none by the extension thereof afterward obtained, and that the defendants, who acquired it from H. & Co., have had and still have the right to use it, clear of any claim for infringement by the patentee or his representatives.

[Cited in Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 670; American Tube-Works v. Bridgewater Iron Co., 26 Fed. 336; Montross v. Mabie, 30 Fed. 236.]

2. It is a sufficient defence to a suit for infringement, to show that the infringing machine was constructed for use by the defendants or those under whom they claim, with the consent of the patentee, obtained and paid for.

[3. Cited in Montross v. Mabie, 30 Fed. 234, to the point that the extent of the license is the contract of the party making it.]

[In equity. Bill by Charles N. Black, as administrator of Moses Thompson, and Eliza W. Fitzgerald, as administratrix of William P. N. Fitzgerald, against Joseph B. Hubbard and Charles North, for infringement of letters patent No. 12,678, granted to said Thompson, April 10, 1855, and reissued March 31, 1857 (No. 446). Bill dismissed.]

Charles N. Black, for complainants.

William H. Bright and B. B. Burt, for defendants.

WHEELER, District Judge. This cause has been heard on bill, answer, replication, testimony, and argument of counsel. In Bloomer v. Millinger, 1 Wall. [68 U. S.] 340, the supreme court, in considering the right to use a thing patented, acquired of, or made by authority of the patentee, both during the time of the original and also of an extension of the patent, Clifford, J., delivering the opinion of the court, say: "Patentees acquire the exclusive right to make and use, and vend to others to be used, their patented inventions for the period of time specified in the patent, but when they have made and vended to others to be used one or more of the things patented, to that extent they have parted with their exclusive right. They are entitled to but one royalty for a patented machine, and consequently when a patentee has himself constructed the machine and sold it, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for the right, he has then to that extent parted with his monopoly, and ceased to have any interest whatever in the machine so sold or so authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

In this case it clearly appears, from the testimony of Lewis Rider and Charles North, that Rider was an agent or attorney of the patentee of the invention in question, and that as such agent he authorized Hubbard, Coman & North, in consideration of one hundred and fifty dollars paid, to construct a furnace, involving the patent, for use at their tannery, and that such a furnace was constructed there in pursuance of that license, the use of which at that place is the infringement complained of. Upon the principles stated, applied to these facts, after that transaction, the patentee, Moses Thompson, the orator's intestate, had no right or interest in respect to the furnace so built, or the use of it there, during the time of his original patent, and acquired none by his extension afterward. And those who constructed it under his authority, and the defendants who acquired it of them, have had and still have the right to use it at that place clear of any claim for infringement by him or by the orators who are his representatives. Wooster v. Sidenberg [Case No. 18,039]. And the construction of the furnace under that authority, although prior to the patent for improvement in bagasse-furnaces, obtained December 15th, 1857, would, according to those principles, as well as by force of the express provisions of the statutes (Rev. St. U. S. § 4899), give the right to use the furnace there against that patent.

It is objected, in argument, that there is not sufficient proof of the loss of the power of attorney to Rider; nor of the written instrument executed by him to Hubbard, Coman & North, to lay foundation for proof of their contents; nor sufficient proof of their contents, if admissible, to show any lawful conveyance of the right to use this furnace. But in the view taken of this case these objections are immaterial. Hubbard, Coman & North may not have acquired the right to use the furnace by lawful conveyance, according to the statutes, of that right, as a subject of conveyance by itself. The defendants do not stand upon such a conveyance. They acquired the right to use it by constructing it for use with the consent of the patentee obtained and paid for. To make out their defence it is only necessary for the defendants to show the construction, with such consent, by competent proof. These are facts that might be proved by any evidence

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

ordinarily competent to prove such facts. The testimony of Rider, when credited, abundantly shows that he was the agent of the patentee, in a general way, to dispose of the right to use the furnaces. This would include the right to part with the monopoly by consenting to the construction of furnaces involving the invention. The testimony of both him and North shows that this furnace was constructed with his consent, given on behalf of Thompson, the patentee, and the consideration for it paid. And the testimony of North further shows that the defendants acquired all the rights of Hubbard, Coman & North in the furnace, which would carry the right to use that furnace there, as long as it should last. For these reasons it is considered that the orators have not maintained any claim against the defendants, as set up in their bill of complaint.

The bill of complaint of the orators is dismissed with costs.

[NOTE. For other cases involving this patent, see note to Black v. Thorne, Case No. 1,465.]

Case No. 1,461.

BLACK v. The LOUISIANA.

[2 Pet. Adm. 268.] [1]

District Court, D. Pennsylvania. 1804.

SEAMEN—INCOMPETENCY — DISHONESTY — INTEMPERANCE—WAGES—DISCHARGE—REINSTATEMENT.

1. Remnants of a ship's stores are not perquisites of the steward.

[Cited in The Mentor, Case No. 9,427.]

2. No amends can be made [by a steward] for disqualification.

[Cited in The Nimrod, Case No. 10,267.]

3. Cook and steward may sue as mariners yet in their duties are distinct.

[Cited in Allen v. Hallet, Case No. 223; Sheridan v. Furbur, Id. 12,761.]

[4. In what cases a master is justified in discharging a steward.]

[5. Cited in Hutchinson v. Coombs, Case No. 6,955, to the point that a master may discharge a steward who is guilty of gross dishonesty, as embezzlement or theft.]

[6. Cited in Sherwood v. McIntosh, Case No. 12,778, to the point that a master is justified in degrading or discharging a steward for habitual intemperance.]

[7. Cited in The Garnet, Case No. 5,244, to the point that the dismissal of a cook or steward incapable from drunkenness may be ratified with more latitude than that of mariners.]

8. The master is not compelled, after dismissal, to receive him again.

9. Casual offences may be overlooked, but confirmed and incorrigible vice is a disqualification.

In admiralty. A steward of a ship belonging to Philadelphia, was discharged, for malconduct, at Liverpool, in England, where the vessel had delivered her cargo, and earned her freight, for that section of the voyage. On the ship's arrival at Philadelphia, he sued for wages during the whole voyage. He alleged that he had been discharged, at the foreign port, without lawful cause. It appeared, in proof, that the steward had carried on shore, and sold, a considerable quantity of cabin-stores and provisions, which had been left on board by passengers. He had, by landing these articles, endangered the ship, under the revenue laws of that country.

For the steward, it was contended—1st. That the stores and provisions left on board by the passengers, were his perquisites. 2d. That if they were not, he had tendered amends and satisfaction, and offered to return to his duty, and should have been received, agreeably to the maritime law.

PETERS, District Judge. I am satisfied, on due enquiry, that the remnants of stores and provisions, are not perquisites of the steward. They commonly belong to the master, unless it is otherwise arranged, by the custom and usage in such cases. The passengers may, and often do select certain articles of extra stores, for their own disposal; I find no positive, or legal regulation on the subject, much less, any giving a property in such stores, to the steward. If the fact or law, were, as is contended in this cause by the steward's counsel, it would be his interest to stint the passengers, that he might possess the remnants. I consider the steward, as having been guilty of a flagrant breach of trust, and of embezzlement. There is no proof of tender of amends and satisfaction. Such tender and submission, would operate favourably to a mariner, having committed a pardonable fault; but no amends, or satisfaction, can be made, for a disqualification or incapacity.

Although the cook and steward are authorized to sue in the admiralty court, as mariners and part of the crew, yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship. If the cook or steward is found incapable, from dishonesty, drunkenness, extreme filthiness, gross ignorance or negligence, to perfom their duty, I have often ratified their dismission, with more latitude than that of mariners who may know and do their duty, though guilty of temporary aberrations; and I have not deemed the master so rigidly bound to receive them though he may consent to the re-acceptance of their services. If a steward is an habitual drunkard, if he grossly wastes, purloins and sells, the stores committed to his charge, it is lawful for the master to dismiss him. He renders himself unworthy of further trust, and is unfit for so confidential a station. If dismissed, the master ought not to be compelled to receive him again. Disobedience, casual drunkenness, passionate or insolent behaviour, accidental negligence, or carelessness, may be overlooked and forgiven. During a long, or untoward passage

[1] [Reported by Hon. Richard Peters, District Judge.]

and with some masters as well as passengers, any passage is a trial of patience and temper: stewards are often the objects of acidities, arising from other causes than their own conduct. Cooks have also their share, of such acrimonious effervescences. These place them often in situations, to revolt against what they deem unmerited ill-treatment; but it is their duty to suffer beyond the point of moderate forbearance. Amends may be made for offences, venial, or not inveterately vicious, and on submission, or tender of satisfaction, their services should be re-accepted. In such cases I have decreed wages; especially, when it required a more balancing, or nicely discriminating view of the subject than I desire to take, to determine who was most in fault. The solemnity of a contract, always should turn a doubtful scale.

But want of honesty is a disqualification, and not a pardonable fault in a steward, to whom are committed the necessaries, conveniences and comforts of those on board. His duties are peculiar, and separate from those of common seamen. His case cannot, in many respects, be considered within the reason and contemplation of the rules of the maritime laws, applicable to mariners committing faults. I decree wages to Liverpool, deducting the value of the articles embezzled.

This is another exception to the general rule of obligation to receive a repenting member of the crew, tendering his service and amends. This rule may be tested by its exceptions; exceptio probat regulam. There can be no amends for a radical disqualification. Although I have often decided, that a repenting mariner, discharged even for lawful cause, should be again received, agreeably to the law of Oleron; yet I have not so decided, without limitation. One shipping for a seaman, who was utterly ignorant and incapable, whether from want of nautical skill or disease, at the time of making the contract—one discharged as really dangerous to the peace and safety of the ship, or the property on board—notoriously dishonest and incorrigible—has never been held to be unconditionally entitled to a restoration to his contract. In such cases I have ratified the refusal of the master, to receive him, on any terms.

Case No. 1,462.

BLACK v. McCLELLAND.

[12 N. B. R. 481;[1] 7 Chi. Leg. News, 420; 1 N. Y. Wkly. Dig. 174; 32 Leg. Int. 363; 23 Pittsb. Leg. J. 9.]

Circuit Court, W. D. Pennsylvania. Sept. 4, 1875.

BANKRUPTCY—PROVABLE DEBT—VERDICT IN ACTION OF TORT—LEAVE TO ISSUE EXECUTION.

1. A mere verdict in an action for a personal tort is not a provable debt.

[Cited in Re Boston & Fairhaven Iron Works, 23 Fed. 881, 29 Fed. 784.]

2. A judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, upon a verdict rendered before that time, is not a provable debt.

3. A party who holds a judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy need not apply to the district court for leave to issue an execution.

[Appeal from the district court of the United States for the western district of Pennsylvania.

[In bankruptcy. Petition by C. L. Black for leave to issue process from the state court on a judgment entered therein May 6, 1875, on a verdict rendered January 12, 1875, against William H. McClelland, who was adjudicated a bankrupt March 20, 1875. From an order granting the prayer of the petition, the bankrupt appeals. Appeal dismissed.]

On the 11th of August last, application was made to Judge McCandless, of the district court of the United States, to permit the plaintiff to issue process on the judgment obtained by Black against McClelland, in the court of common pleas No. 2, for the county of Allegheny. The application set forth that on the 7th of May, 1874, an action was instituted in the district court (now court of common pleas No. 2), by Black against McClelland, for injuries done by McClelland to the petitioner in punching out his eye with an umbrella. The petitioner further sets forth that on the 12th of January, 1875, he recovered a verdict for three thousand eight hundred and fifty dollars against McClelland as damages; that on the 15th of January, 1875, a motion for a new trial was made, and on the 2d of April, 1875, after argument, this motion was refused; that on the 6th of May, 1875, judgment was entered on the verdict. That after the verdict and prior to the entry of judgment (to wit, on the 20th of March, 1875), said McClelland filed his petition in bankruptcy, and was on the same day adjudicated a bankrupt. The petitioner prayed the district court of the United States for leave to issue process from the state court for the collection of his debt.

The case was argued by David Reed, Esq., for Black, and C. S. Raymond, Esq., for McClelland, before his honor, Wilson McCandless.

The petitioner's counsel claimed, as the verdict was for damages in tort and no judgment being entered upon the verdict at the time of the adjudication in bankruptcy, it was not a debt provable in bankruptcy at the time of adjudication, and consequently the proceeding in bankruptcy was not a discharge of the debt, and he should be allowed to issue process for the collection of the debt.

To this application Judge McCandless made the following order on August 19th, 1875: "Motion allowed and leave granted to issue execution in the case of C. L. Black v. Wm. H. McClelland, No. ——, July term, 1874, common pleas, Allegheny county."

The defendant, McClelland, appealed to the circuit court, and the case was, on August

[1] [Reprinted from 12 N. B. R. 481, by permission. 1 N. Y. Wkly. Dig. 174, contains only a partial report.]

28th, 1875, argued by the same counsel, before Hon. Wm. McKennan, judge of the circuit court of the United States.

McKENNAN, Circuit Judge. By the 19th section of the bankrupt act, the time of the adjudication of bankruptcy is fixed as the date with reference to which the provable character of the bankrupt's liabilities are to be determined; liabilities which are not within the category of provable debts, as the act enumerates and describes them, are not chargeable upon the bankrupt's estate, and are not discharged by his certificate.

In this case the plaintiff was adjudicated a bankrupt on his own petition. Before the filing of the petition an action of trespass against him for an assault and battery, brought by the respondent in this proceeding in the state court, had been tried and a verdict rendered in favor of the plaintiff, but a motion for a new trial was made by the defendant, and judgment was not entered upon the verdict until after adjudication in bankruptcy. The question, then, upon which the result of the present proceeding depends is, whether the amount of the verdict is a provable debt against the bankrupt. In England this was long a subject of contention, and the decisions of the English courts touching it are in direct conflict with each other. But in Ex parte Hill, 11 Ves. 646, where the question came before Lord Eldon, incidentally, he discussed most of the cases on both sides of it, and expressed strong doubt of the soundness of those which held that a verdict in an action for damages for a tort was a provable debt in bankruptcy, and in Ex parte Charles, 16 Ves. 256, where it was directly presented for decision, he ordered a commission in bankruptcy to be superseded, which was issued upon a creditor's petition, whose debt consisted of a verdict for damages in an action of breach of promise of marriage rendered before the act of bankruptcy, and upon which judgment was entered before the allowance of the commission. At the same time he directed a case to be stated for the opinion of the judges of the king's bench, who after full argument and deliberate consideration of the question, with all the cases bearing upon it, unanimously certified their opinion that the debt of the petitioning creditor was not sufficient in law to support the commission. Ex parte Charles, 14 East, 197. Since then the law has been settled accordingly in England.

The phraseology of the American act seems to have been employed with reference to the exposition of the English statute. All debts due or owing before the bankruptcy are provable under the British statute, but in the enumeration in the American act, this class of provable indebtedness is restricted to debts which are not only due, but payable at the time of the adjudication, or whose payment is postponed to a future day.

Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it, or by the allowance of a new trial. No action could be maintained upon it; it does not bear interest, and no determinate character is impressed upon it until the court has pronounced its judgment, that the plaintiff do recover from the defendant the amount of it. The judgment establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable.

The respondent's debt was not, therefore, in the category of debts provable against the bankrupt's estate at the time of the adjudication, and so it was not necessary for him to apply to the bankruptcy court for leave to take judgment on the verdict, or to issue execution thereon; and the bill of review must be dismissed at the cost of the complainant.

Case No. 1,463.

BLACK et al. v. MUNSON et al.

SAME v. WELLS et al.

[14 Blatchf. 265; 2 Ban. & A. 623.][1]

Circuit Court, D. New York. June 19, 1877.[2]

PATENTS — INFRINGEMENT — ASCERTAINMENT OF PROFITS—EVIDENCE—LICENSE FEE—ROYALTY.

1. In ascertaining the profits derived by a defendant from the use of a patented improvement in a furnace for burning wet tan as fuel, the plaintiff must show, before the master, the particular profits which accrued to the defendant from using such improvement, and is not entitled to the entire profits arising from the use of the furnace.

[Cited in Gould's Manuf'g Co. v. Cowing, Case No. 5,643; Schillinger v. Gunther, Id. 12,457; Greenleaf v. Yale Lock Manuf'g Co., Id. 5,783; Westcott v. Rude, 19 Fed. 833; Reed v. Lawrence, 29 Fed. 918.]

[See note at end of case.]

2. Where the plaintiff fails to give evidence as to such particular profits, the court will not consider exceptions taken by the plaintiff to what is alleged to be incompetent evidence put in by the defendant before the master.

[Cited in Garretson v. Clark, Case No. 5,248; Cornely v. Marckwald, 32 Fed. 293.]

3. The question of what amounts to a fixed license fee or established royalty, considered.

[Cited in Greenleaf v. Yale Lock Manuf'g Co., Case No. 5,783; Matthews v. Spangenberg, 14 Fed. 351; Westcott v. Rude, 19 Fed. 833.]

[In equity. Bills by Charles N. Black, as administrator of Moses Thompson, and Eliza W. Fitzgerald, as administratrix of William P. N. Fitzgerald, against Daniel Munson and

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 623; and here republished by permission.]

[2] [Affirmed by supreme court in Black v. Thorne, 111 U. S. 122, 4 Sup. Ct. 326.]

Henry Knight, and by the same against Henry F. Wells and others, for infringement of letters patent granted to said Thompson—one, April 10, 1855, numbered 12,678, reissued March 31, 1857 (No. 446); the other, December 15, 1857, numbered 18,874—for improvements in furnaces for burning wet fuel and in bagasse furnaces. There was a decree for complainants and for an accounting, and plaintiffs excepted to the master's report. Exceptions overruled.]

Charles N. Black, for plaintiffs.
Dorman B. Eaton, for defendants.

HUNT, Circuit Justice. In the opinion given by me upon the merits of this case, it was held: 1. That the Thompson patent was not intended to include, and did not include, a claim to an invention or discovery of the use of wet tan as a fuel. 2. That the operation of the heat or fire of the ash pits in drying the wet tan, was not a part of the claim. 3. That the parts or combinations of the furnace were not claimed, except in their application to the preparation and combustion of wet fuels. 4. That the construction and operation of the mixing chamber was the elemental idea of the patent, and that this was an improved machine by which the principle of mixing and applying the different heated gases is carried out. 5. That the defendants' machines infringed the right thus secured by Thompson's patent.

In examining the exceptions made to the master's reports, I am not able to see that he has erred in the principles of law laid down by him. The principles laid down by the master, which are embraced within the first four of the complainants' exceptions, fall within the conclusions above stated, and the exceptions must be overruled.

The fifth exception is to that part of the report which announces "that the complainants' patent only secures to the patentee a part of the furnace, and it was the duty of the complainants to show by proofs, which they have failed to do, the particular profits which have accrued to the defendants from the use of the particular improvement of Thompson's, and that this was necessary in order to show any savings to the defendants, or profits made by them, by the use of Thompson's invention." This principle is sound, and, applied to the present case, means, that the defendants cannot be charged with the profits arising from the use of a furnace which burns wet tan as a fuel, and which dries the tan, in its use, by means of its fires or ash pits, and which also uses a mixing chamber upon the principle of Thompson's furnace. The first two operations the defendants have the right to use, and all the profits and advantages to be made from their use belong to them. They infringe upon no right of Thompson or the complainants, in such use. Thompson's patent gives a monopoly of the use of the mixing chamber only, and it is only for the profits that arise from that portion of the furnace that he can claim damages. It is possible that the profits made by the defendants' machine are in spite of, rather than in consequence of, the use of the mixing chamber described. Conceding that the apparatus and process of Thompson are used by the defendants, it does not follow that the profits of the business are due to that source. The master justly says, that it is the duty of the complainants to make proof of the profits arising from the use of that portion of the furnace which is included in Thompson's improvement. The opinion before referred to, and that of Judge Blatchford in the Thorne Case (Black v. Thorne [Case No. 1,465]), both hold, that the furnaces constructed after the models of the Hoyt, Sparrowbush, Crockett and Morrison furnaces, as arranged before the date of Thompson's invention, are not in conflict with Thompson's patents. I consider it clear, therefore, that the principle laid down by the master, as applied to this case, is a sound one. It is not enough, therefore, for the plaintiffs to prove, that, in burning wet tan in his furnace, and in using Thompson's improvement, the defendant Knight saved $5,691 in the item of wood, between January 1st, 1864, and May 22d, 1872. They must show, also, that this economy was due to the use of Thompson's improvement, to wit, the construction and apparatus of the mixing chamber. This they fail to do.

The plaintiffs also except to the decision of the master in permitting proof to be made, that the defendants are now burning wet tan in Hoyt's or Crockett's furnaces. This is supposed to be what is meant by the seventh exception, which is entirely general in its terms, not specifying whose testimony, or on what points, or on what occasion, or as to what subject, the objection is taken. I think this exception must be overruled for the reasons following: 1st. It is too general. 2d. Assuming that it refers to the evidence intended to rebut the claim of damages, by showing that an equally good result was produced in the furnaces in which wet tan is burned which did not use Thompson's improvement, it comes within the principle of Mowry v. Whitney, 14 Wall. [81 U. S.] 620. What advantage did the defendants derive from using the plaintiffs' improvement, over any other furnace open to their use? 3d. If, as I have before stated, the plaintiffs have failed to establish their claim by showing what portion of the profits was due to the use of Thompson's improvement, then the defendants are not put upon their defence in that respect, and, whether they gave incompetent evidence, or no evidence, is not important. If their evidence, in this respect, is all stricken out, they are protected by the plaintiffs' failure. They are not called upon to rebut until the plaintiff has made out a case.

The plaintiffs contend, further, in their

eighth exception in the Wells Case, that they have made out their damages upon the datum of a fixed license fee for the use of the improvement. In an action in equity, (which is this case,) profits made by the assignee by the use of the improvement, constitute the general measure of damages. Sales, or a royalty established, on the other hand, constitute the primary criterion of damages in actions at law (Burdell v. Denig, 92 U. S. 716;) but, in any court, this latter rule can only be applied, where there is a fixed and established price at which a license is granted. No price can be said to be fixed, or royalty established, where the patentee varies his price according to the courage, or the ability to resist, of the infringer, or where there are other circumstances showing the absence of a fixed and established fee. The master states, in his report, that the counsel and plaintiff (Mr. Black) admitted, on the argument before him, that he had not established any fixed license fee. I must assume this to be true. Mr. Black's testimony shows, that two-thirds of those who took licenses from him, did so after suit commenced against them, and a liability to be stopped in their business by injunction, and that the amounts varied from $100, the sum received from Mr. Wood, to $2,500, the amount collected from Mr. Stevens by litigation. To the Boston Dye Wood Co. he gave a license for the sum of $3,000, but afterwards deducted $1,250, because their furnace did not work well. None of the licenses given by him expressed any limitation as to the amount of business to be done under it. I know of no authority and of no principle, on which, under these circumstances, it can be held that damages are established by the existence of a fixed license fee or an established royalty.

I have not discussed or passed upon the exceptions seriatim or by numbers, but the views expressed cover the whole case, and I am of the opinion, and do decide, that each and every one of the said plaintiffs' exceptions should be overruled.

[NOTE. For other cases involving this patent, see note to Black v. Thorne, Case No. 1,465.

[On affirmance by the supreme court, FIELD, J., delivering the opinion, said: "The report could not have been otherwise than as it was. It does not always follow that because a party may have made an improvement in a machine, and obtained a patent for it, another using the improvement and infringing upon the patentee's rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer, or impair the just rewards of the inventor. The inventor may, indeed, prohibit the use, or exact a license fee for it; and, if such license fee has been generally paid, its amount may be taken as the criterion of damage to him when his rights are infringed. In the absence of such criterion, the damages must necessarily be nominal." Black v. Thorne, 111 U. S. 122, 4 Sup. Ct. 326.]

Case No. 1,464.

BLACK et al. v. SCOTT et al.

[2 Brock. 325.] [1]

Circuit Court, D. Virginia. June 30, 1828.

EXECUTORS AND ADMINISTRATORS — DEMANDS AGAINST ESTATE—CLAIM OF WARD—PRIORITY—STATUTE OF WILLS — MEANING OF "ESTATE"—LIEN OF WARD—EQUITABLE CONVERSION.

1. The proceeds of the sale of the real estate of J. L., deceased, constituting a very large fund, being in the hands of the federal court, for distribution among his creditors, the executor of W. L. M., a ward of J. L., moved the court for an order that he should receive the amount of the ward's claim against J. L.'s estate, which had been established by a decree of the court of chancery for the state of Virginia. The fund in possession of the court being inadequate for the payment of all the debts of J. L., deceased, for which his real estate was bound, the executor of the ward claimed the whole amount of the debt due to his testator, both as a creditor by bond (the guardian having given a bond in which his heirs were bound), and by virtue of the acts of assembly of Virginia, in such cases provided. By the law of Virginia, it is provided, that the "estate of a guardian or curator, appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her, on account of his or her guardianship, to his or her ward, before any other debt due from him or her" (see act concerning guardians, &c., 1 Rev. Code, c. 108, § 12, p. 408), and that "the executors or administrators of a guardian, of a committee, or of any other person, who shall have been chargeable with, or accountable for the estate of a ward, an idiot, or a lunatic; or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate, to the ward, idiot, or lunatic, or to the legatees, or persons entitled to distribution, before any proper debt of their testator or intestate" (see act concerning wills, intestacy, and distributions, Id. c. 104, § 60, p. 389). The will of J. L., contained the following clauses:—"In the first place, I desire that all my just debts may be paid, and for this purpose, I subject my whole estate, real and personal. In case it should be necessary for the purpose of paying my debts, to sell any part of my real estate, I give to my executors, after named, the power of so doing," "and authorize my said executors, or such of them as may act, to make conveyances to the purchaser or purchasers." "All the rest and residue of my estate, after the payment of my debts and legacies as aforesaid, I give to my two children, Andrew and Jane." The devisees of the residue, were his heirs at law. *Held*: 1. That the 12th section of the law concerning guardians, &c., and the 60th section of the act concerning wills, &c., having both been passed at the same session of the legislature, and being in pari materia, must be considered in connexion as if they were parts of the same act; that the latter section applies only to executors and administrators, in the administration of the effects of their testator or intestate, that come to their hands in their official character, giving priority to debts due to a ward, an idiot, a lunatic, or the estate of a dead person, &c., over all others, but placing them all on the same footing with reference to each other.

2. That the word estate, in the 12th section, concerning guardians, &c., must be construed to apply only to the real estate of the guardian, for if it were applicable to the personalty also, it would give the ward the priority on the personal estate, over persons who are, by the section respecting wills, &c., expressly placed on

[1] [Reported by John W. Brockenbrough, Esq.]

an equal footing with him. But this act gives the priority to the debt due to the ward, to any bond debt due from the testator or intestate, on his own account.

3. But this statute does not create a lien on the lands of the guardian, for that would bind them in the hands of a purchaser. To give it such an interpretation, would violate the general policy of the law, in setting up a secret lien, in restraint of alienations, and is not required, either by the express words of the act, or any necessary construction of it. But

4. Although this act does not create a lien on the guardian's lands, it does create a liability of the heir, or devisee, to pay the debt due to the ward on guardianship account, in consideration, and to the amount, of the land descended or devised, and does not merely give the preference to an existing liability. The words in the section, "the estate of a guardian, or curator, appointed under this act, shall be liable, &c.," although the comma in the printed code, is placed after the word "curator," must be read as if it was placed after the word "guardian," so as to bind the lands of all guardians, and not merely "guardians appointed under this act," or statutory guardians. Thus, the debt due to the ward of a testamentary guardian who was not required to give bond, would as effectually bind his lands in the hands of the heir, or devisee, under this construction of the act, as of a statutory guardian who had given a bond binding his heirs.

[See Ewing v. Burnet, 11 Pet. (36 U. S.) 54; U. S. v. Three Railroad Cars, Case No. 16,513; U. S. v. Voorhees, 9 Fed. 144; Hammock v. Farmers' Loan & Trust Co., 105 U. S. 83.]

5. The testator J. L., having, by his will, subjected his whole estate to the payment of his debts, (which was a valid devise, sanctioned both by the principles of equity, and the act for the relief of creditors, against fraudulent devises,) and empowered his executors, or such of them as might act, to sell his lands, and convey to the purchaser; has converted his whole real estate into equitable assets, subject to the payment of all his debts equally.

6. The 12th section of the act concerning guardians, &c., before cited, having declared that "the estate of a guardian, or curator, &c., shall, &c., be liable for whatever may be due from him or her, on account of his or her guardianship, &c., before any other debt, &c.," although it gives priority, and creates liability, if it did not before exist, can apply only to real estate, in a condition to be reached by other debts. The language of the section is comparative, comparing the charge it creates with other charges, and giving it the priority over them. Before the passage of the act against fraudulent devises, lands devised, were not liable for any debt whatever, and that statute expressly protects devises for the payment of debts, and declares them valid: it protects the trust, and leaves the estate to its operation. The act of assembly applies to legal, and not to equitable assets. Wherever real estate is made equitable assets by the will, the equitable principle must prevail, and the executor of the ward is only entitled, therefore, to his equal proportion of the fund arising from the real estate of J. L.

In equity. A statement of the facts, and of the statute of Virginia, essential to the elucidation of the various points discussed and settled in the following opinion, is embodied in the above caption. On the 30th of June, 1828, the chief justice delivered his opinion as follows:

MARSHALL, Circuit Justice. This is an application on the part of John Forbes, executor of William L. Myers, for an order that he shall receive the amount of his claim, which has been established by a decree of the court of chancery of the state, out of the proceeds of the real estate of John Lesslie, deceased, which are now in the possession of this court for distribution among his creditors.

William L. Myers was a ward of John Lesslie, and priority is claimed for him over all other creditors out of the real estate of his guardian. This priority is claimed under the 12th section of the act "to reduce into one, the several acts concerning guardians, orphans, curators, infants, masters, and apprentices," which is in these words: "The estate of a guardian or curator, appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her, on account of his or her guardianship, to his or her wards, before any other debt due from him or her."[2] This clause has been, in the argument, considered in connexion with the 60th section of the "act reducing into one, the several acts concerning wills, the distribution of intestate's estates, and the duty of executors and administrators," which was passed at the same session. That section is in these words: "The executors and administrators of a guardian, of a committee, or of any other person who shall have been chargeable with, or accountable for the estate of a ward, an idiot, or a lunatic, or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate to the ward, idiot, or lunatic, or to the legatees, or persons entitled to distribution, before any proper debt of their testator or intestate."[3] It has been truly said, that these two acts, having been passed at the same session, respecting the dignity of claims on the estates of deceased persons, ought to be considered together, and that the two sections ought to be construed as if they were contained in the same act. It has been added, not, I think, with the same correctness, that the one ought to restrain and limit the extent of the other. I have to regret, that these two sections, which are certainly very interesting to the people of Virginia, have not received a settled construction in the state courts, and that this court should be required to hazard an opinion on any point which may not heretofore have arisen in them. It is, however, my duty to state my view of the subject, which I shall be ready to correct, if a different view of it shall be taken in the state courts. In doing this, I shall first consider the 60th section of the act concerning wills, &c., as if it stood alone. The

[2] See 1 Rev. Code Va. 1819, c. 108, § 12, p. 408, passed Feb. 18, 1819.

[3] See 1 Rev. Code Va. 1819, c. 104, § 60, p. 389, passed March 3, 1819.

words of that section are applicable exclusively to the conduct of executors or administrators, in disbursing the assets of their testator or intestate, which come to their hands in their official character. The language of the section will admit of no other interpretation. It applies to no other part of the decedent's estate, and regulates the conduct of no other person. The section is addressed to executors and administrators, and prescribes their duty in the case it describes. That case is the existence of a debt due from their testator or intestate, to the estate of a lunatic or of any deceased person, which may have been committed to his charge. These claims have priority to any proper debt of their testator or intestate, and must be paid by such executor or administrator, out of the assets which may come to his hands. I think it cannot be doubted, that as between themselves, these debts have equal dignity.

The language of the 12th section of the act, concerning guardians, &c. is entirely different. It does not address itself to the personal representatives of the deceased, nor prescribe their duty; nor does it comprehend all the persons who are described in the 60th section of the act concerning wills, &c. It affects the estate of the deceased, not under a specific lien, and provides for the single claim of a ward, on the estate of his curator or guardian. The language of this section reaches the real estate, and must have been so intended. It provides that such estate, not being under any specific lien, shall be liable for such debt, before any other debt due from him or her. A question might arise, whether this section gave priority to a ward on the personal estate over other persons enumerated with him, in the 60th section of the act concerning wills, &c. If it did give such priority, the two acts would be inconsistent with each other. The one would give the ward a preference over persons, whom the other, in express words, placed on an equal footing with him. The rule which requires that acts in pari materia should be construed together, requires that the persons enumerated in the 60th section of the act concerning wills, &c. should stand equal in their claims on the personal estate, and that the 12th section of the act concerning guardians, &c. should apply only to real estate. The same rule, however, requires that it should apply to real estate.

In making this application, I cannot doubt, that the debt due to the ward, is to be preferred to any bond debt due from the testator or intestate on his own account. The language of the act is imperative and explicit. It has been said, that heirs commit no devastavits. From this it is inferred, that one claim can have no priority over another. I shall not examine this proposition. If its truth be admitted, the inference is not of course. In England, all bond debts binding the heir, unless it be the debt to the king, are equal. In Virginia, they are not equal. A debt due to the ward has a prior claim on the estate of his guardian, to any other debt due to a proper creditor of the guardian. And though I will not say that the heir or devisee may, or may not, commit a devastavit, that he may or may not plead a debt due to a ward, to an action, I think it may be said, that where both claims come before a court administering legal assets, that which the law prefers, is entitled to preference from a tribunal which expounds and applies the law.

A question of more difficulty, is, on the operation which this statute has on the land of the guardian. Does it create a lien? If it does, the land would be bound in the hands of a purchaser. This has never been supposed, and would be an alarming construction. It would, contrary to the general policy of the law, set up a secret lien, which would be a restraint on alienations not imposed by express words, and not required by any necessary construction of the section. Does it, without giving a lien on the land itself, create a liability of the heir or devisee to pay the debt due to the ward, in consideration of the land descended or devised, or does it merely give preference to an existing liability? The language of the section would indicate, that priority alone was in the mind of the legislature. Its object does not seem so much to enable the ward to obtain satisfaction out of the real estate, as to give an existing claim on that estate a preference to other existing claims. The estate shall be liable to it, "before any other debt due from" the guardian. The legislature would seem to have in its mind, debts for which the estate is liable, and to decide on the dignity of those debts. If, according to the existing state of the law, all debts due to wards from the estates of their guardians, which have preference under this section, have a right to claim satisfaction from heirs and devisees, to the extent of the estate descended or devised, the statute may be construed, not as giving the right, but as giving priority to that right. But if the section applies to cases where no antecedent right exists, it would be difficult to resist that construction of the words, which gives the right as well as the priority. The words of the section which describe the estate to which it applies, are "The estate of a guardian or curator, appointed under this act, &c." If the words, "appointed under this act," apply to a guardian as well as a curator, then priority is given to the wards of statutory guardians only, not to the wards of testamentary guardians; and all statutory guardians are required to give bond. If they apply to a curator only, and give equal priority to a debt due to a ward, whether his guardian was created by testament or by a statute, then priority is given in a case where no antecedent right existed. Testamentary guardians are not required to give bond, if the testator has otherwise directed by his will,

At least this appears to me to be the proper construction of the 2d and 5th sections of the act compared with each other. If the words, "The estate of a guardian or curator appointed under this act, shall be liable, &c." be read with a comma, after the word "guardian," the words, "appointed under this act," could apply solely to the curator. But in the printed code, the comma is placed after the word, "curator," so as to connect the guardian with the curator, and apply the subsequent words equally to both. I am, however, aware, that not much stress is to be laid on this circumstance; and that the construction of a sentence in a legislative act does not depend on its pointing. The legislature can scarcely be supposed to have intended to distinguish between remedies for debts from testamentary and statutory guardians, and I am, therefore, disposed to read the act with the comma after the word "guardian." But although the act directs bonds to be given by guardians, it does not prescribe the form of the bond, or that the heir shall be bound in it. The usage undoubtedly is, to bind the heirs, and it is not probable that any court would be inattentive to this circumstance. The legislature may be presumed to have had such a bond in contemplation, and to have legislated on the idea that the heirs were uniformly bound in it. But suppose a court should neglect to take a bond, or should take a bond in which the heirs were not named, would the general provision of the act, that the estate of the guardian shall be bound to satisfy the debt due to his ward, before any proper debt of his own, be defeated by this omission? I should feel much difficulty in answering this question in the affirmative.

The history of the legislative enactments on this subject, has been referred to in the argument. The act of 1705, for the distribution of intestate's estates, &c., subjects the estate of any person who shall die, chargeable with the estate of any person deceased, or with any orphan's estate, to the payment of such debt, in the first instance, in terms which would apply to real as well as personal estate. The same act may be construed to require bond from testamentary guardians, or from those only to whom the orphan's estate may be committed by the court. In the year 1748, a revisal of the laws was made. The act "for the better management and security of orphans and their estates," gives the debt due from the guardian to his ward priority against the personal estate only, and requires bond from those guardians only to whom the estates of orphans have been committed by order of court. As this revisal is understood to have been the work of the ablest lawyers of that day, it is probable that this act contains the received construction of the act of 1705. The laws were again revised in 1779, and the bills prepared by the revisers, were enacted in 1785. The 50th section of the act concerning wills, &c., gives the same priority against the personal estate which is given by the act of March, 1819. The 1st section of the "act concerning guardians, infants, masters, and apprentices," renders the estate of every guardian liable, in the first instance, for any debt due to his ward on account of his guardianship, but requires no bond from any guardian not appointed by the court. The revisal of 1792, re-enacts the provisions contained in the acts of 1785. In December, 1794, for the first time, an act was passed, requiring a testamentary guardian to give bond, before he exercises any authority over the minor or his estate, unless it is otherwise directed by the testator's will. This act took effect on the 1st day of March, 1795. From the 1st day of January, 1787, then, when the law of 1785 went into operation, until the 1st day of March, 1795, the law gave priority, against the real estate of guardians, to debts not secured by bond. Upon a review of the whole subject, I am inclined to think, contrary to my first impression, that the act of 1819 ought to be construed, as making the estate of a guardian liable to a debt due to his ward on guardianship account, and not as merely giving priority to such debt. I am not sure that this is material to the main question now before the court.

In this case, the guardian had given a bond in which his heirs were bound; and the question is, whether the ward can now assert, in this court, the priority given by the statute and by his bond. The simple contract creditors maintain that he cannot; because, under the will of John Lesslie, the real estate has been converted into equitable assets. The following are the material clauses in the will: "In the first place, I desire that all my just debts may be paid; and for this purpose I subject my whole estate, real and personal. In case it should be necessary for the purpose of paying my debts, to sell any part of my real estate, I give to my executors, after named, the power of so doing," "and authorize my said executors, or such of them as may act, to make conveyances to the purchaser or purchasers." He then gives some legacies which he charges on his whole estate, and adds, "all the rest and residue of my estate after the payment of my debts and legacies, as aforesaid, I give to my two children, Andrew and Jane." The devisees of the residue are his heirs at law.

It is contended on the part of Myers, that he is entitled to preference: 1. As a creditor by bond, in which the heirs are bound. 2. Under the act of assembly.

1. I will first consider the general proposition, that under this will, bond creditors may assert a prior claim upon the real estate. It must be admitted, that specialty creditors have no lien upon the lands. The heir being bound by the contract of his ancestor, is liable to the amount of assets, which he takes by descent from that ancestor, and no farther. The ancestor could devise his lands,

and the devisee not being bound by the contract, held them exonerated from the creditor, or the heir could alien them, and thus also defeat the creditor, because the lands, not being specifically bound, could not be reached, and the heir at the time the writ issued, held nothing by descent. It being thus clearly settled, that the creditor had no lien on the lands of his debtor, even after his decease, and that the heir was liable for the contract of his ancestor, in regard of lands actually held by descent at the time the writ issued, only to the amount of the land so descended, let us apply these principles to the case under consideration. John Lesslie, by his will, subjects his whole estate to the payment of his debts, and empowers his executors, or such of them as may act, to sell his lands and convey to the purchasers. The validity of this devise in a court of equity, has not been questioned. If it be valid, then it would seem in reason to affect the land in the same manner as a disposition of the land itself, limited to the same objects. The actual interest of the heir in the land, is no greater than if it had been devised to be sold, so far as was necessary to pay his debts, and after the payment of debts, to descend. What then does the heir take beneficially by descent, supposing the will to go no farther than this clause? Obviously, nothing more than what remains after payment of debts. This, then, is the amount of the real assets which he holds liable to the contracts of his ancestor. Suppose this devise, instead of being for the payment of debts generally, had been for the payment of a portion to a child, in pursuance of a marriage contract, or of debts due by simple contract; these devises would have been unquestionably valid, and the land would have been subject to them in equity. What then would have descended to the heir? Clearly, so much only as would remain after payment of the charge. It would seem, then, in reason, that to an action at law by a specialty creditor, the heir ought to have been permitted to show in his plea, the land that had descended, and the charge upon that land, and that in such a case, the judgment should be only for the value, after the discharge of the incumbrance. Suppose, in such a case, the heir were to pay off the portion due by marriage settlement, or the simple contract debts charged on the land, as a court of equity would, I think, compel him to do, and a suit were then to be instituted by a specialty creditor, can it be doubted for a moment, that the heir would be allowed to offset these payments against the sum for which he was chargeable, in consideration of the lands descended, if a court of law could take notice of the charge? These seem to me to be corollaries from the propositions, that, before the statute against fraudulent devises, the ancestor might devise his lands, in whole or in part, so as to defeat creditors, and that a charge upon lands, being valid, affects them to the full extent of the charge, and diminishes, pro tanto, the real assets in the hands of the heir. But in England, courts of common law do not take up the subject in this reasonable point of view, because they do not take cognizance of a trust, nor have they ever sustained a suit brought by a simple contract creditor, against an heir to whom lands have descended, charged with the debts of his ancestor; nor have they, so far as I have observed, ever considered such charge, in the decision of any question brought before them, unless the heir has been also executor. When the two characters are united, so that suits at law could be sustained by simple contract creditors, the courts of common law, excluding the trust from their view, have considered the whole as legal assets. This limited view of the subject, is probably to be ascribed to their limited jurisdiction. I have considered the question, as if the real estate had descended to the heirs. But the testator has devised it to them, and the words of the devise rather strengthen the argument. They are:—"All the rest and residue of my estate, after payment of my debts and legacies, aforesaid, I give, devise, and bequeath to my two children, Andrew and Jane, their heirs, executors, and administrators, to be equally divided between them." What is given to them by this will? If the words of the testator are worth anything, he gives only the residue of his estate, after payment of debts and legacies.

I will now advert to the act for the relief of creditors, against fraudulent devises.[4]

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[4] See 1 Rev. Code Va. 1819, c. 105, p. 391. This act was passed in 1789, and is nearly an exact transcript of the English statute 3 Wm. III. c. 14. The five first sections upon which the chief justice comments, are as follows:

"Section 1. Whereas, it is not reasonable or just, that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless, it hath often so happened, that, where several persons, having by bonds or other specialties bound themselves and their heirs, have afterwards died, seised in fee simple of, and in, messuages, lands, tenements, and hereditaments, or, having power or authority to dispose of, or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts: For remedying of which, and for the maintenance of just and upright dealing;

"§ 2. Be it enacted, &c., That all wills and testaments, limitations, dispositions or appointments, of, or concerning any messuages, lands, tenements or hereditaments, or of any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators and assigns, and every of them,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or

This act recognizes the power of persons indebted by specialties, in which themselves and their heirs are bound, who die seised of lands, "to dispose of, or charge the same, by their wills or testaments," "in such manner as such creditors have lost their debts." To remedy this mischief, the 2d section enacts, "that all wills and testaments, limitations, dispositions, and appointments of, or concerning any messuages," &c., shall be utterly void as to creditors; and the 3d section gives the creditor the same remedy against the heir and devisee, as he would have had against the heir, had the land descended to him. The 4th section provides, that where there shall be "any limitation or appointment, devise or disposition of, or concerning any messuage," &c., "for the raising or payment of any real and just debt or debts," &c., "the same, and every of them shall be in full force." The case comes within the very words of this part of the proviso. The will of Mr. Lesslie is "a devise or disposition of, or concerning lands," "for the raising or payment of just debts." I do not think the subsequent part of the proviso can vary the construction. The 5th section of the act applies exclusively to cases where lands, not charged by the ancestor with his debts, have been sold by the heir. In the case of Freemoult v. Dedire, 1 P. W. MS. 429, the lord chancellor obviously so understood them. This case, then, stands as it stood before the statute was enacted; and that statute has no other influence on the cause, than to furnish an argument in favor of the validity of the charges made in the will, by its recognition of their validity.

I will now consider the question on the English decisions. At law, the books furnish, I believe, no case in which the rights of a simple contract creditor have been taken into view. To actions of debt brought against the heir on the bond of his ancestor, he has generally pleaded, "nothing by descent," and has relied on a will devising lands to him, charged with debts to support his plea. The single inquiry made by the court has been, whether he holds at law, by descent, or by purchase. In Gilpin's Case, Cro. Car. 161, and Brittam v. Charnock, 2 Mod. 286, he was considered as a purchaser; but in Emerson v. Inchbird, 1 Ld. Raym. 728,[5] and Allam v. Heber, 2 Strange, 1270, which last case is also reported in 1 W. Bl. 22, it was decided that he held by descent. If, in a court of law, which has no jurisdiction over trusts, this issue had been found in favor of the heir, the creditor would have been without remedy. A will, charging his debt on land devised to their heir, would, before the statute against fraudulent devises, have been construed to be a will depriving him of all recourse against the fund.

In cases, where the characters of heir and executor were combined in the same person, the construction by the courts of law, that the whole fund was to be considered as constituting legal assets, seems also to result from the incompetency of those courts to act upon trusts. Common law can reach the case but partially; and its decisions, therefore, ought not to bind a court conclusively, which is so constituted as to enter into the whole subject, investigate it thoroughly, and decide upon it in all its relations. For a time the court of chancery seems to have followed the rule of law; but it is matter of surprise, that any hesitation should ever have been made by that court, in considering the heir as a trustee, and compelling him to execute the trust according to the principles of equity. In Hargrave v. Tindal, reported in a note (1 Brown, Ch. 136), Lord Hardwicke held an estate which descended to an infant heir, charged with debts by the will of his ancestor, to be equitable assets; and the case is still stronger if the estate be devised to the heir so charged. The principle is well settled in chancery, where lands descend,

thing to the contrary notwithstanding. 3 & 4 W. & M. c. 14, § 2.

"§ 3. And, for the means that such creditors may be enabled to recover their said debts, be it further enacted, that, in the cases before-mentioned, every such creditor, shall and may, have and maintain, his, her, and their action and actions of debt, upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees, jointly, by virtue of this act; and such devisee or devisees, shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. Id. § 3.

"§ 4. Where there hath been, or shall be any limitation or appointment, devise or disposition of, or concerning any messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to, or in pursuance of any marriage contract or agreement in writing, bona fide made before such marriage, the same, and every of them shall be in full force; and the same messuages, lands, tenements and hereditaments, shall, and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied; any thing in this act contained to the contrary notwithstanding. Id. § 4.

"§ 5. And whereas, several persons, being heirs at law, to avoid the payment of such just debts, as, in regard to the lands, tenements and hereditaments, descending to them, they have by law been liable to pay, have sold, aliened, or made over such lands, tenements or hereditaments, before any process was or could be issued out against them."

[5] An heir shall take by purchase under a devise altering the limitation of the estate, but under a devise charging the estate only, by descent.

or are devised to an heir, who is simply heir, subject to the payment of debts. The question was longer unsettled, where the will gave a power to executors to sell. The law uniformly considered the estate as legal assets, where the executors were the trustees. Equity followed the law in this respect, even where the land was devised to the executors to be sold. But in Lewin v. Okeley, 2 Atk. 50, Lord Camden decided that, in such a case, the assets were equitable, not legal. A distinction, not very well founded in reason, was taken between a power given to executors to sell, and a devise of the lands to be sold by executors. The descent was considered as broken in one case, not in the other. This distinction derives countenance from the great authority of Lord Coke; but is, I think, assailed in the notes of Hargrave and Butler, with arguments not easily to be refuted. However this may be at law, it is, I think, completely overruled in chancery. This whole subject is fully considered in the case of Silk v. Prime, reported in a note 1 Brown, Ch. 138. The testator charged all his real estate, except a part devised to his mother, with his debts, and directed that Prime and Maxon, who were his executors, or the survivor of them, or his heirs, should sell so much of it as might be necessary for their payment. In this case, the land was devised to his wife and two daughters, which two daughters were his heirs; and the words of the will give a naked power to the executors, and the heirs of the survivors to sell. The chancellor, after great deliberation, and a thorough examination of the cases, determined that the lands were equitable assets. In giving his opinion, he enters into a full investigation of the subject, in which he says that he can hardly suggest a case in which the assets would be legal, but where the executor has a naked power to sell qua executor. It was held that the naked power was not qua executor in that case, because the power might be executed by the heirs of the survivor, in whose hands the produce of the sales could not be assets, nor could the creditor maintain an action at law against him. As Mr. Lesslie has not given the power to the heirs of the executor, it may be supposed that the decision in Silk v. Prime is inapplicable to the case before the court; and is rather an authority in favour of treating the assets as legal. This makes it proper to proceed somewhat farther with Silk v. Prime. The chancellor obtains two rules from the dissertation he had concluded. 1. It is a good rule in expounding wills, to make them speak in favour of equitable assets, if it can be done. 2. If you can lodge the assets in the hands of the trustees, the court will never put them in the hands of the executors; and when a person is invested with both characters, the trustee shall be preferred. In applying these rules to the particular case, the chancellor undoubtedly rests much on the extension of the power to the heir of the executor, but he does not rest on this principle solely. He relies also on other parts of the will, which I think would have been deemed sufficient, had the power to sell not been extended to the heirs of the surviving executor. His language in this part of his opinion is impressive. 1. It is, "The testator's will does most emphatically direct the payment of all his just debts." "I can never think that a man who does repeatedly and so anxiously provide for the payment of all, could ever mean, by legal preference, to pay some and leave the rest unpaid." 2. The second relates to the extension of the power to the heir of the surviving executor. 3. "This is the case of a charge upon the lands. They are devised to the testator's wife and daughters, subject to this charge. In this respect it is a trust, and no more to be sold, than what is necessary for this purpose. The power, then, to sell, is merely consequential; the testator having named the executor for this purpose. The court would have compelled the devisees. Whoever sells to satisfy a charge must be a trustee—because a charge is a trust. To make this case still clearer: the rents and profits in the hands of the devisees are assets before the sale; legal assets they cannot be, for the executor has no right to receive them. They must, therefore, be equitable assets: and if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout." These reasons exist in all their force in the case under consideration. No testator could display more anxiety for the payment of all his debts, than is displayed by Mr. Lesslie. This, too, is a charge on lands. They are devised to the daughters, subject to this charge. That the devisees are the heirs at law, can make no difference in the question now under the consideration of this court, or which was under the consideration of the English court. That question was not and is not, whether the descent is broken by the devise, but whether the naked power to the executors to sell, converted the estate into legal assets. That question is the same in this court as in that, and the language of the chancellor is as applicable, as if a third person had been a devisee with the two daughters. In this, therefore, the charge is also a trust, and no more of the land is to be sold than is necessary for the purpose. In this case, too, the court would compel the devisees to sell; and the power, therefore, to sell, "is merely consequential; the testator having named the executors for this purpose." The devisees would have sold under the order of the court as trustees. In this case, too, had the heirs received the rents and profits before the sale, they would have been equitable assets, subject to the trust. I cannot read this part of the opinion without being convinced, that the chancellor would have decreed the assets to be equitable, although

the heir of the executor had not been named. In the case of Newton v. Bennet, 1 Brown, Ch. 135, the testator, after making provision for his wife, desired, "that all his estates in Kent should be sold forthwith, and, (after payment of several sums of money,) that the remainder might be vested in his executors for the payment of his debts." Lord Bathurst decided that these were equitable assets. Upon a re-hearing, by consent, Lord Thurlow (pages 137, 138) expressed the same opinion. He said, "the devise was tantamount to giving the executor a power to sell, and to apply the money to the payment of debts." In noticing the argument at the bar, that the descent was not broken, he adverts, certainly not with approbation, to the distinction taken by Lord Coke, between a devise of land to be sold by his executor and a dry power to sell. He concludes with saying: "I think the descent is broken, and that these are equitable assets," &c.

It has been contended, that this case turned entirely on the question, whether the descent was broken, and is an authority in favour of equitable assets in no case, unless the descent be broken. This argument is founded on the following words, which the reporter has ascribed to Lord Thurlow: "I think the descent is broken, and that these are equitable assets on the authority of Sir Joseph Jekyl. 3 P. Wms. 341." The proof that these words were not uttered by Lord Thurlow, is very strong. In two cases, mentioned in a note to the report, the mistake is stated on evidence which appears to be conclusive. The opinion itself, seems to me to prove that Lord Thurlow could not have put the case on this point; if, as he says, "the devise was tantamount to giving the executor a power to sell, then the descent could not be broken, according to the construction put on such devises, by those who contend for legal assets." The reference to the case in 3 P. Wms. 341, in the very sentence in which this declaration is said to be made, and following that declaration as if furnishing the authority for making it, is also of some weight, because that case turns on a different question. Lord Thurlow also says: "The only matter urged, was, that where money, to be raised by the sale of lands, was given to executors, it was made personal, and must be applied in a course of administration;" "but that doctrine has not been adopted in later times, and must imply that a testator meant differently in giving to an executor, than if he had given to any other trustee." But if the will is properly stated in the report, these words, giving them the full effect claimed for them, would make no difference in the effect of that case on the present. If, in the will of Thomas Tryon, as stated in Newton v. Bennet, the descent was broken, then it is broken in this case also, and in every case where a power is given to sell. The case of Pope v. Gwyn, mentioned in 8 Ves. 28, was on a will in which the testator directs, that his real and personal estate should be liable for all his debts of what sort soever. Lord Thurlow held the real estate to be equitable assets. These cases were decided before the passage of the act establishing the judiciary of the United States, which adopts the principles of chancery, as the rule in cases of equity in the federal courts. In Bailey v. Ekins, 7 Ves. 319, William Garrett charged his real and personal estate with the payment of his debts, and devised his lands to his executors, their heirs, &c., in trust to sell and pay his debts, and apply the residue to the support and education of his heir, until he should attain his age of twenty-one, when he gave the money and real estate to his heir. It was contended, that the descent was not broken, and that a charge did not make the estate equitable assets. In this case, the devise is to the executors and their heirs, but this circumstance is not relied on or mentioned in the argument of counsel, or in the opinion of the court. The chancellor did not decide the question, whether the descent was broken. He said, "That Hargrave v. Tindal, and Burt v. Thomas, and Batson v. Lindegreen [2 Brown, Ch. 94], were authorities, that a charge upon real estate does make it equitable assets." He said, "the rule cannot be accurate, when it is stated that the descent ought to be broken. Suppose a devise to trustees, in trust to pay debts; and all the trustees dying in the life of the testator, the estate descends upon the heir, would not that be equitable assets?" He says again, "a mere charge is no legal interest. It is not a devise to any one, but that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts." In Shiphard v. Lutwidge, 8 Ves. 26, Henry Lutwidge devised his estate to his heir, charged with the payment of his debts. The chancellor determined that the heir was a trustee, and that the estate was equitable assets.

This question, where the estate passes to the heir, or where the power to sell is given to the executor and his heirs, appears to be completely settled in England.[6] The only doubt, if there be a doubt, is where a naked power to sell is given to the executors, without mentioning their heirs. I think the case of Silk v. Prime, together with the subsequent cases, decides that under such a will, the assets are equitable. In Nimmo's Ex'r

[6] So said Kent, chancellor, in Benson v. Le Roy, 4 Johns. Ch. 651. That was a devise of all the testator's estate, real and personal, to four trustees, (three of whom were executors,) in fee, in trust, to pay his debts, and then to distribute the residue. "Such a devise, in trust, places the assets under the jurisdiction of this court. A court of law, does not take cognizance of a trust; but the notice of it belongs, peculiarly and exclusively to this court."

v. Com.,[1] 4 Hen. & M. 57, the testator had directed his lands to be sold for the payment of debts. I have searched the record, but the will is not in it. The judges all speak of it as a charge, and it is to be presumed that the sale was made by the executor, because the price of the lands is introduced into his account. The judges all say, that it is equitable assets, and that the judgment of the commonwealth gave no priority: that those assets should be pursued in chancery.

I proceed now to consider the operation of the act of assembly on this case. It declares that the estate of a guardian or curator, shall, after his death, be liable for whatever is due to his ward on account of his guardianship, before any other debt due from him or her. It has been already said, that this section gives priority, and creates liability if it did not before exist, but does not create a lien. The words imply a liability for other debts. One estate cannot be properly said to be liable for one debt before others, if it be not liable for others. Although, then, the section may charge lands with a debt with which they were not previously chargeable, it does not follow that it charges land in a condition not to be charged by existing law. The language of the section is comparative. It compares the charge it creates, if it does create one, with other charges, and gives it the priority over them. This can apply only to an estate, in a condition to be reached by some other debts. Previous to the passage of the act against fraudulent devises, lands devised were not liable for any debt whatever. Lands devised for the payment of debts, being exempted from the operation of that statute, pass as they did before it was enacted, and still remain exempt from all legal liabilities. By this exemption, the statute protects the trust, and leaves the estate to its operation. I felt much difficulty in deciding, whether the words of the section do not apply to equitable as well as legal assets. But legislation is rarely intended to act upon, and control the equitable principles which are applied by a court of chancery, unless its language be such as to leave no doubt of the intended application. Even after forming an opinion on this point, I felt a pressure of the question, whether a case in which the lands were to be sold under a power given to the executor, did not constitute an exception applicable to this case. After bestowing the best consideration in my power on the English cases, I have come to the conclusion, that wherever the assets are equitable, the equitable principle must prevail. That the right of the ward to priority, where the assets are equitable, has never been asserted in this country, is not without its weight in the consideration of this case. In the case of Jones v. Hobson, 2 Rand. [Va.] 483. the court of appeals determined, after an elaborate argument, as I have understood, and a profound consideration of the subject, that the sureties of an executor were not bound for money which came to his hands, on account of lands sold for the payment of debts. In delivering the opinion of the court, Judge Green, in commenting on the act which provides that the bond may be put in suit until the will "be fulfilled," "as far as lies in the executors to fulfil the same," says: "This expression is understood to relate to the fulfilment of so much of the will, as it belongs to the executors in their character of executors merely to fulfil, and not to any superadded duty imposed upon them by the will, as trustees or otherwise." Page 497. Again, he says: "At the common law, in whatever order the executor might be bound at law or in equity, to apply the proceeds of land to the payment of debts, he acted in relation to that subject only as trustee. It was a trust

[1] "Before the statute of 3 W. & M.," viz: the statute against fraudulent devises, "if the testator devised his lands for the payment of his debts, all the creditors were to be paid pari passu, or in ratable proportions, for it was to be presumed, that the testator meant to do equal justice to all." "The statute of W. and M., did not interfere with this doctrine of equitable assets, but rather gave it, as it has been said, a parliamentary sanction. That statute was made for a relief of creditors against fraudulent devises; and so the preamble to it, as well as its title, expressly declares. It does not apply to the case of a devise to trustees, for the payment of debts, for such a devise is in furtherance of justice, and of the avowed policy and purpose of the statute. To mark that policy the more distinctly, the 4th section of the statute, expressly excepted from its operation, devises of lands for the payment of debts, or children's portions. The omission of this proviso in our statute," (retained in the Virgina statute, see ante, p. 512,) "cannot make the least alteration in its construction. It must have been omitted, because it was unnecessary, and was doubtless inserted in the English statute, for greater caution." In reviewing the English cases cited above, by Chief Justice Marshall, Chancellor Kent, says:—"In Newton v. Bennet, Lord Thurlow referred to the former case, and said, that an estate devised to an executor to sell, was equitable assets; and from some correct notes of this case, 7 Ves. 321, 322; 8 Ves. 30, it appears that he did not consider it to be requisite that the descent should even be broken by the devise, to render the assets equitable. It has since been repeatedly held, Bailey v. Ekins, 7 Ves. 319, Shiphard v. Ludwige, 8 Ves. 26, that a mere charge of the debts upon the real estate by will, makes it equitable assets, even though the descent be not broken. It is sufficient that the estate be devised upon trust to pay debts; and a charge of the debts upon the real estate, is, in substance and effect, a devise, pro tanto. This was the doctrine of Lord Eldon, in those cases; and he made this clear and pertinent observation, that a provision by will, effectual in law or equity, for payment of creditors, was not a fraudulent devise within the statute. And I may add, that such a devise is equally valid and innocent, and commendable withal, as it would be under the protection of the proviso in the English statute."

The case of Benson v. Le Roy, however, the chancellor said, steered clear of every difficulty, because in that case, the descent was broken, there being a devise in fee and to a stranger, as well as to the executors. See, also, Clay v. Willis, 1 Barn. & C. 364, 8 E. C. L. 103.

superadded to the office of executor, and not inseparable from it." Page 498. He concludes so much of this very able opinion, as relates to this subject, with saying: "Upon this point we are of opinion, that the proceeds of land devised to be sold are not, and never were, a testamentary subject; that executors held such proceeds, not in their character of executors, but as trustees; that the literal terms of the executor's oath and bond, bind him only in relation to the goods, chattels and credits, of his testator; that there is nothing in our legislation on this subject, which indicates an intention that the obligation should have a greater extent, but the contrary; and that the sureties of an executor, are not responsible for the proceeds of land sold by him." Pages 501, 502. This opinion was given in a case in which the will of the testator in all its material features, resembled that of John Lesslie. It decides positively, that in such a case, the court of appeals considers the executor as holding the money, arising from land sold by the executor under a power given by the will, as a trustee; and, consequently, that they are equitable assets.

The conclusion to which I am brought by a consideration of the cases in England and in this country, is, that the executor of Myers, is entitled, only to his equal proportion of the fund arising from the real estate.[8]

Decree.—The decree rendered in this cause, directs the commissioners, R. Stanard and Samuel Taylor, to disburse the fund in their hands ratably, among all the creditors of John Lesslie, deceased, paying to John Forbes, executor of William L. Myers, deceased, the sum of $2340.46, that being the dividend to which he was entitled on his claim, in part payment of the decree rendered in the chancery court of the state, in favour of the said Myers, against Lesslie's executor, without prejudice to the said decree.

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[8] Since the opinion given above was delivered, several cases have been decided by the court of appeals of Virginia, involving the question, how far certain devises should be considered as creating a charge upon the testator's real estate, and converting it into equitable assets? which it is proper to notice here.

In Downman v. Rust, 6 Rand. [Va.] 587, decided in December, 1828, the contest was between the legatees and devisees. The testatrix bequeathed two several legacies, and in the event of the legatees, (or either of them,) dying before the executor could pay the legacies, she directed the legacies to be equally divided among the heirs of the legatees respectively. The testatrix then devised all the rest of her estate, real and personal, in fee simple, to her brother, whom she appointed executor. It was in proof, that the testatrix lived for many years in the family of one of the legatees, (who was the mother of the other legatee,) on terms of the utmost intimacy and affection, and that the devisee was her heir at law; that the personal estate of the testatrix, at the date of the will, and at the death of the testatrix, about a month afterwards, was very inconsiderable: that, at each of these periods, she was seised of a valuable tract of land, on which her brother entered as devisee; that the devisee conveyed the land in trust, under which it was sold, and that the purchaser had notice of the claim of the legatees. It did not appear that the testatrix left any debts. The opinion of the court was delivered by Carr, J., who said:—"Every question of a charge on lands under a will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that courts have taken very slight words in a will, to imply a charge upon lands. The books are full of such cases. Trent v. Trent, Gilmer, 174, is one of that class. Legacies do not stand on quite so high ground, being voluntary gifts; but yet, every man is supposed to intend that they shall be paid, and to have settled in his mind, the fund for their payment; and if there be no fund but land, or if there be expressions tending to show that the testator had the land in his mind, the court will turn them upon the land, rather than they should go unpaid." *Held*: 1. That the will created a charge upon the land, for the payment of the legacies. 2. That this charge followed the land into the hands of the purchaser, with notice, not, indeed, upon the ground of fraud, but upon the principle of caveat emptor. In this case, it may be remarked, that the will was held to create a charge upon land: 1. by implication; 2. in favour of legatees; 3. that the charge adhered to the land in the hands of a purchaser, with notice.

"I appoint A. B. my sole executor; no security to be required of him, without so much as will justify all my just debts. The residue I confide in him, to dispose of as I shall hereafter direct. I wish him to dispose of all my real estate, except, &c." In a subsequent clause, the testator bequeathed a legacy, "as soon as it can (could) be made after my (his) just debts are (were) paid." Per Curiam. We are of opinion, that the will subjected the real estate to the payment of the testator's debts. Dunn v. Amey, 1 Leigh, 465.

"It is my will and desire, that all my just debts be paid. After that, I wish that A. B., have $1600, provided my estate will admit of it." The testator had real estate, which, not being disposed of by the will, descended to the heir at law. The heir at law, qualified as administrator, with the will annexed. Nearly the whole of the personal estate, which did not amount to $1000, was absorbed by debts. The legatee filed her bill against the heir at law, praying to charge the legacy on the testator's lands, descended to him. To this bill, the heir demurred, and thus presented the question: whether the legacy could in any manner, be charged on the real estate descended?

Per Curiam. 1. By the will, the real estate was charged with the payment of all the testator's debts. Trent v. Trent's Ex'x, Gilmer, 174. 2. The legacy was a direct and absolute charge upon his real estate, not, indeed, by the express terms of the will, but by strong and necessary implication. Clarke v. Buck, 1 Leigh, 487.

In Kenney's Ex'rs v. Harvey, 2 Leigh, 70, the testator charged his real estate with the payment of his debts, and, subject to debts, devised it to his wife, part in fee, and part for life, with remainder over. The court said that, the will constituted the real estate an equitable fund, out of which, all the creditors were entitled to satisfaction, pari passu.

BLACK v. STODDART. See Case No. 12,561.

BLACK (SWETT v.). See Cases Nos. 13,690 and 13,691.

Case No. 1,465.

BLACK et al. v. THORNE et al.

[10 Blatchf. 66; 2 O. G. 388; 5 Fish. Pat. Cas. 550.] [1]

Circuit Court, S. D. New York. June 19, 1872.

PATENTS—IMPROVEMENTS IN FURNACES FOR BURNING WET FUEL—APPARATUS—PROCESS — PRIOR DISCOVERY—JURISDICTION—WAIVER.

1. The reissued letters patent granted to Moses Thompson, March 31st, 1857, for an "improvement in furnaces for burning wet fuel," the original patent having been granted to him, as inventor, April 10th, 1855, and reissued to him October 7th, 1856, and the patent having been extended for seven years from April 10th, 1869, and the letters patent granted to said Thompson, December 15th, 1857, for an "improvement in bagasse furnaces," and extended for seven years from December 15th, 1871, are valid.

2. The first claim of the reissue of 1857, namely, "Using green bagasse, wet tan, wet sawdust, and other wet carbonaceous or vegetable substances, as fuel, for the production of intense heat, by mingling the gases issuing from a highly heated mass thereof, with those arising from carbonaceous combustion, by the intervention of a flue or chamber, with which the chamber or chambers containing the fire and charge of wet substances communicate, and in which said gases meet, mingle and consume each other, on their way to the apparatus to be heated and to the stack," is a claim to the use of a flue or chamber, intervening between, on the one hand, the chamber or chambers containing the fire of carbonaceous combustion and a highly heated mass of the wet substances named, and, on the other hand, the apparatus to be heated and the stack, for the purpose of mingling, in such chamber, the gases issuing from such highly heated mass with the gases arising from the fire of carbonaceous combustion, so that such gases may consume each other in such flue or chamber, and thus intense heat be produced, by the use, for fuel, of such wet substances.

3. As the model and drawings of the reissue are the same as those of the original patent, and show such a mingling or mixing chamber as is claimed in such first claim, and such an arrangement of parts, as, when used according to the directions of the patentee, with the fuel named, will produce the result described in said claim, and as the specification of the original patent gives substantially the same directions for producing such result as are given in the reissue, such claim is valid.

4. Although, in the reissue, the patentee disclaims the arrangement of a series of fire-chambers to communicate with one common flue, irrespective of the purpose for which, and the manner in which, the arrangement is employed, he can lawfully claim the arrangement which he uses, when used for the purpose for which he employs it, and can lawfully claim it when used in the manner in which he employs it.

5. The said first claim is for a process carried into effect by an apparatus. The prior apparatus would not have enabled the patentee to work his new process, nor was such process ever worked before in any apparatus.

6. The second claim of said reissue, namely, "The combustion, for the purposes of a high degree of heat, of bagasse, refuse tan, sawdust, and other wet refuse substance, or very wet and green wood, by the employment of a series of fire-chambers arranged in any manner substantially as described, to communicate with one common flue or mixing chamber, when any number of said chambers are nearly closed to the admission of air, when first charged, as described, whilst the remaining chamber or chambers is in full communication with the mixing chamber, and has a proper supply of air admitted, and the ash-pit of each chamber, in its turn, is nearly closed, and then opened, and has air admitted, whereby the heat required is rendered continuous and comparatively uniform, while the fuel in some of the chambers is being heated and decomposed, and its gases sent forward to the mixing chamber, to any desirable degree, as herein set forth," is a claim for an apparatus when employed to work a process, the apparatus and the process being both of them new with the patentee.

7. The claims of the letters patent granted to said Thompson, December 15th, 1857, for an "improvement in bagasse furnaces," are for special constructions to work out more effectually the process of burning wet fuel discovered by Thompson and made known in his original patent of 1855, and are valid claims.

8. The form of apparatus shown by Thompson in his drawings, and described, admits of many formal variations, within the principle of his inventions, and the scope of his claims.

9. Consideration of constructions which would infringe various claims of Thompson's patents.

[Cited in Black v. Munson, Case No. 1,463.]

10. Thompson was the first to discover and put in practice the true method of economically burning wet fuels, and obtaining from them better results than from equal quantities of dry fuels.

11. The point that a cause of action arose in the northern district of New York, so as not to be cognizable by the circuit court for the southern district of New York, may be voluntarily waived by a defendant, and is waived where, in a suit in equity, it is not raised in the answer.

[Cited historically in Black v. Thorne, Case No. 1,466.]

[2] [In equity. Final hearing on pleadings and proofs.

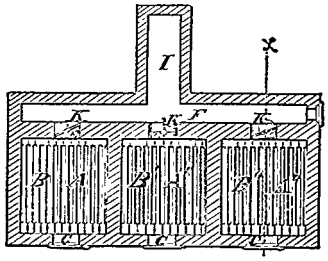
[Suit brought (by Charles N. Black, as administrator of Moses Thompson, and Eliza W. Fitzgerald, as administratrix of William P. N. Fitzgerald, against Samuel Thorne, James McFarlane, and Jonathan Thorne, Jr.) upon two letters patent granted to Moses Thompson: One (No. 12,678) for an "improvement in furnaces for burning wet fuel," granted April 10, 1855; reissued October 7, 1856, and again March 31, 1857 (No. 446), and extended for seven years from April 10, 1869; the other, for an "improvement in bagasse furnaces," granted December 15,

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 5 Fish. Pat. Cas. 550; and here republished by permission. Syllabus is from 10 Blatchf. 66, and statement from 5 Fish. Pat. Cas. 550.]

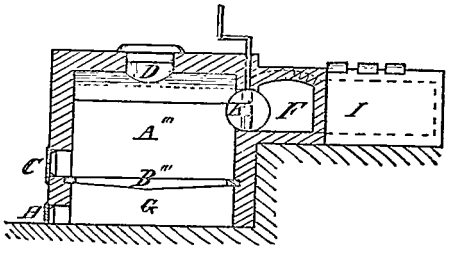
[2] [From 5 Fish. Pat. Cas. 550.]

1857 (No. 18,874), and extended for seven years from December 15, 1871. (Decree for complainants.)

[Patent of 1855.



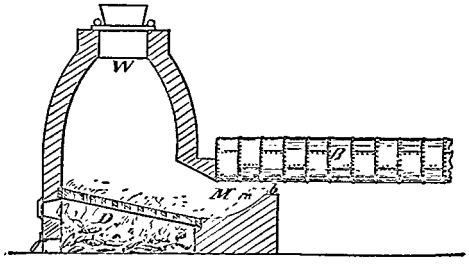
[Horizontal Section.



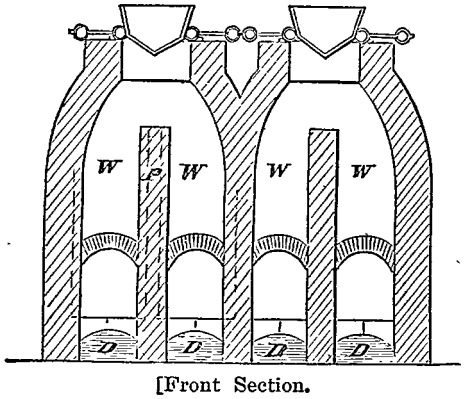
[Vertical Section.

[The invention which formed the subject of the reissue of March 31, 1857, will be readily understood from the detailed description given in the opinion, in connection with the foregoing engravings.]

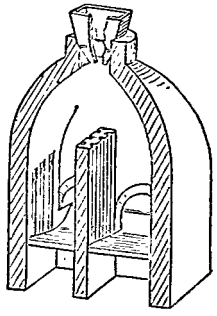
[Patent of 1857.



[Side Section.



[Front Section.



[There were five drawings attached to the patent of December 15, 1857. The last three engravings are copies of three of them, to wit: the sectional side view, the front sectional view, and the sectional prospective view of the interior of one-half of the furnace. These will be fully understood by reference to the description of the invention in the opinion of the court.] [3]

Charles N. Black, for plaintiffs.

Clarence A. Seward and Andrew J. Todd, for defendants.

BLATCHFORD, District Judge. This suit is brought on two patents. The first is a reissued patent, granted to Moses Thompson, March 31st, 1857, for an "improvement in furnaces for burning wet fuel," the original patent having been granted to him, as inventor, April 10th, 1855, and reissued to him October 7th, 1856. The application for the original patent was filed November 14th, 1853, the specification having been sworn to November 9th, 1853; and a caveat, describing substantially the invention patented, was filed August 12th, 1853. This patent was extended April 8th, 1869, for seven years from April 10th, 1869, by the commissioner of patents.

The second patent is one granted to the same Moses Thompson, December 15th, 1857, for an "improvement in bagasse furnaces." The application for this patent was filed May 13th, 1857, a previous application filed on the same model, in February, 1857, having been rejected. On an interference declared between the application of Thompson and a patent granted to A. Hager and S. Allyn, for an "improved bagasse furnace," May 6th, 1856, priority of invention was decided in favor of Thompson, November 30th, 1857. This interference related to what is the second claim in the patent granted to Thompson, December 15th, 1857. This patent was, on the 14th of December, 1871, extended for seven years from the 15th of December, 1871, by the commissioner of patents.

The contest between the parties to this suit has been very severe. The suit was brought after the extension of the 1855 pat-

[3] [From 5 Fish. Pat. Cas. 550.]

ent, and before the extension of the 1857 patent. The extension of the 1857 patent was strenuously opposed by the same parties who have conducted the defence of this suit, and on substantially the same evidence, on the question of the novelty of the inventions covered by that patent, which is adduced on the same question in this suit. It appears, from a paper in evidence, that seventeen different persons and firms, including the defendants, representing thirty-eight tanneries, including the three tanneries involved in this suit, have joined together to resist the claim of the plaintiffs under the said patents, agreeing to share, pro rata, all legal expenses incurred in defending against said patents. The defence of this suit has been conducted under that arrangement.

The answer sets up, that the 1857 reissue of the 1855 patent was obtained by Thompson for the purpose of further including therein, and did include therein, more than Thompson originally contemplated, specified or showed to be his alleged invention, on the application for his original patent, and matter which he had no right to include and claim therein, and that such reissue is not for the same invention as the original patent of 1855, but is for inventions and things substantially and materially different. It also sets up, that the first claim of such reissue is invalid, because it is indefinite and equivocal, and does not refer to the process specified and described in the language preceding said claim. It avers, that the extension of the 1855 patent was obtained by misrepresentation and fraud, and denies any infringement of either patent. It sets up want of novelty in regard to both patents, and specifies, in respect to each, prior knowledge by nineteen persons, and prior description in eight printed publications, fourteen English patents, and two United States patents. Twenty-six witnesses have been examined on the part of the defendants, and twenty-one on the part of the plaintiffs. Of these, two on each side are chemical experts, Benjamin Silliman and William H. Plumb for the plaintiffs, and Charles F. Chandler and Adolph Faber du Faur for the defendants. The printed case on the part of the plaintiffs covers over six hundred printed pages. That on the part of the defendants covers nearly one thousand printed pages. The direct examination of the plaintiffs' experts occupied six days, and covers sixty-five printed pages, embracing seventy-six interrogatories. The cross-examination of those experts occupied twenty-five days, and covers two hundred and seventy-two printed pages, embracing six hundred and five interrogatories. The direct examination of the defendants' expert Du Faur occupied six days, and covers fifty-six printed pages, embracing one hundred and fifteen interrogatories. The cross-examination of the same expert occupied seven days, and covers sixty-seven printed pages, embracing three hundred and thirty-one interrogatories. The direct examination of the defendants' expert Chandler covers fifteen printed pages, embracing thirty-two interrogatories. He was not cross-examined. These observations are made for the purpose of showing how thorough has been the investigation of the questions at issue.

The title of the reissued patent of 1857 is, "an improvement in furnaces for burning wet fuel." The specification states the invention to be one of "improvements in burning tan-bark, bagasse, sawdust, and other kinds of fuel, in a wet state, for the purpose of creating heat to generate steam, or to be employed in heating or drying operations." Bagasse is crushed sugar-cane. There are two figures of drawings accompanying the specification. One is a horizontal section of a furnace constructed according to the invention. The other is a vertical section of the same. The specification states, that the main object of the invention is, "to effect the more economical use, for fuel, of tan-bark, bagasse, or other trashy matter, in a wet state, or very green or wet wood." The furnace shown in the drawings has three fire-chambers. The patentee state that he considers three, "in many cases, to be best adapted to practical operation." He proceeds: "In some cases, two may be sufficient, and, in others, more or less. In making these variations as to the number of chambers, the builder is to be guided by the quantity of heat required, size of chambers and character of fuel to be used. The fire-chambers are of a square, but may be of other form, with grate bottoms, B, B', B'', and arched tops, or said tops may be used or built of any other form adapted to the kind of fuel to be used. They are separated by a wall of fire-proof material, and lined throughout with fire-brick, and, in case of burning wet tan or bagasse, fire-brick grates should be used. Each burning chamber is provided with a door, C, in front, for the purpose of lighting and tending the fire, and with an opening, D, at the top, for the purpose of supplying the fuel, and with an opening, E, at the back end of the chamber, which leads to the flue, F, or the mixing chamber. The opening may be provided with a damper, K. Each fire-chamber has a separate ash-pit, G, below it, which is furnished with a door, H, to regulate the admission of air. The flue or mixing chamber, F, extends across the back of all the three fire-chambers, and the chimney may be at one end, or may be placed in the rear, with a flue, I, leading to it from the flue, F. If the furnace is used for generating steam, the best place for the boilers will be in flue I, which will be made of a proper size to receive and nearly surround it. If used for other purposes, any arrangement may be made best adapted to the application of said heat. The thing to be heated ought to be placed a little above the inside top of the

mixing chambers. The current from the mixing chamber, in passing to the place of use, should descend or pass under a bridge to the place of use, equal to about one-half of the depth of the mixing chamber, then rise to the place of use. In case of nearly dry fuel, such as green wood and sawdust, the current should rise, immediately after leaving the burning chamber, through the mixing chamber, to the place of use, and the flue, E, leading out of the fuel chamber, A, into the flue or mixing chamber, F, should be increased to about three-fold capacity of that used for very wet fuels, to be varied in proportion to the wetness or dryness of said fuel. In case of burning of sawdust or green or wet wood, the chambers should be about double the grate surface of what is commonly used for burning of wood to accomplish the same object, but for wet tan it should be increased to about four-fold, and, in case of burning bagasse, it should be increased about six-fold, and the height of the chamber increased so that the grate may be covered by feeding at the top. The mode of conducting the operation of the furnace is as follows: Fires being lighted in all of the fire-chambers, with dry fuel, and the masonry heated to a high degree, two of the three chambers, A, A', are fed with wet fuel, and have their ash-pits closed, and the dampers, K, K, partially closed, though this latter is not absolutely necessary. The other fire-chamber, having its charge partially dry in the meantime, has the damper, K, opened, and the door of the ash-pit, H, opened far enough to admit any quantity of air which may be required to promote such a degree of combustion as may be necessary to generate the amount of heat required. There should be no artificial blast, and, if a high stack be used, there should be a damper in it, to moderate the draft. When the fuel in the open chamber is reduced to a desirable degree, its ash-pit is closed, and the chamber recharged, and another opened and supplied with air, until the fuel within is reduced, when it is closed, recharged and another opened, each, in its turn, being opened and supplied with air, to generate and supply the requisite amount of heat and carbonaceous gases, while the others are closed and successively supplied with fresh fuel, to heat and decompose the same to such a degree as is desirable before allowing rapid combustion to take place. Each fire-chamber should be supplied successively with fuel at proper intervals, by any convenient means, either through the hole, D, or door, C, in front. The principal advantage of a furnace and process of this description consists in heating the wet charge without unnecessary waste of heat, decomposing it into such gases as will, when mingled, in the mixing chamber, with the products of combustion from the active chamber, cause the most perfect combustion of the gases and smoke to be effected. This perfect combustion could not be effected in a single fire-chamber, but, when two or more fire-chambers are employed, no interruption takes places, and the object is readily attained. Another advantage consists in always holding a certain quantity of heat and highly heated fuel in reserve in the closed chambers, which may be immediately brought into action by opening one or more of the chambers. A similar but inferior result might be produced by having several grates and ash-pits to the same fire-chamber, each grate charged successively, and its ash-pit for the time closed, immediately after fresh charging, to exclude the air. I have described this in my caveat on which my application is based, but do not use it because of its inferiority in practice, although it involves my principle. After ample experiments, I have discovered that any results which can be produced by the use of dry fuel are inferior to wet, in proportion to quantity used, and that results like mine can only be attained by the use of wet fuel, similar to what I have herein mentioned, fed into an intensely heated chamber. Under such circumstances, the water in the fuel, in the presence of the carbonaceous substances in the furnace, will be decomposed, giving its oxygen to the carbonaceous matter, dispensing with a draft, and its cooling and wasteful influence, and rendering the combustion so perfect that no smoke is visible. In burning tan and sawdust, where a large quantity of heat is to be made, in order to save the increase of their number, I put the chambers in twice as long as wide, and use two openings, D, to feed through, and thereby accomplish double to each chamber." Then follows this disclaimer: "I do not claim the within described arrangement of a series of fire-chambers to communicate with one common flue, irrespective of the purpose for which, and the manner in which, I employ the said arrangement." The claims are these: (1.) "Using green bagasse, wet tan, wet sawdust, and other wet carbonaceous or vegetable substances, as fuel, for the production of intense heat, by mingling the gases issuing from a highly heated mass thereof, with those arising from carbonaceous combustion, by the intervention of a flue or chamber, with which the chamber or chambers containing the fire and charge of wet substances communicate, and in which said gases meet, mingle and consume each other, on their way to the apparatus to be heated and to the stack." (2.) "The combustion, for the purposes of a high degree of heat, of bagasse, refuse tan, sawdust, and other wet refuse substances, or very wet and green wood, by the employment of a series of fire-chambers arranged, in any manner substantially as described, to communicate with one common flue or mixing chamber, when any number of said chambers are nearly closed to the admission of air when first charged, as described, whilst the re-

maining chamber or chambers is in full communication with the mixing chamber, and has a proper supply of air admitted, and the ash-pit of each chamber, in its turn, is nearly closed, and then opened, and has air admitted, whereby the heat required is rendered continuous and comparatively uniform, while the fuel in some of the chambers is being heated and decomposed, and its gases sent forward to the mixing chamber, to any desirable degree, as herein set forth."

It will be proper, in the first place, to consider the objections that are made to the reissued patent of 1857. It is contended, that the first claim of the reissue is void, because the invention claimed in it is not found in the original patent of 1855. That claim is a claim to the use of a flue or chamber, intervening between, on the one hand, the chamber or chambers containing the fire of carbonaceous combustion and a highly heated mass of the wet substances named, and, on the other hand, the apparatus to be heated and the stack, for the purpose of mingling in such chamber the gases issuing from such highly heated mass with the gases arising from the fire of carbonaceous combustion, so that such gases may consume each other in such flue or chamber, and thus intense heat be produced, by the use, for fuel, of such wet substances. The model and drawings of the reissue are the same as of the original patent. Such model and drawings show such a mingling or mixing chamber as is claimed, and show such an arrangement of parts, as, when used according to the directions of the patentee, with the fuel named, will produce the result described in the claim, of mingling and consuming, in such chamber, the gases mentioned, and producing intense heat. The specification of the original patent of 1855 gives substantially the same directions for producing such result as are given in the reissue of 1857. Those directions are, that, taking the use of three fire-chambers, for illustration, in burning wet fuel, two of the fire-chambers have their ash-pits closed and their dampers partly closed, while the third fire-chamber has its damper open and its ash-pit open, so far as necessary to produce the requisite combustion in that chamber, to produce the degree of heat desired; that when, by such combustion in the open chamber, its fuel is reduced, it is recharged with wet fuel and closed, and one of the above chambers is opened for combustion; that so, in turn, each chamber is opened and supplied with air, to make it a burning chamber and generate carbonaceous gases, and is then supplied with wet fuel and closed, so as to heat and decompose such fuel before admitting air freely to it; that the chambers are thus supplied with wet fuel in succession; that this carrying out of the process by using two or more fire-chambers, with such a construction of apparatus and flues as is shown in the drawings, will effect the most perfect combustion of the gases generated in the chambers, and enable a proper supply of heat to be yielded uninterruptedly; that the use of a single fire-chamber will not produce such a perfect result, nor an uninterrupted supply of heat, although an inferior result, within the principle, may be produced, by using a single fire-chamber, with several grates and ash-pits, and charging the several grates in succession, excluding the air from the charged grate, until the charge is in a condition for rapid combustion; that, by such use of wet fuel, fed into an intensely heated chamber, better results can be obtained than can be from an equal quantity of dry fuel; and that the principle of the operation is, that the products of the carbonaceous combustion in the rapid combustion chamber, being present with the gases arising from the decomposition of the wet fuel in the heating chamber will decompose the vapor of the water and cause it to yield up its oxygen, so that a perfect combustion will be produced, without such a draft being used, as had ordinarily been employed for like fuel. All this is disclosed in the specification and drawings of the original patent, and is repeated in the specification of the reissue. The claims of the reissue are both of them fully warranted by what appears in the specification and drawings of the original patent. The inventor failed to claim, in his original patent, all that his original specification and drawings would have warranted him in then claiming.

It is also objected to the reissued patent of 1857, that as the patentee disclaims the arrangement of a series of fire-chambers to communicate with a common flue, irrespective of the purpose for which and the manner in which he employs such arrangement, he cannot lawfully claim the arrangement which he uses, when used for the purpose for which he employs it, and cannot lawfully claim it used in the manner in which he employs it. Fire-chambers in a series, communicating with a common flue, existed before. But, the patentee's process was not carried out in any of such prior structures, nor was such common flue used as a mixing chamber in any of them. The first claim of the reissue is for a process carried into effect by an apparatus. The prior apparatus would not have enabled the patentee to work his new process, nor was such new process ever worked before in any apparatus. The second claim of the reissue is for an apparatus when employed to work a process, the apparatus and the process being both of them new with the patentee. It is not perceived how any tenable objection can be taken to the validity of either claim. The disclaimer does not admit that the patentee's arrangement existed before, although he disclaims it irrespective of the purpose and manner of his use of it.

Passing now to the patent of December,

1857, the invention therein is stated, in the specification, to be, "improvements in furnaces for using, as fuel, bagasse, wet tan, and other carbonaceous substances too wet to be conveniently burned in the usual way." Five figures of drawings are given—a front view of the patentee's furnace; a sectional side view, showing the interior thereof, and the charge of wet fuel, &c.; a front sectional view; a horizontal view of the grate; and a sectional perspective view of the interior. The specification says: "The leading object of my invention is, to use, as far as possible, the hot vapors driven out of the wet mass, while drying, instead of cold common air, to support and complete the combustion of the carbonaceous portions of the wet fuel. Bagasse and other wet fuels might be advantageously burned in one furnace, but results are much more uniform and reliable when two are used, discharging their gases into a common mixing chamber, and I, therefore, prefer to use two or more. The grate surface and the height of the furnace should be regulated according to the kind and wetness of the fuel. The wetter the fuel, the larger the furnace, and the smaller the mixing chamber should be." Then follow directions for the sizes of furnaces for burning bagasse. "For burning refuse tan and sawdust, I think it better to make the furnace longer and narrower, with two fuel openings on the top, and, for a furnace five feet wide and ten feet long, I would make the height, from the bottom of the fire-chamber to the top of the wet fuel chamber, about five feet. The bottom of the grate I would place about two feet above the hearth. But, wet fuels differ so much in character and wetness, that it is impossible to give precise dimensions. The furnace I propose to describe is particularly calculated to consume bagasse. I build two furnaces side by side, each nearly square, in its horizontal section. Towards the top I draw in the wall, in such manner as to form a kind of dome, with a sufficient opening at top to feed the bagasse. The outer walls of these furnaces should be from twenty-four to thirty inches thick, and built with a special view to rendering them nonconducting. The wall near the top, and the partition between the two furnaces, may be thinner. In each furnace chamber there should be a partition of fire-brick, extending across it from front to back, and rising nearly to the top, dividing it into two nearly equal parts. The whole interior of the furnace should be of fire-brick. The main chamber of each furnace should be divided into two parts, upper and lower, by a fire-brick grate about one-fifth the height of the furnace above the hearth, the back end of the grate being a little lower than the front. The bottom of the lower chamber may be a grate with an ash-pit, but a hearth is much better. In each furnace, at the front, on each side of the central partition, and immediately under the front end of the grate, should be doors for feeding wood or other dry fuel, and, directly under these doors, at the hearth of the lower chamber, should be draft openings, capable of adjustment, to support combustion in the lower chamber. Extending across the back of both furnaces, and opening into both by flues, is a mixing chamber, into which all the gases from both furnaces enter, in a highly heated state, and mix, and consume each other, on their way to the boiler and stack. This chamber should be about one-half the capacity of all the fire-chambers, and it should extend down about as low as the back end of the grate. The flue through which the products of combustion pass out of this chamber, and under the boiler, should be, in section, about one square foot to forty cubic feet of mixing chamber. The feed openings at the top of the furnaces should be closed by doors, which open inward by the weight of the feed, but are self-closing, and do not yield to pressure from within." Then follows a description of up and down corrugations in the interior of each upper chamber, on each side, down to the grate, which are stated to be unnecessary in burning tan and sawdust, and to be "for the purpose of allowing the heat to radiate upwards from the fire-chamber, for heating the masonry and the wet charge, while the gases or vapors driven out of the wet charge, by the heat, are allowed to descend to the fire-chamber or the mixing chamber." "The spaces between the grate bars, for burning bagasse, should be about six inches wide, for the finest grinding, and twenty inches wide for the coarsest, and should vary between these widths according to the fineness of grinding, but, for sawdust and tan, much less, say from one inch to three-quarters of an inch. The grate should be made of fire-brick. The operation of my furnace is as follows: A hot fire of dry fuel is kindled in the lower fire-chambers of the furnaces, and, after it has been continued until the masonry is well heated, the chamber above the grate is fed with the bagasse, or other wet fuel. This hot fire in the fire-chamber, especially towards the front of it, under the principal mass of the wet fuel, must be preserved throughout the operation. The heat from the masonry and the fire-chamber will be communicated to the wet fuel, which will cause steam and other gases to issue from it, and mix with the intensely hot gases of combustion from the fire-chambers, and, in a short time, the mixing chamber will present intense combustion and heat, the dampers of the fire-chambers being partially closed. The lower part of the wet charge will, by degrees, become dry and charred, and will fall through the grate, prepared as above, into the fire-chamber, and supply, or nearly supply, the place of other dry fuel, in preserving the fire in this chamber, and the wet fuel, being from time to time supplied, will furnish, in a highly heated state, aqueous vapors, which descending through the corruga-

tions, and otherwise, into the fire-chamber and mixing chamber, will be decomposed, furnishing much oxygen to the fire, and supply the oxygen necessary to complete, in the mixing chamber, the combustion of all the combustible gases issuing from the fire-chamber. If, by accident, the fire in the lower part of the furnace should predominate, the draft should be diminished, and more wet fuel added; and if, by accident, the fire in the fire-chamber should become too much cooled down, the draft should be let on, and any deficiency of dry fuel should be supplied to the fire-chamber. Under proper management, little or no dry fuel need be fed to the fire-chamber, after the operation is fairly commenced. The charred matter falling through the open grate will supply its place, and the caloric thus produced by the combustion of wet fuel will be vastly greater than from the same quantity, by measure, of the same fuel, when dry. In the fire-chamber, and in the mixing chamber, under intense heat, the carbonaceous gases will decompose the steam from the wet fuel, and effect complete combustion. When the operation is fairly commenced, if the water in the wet charge amounts to, say, fifty per cent., by weight, of the fuel, the dampers of the fire-chambers should be nearly or quite closed, to exclude the air. Vapor from the wet charge will then descend through the corrugations, and otherwise, into the fire-chambers, and support the combustion therein, while other portions of the vapor will enter the mixing chamber, and complete the combustion there. If the fuel, however, contains much smaller quantities of water, more air in proportion should be admitted at the damper, the object being to admit no more air than will supply the deficiency of the vapor." Then follow written references to the drawings. "Little, if any, of the boiler, should extend over the mixing chamber. If any considerable portion of the mixing chamber is covered by the boiler, its cooling influence will prevent the decomposition of the vapor, and defeat the object of my invention. Great care should be observed in giving proper dimensions to the mixing chamber, for, the perfection of the combustion, and the efficiency of the furnace, depend greatly upon it. The principal object of this chamber is to give the combustible carbonaceous gases from the fire, and the aqueous gases from the mass of wet fuel, an opportunity of mingling together in such a manner, and under such circumstances, that the aqueous vapor will be decomposed by the carbonaceous gases, and its oxygen given out, to complete the combustion of the carbon, without the introduction of air into the mixing chamber, thus saving the caloric previously communicated to the wet charge, while drying it and charring its lower portions, and avoiding the cooling influences of cold air. This can take place effectually only in the presence of a high degree of heat, and in the absence of a supply of free oxygen. If that chamber be too small to receive these gases as fast as the furnace is able to produce them, the operation will, of course, be choked and impeded. If the chamber is larger than can be kept densely filled with these gases, of course, atmospheric air will be found there at the commencement, and will continue to find its way into the chamber, and, while atmospheric air is present, the carbonaceous gases will take its oxygen from that principally, instead of decomposing the steam, and the heat in the chamber will be much diminished, and the large quantity of nitrogen, four-fifths, contained in the air, which is neither a combustible, nor a supporter of combustion, will at once greatly increase the volume of gases to be sent forward to the stack, and proportionately decrease its temperature; and, when the chamber becomes very large, the cooling influences become so great, that combustion will immediately cease, and smoke, mingled with steam, oxygen, and nitrogen, will go forward, thus wasting the fuel, and imparting a faint degree of heat to the boiler. I have, therefore, fixed the size of the mixing chamber by many careful experiments, and that given above will produce the desired effect with wet bagasse. For drier fuel, furnishing less vapor, the mixing chamber should be proportionably increased in size, to supply the deficiency with air, and to effect complete combustion. Rules more precise would be inconsistent with the nature of the subject. A large and hot fire should always be preserved in the fire-chamber below the grate, and directly under the charge of wet fuel, for the purpose of driving the vapor out of it, and charring its lower portion; and the grate is left much more open than in furnaces for burning dry fuel of the same size, for the purpose of allowing the charred portions of the wet charge to fall through, to supply fuel for this fire, as fast as it becomes fit for that purpose, thus consuming the mass with little or no expenditure of other fuel." The claims are: (1) "The combination of two chambers, the one above the other, and separated by a grate, the lower one for the combustion of any known dry carbonaceous fuel, and the upper one, in immediate proximity therewith, to receive heat therefrom, for heating and drying the charge of wet fuel, with a mixing chamber into which both continuously and simultaneously discharge their gases, before reaching the thing to be heated, for mingling and mutual combustion." (2) "In combination with said fire-chamber and wet fuel chamber, or drying chamber, making the grate upon which the wet charge rests sufficiently open to allow the lower portion of the wet charge, as it becomes dried and charred, to fall through into the fire-chamber, and keep a hot fire therein, supplying the place of other dry fuel, while the uncharred portion of the wet fuel is properly supported by the grate, till dried, as de-

scribed." (3) "Placing the mixing chamber of combustion in substantially the same position described relatively to the fire and the wet charge, so that the products of combustion from the dry fuel may pass along the lower part of the wet charge, drying and charring it, on their way to the mixing chamber, and reach it without being, in any considerable degree, obstructed or cooled by the wet charge, substantially as shown." It is added: "I wish it distinctly understood, that I make no claim to any of the parts or combinations above specified, except in their application to the preparation and combustion of wet fuels."

The principle developed in the first claim of the reissue of 1857 is worked out in the furnace and method of procedure described in the patent of 1857, but the claims of the two patents are different. The claims of the patent of 1857 are for special constructions to work out more effectually the process of burning wet fuel discovered by Thompson, and made known in his original patent of 1855. The first furnace constructed by Thompson on his principle was built at Richmond, Virginia, in August, 1853, and was then and there used successfully in burning wet tan. In 1854, he built a furnace on this plan, at Weed's tannery at Binghamton, New York. Others were built after its pattern at various places in New York, and the furnaces used by the defendants are traced, in their origin, to the furnace so built at Binghamton. It is very manifest, from the language of Thompson's specifications, and from the testimony, that the form of apparatus shown by Thompson in his drawings and described, admits of many formal variations, within the principle of his inventions and the scope of his claims. Thus, a single furnace, with an upper chamber and a lower chamber, separated by a grate and sufficiently long to admit of two feed holes in the top, with a proper mixing chamber, and operated so as to produce, in such chamber, the mingling and consumption of the gases from the wet fuel in the upper chamber with the gases from carbonaceous combustion, would infringe the first claim of the reissue of 1857. Such a construction, with the lower chamber used for the combustion of dry carbonaceous fuel, and so operated as to cause the gases from both chambers to be continuously and simultaneously discharged into the mixing chamber, for mingling and mutual combustion, would infringe the first and third claims of the patent of 1857. A single furnace, with the grate between the upper and lower chambers so open as to allow the lower portion of the wet charge, as dried and charred, to fall through into the lower chamber, and keep a hot fire therein, the uncharred portion of the wet charge being supported by the grate, would infringe the second claim of the patent of 1857. So, also, various constructions of mixing chambers may be made, which would be substantial equivalents for the mixing chamber of the form and location shown by Thompson, and would be the mixing chamber of each of his two claims in the reissue of 1857, and of the first and third claims of his patent of 1857.

It is satisfactorily shown, that the wet tan furnaces of the defendants, in their tanneries at Albion, Laporte, and Thorndale, which are the three proceeded against, infringe each of the patents. All of the claims of each patent are infringed by the furnaces at Albion and Laporte, and all except, perhaps, the second claim of the reissue of 1857, are infringed by the furnace at Thorndale.

The claims of the Thompson patents are none of them successfully attacked on the ground of a want of novelty. There is nothing in the Crockett furnace, or the Morrison furnace, or the Woodstock, Sparrowbush, or Newark furnaces, or any of the other American furnaces adduced in evidence, so far as such furnaces are shown to have existed in construction, or in description or drawings, before the dates of Thompson's inventions, which destroys the novelty of those inventions. So far as such furnaces burned wet fuel successfully, before Thompson's inventions, to what extent they did, they did so on different principles from those developed by him, and in structures arranged and operated in a manner not embraced in his claims. In regard to all the foreign patents and publications put in evidence, it is sufficient to say, that they none of them anticipate Thompson's inventions. It is not an unimportant consideration, that both of his patents have been extended by the patent office, after, as there is every reason to believe, a full consideration of substantially everything, on the question of novelty, that is brought up in defence in this suit.

It is apparent, from the evidence, that Thompson was the first to discover and put in practice the true method of economically burning wet fuels, and obtaining from them better results than from equal quantities of dry fuels. In respect to the tanning business, tanners can, by his inventions, certainly obtain all the heat they need by the use of no other fuel than their spent tan, wet from the leaches. The combined resistance by them to his patents is a tribute to the merits of his inventions.

I have examined, with care, all the evidence taken in this case, and considered the views advanced by the counsel for the defendants, but I am unable to resist the conclusion that the plaintiffs have fully established their case.

As to the point, that the cause of action respecting the furnace at Albion arose in the northern district of New York, where that furnace is situated, the objection is one which may be voluntarily waived. The defendants in this case have waived it by not raising it in their answer.

There must be a decree for the plaintiffs, for a perpetual injunction, and on account, with costs.

[NOTE. Patent No. 12,678 was granted to Moses Thompson, April 10, 1855, reissued March 31, 1857 (No. 446); No. 18,874 was granted to the same December 15, 1857. For other cases involving these patents, see Black v. Hubbard, Case No. 1,460; Black v. Munson, Case No. 1,463; Black v. Scott, Case No. 1,464; Black v. Thorne, Case No. 1,466; and Black v. Thorne, 111 U. S. 122, 4 Sup. Ct. 326.]

Case No. 1,466.

BLACK et al. v. THORNE et al.

[12 Blatchf. 20; 1 Ban. & A. 155; 7 O. G. 176.][1]

Circuit Court, S. D. New York. April 28, 1874.

PATENTS — ACCOUNTING FOR INFRINGEMENT—EVIDENCE.

In taking an account of profits in this suit, under the decree therein,—10 Blatchf. 66 [Black v. Thorne, Case No. 1,465],—the master proceeded on the principle of charging to the defendants, as profits, the cost or value of all the wood which, but for the use of the patented improvements, they would have burned in their furnaces, and made a report accordingly. On the accounting, the defendants inquired of one of their witnesses, whether he had examined and worked any furnaces substantially differing from the plaintiffs' furnace and worked substantially different from the plaintiffs' process, which existed at the time the defendants constructed their furnaces, and, if he had, what was the economical working of such furnaces, as compared with the plaintiffs' furnace and process. The master, on the plaintiffs' objection, excluded the evidence, as incompetent. The defendants excepted to the ruling, and afterwards excepted to the report on the ground of the exclusion of such evidence: *Held*, (1.) That the ascertainment of the profits made by the use of the patented improvements to produce heat, by the burning of wet fuel, necessarily presented, as the question to be determined—what advantage did the defendants derive, in producing heat, from burning wet tan by the employment of the patented improvements, over what would have resulted to them from the use to produce equally beneficial results in the way of heat, of other methods for producing such equally beneficial results, open to the public and to them to be used at the time they used the patented improvements; (2.) That the evidence excluded ought to have been received.

[Cited in Reed v. Laurence, 29 Fed. 918.]

[In equity. Bill by Charles N. Black, as administrator of Moses Thompson, and Eliza M. Fitzgerald, as administratrix of William P. N. Fitzgerald, against Samuel Thorne, James McFarlane, and Jonathan Thorne, Jr., for infringement of letters patent. Decree for complainants, and accounting ordered. Case No. 1,465. Defendants except to the master's report. Exceptions sustained.]

Charles N. Black, for plaintiffs.

Dorman B. Eaton and Andrew J. Todd, for defendants.

BLATCHFORD, District Judge. The master was ordered by the decree to take an account of the profits derived by the defendants from their infringement of the plaintiffs' two patents. 10 Blatchf. 66 [Black v. Thorne, Case No. 1,465]. The infringement proved was by the use, in burning wet tan, to make heat employed in and about the tanning of hides, of furnaces containing, and employing, in their use, the improvements covered by the plaintiffs' patents. The defendants used the infringing furnaces to produce heat. They burned wet tan in such furnaces to produce heat. The claims of the plaintiffs' patents are confined to the use of the improvements claimed only to produce heat by the burning of wet fuel. The ascertainment of the profits made by the use of the patented improvements to produce heat by the burning of wet fuel, necessarily presents, as the question to be determined—what advantage did the defendants derive, in producing heat, from burning wet tan by the employment of the patented improvements, over what would have resulted to them from the use, to produce equally beneficial results in the way of heat, of other methods for producing such equally beneficial results, open to the public and to them to be used at the time they used the patented improvements. This requires that the inquiry should be limited to the production of heat, and to the production of equally beneficial results in the way of heat, but it does not require that the heat should be that capable of being produced by burning wet tan alone. It extends to any fuel.

The master, in taking the account of profits, has proceeded on the principle of charging to the defendants, as profits, the cost or value of all the wood which, but for the use of the patented improvements, they would have burned in their tanneries. The view is, that the cost of the wood was saved, because the wet tan burned cost nothing as fuel, and would otherwise have been useless. This principle is correct, if, to obtain equally beneficial results in the way of heat, by other open methods, would have required the use of wood to the given amount or value. The solution of the question, therefore, involves these inquiries: (1.) Whether there was any other open method whereby equally beneficial results in the way of heat could have been obtained, and, if so, what it was; (2.) What would have been the expense of such method, in construction, operation and fuel, as compared with the expense of the use of the plaintiff's improvements, in construction, operation and fuel. If the first inquiry should require, on evidence, the answer, that it was a method which, to produce the equally beneficial results in the way of heat, would require a certain quantity of wood or other article, as fuel, then the saving in expense, in fuel, would be the cost of the wood or other fuel.

Now, I understand the above inquiries to involve an investigation into the matters inquired about in a question put, on the reference before the master, by the counsel for

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 155; and here republished by permission.]

the defendants, to the defendants' witness Du Faur. The question was, whether he had examined and worked any furnaces substantially differing from the plaintiffs' furnace, and worked substantially different from the plaintiffs' process, which existed at the time the defendants constructed their furnaces, and, if he had, what was the economical working of such furnaces, as compared with the plaintiffs' furnace and process. This question was objected to on the part of the plaintiffs, as being incompetent, and as having been already asked. The master sustained the objection, and the defendants took, on the record, an exception to the ruling. The defendants have also filed an exception to the master's report, (exception 10,) on the ground that he erred in excluding proof of the economy of furnaces used in the combustion of wet spent tan, substantially different from the plaintiffs' furnace, and worked substantially different from the plaintiffs' process, as compared with the plaintiffs' furnace and process, and which furnaces were existing and in use at the time the defendants constructed their furnaces which are complained of. The evidence so excluded ought to have been received. It was competent and relevant. It could not be told, a priori, that the answer to it would introduce nothing which had not already been given in evidence in the case. It does not appear whether the master sustained the objection to the question on the ground that it was incompetent, or on the ground that it had been already asked, or on both grounds. Where and when the question had been already asked of the witness is not stated in the objection, or pointed out in the record. There may have been general evidence given by the witness, in the proofs for final hearing, as to the working of furnaces substantially differing from the plaintiffs' furnace, and worked substantially different from the plaintiffs' process, which existed at the time the defendants constructed their furnaces, and which were open to them to be used, and as to the general economical working of such furnaces, as compared with the plaintiffs' furnace and process; but the inquiry before the master involved the details of such economical working, with a view to arriving at the saving in money effected by the use of the plaintiffs' patented improvements.

It is no answer to these views to say, that the court has held, in this case, that the patentee was the first to discover, and put in practice, the true method of economically burning wet fuels, and obtaining from them better results than from equal quantities of dry fuels. That is true, but still the difference in economy which the defendants have derived from using the patented improvements is now the subject of inquiry. It may be that equally beneficial results in the way of heat could not have been obtained by the use of any number of furnaces burning any quantity of fuel, wet or dry, or both. It may be, that, to produce equally beneficial results in the way of heat, would have required a certain number of furnaces, involving a certain expense for construction and working, and a certain quantity of a given kind of fuel, costing a certain sum. It may be, that the result of all these inquiries will be to show that, after all, the defendants have saved the expense of all the wood it would have taken to produce heat enough for use in tanning the same number of hides which they have tanned by the use of the heat produced by the infringing furnaces; and that, with that saving, they have still had a surplus of unused heat. If so, the proper inquiry will have been made, and the result arrived at will have been reached on a presentation of all the evidence properly bearing on it.

As these views require the report to be set aside, and the case to be sent back for the taking of further evidence, in conformity with this opinion, an order will be entered to that effect.

[NOTE. For other cases involving this patent, see note to Black v. Thorne, Case No. 1,465.]

BLACK (UNITED STATES v.). See Cases Nos. 14,600–14,602.

BLACK v. WELLS. See Case No. 1,463.

BLACK (YOUNG v.). See Case No. 18,153.

Case No. 1,467.

BLACKBURN v. SELMA, M. & M. R. CO.

[2 Flip. 525;[1] 12 Chi. Leg. News, 130.]

Circuit Court, W. D. Tennessee. December 21, 1879.

CORPORATIONS — JURISDICTION OF THE FEDERAL COURTS—ESTOPPEL — FOREIGN CORPORATIONS—VOLUNTARY APPEARANCE — PLEADING — WHEN FOUND WITHIN THE DISTRICT—WHETHER STATUS HOME OR FOREIGN—COLLUSIVE SUIT — CONSOLIDATION OF CORPORATIONS — MORTGAGE — SUIT PENDING—SUBSEQUENT SUIT—RAILROADS—REAL ESTATE—SALARIES.

1. A corporation authorized by statute in Tennessee, doing business there and dealing, as if organized, by reciting in its bonds and mortgages that it has been chartered by that state, is estopped when sued in the federal courts to deny that it was duly organized under the laws of Tennessee.

2. A foreign corporation, by filing an answer waives the right to be sued only in the districts of the state creating it, and if the suit be in equity to enforce a lien or claim to property within the federal district where sued, the jurisdiction is not limited to the property situated within the district, but is plenary for all proper purposes after such voluntary appearance.

[See Decker v. New York B. & P. Co., Case No. 3,727; Cadle v. Tracy, Id. 2,279; Wilmer v. Atlantic & R. A. L. R. Co., Id. 17,776; Kelsey v. Pennsylvania R. Co., Id. 7,679.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

3. An averment in a bill that a defendant corporation is duly chartered under the laws of Tennessee can only be denied by a plea in abatement to the jurisdiction. A demurrer for want of equity or an answer is a voluntary appearance, although the demurrer may also seek to aver a want of jurisdiction.

4. A defendant corporation "is found" within a district where it is sued, whenever it does business there by authority of law; the law implies a condition that it shall be amenable to suit within the state, whether the effect of the legislation is to adopt the foreign corporation as one belonging to the state, or only to license it to do business within the state. An express condition that it shall consent to be suable is not necessary.

[Cited in Uphoff v. Chicago, St. L. & N. O. R. Co., 5 Fed. 546.]

[See Northern Indiana R. Co. v. Michigan C. R. Co., Case No. 10,321. Contra, Hatch v. Chicago, R. I. & P. R. Co., Id. 6,204; Railroad Co. v. Harris, 12 Wall. (79 U. S.) 65; Wilson Packing Co. v. Hunter, Case No. 17,852; Railroad Co. v. Koontz, 104 U. S. 10.]

5. It is always a question of legislative intent whether a foreign corporation is adopted as a home corporation or only licensed as a foreign corporation to do business within the state. When the foreign charter is duplicated, and the legislation assumes the form of creating a home corporation, and not the form of a license only, the intention is to adopt the foreign corporation as one of home construction; its effect is to consolidate the two, but for purposes of jurisdiction it is a separate corporation resident within the state of its adoption. In such a case separate organization is not necessary, the foreign organization having been adopted as one existing.

6. Where a plaintiff has otherwise a right to sue, it is no objection to the jurisdiction that he acquired the title in question for the purpose of enabling him to bring the suit. A person has the right to acquire property to enable him to sue in the federal courts concerning it. But if the transaction is not real, and only colorable, the title, in fact, remaining in the grantor, the jurisdiction is defeated by the statute.

7. Where corporations of three states are consolidated into one, a court of equity in foreclosing a consolidated mortgage upon the entire property, has jurisdiction to sell all the property in all the states. Separate suits are unnecessary.

[See Wilmer v. Atlantic & R. A. L. R. Co., Case No. 17,776; Muller v. Dows, 94 U. S. 444.]

8. Where by a bill to foreclose a consolidated mortgage a court in one state has acquired jurisdiction to sell property in three states wherein the consolidated company has mortgaged its property, subsequent proceedings to subject the property to other claims in one of the states cannot oust the first court of its jurisdiction to proceed. And a sale of part of the property by such subsequent proceedings cannot avoid a decree for sale in the first suit. Nor can the defendant corporation be heard to set up such subsequent proceedings as a defense to a decree of foreclosure.

9. A railroad corporation, when not restricted by its charter, may acquire lands, ad libitum, and where it executes a mortgage to secure bonds to be used to raise money for construction purposes, may buy lands with part of the bonds to be utilized by including them in the mortgage as additional security for all the bonds.

[See New York Dry-Dock Co. v. Hicks, Case No. 10,204.]

10. The salaries of the officers of the company are a necessary part of the expenses of construction of the road, and may be paid out of the construction fund, or with the bonds to be used to raise construction funds, unless restricted by the charter.

In equity. The [defendant] company authorized about four million dollars of bonds to be issued to raise money to build the road, and executed a mortgage upon all the property in the states of Alabama, Mississippi and Tennessee, including about forty-five miles of finished road in Alabama. The loan did not attract the money-lenders, and only $310,000 of the bonds were actually issued. Of these, Gen. N. B. Forrest received $102,000 in payment of his salary as president, and commissions for procuring subscriptions to the capital stock from counties, towns and private individuals, and for other services rendered the company. A large part of the other bonds were used to purchase of Jacob Thompson, A. M. Clayton, W. G. Ford and others about 250,000 acres of land in Mississippi, known as swamp lands, which were included in the mortgage that authorized their sale by the trustees. A small fund was also raised on the bonds, and used in the construction of the road. Some of the bonds being sold by Gen. Forrest to [complainant] Dr. Luke P. Blackburn, now the governor of Kentucky, that gentleman filed this bill to foreclose the mortgage. Judge Emmons appointed a receiver, and a deed was made to him, but he never got possession of the Alabama part of the road, because while the motion was pending, a creditor with a judgment for $75 filed a bill to sell the road, and it was put in the hands of a receiver by the state courts of Alabama, and subsequently sold. The corporation was never separately organized in Tennessee; the acts of the Tennessee legislature being merely duplicates of the Mississippi acts. The jurisdiction of the United States court was earnestly resisted because it was not a Tennessee corporation, although the principal office was kept in Memphis. The use of the bonds to buy lands and pay salaries was attacked as unauthorized and fraudulent.

Estes & Ellet and J. W. Hampton, for plaintiff.

Minor Meriwether, for defendant.

HAMMOND, District Judge. By certain acts of the legislature of the state of Alabama, commencing February 13, 1850, and on to the latest act of December 31, 1868, there was incorporated a railroad company, finally known as the Selma, Marion & Memphis Railroad Company; by certain acts of the legislature of the state of Mississippi, from November 23, 1859, to July 21, 1870, there was incorporated by that state a railroad company by the same name; and by certain acts of the legislature of Tennessee, from March 24, 1860, to February 15 and 27, 1869, there was incorporated in this state a

railroad company by enacting verbatim the Mississippi act of November 23, 1859. The persons incorporated were identically the same, both in Tennessee and Mississippi, and the object evidently was to authorize a consolidated corporation to promote the scheme of building a railroad from the city of Memphis across the state of Mississippi to its eastern boundary. Nothing seems to have been done in furtherance of this enterprise until after the war, when by subsequent legislation the original acts were revived and amended in both Mississippi and Tennessee with the evident purpose of creating, so far as could be done, one single corporation in both states. The corporators and stockholders met at Okalona, Miss., on the 9th of November, 1868, and organized the company. The stockholders and corporators resided in both Mississippi and Tennessee. Some of the Tennessee stockholders were delegates from the city of Memphis and Shelby county, Tennessee, and representatives of the chamber of commerce at Memphis. At that time the only Tennessee legislation was that of March 24, 1860, but shortly after, on the 15th February, 1869, the necessary legislation was procured reviving the act of March 24, 1860. There was never any separate organization in the state of Tennessee. The Mississippi and Tennessee legislation seems to be almost identical throughout, the plan being whenever Mississippi passed an act to have it duplicated in Tennessee. The board of directors and officers elected were largely composed of residents of Tennessee. It does not appear when the scheme of consolidating this Mississippi and Tennessee corporation with the Alabama corporation was first conceived, but it may be inferred from the 46th section of the Tennessee act of February 15, 1869, and from the fact that some of the officers of the Mississippi and Tennessee corporation were likewise officers in the Alabama corporation; that this consolidation was the one referred to and authorized by the Tennessee legislature by that act. At all events, it appears by the proof that as early as January 30, 1871, the board of directors of the Alabama corporation considered the matter of consolidation by adopting articles of consolidation, which were also adopted by the directory of the Mississippi and Tennessee company March 8, 1871; and by both directories submitted to a joint convention of the stockholders. The proceedings of this convention do not fully appear in the proof, owing, it is said, to the loss of the record of it; but it does fully appear by the testimony that it was held, and the consolidation authorized; that directors were elected for the consolidated company, and that said directors assumed control, and the bonds and mortgages in this case were issued, and recite on their face the fact of consolidation. The consolidated company appears as a defendant in this suit, and by its answer makes defense. This puts the fact of consolidation beyond dispute, as it seems to us, at least, so far as the stockholders of the several companies, whether they be two or three, understood it. If in fact there was no consolidation, it must be because there was some inherent want of power, or some fatal irregularity, to be presently considered.

It is contended by the plaintiff, and no doubt correctly, that a corporation, contracting as such when sued on the contract is estopped to deny its corporate existence, or the regularity of its organization. Nor can it disprove the regularity and sufficiency of the original articles of association; nor thus repudiate its debts. Herm. Estop. § 542; Bigelow, Estop. 419, 420; Field, Corp. § 386; Abb. Dig. Corp. 328, 329, 367; Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64; Zabriskie v. Cleveland, C. C. R. Co., 23 How. [64 U. S.] 381; Adams v. Memphis & L. R. Co., 2 Cold. 645; Dooley v. Cheshire Glass Co., 15 Gray, 494; Merrick v. Reynolds E. & G. Co., 101 Mass. 385; Priest v. Essex Hat Manuf'g Co., 115 Mass. 380. And see Chubb v. Upton, 95 U. S. 667. In one of the cases cited, it is said, that "in relation to the question of acceptance of a particular charter by an existing corporation or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence, from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance, or the corporation books. It may be inferred from other facts, which demonstrate that it must have been accepted." Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64, 71.

As we understand the argument of the learned counsel of the defendant, it is claimed that the question here is one of jurisdiction, and therefore this doctrine of estoppel does not apply; however, it may be in a case where the defense is non est factum or some other plea to the merits. The fact that there never has been any separate organization of a corporation in Tennessee is relied on as conclusive against the jurisdiction, it being argued that without such an organization and acceptance of the charter in Tennessee the charter is dead by non-acceptance and non-user and limitation. Ang. & A. Corp. § 81. It is said this failure to organize separately in Tennessee shows that the defendant corporation is not a citizen of the district in which the suit was brought, and therefore we have no jurisdiction. Rev. St. U. S. § 629.

We cannot see why this estoppel is not as conclusive to support the jurisdiction as to support the contract. If a body of citizens shall assume to act as a Tennessee corporation; keep its headquarters and principal officers here, as this did; execute bonds and mortgages, including property lying in Tennessee, and reciting and showing its Tennessee charter and legislation as part of its

authority to do those acts, we do not see why it is not estopped by them to deny its Tennessee citizenship as well when the jurisdiction of the court depends upon it as when the validity of the contract is called in question. In Louisville, C. & C. R. Co. v. Letsom, 2 How. [43 U. S.] 497, 559, it is said that, "when the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit court jurisdiction." And in this case and the case of Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314, 328, and subsequent cases, it is held that the members of a corporation are conclusively presumed to be citizens of the state creating it, and are estopped to defeat the jurisdiction by any averment denying it. Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 227, 233; Muller v. Dows, 94 U. S. 444; Field, Corp. §§ 368–376. This shows that the doctrine of estoppel, and the presumption of a fact which may be contrary to the real fact itself can be relied on to support the jurisdiction of the court, as well as for any other purpose. We say, then, that when parties act as a corporation in Tennessee, and claiming to be a Tennessee corporation, deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the federal courts of that state, and they can no more aver their non-user or non-acceptance of the charter, under which they have assumed to act against the jurisdiction of the court in which the corporation is sued, than they can aver the fact against the contract itself. But the jurisdiction is supported as well on other grounds. By the act of the 28th of February, 1839 (Rev. St. § 737), which the cases just cited show to be applicable to corporations, this court can acquire jurisdiction over the corporation by its voluntary appearance, and has done so by the answer in this case. Jones v. Andrews, 10 Wall. [77 U. S.] 327; Gracie v. Palmer, 8 Wheat. [21 U. S.] 699. By the act of 1789 (Rev. St. § 629), the defendant must be a citizen of the state where the suit is brought, but these decisions show that where the constitutional requirement of being citizens of different states exists the plaintiff may sue the defendant in any district where he is found; that is, served with process, or where he voluntarily appears. In Jones v. Andrews, supra, a motion to dismiss was held to be such voluntary appearance as waived the right of the defendant to be sued in the district of his residence. It is not necessary to hold here that where the president or other officer of the corporation, on whom process may be served, is found and served in a district other than that of the state creating the corporation, such service will give jurisdiction. Where there is nothing but the presence of an officer of a non-resident corporation in the district to support jurisdiction it would not be acquired by the service of process on him; but with or without the service of process, if a corporation of a state other than that of the plaintiff being made a party, does voluntarily appear, such appearance gives jurisdiction over the corporation where there are other parties resident within the district who are sued, as in this case. Grant, then, that this corporation is only an Alabama and Mississippi corporation, one or both, being a necessary party to this suit and voluntarily appearing, the jurisdiction over it is complete. It is true that the defendant demurred for want of jurisdiction, and the demurrer was decided against it by the late circuit judge, Emmons, and it seems to us properly, not only upon the merits but technically, upon the record. The bill avers that the defendant corporation was created by the laws of Tennessee, and that the plaintiff is a citizen of Kentucky. This was a sufficient averment and, on the record the jurisdiction sufficiently appeared. Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404; Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 227. If the averments were false, the proper way to raise the question and the only way, it seems to us, was by plea in abatement traversing the fact and showing the truth. The learned counsel seeks to avoid this by relying on the rule, that the demurrer did not admit "averments of law nor averments of fact in the bill which are contrary to any fact, of which the court takes judicial notice;" for which he cites 1 Daniel, Ch. Pr. 546. This averment that the defendant corporation was a corporation chartered by the laws of Tennessee, was not an averment of a matter of law nor an averment contrary to any fact of which we take judicial notice. This very case illustrates that it is not; for, the fact relied upon to defeat the jurisdiction, is that the charter granted "is dead by non-user and non-acceptance and limitation," to quote the language of the brief, and substantially the allegations of the answer. If we admit that we take judicial notice of the Tennessee statutes, creating a corporate body as in the case of Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 227, 234, we find them in abundance chartering this corporation or one for the same object and same purpose with same name and same parties as the Mississippi and Alabama corporations. Acts March 14, 1860, p. 598; Feb. 15, 1869, p. 221; Feb. 27, 1869, p. 345; Dec. 12, 1871, p. 59; March, 1875, p. 48. The fact that no such corporation was ever organized and that the charter was not accepted is one aliunde all these statutes, and should have been pleaded in abatement, if relied on to defeat the jurisdiction. 2 Abb. Pr. 55; Conk. Pr. 355; De Sobry v. Nicholson, 3 Wall. [70 U. S.] 423; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386; Sheppard v. Graves, 14 How. [55 U. S.] 506; Wickliffe v. Owings, 17 How. [58 U. S.] 47; Jones v. League, 18

How. [59 U. S.] 76; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. [62 U. S.] 202, 214. The filing of an answer, and perhaps the demurrer itself waived it; the demurrer being for want of equity as well as to the jurisdiction. See Jones v. Andrews, supra. The reservation in the answer of the question of jurisdiction, does not avoid the effect of filing it as a waiver of jurisdiction and a voluntary appearance. When the want of jurisdiction appears by the bill, it may be raised by demurrer, otherwise, it must be by plea in abatement, averring the facts relied on. It cannot be taken by answer. It is not like the case of an entire want of jurisdiction of the person or subject matter, which may be taken advantage of at any time. Here the court can by voluntary appearance acquire jurisdiction; and here the record shows a case of jurisdiction on its face. We have considered this question as if it were properly presented on the final hearing; but it is by no means clear that the ruling heretofore made, on this demurrer, belongs to that class of interlocutory orders, which may be reviewed and set aside on the hearing. The decree overruling the demurrer, does not grant leave to rely on it at the hearing, or to take the objection by answer, and this would be, perhaps, the only method of avoiding the necessity of a plea in abatement, if it could be done at all.

Again, we may acquire jurisdiction under the act of June 1, 1872 (Rev. St. § 738), by reason of the property of this corporation situated within the district and conveyed by the mortgage; and, all that has been said by us on the subject of acquiring jurisdiction by voluntary appearance under the act of Feburary 28, 1839 (Rev. St. § 737), applies as well to this section. And it is obvious from the reading of the statute that this jurisdiction is not limited to the property within this district, as is claimed by counsel, in any case where there is a voluntary appearance. It is only where there is a decree "without appearance" that the jurisdiction is so limited. The act of March 3, 1875 (18 Stat. 470), for the first time in terms confers jurisdiction to the full extent of the judicial power conferred by the constitution; but it will be found that the courts had already by construction of the acts of 1789 and subsequent acts, extended the jurisdiction to the utmost limits mentioned in the last act upon the subject. It is not therefore necessary to consider the question, whether the act of 1875 can confer jurisdiction of a suit brought prior to the act itself and which was pending at its passage.

I fully concur with the opinion of the learned circuit judge of the seventh circuit in the case of Wilson Packing Co. v. Hunter [Case No. 17,852], that in the purview of these acts of congress a defendant corporation "is found" within this district whenever it does business here by authority of law, and that the license to carry on business implies an obligation to submit to the jurisdiction of the courts of the state in which the license is granted. The supreme court have held that such a condition may be attached to the license, and the federal courts acquire jurisdiction as well as the state courts. Ex parte Schollenberger, 96 U. S. 369. We have no general statute in Tennessee requiring foreign corporations doing business here to submit to the service of process, although there is such requirement as to foreign insurance companies. Code, § 1590. But the legislation of this state in reference to this company certainly authorizes it to own and operate its railroad within this state and within this federal district. It does own and, the proof shows, has graded its road either wholly or partly within the district. It kept its principal offices here, and acted in all respects as if it were a Tennessee corporation. Now, whether it was or not, cannot affect the question of our jurisdiction. It may be fairly inferred or implied from the legislation that the company was to be suable here in our courts, if the benefits conferred were accepted as they have been. It is not necessary that the law should especially provide that the company should agree to submit to the jurisdiction of the courts in this state. This is perhaps all that was intended to be decided in the case of Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65, 81. An act of congress authorized process against foreign corporations to be served on an agent in the District of Columbia, but it did not attach any condition of this kind to the legislation granting the license, but it was implied from the legislation.

More than this, we hold that it was not necessary to have a separate organization in Tennessee in order to make this a Tennessee corporation. We doubt if such was ever the intention of the legislature; but whether it was or not, it was, in the progress of the legislation, manifestly changed into a purpose to adopt the Mississippi organization as a Tennessee corporation. When this is done no separate organization is necessary to give the company a residence in Tennessee, certainly none is necessary to make it suable here. In the case of Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65, the legislation of Virginia and of the District of Columbia by congress was held only to license a Maryland corporation, and not to create a Virginia or District of Columbia corporation. Whether the particular legislation does the one or the other was said to be "always a question of legislative intent." Page 83. In the case of Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286, an Indiana corporation, licensed by Ohio, sued a citizen of Indiana in a federal court of Indiana, which was held to be inadmissible. In Chicago & N. W. R. Co. v. Whitton, 13 Wall. [80 U. S.] 270, it does not

clearly appear what the legislation of Illinois was, but it seems to have been taken for granted that it was of such a character as to make it an Illinois corporation. Yet a citizen of Illinois could sue it in the federal court of Wisconsin, because it was a citizen of that state, being also a Wisconsin corporation; and there could not be a corporation or citizen of any other state. Page 83.

In Muller v. Dows, 94 U. S. 444, the corporations were chartered separately in Missouri and Iowa and subsequently consolidated under the laws of both states; and it was held to be a separate corporation in each for the purposes of jurisdiction. In the case of Williams v. Missouri, K. & T. R. Co. [Case No. 17,728], the defendant was held to be a Kansas corporation, and that it was not by the Missouri legislation made a corporation of that state. The acts of the Missouri legislature are not shown by the report. From these cases and others it appears that it depends upon the intention of the legislature in Tennessee whether this corporation is a Tennessee corporation, or only the corporation of another state, licensed to operate within this state. In creating a Tennessee corporation, it might select as corporators citizens of the state or other states, or of both or any number of states, or it might incorporate the same citizens as were incorporated by the other states, and give the same powers, privileges, etc.; or it might only license the foreign corporation to do business here as a foreign corporation. We think on a careful reading of the whole legislation that it was intended to adopt the corporation of Mississippi as a Tennessee corporation, and that while no separate organization was required, yet for the purpose of jurisdiction, a separate corporation was, in fact, created with its status fixed as a Tennessee corporation; and for all purposes it was intended to consolidate them to the only extent which can be done under our system. Therefore, the averment of the bill that the defendant was a corporation, created by the laws of Tennessee, is strictly true. But in the face of that averment, if it appear otherwise by the pleadings, as it does here; if the defendant's counsel is correct in his construction of the legislation that the corporation is only a citizen of Mississippi or Alabama or both, the jurisdiction can still be supported, notwithstanding the defective averment, if we are correct in the positions we have assumed on that subject. Muller v. Dows, supra. The plaintiff, being a citizen of Kentucky, could sue in the federal courts of either state, and our jurisdiction is established.

It is not necessary to consider what the effect of the consolidation is as to the entity of this corporation, whether it is a compact whole or composed of three or two parts, broken by state lines; because, as we have endeavored to show, in any view we can take of the facts, we have jurisdiction to foreclose this mortgage, so far as the parties to the suit are considered in their relation as citizens to each other.

Nor is it necessary to consider this question in reference to the property sought to be foreclosed by decree of sale. The case of Muller v. Dows, supra, settles the law to be that our decree, if given, may include the whole property in all three of the states where there has been a consolidation, as in this case. Copeland v. Memphis & C. R. Co. [Case No. 3,209].

The next point to be considered as to the jurisdiction is the allegation, made in the pleadings, that this suit is collusive. It is said Luke P. Blackburn is not the real owner of the bonds sued on by him, but that they were only transferred to him to give this court jurisdiction, and really belong to N. B. Forrest, or his estate; he having died pending the suit, and he being a citizen of Tennessee. There is no proof of this collusive arrangement. It may be that Forrest sold the bonds to Blackburn for the very purpose of enabling him to bring this suit, but that cannot defeat the jurisdiction. It is neither wrong to entertain such a motive nor to carry it out, and certainly not fraudulent. The act of March 3, 1875 (18 Stat. 472), does not avoid a suit because of such a motive. It refers only to simulated and unreal controversies; that is, controversies between citizens of the same state, falsely set up as being citizens of different states. Barney v. Baltimore City, 6 Wall. [73 U. S.] 280; Smith v. Kernochen, 7 How. [48 U. S.] 198; McDonald v. Smalley, 1 Pet. [26 U. S.] 620; Osborne v. Brooklyn City R. Co. [Case No. 10,597]; Newby v. Oregon Cent. R. Co. [Case No. 10,145]; Briggs v. French [Case No. 1,871]; Welles v. Newberry [Case No. 17,378]; Starling v. Hawkes [Case No. 13,311]. It can make no difference where the suit is brought, the law is, or should be, the same in all courts. But if it be different, the real parties to the controversy have a right to select the forum in which to sue. Of course, Blackburn cannot sue on bonds belonging to Forrest, whether it is treated as a question of jurisdiction collusively obtained, or a question of title of the plaintiff. The only fact relied on to sustain this allegation of want of title in the plaintiff, is that he gave Crab Orchard salt stock for the bonds, and it is said the stock was valueless. It does not appear to have been so in the minds of these parties; and it was a good consideration if they thought it valuable.

It is said, the charter did not authorize the purchase of Crab Orchard salt stock by its president. There is no proof that these bonds, sold to Blackburn, belonged to the company, as is assumed in the argument. It seems Forrest owned some of the bonds, and those he sold may have been his own, and in the absence of proof, will be taken to be so.

It appears, by the proof, that this corpora-

tion, before issuing these bonds, entered into a contract to purchase, with some of the bonds, certain large quantities of what are said to be "swamp lands" in the state of Mississippi; and some of the defendants, who are directors in the corporation, were vendors of the lands, and are now holders of the bonds. This transaction is said to be fraudulent and collusive, made for the purpose of working off worthless lands in return for valuable bonds secured by this mortgage. There is no proof of this whatever. There is not even a syllable of proof taken as to the value of the lands, and we are asked to base a finding that they are valueless on an inference that they are so from the fact that they are denominated "swamp lands" and have been forfeited for taxes, and that some of the directors were the owners of some of the lands. If this transaction were fraudulent, it could have been proven to be so; and we do not feel authorized to infer it without proof.

It is true the courts scrutinize very closely, and sometimes with suspicion, the dealings of the officers of a corporation with it. But still, fraud is never inferred from the mere suspicion itself. There must be proof of it, as in other cases.

It seems a fair inference, from the proof, that these lands were purchased and included in the mortgage with a view of thereby strengthening the security and as an auxiliary means of floating the whole issue of bonds on the market. The scheme failed, as many such do; but it is not fair to treat it as a fraud upon the stockholders because it did fail. Many other railroad enterprises failed about this time from general causes, and it may be this did also. Neither can the company refuse to pay these bonds, which it gave for the lands, because of the failure to float the entire loan in the money markets of the world. It took the risk of the transaction, and in the absence of any fraud the contract must be enforced. There is nothing in any of the charters, or acts of the several legislatures under which the company acted, restricting its powers or prohibiting this transaction. In the absence of such restriction, there is no doubt of the power of a railroad corporation to take and hold real estate; and one of the most useful methods of building railroads is by grants of lands, or subscriptions of them to the capital property, to be utilized by sale or mortgage, or otherwise, as the interests of the company may require. It is true the money raised by the bonds was required by the covenants of the mortgage to be used in the construction of the road, and the object of purchasing these lands may have been to so use them as to convert them into money for that purpose. It is to be observed that the mortgage itself includes these lands and provides for utilizing them. If this scheme had been successful, no one would say that the using of a comparatively few thousands of the bonds in buying lands, which added strength to the security given for the large loans provided to build the road, would have been spent in its construction. Of the $4,250,000 of bonds, only $184,000 were used in the purchase of these lands. The same may be said about the salaries of the officers. The company might pay its officers out of the construction fund as a necessary expense incurred in the construction. The salaries may have been large, perhaps were too large, but that is no defense against the bonds paid out for them. And, here it may be said that if the purpose was to attack this land transaction as fraudulent, and the payment of these salaries as fraudulent, there should have been filed an original or cross-bill for the purposes of rescission, specifically charging the facts constituting the fraud and presenting the issues directly for adjudication. General charges of this kind, in an answer against co-defendants and bondholders proving their claims in a foreclosure suit, will not do. The plaintiff here is not shown to have had anything to do with these matters. Some mode must be adopted of making the issue with each bondholder as he comes up, where the particular transaction under which he claims, is attacked as fraudulent. There is nothing in the proof to show that the plaintiff, Luke P. Blackburn, got a bond paid out for land or given for salaries. His may have been of those paid out for construction of the road. We cannot infer, because he got it of Forrest, that it was of those paid to him for his salary. We have been asked to embody into a judgment the suspicion of bad faith, entertained by those now representing the company, against those, who formerly represented it, without any direct proof on the subject and on the very general charges of fraud. We are asked to assume that "swamp lands" and "Crab Orchard Salts Stock" are valueless, without any testimony as to their real value; to assume that Blackburn's bonds are of those, alleged to be fraudulently issued, and so of the other allegations of fraud. Too much has been left to inference in the matter of proving these charges of fraud to enable a court to say that they are true. The land transaction seems to have been ratified, or attempted to be ratified, by special legislation which was designed to further the scheme. We think the powers of the company to mortgage its property included a power to mortgage its franchises. There is no restriction on the subject and much in the legislation, which indicates an intention to include a power to mortgage franchises as well as other property. The mortgage does include the franchises; and it is not for the company to now deny its power in this respect. The incidental power to hold real estate and to mortgage franchises, is adequate unless specially limited by legislation. Field, Corp. § 52; Planters' Bank v. Sharp, 6 How. [47 U. S.] 332; 2 Redf. R. R. 462; Wilson v. Gaines,

(Sup. Ct. Tenn.) 1 Memphis Law J. 171, 175.

The plaintiff seems to have purchased a bond of Forrest, but, in the absence of proof, we cannot say that it was of the tainted bonds, if any were tainted. It may be that his belonged to the $16,000 issued for construction purposes. In the absence of proof, we must assume that he was an innocent holder, and therefore it is not necessary to consider the question, whether taking a bond after a coupon is due charges him with notice. This question would only arise, if it were proved that his bond was of those that were issued for the lands or the salaries. The company cannot take advantage of the unauthorized use of the bonds by its agents in violation of their instructions to use them only in construction of the road without proof, showing that the holder had notice that they were so issued. Nothing must be left to inference in determining this question; but the facts constituting the notice must be proved.

By the answer and by an amendment to the answer, filed since the cause came on for hearing, certain proceedings in the state courts of Alabama are set up as a defense to the bill in this case. Technical objections to the consideration of the transcripts, filed as evidence, are made, and in strictness they should not be heard in evidence; but we have, nevertheless, looked carefully into the matter; considered the nature of the defense set up, and feel inclined to dispose of it rather on the merits than the exceptions taken to the irregular mode of its introduction in the record. All these proceedings were taken in the courts of Alabama subsequently to the filing of the bill in this case. It seems that one May had a judgment against the road, whether the Alabama corporation or the consolidated corporation does not appear—nor is it material—for the sum of $76.70, upon which he had a nulla bona return. He filed a bill in the state chancery court to marshal the assets of the company, and to satisfy his judgment and all proper claims against the company in favor of other creditors, in whose behalf as well as his own, he filed the bill. By this bill he attacked the bonds and mortgage sued on in this case; denied the legal existence of the consolidated company, and set up very much the same defense against them as is set up by the answer in this case. He also attacked by the bill the bonds of the Alabama corporation, indorsed by the state of Alabama, and which were claimed as a prior lien on the Alabama portion of the road which seems to be completed, equipped and in full operation for a distance of some forty-five miles. This lien in behalf of the state of Alabama seems to have been recognized by the mortgage sued on in the case in this court, but its validity is denied by this bill of May in the equity court of Perry county, Alabama. The bill prays for the appointment of a receiver for a sale of the road and a general administration of the assets. At the very time of the filing of this bill, and on the very day, one Porter King, who is president of the defendant company, residing in Alabama, appeared by his answer; substantially admitted the equities for the appointment of a receiver; waived notice, and a receiver was immediately appointed and put in possession of the Alabama portion of the road. This was done pending a motion in the case now at bar for a receiver, who was subsequently appointed by the late Circuit Judge Emmons, and to whom the defendant company by his order conveyed all its property included in the mortgage.

It is manifest that this Alabama proceeding was taken to overreach the jurisdiction of this court and defeat the effect of the proceedings here. It also appears that one Luddington subsequently filed his bill in the chancery court of Alabama, claiming to own some of the bonds indorsed by the state of Alabama, and asking to be subrogated to the lien of the state of Alabama for the bonds he held. By an order of the court the receivership in the May bill was extended to the Luddington bill, and the cause went to a decree of sale, recognizing the validity of the lien in favor of the state of Alabama and subrogating the bondholders to the lien. The road in Alabama was sold under the decree, and Crenshaw and others became the purchasers August 12, 1878, and the sale was confirmed to them.

This decree and these proceedings are now set up in this court, not by the purchasers, who are not parties to this suit, but by the defendant company, as a defense against a foreclosure here.

It is manifest that the defendant cannot make such a defense. It has no interest in it, and cannot plead title outstanding in an adverse claimant as a defense to a suit upon other contracts it has made.

But aside from this, these proceedings in Alabama were all taken after the bill filed here and pending the litigation. If in the race of diligence to get possession of the property, by collusion of the defendant, or otherwise, creditors appealing to another jurisdiction, have been satisfied, the defendant company has no right to complain. Whether the proceedings, taken there, are binding on creditors, who had, before they were commenced, taken proceedings here to enforce their lien, is a question we are not called on to decide. It is certain that the jurisdiction of this court cannot be ousted by subsequent proceedings taken in another forum, and such subsequent proceedings are not an obstacle to a decree in the court which first acquires jurisdiction. The general rule is that the court, which first acquires jurisdiction, is the one to which all parties claiming an interest in the property, sought to be foreclosed, must resort to settle their conflicting claims. Whether there be circumstances which relieve the creditors proceeding in

Alabama from the effects of this rule; whether they might proceed there and acquire a title which is paramount to that claimed by the plaintiff in this suit, is not properly now before us; nor can we undertake, in the condition of this record and with only the parties now here, to determine who will have the better title—the Alabama purchasers or the purchasers under any decree made here. All we determine is that no subsequent proceedings in Alabama can interfere with the proceedings here. We do not understand that actual manual possession of the mortgaged property, by a receiver or otherwise, is necessary to give a court of equity jurisdiction to foreclose the mortgage. A receiver has been appointed here, and a deed has been made conveying the property to him. Whether he ever took possession or not is immaterial; nor do we deem it material whether he got paramount title by the deed. The jurisdiction over the corporation has been acquired, jurisdiction over the trustees in the mortgage has been acquired, and we have jurisdiction to foreclose by sale all the property, included in the mortgage, to satisfy the claims of all creditors coming into this suit. Certainly, the defendant company cannot defeat the right to a foreclosure by alleging that some one else may be injured by the sale we make, casting a cloud upon his title.

Let there be a decree in the usual form to foreclose the mortgage.

Case No. 1,468.

BLACKBURN et al. v. STANNARD et al.

[5 Law Rep. 250.]

District Court, D. Connecticut. July 29, 1842.

INJUNCTION—PLEADING—SURPLUSAGE—DEMURRER.

1. On an application for an injunction, it is not competent for the respondents, by reciting an original petition in bankruptcy, and concluding in demurrer, to test the sufficiency of the original petition in bankruptcy, that being collateral.

2. Whatever is surplusage in a plea to a bill in equity, may be rejected.

3. A demurrer to evidence, is not a good plea to a bill in equity.

4. An application for an injunction, should contain a description of the property sought to be protected by a decree, together with appropriate allegations of the danger or loss impending.

In equity. This was a petition for an injunction against Stannard and his assignees, upon the alleged ground that the creditors of Stannard have filed proceedings in the district court against him as a bankrupt, and in this petition, they alleged that he was collecting the debts, and that the other respondents were selling the property put into their hands. On the 21st of July, a process of subpoena issued against Stannard, Buckingham, and Carew, to show cause on the 29th day of July. The respondents all appeared, and made answer as follows: "And now the respondents come into court, and crave oyer of the said petition (in bankruptcy), and it is read to them in the words and figures following." Here followed the petition in bankruptcy verbatim; and the conclusion is in these words: "which being read and heard, the respondents defend, plead, and say, that the said petition and matters therein contained are insufficient in the law, and therefore pray judgment." Under this plea or answer, the counsel for the respondents argued, that the original petition in bankruptcy, and the present petition for an injunction, were but one; that no claim could be urged for an injunction, unless that proceeding should be predicated upon a petition in bankruptcy, couched in suitable averments. The petition for an injunction being wholly dependent upon the proceeding in bankruptcy, that must be sufficient to warrant the decree in bankruptcy; that not being sufficient for any such purpose, such insufficiency was available here. In recurring to that petition, it will be seen, that there has been no act of bankruptcy set up, in any legal form. That the respondent has committed one or more of the acts denominated acts of bankruptcy, is no such averment as will authorize the court to pass the proper decree. There is no time specified when such act or acts were committed; there is no date to the petition in bankruptcy. That proceeding on its inspection will be found insufficient. The counsel further proceeded to argue the insufficiency of this application for an injunction. It is not alleged that the property of the bankrupt is about to be destroyed—it is not alleged that any or either of these respondents are insolvent.

The counsel for the application objected to the reception of this plea, as involving the sufficiency of the petition in bankruptcy, and proceeded to argue the sufficiency of the petition for an injunction. In point of fact, the petitioners have only to make out a prima facie case, and in point of form, these facts may be stated substantially. There are no technical rules which should govern a court of equity, in a case like this.

Mr. Rockwell, for petitioners.

Strong & Foster, for respondents.

JUDSON, District Judge. In determining this case, it may be necessary to inquire, what is the plea interposed by the respondents? This court, sitting in bankruptcy, has on file, a petition instituted by the creditors of Stannard, founded upon the compulsory provision of the bankrupt act, and now these creditors apply for an injunction against the bankrupt, who is, as they allege, collecting and applying to his own use, the debts; and against Wm. A. Buckingham, to whom a part of the bankrupt's property has been assigned; and also against Carew, the other respondent, who, it is said, is the general

assignee under the state insolvent law. The respondents come in, and having prayed oyer of the original petition, recite the same at large, and then conclude in the form of a demurrer, "that the petition is insufficient in the law." This form of pleading, to say the least, is novel. The plea contemplates, and the counsel have insisted on the right of calling in question and testing the legal sufficiency of the original petition in bankruptcy, pending in this court, sitting in bankruptcy, that being one branch of its jurisdiction, while this petition proceeds on the ground of its equity jurisdiction. The records, proceedings and decrees in equity are kept in the same manner as records and judgments at law. In bankrupt proceedings no such records are made up. By the act of congress, the files are to be kept, and the preservation of these files is a substitute for a record.

Upon the present application to this court, as a court of equity, the proceedings in bankruptcy are to be brought up as evidence, in the same manner as the partner would show the danger to which his property, or rights of property, may be exposed, and to prevent which the injunction is prayed for. By way of illustration, a case may be stated. Suppose A institutes an action of ejectment against B, relying upon an execution title acquired by a levy under the Connecticut statute, and the defendant in ejectment, "prays oyer of the original proofs, judgment, execution and levy, and then demurs to the declaration?" Would this be a demurrer to the original process—the judgment or the return? Surely not. These several documents might be essential evidence for the plaintiff in ejectment, on the general issue. Suppose another case. A sheriff is sued for a false return, and instead of pleading not guilty, leaving it for the plaintiff to exhibit in evidence, the original proceeding, he should pray oyer, and demur to the declaration. Let me suppose a third case. A petition in chancery is preferred to validate a deed, rendered void at law, for the want of some one of the legal requisites. The defect in the deed is particularly stated in the petition. On proceeding to a decree, in such a case, the petitioner would make an exhibition of his defective deed—this would be matter of evidence, but the respondent does not wait for this exhibition, and praying to see the deed, recites it at large, and concludes with a demurrer to the petition, not in the form of a demurrer to the evidence, but a demurrer to the petition.

The question in this case, as well as in the cases stated, is, can the pleader, under this peculiar mode of pleading, go back and try the validity or sufficiency of the collateral matter? I think not. By an examination of the plea, it will be found, that the counsel do not proceed upon the idea, that this is a demurrer to the evidence, but they proceed upon the ground, that the two petitions are but one: and being but one, their demurrer will reach all defects apparent in each. The court knows of no rules of practice that will permit a respondent to demur to the evidence in support of a bill in equity. The respondent may demur to the bill, or he may make answer. If he elects to demur to the bill, that demurrer cannot reach beyond the allegations in the bill. This is a bill in equity praying for an injunction for certain causes alleged in the bill. I recur again to the question first stated; what is this plea? It clearly is a demurrer to this petition, and nothing more. That part, which is a recital of the application in bankruptcy, may be rejected as surplusage, leaving the demurrer applicable to the petition for an injunction. Under such a plea, it would be manifestly wrong to go into the consideration of any matters not on the face of the bill. The court will not dictate to the party what plea, or answer shall be made, but the party is, and must be left to his own discretion, and the court will determine the legal effects of that plea or answer. Because this peculiar form of pleading has been adopted by the party, it does not follow that the court can adjudicate upon another petition addressed to another branch of its jurisdiction, but the present investigation can be extended to nothing but the bill itself. It involves the sufficiency of the petition for an injunction, and this question has also been argued, and so far as I have been able to consult the usual forms and precedents, and examine the principles in question, this application for an injunction is insufficient.

The great principle upon which a court of equity proceeds to decree an injunction, is the present or future danger to which the property is, or may be subject. If this danger be threatened, or is imminent, the court, by its proper decree, will interpose, to save the property and protect the rights of the party. In this case the alleged causes for this interposition have been examined, and there is no allegation, which resembles danger, either threatened or imminent. These are indeed loose and indefinable statements in the petition, which perhaps were intended as allegations of danger, but they are found to fall very far short of the usual averments in similar cases. These are the allegations to which I refer: 1st. "On the 21st day of May last, the said Stannard transferred and assigned to Wm. A. Buckingham, a large amount of his personal estate, which said goods are in whole or in part now in the possession of said B., who is selling the same." These are all the allegations in relation to Buckingham, but it is confidently affirmed, that something more is required. For all that appears here, and for aught the court can know, Buckingham may be a safe depositary for these goods, and this is the legal presumption, until the contrary appears. It may be said, that Buckingham is selling these goods, and suppose he is, and it should be found also, that he is entirely responsible

to account for the avails, then there may be no necessity for an injunction. It is not stated that he is destroying, but only selling the goods. It is not stated that there is any personal or peculiar value attached to this property, which should be preserved. If these goods are common articles of traffic, and the holder is responsible, then the sale may be a benefit, rather than an injury. To entitle the petitioner to the injunction prayed for, it should have been alleged that Buckingham was insolvent and unable to account for the goods, or, that there was some special property in them, which would be lost to the petitioner if sold. 2d. The allegations in regard to Carew, another respondent, are liable to the same objections. "And that on the 23d day of May, the said Stannard made a conveyance of all his property, to J. C. Carew, in trust for all his creditors." If Carew be an unsafe depositary of this portion of the goods, in his hands, or if insolvent, it should have been so alleged. If underselling —squandering—or destroying the goods, the facts should have been stated. 3d. The allegations in regard to Stannard himself are equally wanting in substance. "And that the said Stannard is now collecting the debts due to him, or that the person to whom he may have assigned said debts is collecting the same and applying the same to his own use." This mode of alleging a fact in the alternative, "the said Stannard or some other person is collecting," cannot be sanctioned. If these debts are all in the hands of "some other person," then the prayer should not have extended against Stannard, nor can a decree be passed against "some other person" not named in the application. In relation to Stannard, it is not even stated that he is insolvent or a bankrupt—or is of inability to account for what may be collected. The only allegation looking that way, is, that Blackburn & Co. have filed their petition in bankruptcy against him; but the filing a petition does not constitute the fact of bankruptcy nor the fact of danger. It should have been alleged that Stannard was a bankrupt and insolvent—that the books and notes were in his hands—that he was collecting the same and applying the avails to his own use, while he was in fact unable to respond or account for the same, defrauding the creditors thereof, and that the said creditors were in danger of losing the whole amount of such collections, should the said Stannard be permitted further to collect and misapply the avails thereof, and that the petitioners would then be remediless.

There is still another objection to this petition, of a more general nature. There is a material defect in the description of the property, sought to be protected. The petition, when examined, is found to contain no other designation or description of the property than this, "that on the 21st day of May last, the said Stannard transferred and assigned to Wm. A. Buckingham, a large amount of his personal estate." The term "personal estate" includes all kinds of property except lands, tenements and hereditaments, when used in its most extensive sense, as it is here. In an application for an injunction, the same minuteness is not required, as in an action of trover, but surely, there should be some description given. Suppose this had been an application for a decree against waste, and it had been alleged that the petitioner was the owner, in fee, of a large amount of real estate? Obviously this would be insufficient. The principle involved is the same in both cases, and in each, there should be a description of the property, as well as appropriate allegations of the danger feared. The present application wants both, and the prayer must be denied. The petition however may be amended, in all these essential particulars, and it may not be improper to say, that the court does not mean to cast any obstacles in the way of creditors who are so deeply interested in the preservation of the property of bankrupts. The equity jurisdiction of the court, in cases of this sort, arising under the bankrupt law, is of great importance to the community. Without this power, and a judicious exercise of it, there might be found numerous cases of fraud and injustice which could be reached by no other process. The dishonest bankrupt, on the eve of failure, casts about, to find some favorite trustee in whose hands could be safely deposited his effects, until the storm should pass away, leaving his creditors unprovided for, and unpaid. To prevent such injustice, this chancery power is given, and its exercise is essential to the administration of justice at all times, but more especially under the provisions of the bankrupt act. This is no new power, neither is it any extension of old power. It belongs to, and is a part of the great equity system, which has long been established.

BLACKBURN (UNITED STATES v.). See Case No. 14,603.

Case No. 1,469.

The BLACK HAWK.

[9 Ben. 207.][1]

District Court, S. D. New York. Aug. Term, 1877.

SHIPPING—DAMAGE TO CARGO—NEGLIGENT STOWAGE—EVIDENCE.

1. A bill of lading for a cask of wine receipted for it "in good order and condition," and excepted "the dangers of the seas." On arrival in port, and before being moved from its place in the vessel, it was found to be leaking, with one of its heads crushed in, and a large proportion of the wine had leaked out. In a suit in rem, in admiralty, against the vessel, to

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

recover for the value of the lost wine: *Held*, the libellant must show negligence in the handling or stowage of the cask.

[Cited in The Pharos, 9 Fed. 914.]

[See Clark v. Barnwell, 12 How. (53 U. S.) 280; The Sabioncello, Case No. 12,198.]

2. The condition of the cask on arrival was prima facie evidence of such negligence.

[Cited in The Pharos, 9 Fed. 914.]

[See Clark v. Barnwell, 12 How. (53 U. S.) 280; English v. Ocean Steam Nav. Co., Case No. 4,490; Bazin v. Steamship Co., Id. 1,152; The Live Yankee, Id. 8,409; The Neptune, Id. 10,118; The Oriflamme, Id. 10,571; The Sabioncello, Id. 12,198; The Compta, Id. 3,069; The Vincenzo T., Id. 16,948.]

3. The vessel must then show that the damage was not caused by negligence on the part of the vessel.

[Cited in The Pharos, 9 Fed. 914.]

[See Clark v. Barnwell, 12 How. (53 U. S.) 280; English v. Ocean Steam Nav. Co., Case No. 4,490; Bazin v. Steamship Co., Id. 1,152; The Live Yankee, Id. 8,409; The Neptune, Id. 10,118; The Sabioncello, Id. 12,198; The Compta, Id. 3,069; The Vincenzo T., Id. 16,948.]

4. General evidence as to proper stowage and dunnage, in place, does not show that the head was not crushed in, in handling, after the vessel took charge of it.

5. Such handling is part of the stowage.

6. The vessel was liable for the value of the lost wine.

Beebe, Wilcox & Hobbs, for libellants. R. D. Benedict, for claimants.

BLATCHFORD, District Judge. The libellants shipped, at San Francisco, on the 18th of June, 1875, on board of the ship Black Hawk, for New York, sixty-seven pipes and half-pipes of California wine, for which the ship gave a bill of lading stating that there were sixty-seven packages of wine; that they were shipped in good order and condition, except that casks Nos. 278, 285 and 288 had broken staves when received; and that they were to be delivered in "like" good order and condition at New York, at the ship's tackles, the dangers of the seas, sweat, fire and collision excepted. The bill of lading contained the following clause: "Vessel not accountable for breakage, leakage or rust, if properly stowed." On the arrival of the vessel at New York, one of the pipes, No. 447, was found, before it was moved from the place where it was stowed in the vessel, to be leaking, and, on examination, one of its heads was found to be crushed in and broken in such manner as to sufficiently account for the leakage. A very large proportion of the wine in the pipe had leaked out. This suit is brought to recover for the value of the lost wine.

There is no doubt that, under a bill of lading of the above character, it is not sufficient for the libellant to show merely that there was leakage of the wine during the voyage. The pipe being in good condition apparently, externally, so far as the wood was concerned, when it was delivered to the vessel, and being in a leaking condition on arrival, and a very large proportion of the wine having leaked out of it, it is for the libellants to give evidence to show negligence on the part of the vessel in respect to the handling or stowage of the pipe. The fact of the crushing in and breaking of the head of the pipe to such an extent as to account for the leakage, is prima facie evidence of such negligence. The damage was done to the pipe while it was in the custody of the vessel. It is then for the vessel to show that the damage was not caused by negligence on the part of the vessel. It is not shown that there was any shifting of cargo or other accident, caused by stormy weather, which could bring the case within the exception of "the dangers of the seas," in the bill of lading. General evidence is given by the vessel that the pipes and half-pipes of wine were properly stowed and dunnaged. But this evidence only applies to the manner in which the packages were braced and supported and protected while lying in their places in the vessel. The stowing of the packages covers the entire handling of them from the time of their delivery into the custody of the vessel, while on their transit to their places in the vessel. The evidence is clear, that the pipe in question received a violent external blow on its head, causing the injury and leakage in question, and the evidence of good stowage and dunnage, and the absence of evidence of any stormy weather sufficient to account for the leakage, show abundantly, that, in handling the pipe, on its transit to its place in the vessel from the place where it passed into the custody of those in charge of the ship, they allowed it to receive such blow. To do so was negligence, which caused the injury and the leakage. The pipe was not "properly stowed," within the meaning of the bill of lading, and such want of proper stowage caused the damage in question.

There must be a decree for the libellants, with costs, with a reference to ascertain the damages.

Case No. 1,470.

BLACKINTON v. DOUGLASS.

[1 MacA. Pat. Cas. 622.]

Circuit Court, District of Columbia. April Term, 1859.

PATENTS—INTERFERENCE—APPEAL FROM COMMISSIONER—ASSIGNMENT OF REASONS—LIMITATION OF TIME TO APPEAL—"PUBLIC USE."

[1. That a decision rejecting an application for a patent is against evidence and the weight of evidence is too vague and indefinite to be considered a substantive reason of appeal specifically set forth within Act 1839, § 11.]

[2. An assignment of a reason is not specific which does not point out the precise matter of alleged error with such reasonable certainty as to satisfy an intelligent mind.]

[3. The court may assume that the commissioner has enlarged the time of appeal where the appeal in other respects is regular and the

reason of appeal is filed shortly after the expiration of the time limited for such filing.]

[4. On interference, the application for the patent was properly denied where it appeared that the applicant had permitted the making and public use of articles involving his invention by a number of persons without restriction for more than two years before his application, and had also exhibited and sold the articles.]

[5. "Public use" for more than two years, such as will defeat an application for a patent made after such period, means use in public, and not use by the public.]

[Appeal from the commissioner in patents. [On interference. William Blackinton, assignee of Benjamin F. Horn, applicant, against Alexander Douglass, grantee of letters patent No. 17,082, of April 21, 1857, antedated January 26, 1857.]

MERRICK, Circuit Judge. In giving my opinion, it is unnecessary to describe the improvement in ladies' dresses which is the subject-matter of controversy, as the applicant does not, in his reasons of appeal, deny that an interference was properly declared, and thereby he admits the substantial identity of his invention with that of Alexander Douglass, patented on the 21st of April and antedated to 26th of January, 1857 (No. 17,082). The reasons of appeal, according to the most indulgent construction, are only two: First. That the applicant Horn was the first inventor. Secondly. That he did not in any manner abandon his right to a patent before his application. That which is apparently assigned as a third reason, to wit, that the decision rejecting his application is against evidence and the weight of evidence, is entirely too vague and indefinite to be considered within the provisions of the eleventh section of the act of 1839, as a substantive reason of appeal, "specifically set forth in writing." It can only be regarded as explanatory of each of the two previously-assigned errors, and as declaring that on the question of priority and the question of abandonment the evidence alike sustains the pretensions of the appellant. While it was not the purpose of the patent laws to introduce into the practice of appeals the nice refinements and technicalities of special pleading, the emphatic language of the statute is not destitute of significance, and, according to the spirit of the act, no assignment can be sufficiently specific which does not, with that reasonable certainty which would satisfy an intelligent mind, point out the precise matter of alleged error; and if for no other object, manifestly in order that the office, in response to the assignments of error, may present definite suggestions thereon for the consideration of the judge on appeal, and if need be, upon a clear error being pointed out, itself correct that error without the vexation of an appeal. But whatever was the motive of the legislature, the requirement of law has been made, and must be respected by appellants at the peril of losing all benefit by appealing. The laxity in practice of appellants has been the subject of repeated comment by the several judges of the circuit court, and gave occasion to an official letter from the late Chief Justice Cranch to Commissioner Ewbank, dated June 11th, 1850, in which he requested that in all cases parties taking appeals should be notified that the revision of the judge would be confined to "the reasons of appeal, specifically set forth in writing and filed in the office, and to the grounds of the commissioner's decision, fully set forth in writing, touching all the points involved in the reasons of appeal."

My attention has been directed to this question in the present case by the response of the office itself, and also by the argument filed by the counsel for Douglass on motion to dismiss the appeal for want of specific reasons of appeal. But as two of the reasons of appeal may by liberal construction be taken to present specific questions for revision, the motion on that ground cannot prevail. The appellee has also moved to dismiss the appeal upon the ground that the decision of the office of December 10th, 1858, limited the time for appealing to thirty days, and that the appeal was not filed until the 11th of January, 1859. It is perhaps not necessary now to decide what would be the effect of disregarding such a limitation if insisted upon by the office. As this appeal was probably mailed at Boston within the time required by the office, and having been received and filed by the office on the 11th January—only the second day after the limit—and having been certified to me as a subsisting appeal, I feel authorized to presume, from the acts of the office, that in the exercise of a wise and proper discretion the limit of appeal was enlarged. Before, however, passing to the main point of the case, it is proper to notice the argument which has been transmitted through the mail to me by the counsel of the appellant. In that argument he has commented in a most unwarrantable manner upon the report and motives of the examiner in charge of the case; and I cannot suffer such conduct on the part of a solicitor to pass without rebuke. No one has a right to assail the motives or integrity of a public officer acting upon his responsibility to his fellow-citizens, and under the solemn sanction of his oath of office, without some weightier occasion for the charge that a supposed illogical course of reasoning or the announcement of a legal conclusion, which to the mind of the assailant seems utterly untenable. The supreme court of the United States, in the case of Boyden v. Burke, 14 How. [55 U. S.] 583, has said that "those to whom the people have committed high trusts are entitled at least to common courtesy, and are not bound to submit to the insolence or ill temper of those who disregard the decencies of social

intercourse." This remark of that high tribunal applies with especial force to the employment of offensive words in a carefully-written argument, and, considered in connection with the facts of this case, warrants me in the determination to which I have come—not to place on the files of the office, together with the other papers in the cause, this paper containing language unnecessarily discourteous and offensive.

The two points made by the office and presented in the reasons of appeal were as to the invention of Horn in 1854 or 1855, and his abandonment of the invention, by suffering it to be used in public for more than two years before his application. That the invention existed in 1854 and 1855, is very clear, from the testimony of Mrs. Adelie H. Newton and Mrs. M. A. Tibbets; and if it was in public use for more than two years before Horn's application, with his knowledge and consent, it is not material whether he was the inventor or not, as in either alternative he would not be entitled to a patent. Mrs. Newton, according to her own testimony, made in the year 1854, under instructions from Horn's wife, and thenceforth continually, wore a bustle such as is described in the specification. Mrs. Tibbets testifies that Mrs. Horn was publicly wearing such a bustle when she and her husband were on a visit to Mrs. Tibbets at Dover, New Hampshire, in August, 1855, and that under the direction of Mrs. Horn she made a similar article, and wore them always from that time forth; this, too, was with the knowledge and consent of Horn. Besides the continued use of the article by Mrs. Horn and these two friends in public from 1854 and 1855, the testimony shows that the article was known to and worn without restriction by others, to whom Mrs. Horn communicated it; and through all this period of four years the testimony discloses no effort on the part of Horn to conceal from others the knowledge of the invention, nor to restrict in any manner its use by those to whom the knowledge of it was imparted, nor any assertion of exclusive right or declaration of purpose to apply for a patent; and this was followed up by an open exhibition and sale of the article in his store in the winter of 1856 and 1857, and then, according to his own declaration, its being thrown aside, and the sale abandoned, because he found the article did not succeed and he had found something better. Without attaching any weight to Horn's admission to the witnesses Smith and Leland that he had been selling these skirts from his store for several years, the above-mentioned testimony establishes beyond controversy that the article, whatever it was and by whomsoever invented, had been used in public with the knowledge and consent of Horn more than two years before his application. It is therefore quite immaterial that we should scan the testimony to determine whether Horn himself was the true and first inventor of the improvement in question.

But the counsel for the applicant seeks to evade the force of the testimony as to the use of the article by these several persons in public, by relying upon what Judge Story is supposed to have said—"that the use of the invention by a few persons as an act of personal accommodation or neighborly kindness will not vitiate an application." But Judge Story, in the case of Wyeth v. Stone [Case No. 18,107], is far from saying what is attributed to him by the counsel in this case and so often by others. The language of the judge is this: "To defeat his right to a patent under such circumstances it is essential that there should have been a public use of his machine, substantially as it was patented with his consent. If it was merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons as an act of personal accommodation or neighborly kindness for a short and limited period, that would not take away his right to a patent. To produce such an effect, the public use must be either generally allowed or acquiesced in, or at least be unlimited in time, extent, or object." There is nothing in the language of the judge in that case which countenances the idea that a use in public of an invention which is unlimited in time, extent, or object, which is not temporary, and for a short and limited period, will not defeat a patent, whatever the motive of the inventor in granting such unlimited indulgence to two or three friends. The rule, on the other hand, is correctly laid down in Curtis on Patents (section 53) that "the phrase 'public use' means use in public, and not use by the public; so that under the act, if there had been a use in public by any person, (for more than two years), with the consent or allowance of the patentee, the patent will be defeated." So, also, in section 297: "By 'public use' is meant use in public; that is to say, if the inventor himself makes and sells the thing to be used by others, or it is made by one other person only, with his knowledge and without objection, before his application for a patent; a fortiori, if he suffers it to get into general use, it will have been in public use." The supreme court, in Shaw v. Cooper, 7 Pet. [32 U. S.] 321, 322, remark that "a strict construction of the act, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy. A term of fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor; but if he may delay an application for his patent at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him. A pretense of fraud would afford no adequate security to the public in this respect, as artifice

might be used to cover the transaction. The doctrine of presumed acquiescence, when the public use is known or might be known to the inventor, is the only safe rule which can be adopted on this subject." If so stern a rule were wise and just prior to the passage of the seventh section of the act of 1839, surely he is without excuse who transcends the indulgence of two years accorded by that law. This view of the law of the case relieves me of the necessity of considering the competency of Horn as a witness, and also of analyzing his testimony and weighing its credibility. Independently of his testimony and that of his impugners, Leland and Smith, there is enough in the case upon the applicant's own showing to reject his application, because he suffered his invention to pass into public use for more than two years before his application.

Now, therefore, I certify to the Hon. S. T. Shugert, commissioner of patents, that, after due notice to the parties, I have read and considered the papers, proceedings, testimony, and arguments of counsel in the above-entitled cause, and I am of opinion that the decision of the office rejecting the application of William Blackinton, assignee of Benjamin F. Horn, was correct; that the same is accordingly affirmed, and a patent to said applicant must be refused.

BLACKINTON (SIMMONS v.). See Case No. 12,866.

BLACKLOCK (BOWIE v.). See Case No. 1,729.

BLACKLOCK (UNITED STATES v.). See Case No. 14,604.

BLACKMAN (FILKINS v.). See Case No. 4,786.

Case No. 1,471.

BLACKMAN et al. v. HIBBLER et al.

[17 Blatchf. 333; 4 Ban. & A. 641; 17 O. G. 107; Merw. Pat. Inv. 209; 25 Int. Rev. Rec. 394; 10 Reporter, 257.] [1]

Circuit Court, E. D. New York. Dec. 5, 1879.

PATENTS—IMPROVEMENTS IN LAMPS—REISSUE—COMBINATION—SUBSTITUTION.

1. The re-issued letters patent No. 7,417, granted to Ebenezer Blackman, December 5th, 1876, for improvements in lamps for burning coal oil, on the surrender of original letters patent No. 123,325, granted to said Blackman February 6th, 1862, are invalid, as respects claims 1, 2, 4 and 5.

2. The claims of the re-issue are not for the same invention described in the original patent.

3. The specification of the original patent describes the invention as the use, only in combination, of a glass chimney base and a mica chimney top, and does not suggest the use of the base as a separate device. Therefore, all claims, in the re-issue, to the use of the base by itself, are invalid.

[See Gill v. Wells, 22 Wall. (89 U. S.) 1; Washburn & M. Manuf'g Co. v. Fuchs, 16 Fed. 661; Flower v. City of Detroit, 22 Fed. 292.]

4. Claims 1, 2, 4 and 5 of the re-issue are void for want of novelty.

[In equity. Bill by Ebenezer Blackman and others against Joseph H. Hibbler and others for infringement of letters patent No. 123,325, granted February 6, 1862, to said Blackman, and re-issued December 5, 1876, by the No. 7,417. Bill dismissed.]

Erastus New, for plaintiffs.

C. H. Watson, for defendants.

BENEDICT, District Judge. This is a suit in equity brought to obtain an injunction, and to recover damages, for an alleged infringement by the defendants of a patent re-issued to Ebenezer Blackman, December 5th, 1876, known as re-issue No. 7,417. The invention is stated in this re-issue to be "a glass base for coal oil burners, so constructed as to fit on a lamp or burner, in a manner similar to ordinary glass chimneys, and having a laterally projecting flange or rim, to support a chimney or reflector; also, in the combination of said base with a coal oil burner; and, also, the combination of said base with a burner and a chimney or reflector, as hereinafter more fully explained." Accompanying this description are drawings showing the base of a lamp chimney from various points of view. The inventor disclaims a chimney base incapable of transmitting light through it, and without such a tubular body as is required to support it on a coal oil lamp and to direct the current of air to the flame. Of the six claims in this re-issue, only the 1st, 2d, 4th and 5th need be mentioned here, those being the claims alleged to have been infringed by the defendants. The first claim is as follows: "A glass base for coal oil burners, constructed with a tubular body to fit around the cone or burner, and having a laterally projecting flange, substantially as and for the purpose set forth." The second claim is as follows: "A glass base having the contraction, I, and the laterally projecting flange h, substantially as described." The fourth claim is as follows: "A transparent base for a coal oil lamp chimney, having a tubular body of suitable form and length to fit and support it on the lamp, and having a laterally projecting flange, h, substantially as described." The fifth claim is as follows: "The combination of a transparent base, having a tubular body, B, of suitable form and length to adapt it to be used on a coal oil lamp, and a laterally projecting flange, h, with a chimney, substantially as described." In regard to these claims it is to be observed, that the first, second and fourth are each for a contrivance variously styled a "glass base for coal oil burners," a "glass base" and a

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 641; and here republished by permission. Merw. Pat. Inv. 209, contains only a partial report.]

"transparent base for a coal oil lamp chimney," but more properly styled a chimney base, capable of use only when forming a part of a lamp chimney. The fifth claim is for a combination consisting of two elements —one, a chimney base, as described, the other, a chimney top of any form.

The first question presented is, whether these claims are for the same invention described in the original patent; for, if not, they are void and afford no cause of action to the plaintiffs. An examination of the terms of the original patent, therefore, becomes necessary. The original patent was issued to Ebenezer Blackman, February 6th, 1862 [1872],[2] and is known as original patent No. 123,325. The specification of that patent gives, first, a description of what is styled the "chimney proper," elsewhere styled by the inventor "the body of the chimney," and by his counsel, on this argument, the "top piece," but what would be accurately styled a "chimney top." This chimney proper, top piece or chimney top is described as constructed of two sheets of mica whose vertical edges are united by a metal strip, and then bent so as to form a tube, and having at the bottom projections, whereby, as the patent states, "to fasten the mica chimney (top) securely to the glass base." Next follows a description of the chimney base, "that is to say, its upper portion is made of a suitable size and form to fit the chimney (top) and its lower portion to fit the lamp, and between the upper and lower portion it is contracted by an external groove, the upper portion flaring or inclined outward." Then follows this significant statement: "In use, the chimney and base are intended to remain united, the whole being put on or taken off together." Two claims follow: "First. A lamp chimney, consisting of sheets of mica united by means of the double and indented or perforated metal strips, b, and provided with means for attaching it to the base, B, substantially as described. Second. A glass base, B, having the contraction, I, and the flaring top, h, constructed and arranged to operate substantially as set forth." It will be observed, from this statement in regard to the original patent, that the thing described in the original specification is a contrivance adapted to produce a draft of air around the flame of a lamp; in other words, a lamp chimney. This contrivance is described by describing first its top and then its base, accompanying the description of the two parts with the statement, that these parts are to remain united, and so form a compound unit, which is the subject of the patent. The subject-matter of the original patent is the contrivance, as a whole, described as, and being in fact, a lamp chimney; or a combination, the elements of which are the glass chimney base and the mica chimney top therein described. Were it not for the express statement in the original specification to which allusion has been made, and to which the second claim makes special reference, it might, perhaps, be, that the chimney base described could be considered a separate device, or a distinct sub-combination of devices, and so capable of being the subject of a separate claim. But, the specific statement of the patent, that, in use, the base and top are to remain united, the whole being put on or taken off together, forbids the conclusion that the inventor ever conceived the idea of his chimney base as a separate and distinct device. In his mind, the chimney base had no existence except as firmly attached to his mica top, and forming an inseparable part of a mica top lamp chimney. The statement in the specification, therefore, compels a determination that the language used was not intended to suggest, and cannot be held substantially to indicate, that the chimney base is a severable part of the contrivance invented. If to the original specification had been attached a claim for the chimney base, as a distinct invention, capable of use by itself, such a claim obviously would have presented a direct conflict with the statement of the specification, that, in use, the base was to remain united with the mica top. This case, therefore, is not within the rule permitting an inventor to select from the elements of a combination, or from the parts of a machine, described in his specification, a severable and distinct device or sub-combination, capable of use by itself, and substantially indicated in his description, and, by means of a surrender and reissue, secure an exclusive right to such single device; because, this inventor, in his original specification, has been careful to state that the chimney base he describes is not to be used except as united to his mica chimney top, and as an inseparable part of his mica top chimney. I, therefore, understand the subject-matter of the original patent to be either the mica top lamp chimney therein described, or a combination whose elements are the devices employed in the chimney described for the purposes designated. This understanding is not at variance with the claims of the original patent, for, in legal effect, the statement of the specification already alluded to is part of each claim. So far as the second claim is concerned, an intention to have it considered a part of the claim is manifest, for, the claim states, not only that the base is to be constructed as described, but, also, "arranged to operate substantially as set forth," that is to say, always firmly united to the mica top. This understanding of the subject-matter of the original patent is fatal to the validity of the re-issue on which this suit is brought, so far as the claims here involved are concerned. For, these claims cover neither a lamp chimney such as de-

[2] [From 4 Ban. & A. 641, and from 17 O. G. 107.]

scribed in the original patent, nor a combination whose elements are the transparent base and the mica chimney top there described. The 1st, 2d and 4th claims, respectively, are for a chimney base by itself—a thing not to be found in the original, as a distinct severable device; while the 5th claim is for a combination, the elements of which are not to be found substantially suggested or indicated in the original specification.

No adjudged case has been cited, nor am I aware of any case that furnishes authority, to support this re-issue. In Herring v. Nelson [Case No. 6,424], the re-issue was upheld for the reason, as assigned, that "all that has been added is the new claim, which embodies in words that which the specifications and drawings could not fail to disclose to any intelligent examination." Here, the possibility of an examination of the specification disclosing a chimney base as a distinct article or combination is forbidden by the specific statement, that, in use, the base is to remain united with the mica top. The case of Gill v. Wells, 22 Wall. [89 U. S.] 1, is directly in point, upon the fifth claim, which is for a combination whose elements are a chimney base, as described, and any form of chimney top. In the original, if there be any combination described, it is the chimney base combined with the mica chimney top described. The re-issue has, therefore, to say the least, dropped one element from the combination, and put in its place another, not its equivalent, thereby greatly enlarging the scope of the invention.

As sustaining the construction I have placed upon the original patent, reference may be made to the difference between the original specification and the specification of the re-issue. In the original the patentee states, that he has invented "certain improvements in lamp chimneys." In the re-issue the statement is, that he has invented "certain new and useful improvements in bases or supports for lamp chimneys." In the original the invention is said to consist in "a novel construction of a mica lamp chimney and its combination with a glass base." In the re-issue the statement is, that the invention consists of "a glass base for coal oil burners, constructed with a tubular body to fit around the cone or burner, and having a laterally projecting flange, substantially as and for the purpose set forth." The original, describing advantages of the invention, says: "As the air passes the contracted throat, I, and enters the upper portion, it spreads out laterally, and, in connection with the burning oil, produces a very broad, brilliant, and steady flame," thus showing that the two parts were intended to operate as a whole, not otherwise. No such advantage could be secured by the base alone, and, naturally enough, such an advantage is not alluded to in the specification of the re-issue. The re-issue also wholly omits the statement, that, "in use, the chimney and base are intended to remain united, the whole being put on or taken off together," and inserts this statement, not to be found in the original: "While I have shown a peculiarly constructed chimney as adapted for use in connection with my base, it is obvious other kinds or styles may be used, if preferred." These alterations are suggestive, and go to confirm me in the conclusion that the subject-matter of the re-issue is different from the subject-matter in the original.

It may, also, properly be noticed, that, in a communication to the patent office by the attorneys of the patentee, in regard to this original patent, it is stated, that "the first claim is for his improved mode of securing the mica sheets which constitute the body of the chimney, and the second for his specially constructed glass base, to be used in combination therewith."

It has been contended, in behalf of the plaintiffs, that a chimney top of any description is the equivalent of the mica top piece described in the original patent, and that the subject-matter of the original and of the fifth claim of the re-issue are, therefore, the same. But, evidently, such a mica top piece as the original patent describes has qualities and characteristic features not possessed by all chimney top pieces. It may be that the results accomplished by the use of the top piece of a lamp chimney are, in most respects, the same, whatever be the form of the top piece or the material of which it is constructed. But, the result is not in all respects the same, nor would the statement, that a mica top piece would be of use when firmly attached to the chimney base, necessarily or naturally suggest the use of any form of top piece not so attached, to accomplish the same result; and it has not been shown that any form of top piece was known, at the date of the original patent, as a proper substitute for the mica top piece described in that patent.

These reasons appear to me to require the determination, that the re-issue sued on covers inventions not described in the original patent, and is, therefore, void. But, if not, then the re-issue, so far as the first, second, fourth and fifth claims are concerned, must fail for want of novelty in the invention. The re-issue, in the claims under consideration, covers a transparent chimney base, whose characteristic features are these: (1) a tubular body, for surrounding the cone of a lamp burner and directing the current of air to the flame; (2) a contraction, groove, or indentation in the upper part of such tubular body, for directing the current of air inwards upon the flame; (3) a flange extending laterally from said groove; and (4) a surrounding rim. This invention is plainly anticipated by the invention described in a patent issued to Arnold and Blackman, February 11th, 1868, as well as by the invention described in the patent of Russell

and Clifford, of December 24th, 1867. In each of these prior patents is described a lamp chimney base, made of glass, having a tubular body to place over the burner of a lamp, with a contraction or groove at the upper part, and a laterally projecting flange supporting the chimney top, and these features accomplish the same result that the same features accomplish in the plaintiffs' patent, and in the same way. The only distinction between the prior inventions referred to, and the plaintiffs' invention, is, that, in these prior inventions, the chimney base and chimney top were formed in one piece, while in the plaintiffs' invention the chimney base is by itself. But, no invention was required to conceive the idea that a lamp chimney could be cut in two; nor was the idea of constructing a lamp chimney in two parts new. In Millar's patent of July 21st, 1863, the lamp chimney was constructed in two parts. So, also, it must be said, that no invention was required to conceive the idea of a surrounding rim upon the upper part of the base, for the purpose of maintaining in position the separate top piece. The use of such a rim to accomplish the same result is common.

Not only are the characteristic features of the plaintiffs' chimney base old, but the combination of the tubular body groove and laterally projecting portion above is old. No change in the mode of operation or the result was effected by cutting off the top piece. In use, there must still be a top piece performing the same functions, in connection with the plaintiffs' base, as the top piece does in the prior invention referred to. The mode of operation and the result are, in both cases, the same. Neither do the plaintiffs gain anything from the surrounding rim, which has formed the sole ground for claiming a difference between the invention in the patent sued on and the invention of Arnold and Blackman. No true combination results from the addition of the surrounding rim, for, there is no co-action between the rim and the tubular body. The only function of the rim is to prevent the top piece from slipping. The application of the surrounding rim for the purpose of preventing the top piece from slipping required no invention, and makes a case of juxtaposition, not a new combination.

It thus appears, that, whether the invention claimed in the re-issue be the same as that described in the original or not, it must fail for want of novelty.

The result is, that the bill must be dismissed, with costs.

Case No. 1,472.

BLACKMAN v. The STAGHOUND.

[Nowhere reported; opinion not now accessible.]

BLACKMAN (VON ROY v.). See Case No. 16,997.

BLACKMER (MACDONALD v.). See Cases Nos. 8,757, 8,758.

BLACK RIVER INS. CO. (SIMONDS v.). See Case No. 12,874.

Case No. 1,473.

The BLACKSTONE.

[1 Lowell, 485.][1]

District Court, D. Massachusetts. Nov. Term, 1870.

COLLISION — BETWEEN STEAM AND SAIL—EXPERT TESTIMONY—FOG — RATE OF SPEED — HOLDING COURSE.

1. In a collision cause, experts may testify concerning the bearing of a steamer's rate of speed upon her navigation, such as the facility of steering, &c., but not to the prudence or propriety of keeping up a high rate of speed in a fog.

[See The Clement, Case No. 2,879; The Aleppo, Id. 157; The City of Washington, 92 U. S. 31.]

2. A steamer was running at her usual speed of more than eight knots in a dense fog in the South Vineyard channel, and too fast to avoid a schooner after she was seen; *held*, the steamer was not going at a moderate speed as required by the statute.

[Cited in The Hansa, Case No. 6,037; The City of Panama, Id. 2,764; The Pennsylvania, 12 Fed. 917; The Rhode Island, 17 Fed. 558; The State of Alabama, Id. 853; Clare v. Providence & S. S. Co., 20 Fed. 536; The Nacoochee, 28 Fed. 467.]

3. A schooner was *held* not to be in fault for tacking and running back on her course in a dense fog, though a collision with a steamer took place which would not otherwise have happened, it being proved that the collision was not a necessary or probable consequence of the act, the schooner being more than four miles from the steamer when the change of course was made.

4. The schooner having the general duty to keep her course after the steamer was discovered; *held*, she was in no fault for doing so, when she heard no hail from the steamer to change it, it not being entirely and unmistakably certain that a change would be calculated to aid the steamer to avoid the collision.

In admiralty. Collision.—The schooner S. H. Woodbury, coal laden, came in collision with the large screw steamer Blackstone of the Merchants' Line, between Boston and New York, and was sunk and totally lost at about two o'clock in the afternoon of the twenty-ninth of July last. The vessels were both bound towards Boston, and were passing through the passage called in the answer the South Vineyard channel, approaching the Cross Rip light-ship from the direction of Martha's Vineyard, the schooner going with a fair wind nearly as fast as the steamer and about four miles ahead of her, when the schooner ran into a bank of fog, and her master thought it more prudent to come to

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

anchor, and for this purpose he tacked and stood back on the wind, close hauled on the port tack, intending to beat up to one side of the channel and come to anchor. After running so for some minutes he heard the whistle of the steamer, and immediately ordered his fog-horn to be sounded, which was done several times. After a few minutes more the steamer was seen, and was hailed to keep out of the way, but did not appear to change her course, and ran into the schooner near her bows, cutting her down and sinking her almost instantly. The crew had time to get into their own boat, and were picked up by the steamer. On the part of the steamer, the evidence was that when the fog shut in, the master clewed up his gaff-topsail, leaving the foresail, staysail, and jib set upon the foremast, placed the second mate and two men upon the watch, and sounded the steam-whistle at short intervals. He had seen only two vessels ahead of him, one of which was this schooner, and both were going in the same direction with his own vessel. He continued in the same course and at about the same speed as before, a speed which witnesses on both sides estimated at about eight knots an hour, against a tide of two or two and a half knots. To support this estimate it was proved that the Blackstone is a heavy boat, slow for her size, with small engines, and that she had a kind of coal which was not well suited to her boilers. On the other hand, the libellants showed from Captain Loveland's log-book that he had passed certain points on the Vineyard at certain times, from which the computation was made that he was going more than eight knots over the ground, and therefore nearly or quite eleven knots through the water.

J. C. Dodge, for libellants.
D. Thaxter & F. Bartlett, for claimants.

LOWELL, District Judge. Every steamer is required by the statute to go at a moderate speed in a fog, and the only real dispute on this part of the case is, whether this requirement was followed. For it is not denied that after the schooner was discovered, every thing was done that could be done, and with all diligence, to avoid her, and to stop and back the steamer; and that it was then impossible to prevent the catastrophe. Nor is the sufficiency of the lookout brought into question. I refused to receive the opinions of experts upon the prudence of the master in keeping his steamer at this speed, excepting so far as any question of navigation, such as convenience of steering, &c., was concerned, because, when all the facts are shown, and their bearing upon navigation is explained, the question whether the speed was moderate, whether called fact or law, is not one of nautical skill at all, but of sound judgment, which the expert is no more competent to speak to than any one else.

The argument for the steamer is, that there was no occasion to slacken her speed, because the fog appeared to be local, a small bank which would soon be passed, and that her officers could see, before it covered them, that there was nothing in the way for several miles; that they had a right to expect the schooner to keep her course, and that if she had done so, there would have been no collision. Besides this, they offered evidence tending to show that the vessels were so near when the horn was first heard, that nothing could have saved the schooner, however slowly the steamer might have been moving. And this evidence was not contradicted. The moderate speed which the statute prescribes is thus spoken of by Judge Shepley, in giving the opinion of the circuit court in the late case of The Monticello [Case No. 9,738]. The term, he says, "is not capable of any definition which would apply to a speed of any given number of miles an hour alike under all circumstances. What would be a moderate speed in the open sea, would not be allowable in a crowded thoroughfare or in a narrow channel. And under the same circumstances in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog, requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully, and effectually to do the three things required of her in the same clause of the statute, viz., to slacken her speed, or, if necessary, to stop and reverse." And he cites, among others, the case of The Batavier, 9 Moore, P. C. 286, in which the court thought it unnecessary to ascertain the precise rate of speed of the steamer, the witnesses having stated it all the way from ten knots to one and a half, because, they said that any rate was too great that endangered other vessels in the river. There is another case in which the same learned body, the privy council, is said to have decided that if the steamer was navigated at a rate which made it impossible for her to avoid collision with a ship, "discovering it only at the dis tance at which alone it could be discovered, that it followed as an inevitable consequence that she was sailing at a rate of speed at which it was not lawful for her to navigate." The Europa, 1 Pritch. Adm. Dig. 187. This seems to make the fact of the collision the conclusive test of negligence in all cases in which the sailing vessel is in no fault. It is not difficult to find cases in which various rates of speed have been held to be too great, in two of which the rate was from three and a half to five miles (The A. Rossiter [Case No. 17,147]; The Robert and Ann v. The Lloyds, Holt, Rule of the Road, 58); and in several it was less than the rate here; but each case must depend on its particular circumstances. The decisions only prove that

there is scarcely any speed that has not been held to be too great upon some state of facts. The evidence is that the fog was very dense while it lasted, and that the channel is much frequented, so that the steamer was placed in the circumstances in which all the authorities require great caution and circumspection to be exercised. To break the force of these circumstances, it is said that neither the general character of the thoroughfare, nor the thickness of the fog imposed any special duty upon the steamer, because her master in fact saw that there was no danger to be apprehended in the channel at the time. This point meets us in both parts of the case, because it is set up as a fault in the libellants, and as an excuse for the claimants, that the schooner should have been put about in the midst of this fog, and have come back upon her former track. The collision is certainly an unfortunate result to have followed from a precaution intended to have a very different effect, but I cannot hold it to be a fault, because it was undertaken at such a distance from the steamer, that the collision or any danger of it, was not an obvious or probable consequence. The schooner was working out of the channel, and had got somewhat to the southward of the usual course of vessels; the master of the steamer says a few hundred yards, and other witnesses make it more. It is proved that she might have anchored, with good ground, on either side of the channel, and without putting back, but her master thought it more prudent to run back to the widest part of the channel. As this decision was taken when the steamer was some four miles off, I hold that the master of the schooner was free to change his course at that time without reference to the steamer. The master of the schooner had seen the steamer, but she was so distant that he was not sure which way she was going. If the schooner had the right to run back in the general direction in which the steamer was coming, she had the right to expect care on the part of the steamer, if they should happen to meet fifteen or twenty minutes afterwards. It is undoubtedly true that the master of the steamer was surprised to meet this particular schooner, as his first exclamation clearly showed. Still, in running through the channel at his usual speed, he took the risk of meeting this or any other vessel properly navigating these waters; and it is nothing to him whether the schooner turned back for a more or less valid reason, seeing that she did it under circumstances which ought to have made it reasonably safe. If she were putting back to port from absolute necessity the decision of this case ought to be the same as it should be under the existing circumstances.

I do not place much reliance upon the evidence, though not contradicted, that a slower speed would have made no difference. It was well suggested, at the argument, that it might, at least, have enabled the lookout to hear the fog-horn sooner, because the noise at the steamer's bow would have been less; and it is by no means clear that it would not have enabled the steamer to avoid the libellant's vessel after she was seen. Even an expert must speak very cautiously to such a question, which involves a very close calculation of what a steamer can do in a given time, because no one is in the habit of timing them exactly, and a difference of a few seconds changes the whole aspect of the question. The statute undoubtedly assumes with a binding force which I have no right to resist, that a slow speed conduces to safety, and there is nothing in this case that should take it out of the rule, unless it be that the fog was unusually dense, or the steamer particularly difficult to manage; in either of which cases, the necessity for caution was all the greater. I should be glad to see the experiment tried by a steamer, of moderating her speed in a fog, but I have hitherto found that their managers do not consider it to be important. If it is not, they should procure a change of the law. Notwithstanding sailing vessels are not specially mentioned in this connection in the statute, I suppose they are still bound by the general rules of navigation, and might, under some circumstances, be held to have carried too much sail in a fog. Such fault is not charged in this case; but it is said the schooner should have luffed. Undoubtedly, if she had heard the hail, she might well have obeyed it, because the steamer could not then have objected, and the consequences might have been very useful. But her duty being to keep her course, I should be very slow to charge her with wrong in adhering to this rule, in the absence of orders from the steamer, although a wise audacity might have prompted a departure from it. The steamer was the master of the navigation, if I may so express it, and might go to port or to starboard, and though, under the particular circumstances, any competent seaman would perhaps have starboarded, yet if the schooner had changed her course upon the faith of this presumption, she could scarcely have been cleared of responsibility, if the steamer had ported, and the collision had occurred, unless the change had taken place so near the very moment of collision, that it seemed a precaution to lessen the shock rather than a manoeuvre to avoid the collision altogether. At all events, she would have been put upon the defensive by her violation of the letter of the law. Upon the whole case, I find that the steamer disobeyed the law by going at her usual speed, which I believe to be nearer eleven knots than eight; and that the schooner was not in fault. Decree for the libellants.

BLACKSTONE (DE VISSER v.). See Case No. 3,840.

BLACKSTONE CANAL CO. (FARNUM v.). See Case No. 4,675.

BLACKSTONE CANAL CO. (McDOWELL v.). See Case No. 8,777.

BLACK WARRIOR, The (GREYOR v.). See Case No. 5,807.

BLACK WARRIOR, The (TURNER v.). See Case No. 14,253.

Case No. 1,474.

BLACKWELL et al. v. ARMISTEAD.

[3 Hughes, 163; 5 Am. Law T. 85; Browne, Trade-Marks, 510 (2d Ed. 638); Cox, Manual Trade-Mark Cas. 220.]

Circuit Court, W. D. Virginia. March Term, 1872.

TRADEMARKS—ENJOINING USE OF—WHAT WILL BE CONSIDERED ON APPLICATION FOR PRELIMINARY INJUNCTION — "DURHAM"—ACTUAL USE—IMITATION—FRAUD—WHAT CHARGES OF WILL BE CONSIDERED.

[1. On application for a preliminary injunction to enjoin the use of a trademark, the only question proper to be considered by the court is whether or not the facts presented by the bill, as affected by ex parte affidavits assailing the title of complainant, are sufficient to justify the stay, and it is improper on such an application to pass on the merits of the defense.]

[2. A tobacco manufacturer using as a brand "Best Spanish Flavored Durham," in 1860, has no priority of trademark over another manufacturer in Durham, N. C., using, in 1865 or 1866, as the distinguishing mark of his goods, the words "Genuine Durham Smoking Tobacco," where the proof shows that, as to the early claims, the words "Best Spanish Flavored" were the distinguishing attribute, and the word "Durham," under the circumstances at the time, but a mere unmeaning incident.]

[3. It is only the actual use of a mark, device, or symbol by the dealer which entitles him to, and gives him the right to be protected in, the enjoyment of it as a trademark.]

[4. The words "The Durham Smoking Tobacco," in connection with the head of a bull as a symbol, are such an imitation of a trademark consisting of the words "Genuine Durham Smoking Tobacco," with the side figure of a bull as a symbol, that their use will be enjoined as an infringement.]

[5. Infringement may consist in an imitation, though not amounting to forgery, yet so close as to deceive an unwary customer.]

[See McLean v. Fleming, 96 U. S. 245; Walton v. Crowley, Case No. 17,133; Humphreys' Specific Homeopathic Medicine Co. v. Wenz, 14 Fed. 250.]

[6. Charges of fraud and falsehood concerning the use of words and symbols claimed as a trademark are not sustained by mere argument and ridicule.]

[7. Distinguished in Blackwell v. Dibrell, Case No. 1,475, on the question of estoppel.]

[In chancery. Bill by W. T. Blackwell and J. S. Carr, partners under the style of W. T. Blackwell, against L. L. Armistead to enjoin infringement of a trademark. Perpetual injunction granted, and accounting ordered.]

RIVES, District Judge. The preliminary injunction in this case was founded on the statements in the bill. In pursuance of the notice required by statute the defendant contested its emanation upon ex parte affidavits assailing the title of the plaintiffs. But in that incipient state of the proceedings it would not have been proper, if at all practicable, to pass upon the merits of their defence; and the only question there was, whether the case as presented by the bill and affected by this adverse testimony, was still such as to require this stay till the merits of the controversy could be developed by further pleading and testimony. The propriety of this interposition by the court will scarcely be now questioned, as these further proceedings have shown the case to be one of perplexity and doubt.

The pleadings have now been perfected. The defendant's answer was duly filed, issue taken upon it, and the cause set down for final hearing. A vast volume of testimony has also been taken, some of it contradictory, and a vast deal of it irrelevant and impertinent. It is to be regretted that the zeal of counsel or the anxiety of parties should have so augmented the bulk of this testimony as to make a needlessly expensive record of it, and to devolve upon all engaged in its examination a wearisome amount of unprofitable reading. Still it is a subject of congratulation that the cause is now fully developed in all its aspects and bearings, and has been argued with a discriminating force and fulness of research alike masterly and instructive, and calculated to produce settled convictions one way or the other.

Our first task is to acquire accurate and precise ideas of the issues made by the pleadings. If this be done, and then the law be properly applied, it seems to me we can reach a safe conclusion almost without resorting to the voluminous testimony. The plaintiffs claim a trademark, designed in 1865 or 1866, and continuously used ever since. It is exemplified and made a part of their bill. The descriptive terms are "Genuine Durham Smoking Tobacco," and the symbol or device is the side view of a Durham bull. They assert that this trademark has been violated by the defendant in using, under date of January, 1871, these terms: "The Durham Smoking Tobacco," and the symbol or device of "a bull's head," with a note of the sale to the defendant of Wright's patent for the manufacture of "Genuine Durham Smoking Tobacco." This latter trademark of the defendant is also exemplified in the bill and placed in juxtaposition and contrast with the plaintiffs' trademark.

The answer, while calling for full proof of the allegations of the bill, does not directly deny this statement, but rests the defence upon three chief grounds: 1. The prior use of this trademark by Wright (under whom the defendant claims) as far back as 1860. 2. That the defendant's trademark is not an infringement of the plaintiffs, but is wholly dissimilar; and, 3. That the plaintiffs, by fraudulent representations in the premises,

have deprived themselves of all equitable assistance.

The main contest is considered by all parties and the counsel in this case to rest on the priority in the use of this disputed trademark. The defendant does not pretend that Wright, under whom he claims, ever used the identical trademark set up by the plaintiffs. On the contrary, he takes especial pains to show that he placed no particular value on the term "Durham," which he now asserts belongs in common to his and plaintiffs' brands. The discovery which he had made, and for which he seeks protection, was his preparation for a mode of treating smoking tobacco, so as to mitigate its noxious qualities and impart to it an agreeable flavor. This is the merit he claims; this the process he has patented. The testimony and the answer concur in proving that the whole merit of this smoking tobacco, and its celebrity, were due to the use of the flavoring he gave his tobacco. He was confessedly the first to commence its manufacture at Durham's Station. There was nothing in the locality he could have reasonably counted upon to commend his manufacture to the public. But, if we are to credit the defendant's answer and his testimony in this cause, it was his discovery of the flavoring compound on which he plumed himself. Accordingly, it was this which he emblazoned on his stencil-plate. Take his own statement for the present, and what was his brand? "Best Spanish Flavored Durham Smoking Tobacco." What, in view of the pleadings and evidence in this cause, is the characteristic, the vital element of this trademark? Manifestly, "Best Spanish Flavored." That was the only conspicuous and discriminating element in the trademark. "Durham," if indeed a part of it, was, upon the defendant's own showing, subordinate and insignificant. Now, the plaintiffs concede in the fullest manner Wright's superior title to the use and brand of his flavoring compound, and disclaim in their process any infringement of it; nor does it appear there has been any, nor, indeed, any formal complaint of it.

The pretension of the defendant, then, amounts to this: that because, in 1860, he branded his smoking tobacco "Best Spanish Flavored Durham," wholly because of the mode in which he flavored it, no subsequent manufacturer of the article at Durham, without the use of his process, shall brand his as "Genuine Durham Smoking Tobacco" with a symbol which he never used. Their reply is that, under the circumstances of his use of the name "Durham," there was nothing in it so descriptive as to restrain succeeding manufacturers at the same place from engrafting it on their brand, so long as they laid no claim to nor made any use of his "Best Spanish Flavored" compound, which he, indeed, appropriated by this first and original use of this only conspicuous term on his stencil-plate in 1860-61. It must be remembered that Wright was only in the infancy of this manufacture at Durham, and that others followed and developed it till the plaintiffs instituted their brand in 1865 or 1866.

Conceding, then, all the defendant claims by virtue of his purchase from Wright, he fails, in my opinion, to rebut the plaintiffs' title by proving a brand as used by Wright previously, wherein "Best Spanish Flavored" was the distinguishing attribute, and "Durham," under the circumstances at that time, a mere unmeaning incident. Thus stands this point in the light of the pleadings alone, the allegations of the plaintiffs on the one hand, and the denials and defences of the defendant on the other.

The testimony as to the fact whether the term "Durham" was ever upon the stencil-plate of Morris & Wright is contradictory. But in my mind it preponderates against the existence of that name in that brand. Counsel have adroitly insisted that the testimony against it is negative, and cannot from its nature, however commanding, overcome clear affirmative proofs. The proposition of law involved in the statement is correct; but the whole inquiry is into a fact, namely, What was the stencil used by Morris & Wright? Some, on the one hand, who had used it, declare with emphasis it was "Morris & Wright's Best Spanish Flavored Smoking Tobacco;" others, but mainly Wright and his two sons—the latter at the time but boys—stated it as "Morris & Wright's Best Spanish Flavored Durham Tobacco." The proofs, therefore, on both sides are equally affirmative. If, then, it be left in doubt, we must look to the probabilities of the case to turn the scales. What motive could have existed with Wright, all whose reliance was upon the merits of his flavoring compound, to invoke the name of a small, thriftless station on a railroad, settled by only two or three families, with a store and this factory, to invoke its name to give celebrity to the preparation to which he solely looked for his reward? It seems to me extremely improbable, upon ordinary grounds of reason and human action, to suppose that he used "Durham" on his stencil at all. On comparing and weighing the testimony on both sides, I am constrained to adopt the conclusion that he did not. Neither he nor his vendee, therefore, have any claim to contest, under this state of the evidence, the validity of the plaintiffs' trademark and their original and paramount title thereto.

It cannot be denied that it is abundantly proven in this cause, that the manufacture of Morris & Wright, and of those who succeeded them at Durham, was known, called, and distinguished in the market as "Durham" smoking tobacco. It is on this notorious fact in the cause that the able and ingenious argument has been raised that the public, by its voice, may appropriate and consecrate to an

individual property in a designation by which he may choose to denote any product of his industry. But I can find no warrant for such proposition in the law on this subject. On the contrary, it is distinctly laid down by the authorities, that it is only the actual use of the mark, device, or symbol by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it.

The doctrine on this subject has grown with commerce, and has assumed the form and title of a distinct body of law under the moulding hand of able judges, who have sought in their decisions to establish its guiding principle, and of acute commentators and essayists, who have exerted the powers of a superior analysis and discrimination to extricate from doubt the true maxims of this beneficent code of business ethics.

So much of it as is necessary for our present inquiry is comprehended in a single proposition. It is the seminal principle of the whole doctrine. The simple statement of it is, that the dealer has property in his trademark. This is allowed him because of the right which every man has to the rewards of his industry and the fruits of his discovery, and because of the wrong of permitting one man to use as his own that which belongs to another. In regard to the latter, it may be well said that any imitation of a trademark, calculated to deceive the unwary customer, differs from an absolute forgery, not in the nature, but rather in the extent of the injury. The dissimilarity to the expert wholesale dealer may be such as to save him from the imposition, but too slight, and that perhaps by design, to diminish sales to the incautious purchaser. But upon the success of fraud depends, ultimately, the extent of the injury. Let the spurious fabrication meet the same sale among private and individual consumers as the genuine article, and the wholesale dealer loses all motive for the exercise of his skill in detection, when he, perhaps, can reap better profits from the spurious, and therefore cheaper, than from the genuine article. In this way a simulated trademark may work the same mischief, and to the same extent as a forgery, defying detection at the hands of the expert.

With this view of the law I proceed to examine the second ground of defence, that the defendant has not infringed the trademark of the plaintiffs. This is scarcely the subject of argument. It must be referred to ocular examination and decision. Place the respective trademarks side by side, contrast the labels, the words, and the devices, and each one's vision must determine for himself whether the imitation is such as to deceive the unpracticed and unwary customer. It matters not now, in the critical inspection of them, and aided by ingenious counsel, we can clearly discern differences between the two. The true question is, whether, taking the "tout ensemble," Armistead's trademark might not pass with the unwary for that of William T. Blackwell & Co.; and if that be so, the wrong is done, and the title of the latter to be protected by this court is consummated. For my part, I do not see how trademarks so similar could escape being confounded in the market. One reads, "Genuine Durham Smoking Tobacco;" the other, "The Durham Smoking Tobacco." This use of the definite article makes these phrases equivalent. To remove all doubt, and aid the deception, in the note of the sale of the patent to Armistead, it reads, for "Genuine Durham Smoking Tobacco." Thus the language, to this extent, of the label is identical. Now, as to the symbols, or devices; one is the side view of the Durham bull; the other, that of his head, on a medallion. The one symbolizes, by a part, the name "Durham" as effectually as the other does by the whole. The color of the paper is also the same. Whether this simulation be the product of accident or design does not matter. It is the province of this court to suppress it in either case. It is a little curious, however, to note that Wright's first label, at Liberty or in Bedford, was wholly different; and that after his son had seen plaintiffs' trademark in Kentucky, and after his return to his father, the present trademark, as transferred to the defendant, was adopted by Wright.

The third and last ground of defence is that the plaintiffs have forfeited their right to relief in this court by reason of their false and fruadulent pretensions. This is upon the ancient and familiar principle that those who do iniquity must not ask nor expect equity. It is worthy of all acceptation. It is a hoary maxim, hallowed by its age, and, unlike some other sacred antiquities, as yet unassailed by the spirit of change or reckless progress; I adhere to it. But the charges are serious and demand investigation.

The first is that the plaintiffs sent out business envelopes and business cards, giving the year 1860 as the date of the establishment of their enterprise. In the absence of explanation this might well impugn the bona fides of the plaintiffs, as in their bill they fix it no earlier than 1865. But was this statement by mistake or design? Have the plaintiffs failed to account for it? A junior member of the firm was examined, and showed how it all occurred innocently, and without intent to deceive. He ordered the printing and gave the date; soon after the packages were received and opened in the presence of Dr. Blackwell. The latter saw the error of date and corrected it; and the witness stated that he proceeded to correct the misdate by writing the figure (5) over the cipher in 1860, so as to make the date 1865, as corrected by Dr. Blackwell, but that some might have gone out before the correction. The exhibits made by the defendant of these envelopes and cards corroborate rather than conflict with the witness. That should not be taken for fraud which is proved by an unimpeached witness to have been a mistake on his part.

Besides there was no reasonable motive for such misrepresentation; the plaintiffs had nothing to gain by it, but much to lose, on the hypothesis of the counsel for the defendant.

The next is a charge of falsehood in representing that the label was secured by copyright. There is not a particle of proof to that effect. Argument and ridicule alone are relied upon to show the inapplicability and absurdity of a copyright for such a print. The language of the statute is certainly comprehensive enough to embrace a label of this kind. Act July 8, 1870, § 86 (16 Stat. 212). The object of such copyright is to secure to "the author, inventor, or designer" of any such "print" the sole liberty of printing and vending the same. It forbids the surreptitious use and illegal sale of his labels. This is a perfectly legitimate resort to copyright in such a case and for such a purpose. It would, indeed, be absurd and ridiculous if the object were, as sarcastically portrayed by counsel, to protect the designer against the unlawful multiplication of such ycleped works of art. The dealer seeks merely by his copyright to keep the printing and vending of his labels in his own hands and under his control. It has been resorted to in other cases, as, for instance, the case of Wolfe v. Goulard, Cox, Trade-Mark Cas. 227, for the label of "Schiedam Schnapps." There is nothing unreasonable or incredible in this claim of the plaintiffs to a copyright for their label, nor is there anything in the testimony or the law to lead us to discredit it and brand it as a falsehood.

It seems to me, therefore, that both these charges are unfounded. They spring from the heat of forensic contests. They pertain to the polemics of the bar. Their effect is to provoke recrimination. Hence, the plaintiffs' counsel retaliate by imputing falsehood to the defendant in dating this purchase of Wright 1st of January, when he had stated in his answer he would not buy till he had ascertained his title by certificates, and those very certificates bore the subsequent date of the 6th of that month. The imputation seems plausible, but the transaction is susceptible of a more charitable construction, which I deem it my duty to put upon it. Dates are commonly immaterial, and often misapplied in business transactions. The main fact is doubtless correctly stated by the defendant, though he is made himself to confront it by a mistaken date.

I am glad, therefore, to have it in my power to state that there is nothing in this cause to affect the fair fame of the parties plaintiff or defendant. They are doubtless respectable men, and enterprising manufacturers of tobacco in their respective communities. They are engaged, as I believe, in the honest pursuit of their rights as they respectively understand them. The defendant has acted on the information of another, under whom he claims. He has obeyed the order of this court. The only thing I have to regret is, that the same deference was not paid by another manufacturer, who, though no party to this suit, could not have been ignorant of it from his near relation to the defendant. But the plaintiffs have not chosen to bring him before this court, save by proving his acts in the use of the simulated mark, notwithstanding the injunction upon his brother.

I am sure the plaintiffs and defendant, as enterprising dealers, will find their ultimate interests subserved by the doctrine I have sought to expound and maintain as to their trademarks. Whoever may now be the loser by it may soon have occasion to invoke it for his own protection, and they whose rights are now sustained, must learn thereby to respect those of other competitors in their business, at the same time that they take encouragement to themselves from their present success. All intelligent men engaged in manufactures and other enterprises must sooner or later become reconciled to losses in whatever favored quarter they may fall, that may be fairly viewed as penalties for the infraction, however unintentional, of laws well settled, designed, and calculated to vindicate the honor, advance the morals, and promote the interests of trade.

For these reasons I declare the perpetuation of the injunction, and order an account to be taken by a master of the profits made by the defendant from his sales under the simulated trademark aforesaid.

[NOTE. For another case involving this trademark, see Blackwell v. Dibrell, Case No. 1,475.]

Case No. 1,475.

BLACKWELL et al. v. DIBRELL et al.

[3 Hughes, 151; 17 Am. Law Reg. (N. S.) 516; 14 O. G. 633; Cox, Am. Trade-Mark Cas. 337.][1]

Circuit Court, E. D. Virginia. Jan. 13, 1878.

TRADEMARKS — "DURHAM" — FORFEITURE BY NON-USER — ASSIGNMENT TO COPARTNER — INCLUSION OF TRADEMARK BY IMPLICATION — EQUIVALENT TRADEMARK — ENJOINING ORIGINAL.

1. The right of exclusively using the word Durham in labels on smoking tobacco belongs to manufacturers of the article in the town of Durham, North Carolina. And

[Cited in A. F. Pike Manuf'g Co. v. Cleveland Stone Co., 35 Fed. 898.]

[See Alleghany Fertilizer Co. v. Woodside, Case No. 206, note.]

2. The right of exclusively using the word in connection with the picture of a Durham bull in labels on smoking tobacco belongs to W. T. Blackwell & Co., of that town.

3. The right to use a trademark is forfeited by non-user for a period of eight years, and cannot be resumed in prejudice of one who had used it exclusively during the period of abandonment.

4. The assignment by one partner of all his interest in a firm to his co-partner carries

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. Cox, Am. Trade-Mark Cas. 337, contains only a partial report.]

with it, if not expressly reserved, the right to the exclusive use of a trademark of the firm.

5. A trademark consisting of a word and symbol arbitrarily assumed, may be lost by non-user by its owner, especially if the disuse continues as long as eight years.

6. If an equivalent trademark, without any knowledge of the first, be originated and devised by another person during such period of disuse, that other person may thereby acquire a right of exclusive use in the second trademark.

[See O'Rourke v. Central City Soap Co., 26 Fed. 578.]

7. If this second trademark during such period of abandonment acquires a public and valuable geographical and commercial signification, so that the use of the original trademark as an arbitrary one would operate to deceive and defraud the public, a court of equity may enjoin against such use of the original one.

[S. Cited in Burton v. Stratton, 12 Fed. 700, to the point that words to be upheld as a trademark must be merely arbitrary, or they must indicate the origin or ownership of the article or fabric to which they are affixed.]

[In chancery. Bill by W. T. Blackwell & Co. against W. E. Dibrell & Co. to enjoin the infringement of a trademark. Decree for perpetual injunction and for an accounting.]

Some time before the year 1860 the North Carolina Railroad was laid off over the farm of Dr. Bartlett, Durham, in Orange county, North Carolina. A station was established there, and called Durham Station. This spot shortly became the seat of a small tobacco factory, a blacksmith shop, a tavern, and the residence of two of three families. It remained an insignificant place until after the civil war, in 1865. It then began to grow up under the effects of a very prosperous tobacco business, which had risen there. In 1866 it was incorporated as a town and called Durham. Now it is a place of several thousand inhabitants, and of a very large business.

The original tobacco factory of 1860 was conducted by the firm of Morris & Wright. This firm principally manufactured plug tobacco, but it utilized its clippings and waste tobacco by putting it in bags and disposing of it as smoking tobacco.

Some time before, or in 1861, one of the partners of this firm, Wesley A. Wright (who is connected with the defence in this suit), sold out all his interest to the other partner, Morris, and went off into the neighborhood, where he manufactured tobacco in a rude way for a year, and then joined the Confederate army and disappeared from Durham Station. To that place he has not returned, either to reside or do business. He seemed to have paid a visit there about 1871 or 1872. We first hear of him after the war, as a tobacco manufacturer, in 1869, in Liberty, Virginia. He then went to Stewartsville, near Liberty. Hearing that J. R. Green, a successor to Morris & Wright, at Durham, was using the Durham bull as a trademark, he adopted the device of the head and neck of a short-horn bull on his tobacco. While at Lynchburg, in 1871, Wright sold to L. L. Armistead a patent which he had then recently obtained, No. 111,712, for a compound liquid flavoring—which he used in making an "improved smoking tobacco," called "Durham Smoking Tobacco," in which appellation he used the word Durham as an arbitrary term for the smoking tobacco made with the said patented flavoring liquid. Record, p. 211. All right to use the word thus derived by Armistead was sold by Armistead in September, 1872, to the firm of W. T. Blackwell, then consisting of W. T. Blackwell and Julian S. Carr, of Durham, N. C. Record, p. 207. It appears from the answer of defendants, Dibrell & Co., that they are and have been using, "with the consent and by the authority of the said Wesley A. Wright, a label substantially the same" as that used by the complainants, and filed by them as an exhibit, to wit: A label, having the words and device, "Established 1860 at Durham, N. C., the Original Durham Smoking Tobacco, W. A. Wright, originator and patentee."

The original factory of Morris & Wright, at Durham Station, went on under different proprietors, and its business has gradually developed into that now conducted by W. T. Blackwell & Co., the complainants in this suit. It is probably the largest manufactory of smoking tobacco in the world.

Those who profess to know, ascribe the prosperity which has attended this business to the peculiar excellence of the tobacco grown in several counties north of Durham, which market their product at that place. They say that it is through the influence of the climate or soil, or both, that the tobacco raised in the counties of Alamance, Orange, Caswell, Person, and Granville, in North Carolina, three-fourths of which is brought to Durham, has this quality. It is probable that there is more demand for the Durham tobacco as a smoking tobacco than for any other grown in the United States. It is regarded as superior to all other articles for making granulated tobacco on account of its bright color and fine natural flavor; its being chiefly flue, sun, or air cured, and thin in the leaf and sweet. Nineteen-twentieths of the tobacco manufactured at and sent from Durham are grown in the counties named. Durham is the principal market for the tobacco of these counties.

A circumstance which is claimed to have given this tobacco the most sudden and widespread celebrity was the following: Just at the close of the war the factory at Durham, which has been mentioned, had come down by assignment and succession to, and was then conducted by, one J. R. Green. At the time that Sherman's and Johnston's armies were in Orange county, Green happened to have a large quantity of loose leaf tobacco lying in bulk on the floor of his factory. Of course this was a prey which soldiers of either army as they passed along eagerly

seized upon, and the evidence is that the whole of this loose tobacco was thus carried away, and as the armies were soon disbanded much of it is conjectured to have been carried to distant parts of the Union. At all events the excellent quality of this smoking tobacco speedily obtained widespread advertisement and celebrity, and ever since then orders have come to Durham from every quarter of the United States.

J. R. Green found his business growing up rapidly under his hands. He at once adopted as his brand or label, and put it upon his bags, the words, "Durham Smoking Tobacco." He connected with these words the side figure of a short-horn bull, as a symbol of the word Durham; and he had a full-size painting of such a bull placed broadside upon his factory, in conspicuous view of the railroad, as an advertisement of his business to all travelers. Green having died, his business passed by succession and assignment to Blackwell and others, and is now conducted by W. T. Blackwell & Co., the complainants in this cause. The name Durham placed in Green's brand was, of course, suggested by the place where the species of tobacco in which he dealt was principally marketed, and was intended as descriptive of that tobacco. It indicated tobacco grown in what Wheeler calls the "Golden Belt of North Carolina." The trademark of a Durham bull was naturally assumed as a symbol of the word Durham, which had come to characterize the particular growth and quality of tobacco which is marketed and manufactured at Durham.

Those who claim under Wright disclaim that the word Durham, as used by him and them, has any reference to the place, Durham's Station, or Durham, in North Carolina, or to the tobacco marketed there by planters. They claim that Wright, when he manufactured tobacco near Durham's, a place then of utter insignificance, used the word Durham as an arbitrary term; that his tobacco was flavored with certain liquids invented and artificially concocted by him; that it was this flavoring, and not the soil or climate of the region trading to Durham, that gave his tobacco its excellence, and that the name Durham and the device of a Durham bull were suggested to him about the year 1860 by seeing the brand of Durham mustard on a tin box. Wright's testimony on this head is as follows: Was in business at Liberty, Va., in 1869; that was the first time the bull's head was used; first view was to adopt the entire bull in connection with the word Durham; the reason of not doing so was that his two sons in Kentucky wrote him that J. R. Green, of Durham, N. C., had adopted the bull on his brand, and he did not wish to interfere with anything that was ahead of him; first conceived the idea of using the word Durham and the bull in connection with it in 1860; and the reason why he did not carry it out until 1869 was his inability to do so for want of funds; the idea was first suggested by picking up a card (can?) of Durham mustard with the vignette of a bull on it.

Wright claims that Morris & Wright used the word Durham on their labels in 1860, and that he himself used the word in his label when living near Durham in 1861; but the evidence on this point is not at all conclusive.

On the other hand, the complainants deny that the word Durham was used at all before 1865 or 1866, either on the labels of Morris & Wright or of any of the successive firms which followed the original firm of Morris & Wright in the business at Durham's. If it was used, however, they claim the right to the exclusive use of it as successors and assignees of Morris, who bought out Wright's interest in the business of Morris & Wright. They insist, moreover, that Durham as descriptive of tobacco, is a geographical term, which first gained its significance just after the war, in 1865-66; that it derived its significance solely from the use of it by J. R. Green; and that, as Green's successors, they are entitled to the exclusive use of it. They patented a trademark in 1870 (No. 122), their patent describing their trademark as "painted on glazed paper, upon which is represented a side view of a Durham bull and the words 'Genuine Smoking Tobacco.'"

In 1871 a suit was brought in the superior court of North Carolina by W. T. Blackwell against W. A. Wright (Blackwell v. Wright, 73 N. C. 310), in which the complainant, claiming a right to the exclusive use of the word Durham as a descriptive term for his smoking tobacco, on the same label with his symbolic trademark of the side view of a short-horn bull, sought to enjoin the defendant Wright from using the word Durham as a description of his smoking tobacco upon a label similar in color, material, and general appearance, having on it the head and neck of a short-horn bull. The suit was a trademark suit, and the complaint contained no charge of fraud in deceiving the public, and no prayer for an injunction to prevent the use of a label deceptively assimilated to that of the complainant. The suit, after going to the supreme court of North Carolina, was dismissed on demurrer to the complaint, the demurrer being based on the ground that the complainant did not, by formal allegations of assignments, trace his title to the exclusive use of the trademark in question from J. R. Green.

In the same year a suit was brought in the United States circuit court for the western district of Virginia, at Lynchburg, by W. T. Blackwell and J. S. Carr, partners, trading under the firm name of W. T. Blackwell, against L. L. Armistead. See Blackwell v. Armistead [Case No. 1,474]. In that suit the complainants claimed the exclusive right to use the trademark already described, including the word Durham and the side view of a short-horn bull; charged an infringement of

it by Armistead, as assignee of William A. Wright, in the use of the label of Wright, also already described; and prayed an injunction against all further use of the last-named label. In this suit the complainants prevailed, and a perpetual injunction was granted; and the matters in controversy were afterwards compromised.

Upon this condition of facts, the complainants, W. T. Blackwell & Co., a firm now consisting of W. T. Blackwell, James R. Day, and Julian S. Carr, of Durham, N. C., have brought their bill into this court against W. E. Dibrell and W. W. Phillips, partners, doing business in Richmond, Va., under the firm name of W. E. Dibrell & Co. The complainants claim an exclusive right to use the trademark described in their patent (No. 122); they charge that the defendants are using the device and trademark which has been described as an imitation of their own and in infringement of their exclusive right; they allege that the defendants nowhere put their own name upon their labels, and that they disclose by such concealment an intention to defraud the complainants and the public generally; and they charge also that by the use of said label and trademark the defendants are practicing a fraud and deception by which the public are deluded, and induced to buy the said smoking tobacco as and for smoking tobacco made in Durham by the complainants. They charge also that the decree in the suit of Blackwell v. Armistead estops Wright and all others claiming under him from using the Wright label. The bill prays for an account and for a perpetual injunction.

The answer of defendants denies the right of complainants to the exclusive use of the word Durham in their label; denies that the Wright label is a fraudulent simulation of Blackwell's; founds their own title to use it upon the title of Wright, originating in 1860, and claimed to be still subsisting; and denies any intention to defraud the complainants or deceive the public. The answer also claims that Blackwell and W. T. Blackwell & Co. are estopped from claiming the exclusive use of the word Durham in their label by the decree of the supreme court of North Carolina in the case of Blackwell v. Wright.

Mr. Solicitor-General Samuel F. Phillips and W. A. Maury, of Washington; Mr. Legh R. Pace, of Richmond; Mr. John W. Daniel, of Lynchburg; and Messrs. Merriman, Fuller & Ashe, of North Carolina, appeared for the complainants.

Mr. W. D. Browne, of Washington; Mr. George Harding, of Philadelphia; and Messrs. Williams and Digges, of Lynchburg, and John O. Steger, of Richmond, appeared for the defendants.

HUGHES, District Judge. It is useless to review all the points relied upon by counsel on each side in their able arguments in the cause. I shall consider only those questions upon which, in my judgment, the case really turns.

I shall first deal with the objection of estoppel, or res judicata, urged by each party against the other.

In order for one suit to constitute an estoppel upon any party to another suit, four conditions must coexist, viz.: 1st. There must be an identity of the cause of action. 2d. There must be an identity of parties to the suit. 3d. There must be an identity in the character or quality of the respective parties; and 4th. There must be an identity of the thing in question. See Smith v. Turner [Case No. 13,119].

These conditions of identity do not exist between the present case and either of the cases of Blackwell v. Wright or Blackwell v. Armistead. Those cases, therefore, do not operate as estoppels. Nor do they at all affect the one now under consideration, except so far as they are precedents of authority upon the principles which were decided by them. In Blackwell v. Wright the decision was upon demurrer to the complaint; and, in technical effect, it was only that Blackwell had not traced his title to his trademark by proper allegations from Green; while, on the merits, the decision went only so far as to determine that the allegations of the complaint did not make a case of exclusive right to the trademark for the plaintiff. The complaint there did not charge that Wright's use of the trademark was a fraud upon the public, or pray for an injunction on that ground. None of these allegations can be made of the complainants' bill in this case.

In Blackwell v. Armistead it is true that the decision was upon the principal questions raised in the present case; but owing to the character of the pleadings it was based upon grounds narrower and more technical than those upon which I propose to found the present decision. That suit was a trademark case. This is more, and involves the question of the fraudulent use of a trademark, to the injury of the public at large, as well as of the complainants. Therefore, neither of the two cases which have been urged in estoppel governs even as precedents the present one, which I shall now proceed to consider.

Two questions arise as to the pleadings and evidence:

1st. The first is, whether the defendants have any right at all to use a label in which the word Durham is used as descriptive of smoking tobacco, and in which the figure of a short-horn bull is used as a symbol of the word Durham; their right to the exclusive use of it not being claimed.

2d. The second question is, whether the complainants have a right to the exclusive use of such a label.

In considering the first question, I shall, for the sake of brevity, speak of the defend-

ants' right to use the label described as Wright's, inasmuch as their title to use such a label could come, under the evidence in this cause, only from Wright.

Has, then, Wright, or his assignees, now, or have they at any time since 1865, had any right at all to use a label having in it the word Durham as descriptive of smoking tobacco, and having also in it the figure of a short-horn bull, or any part of that animal, as a symbol of the word Durham? Of course their title to use the word and the symbol stands on the same basis; if it falls as to the word it falls also as to the symbol of the word.

There can be no doubt of Green's original right to the exclusive use of the full figure of a short-horn bull as a trademark. That is virtually conceded by Wright himself in his testimony.

As to the word Durham as descriptive of smoking tobacco, the right to use it is in this cause claimed by defendants, who do business in Richmond, Va., and who advertise and sell, as Durham smoking tobacco, tobacco which they put up in Richmond, and which they obtain from any source available to them other than Durham.

Such a practice necessarily deceives every purchaser who, in purchasing this Durham smoking tobacco, believes that he is purchasing the fine tobacco put up in the place of that name in North Carolina. Dibrell & Co. claim solely from Wright. What then, is Wright's title under which this deception comes about?

He claims that he did not, in 1861, sell his right in the label used by Morris & Wright, to his partner Morris, when he sold all his interest in the business. He claims that he derived the word Durham and the device of a short-horn bull from a Durham mustard box. He pretends that neither the word nor the device, as invented and used by him, was descriptive or geographical in purport, but that they were arbitrary symbols, and that having been so at the beginning he and his assignees have still a right to use them.

The objection to this pretension lies not merely in the improbability of the origin of the use of the word Durham and its symbol which Wright recounts, or in the unsatisfactory character of the evidence on which his original right to use the word and its symbol is based, or in the presumption that when he sold in 1861 he sold all his interest to Morris; but it lies also in these two facts, viz.: 1st. That whatever title Wright had to the use of the word Durham after leaving Morris, in or about the year 1861, was lost by non-use, his disuse continuing through a period of eight or nine years after he left the vicinity of Durham's; and, 2d, That during this long period of disuse the brand of Durham smoking tobacco acquired a definite and peculiar meaning with dealers and consumers; the word Durham ceasing to be (even if it ever was) a mere arbitrary term, and having obtained a geographical signification as to the place—Durham, and a commercial signification as to the article of tobacco manufactured at Durham. During the interval of disuse, the phrase Durham tobacco had come to indicate that portion of the product of a particular region of country which was marketed at the place called Durham's or Durham. The phrase "Durham Smoking Tobacco" had come to indicate in all markets, and among all dealers and consumers, the smoking tobacco marketed and manufactured at this place of Durham, in North Carolina.

It was not until after this signification had attached to the phrase that Wright adopted (or, as he pretends, returned to) the use of the word Durham, which he had abandoned. If, as he claims, the word Durham had in fact been used by him at first as an arbitrary trademark, and if, in addition, he had continued the use of it without interruption down to 1866 and on to the present time, that use by him would itself have prevented the other and local signification from attaching to the brand and word; for in that case, Durham smoking tobacco would have described two tobaccos: first, those marked and manufactured at Durham, and, second, those sprinkled with Wright's "Durham" juice.

But he did abandon its use; he stood by for some eight years and allowed a peculiar commercial and local signification to attach to the word Durham as descriptive of smoking tobacco, and not until after that local and commercial signification had come to identify the tobacco labelled with the word all over the country as coming from a particular region and as having a particular quality, and not until after this brand had come to be worth thousands of dollars to the manufacturers of this particular tobacco at this particular place, did he begin or resume the use of the device, which he claims to have derived from the mustard can. To put that word now on tobaccos grown elsewhere than at Durham, even though sprinkled with his "Durham" decoction, is, in the light of the evidence in this case, to pass them off as tobaccos coming from Durham, and is to deceive and defraud all who deal in and purchase the commodity as smoking tobacco from Durham. It has so come to pass from Wright's non-use for eight years, that to manufacture and sell other tobaccos at all and brand them with the word Durham is to deceive the public, no matter what liquid may be used on them. Under existing circumstances, to manufacture even Durham tobaccos elsewhere than at Durham, and to sprinkle them with a foreign liquid, is to deceive the public generally, and those who put up the genuine article at that place particularly. The manufacture of these tobaccos at that place is the best guarantee which the public and the trade can have that the commercial article labelled Durham Smoking Tobacco, and sold in all markets, is

genuine, and prepared under the fewest temptations to adulteration.

That the right to use a trademark may be lost by abandonment or disuse is too clear to need argument or the support of authority. The law of the subject is stated in the chapter on Abandonment, sections 674 to 691, of Browne on Trade-Marks.

It cannot be pretended that in Green's first use of his label, in 1865 or 1866, he had any intention of taking up an old label at second hand, or had any knowledge or belief that Wright, or any one else, could claim the label which he then devised as entirely novel and peculiar. The field was open to his enterprise and invention, for establishing his business and inventing his label and trademark just as he did.

Green's adoption in 1865 or '66 of the word Durham, as descriptive of the best tobacco of North Carolina put up by him, and of the bull as a symbol of the word, was naturally suggested by the facts of his business. If Wright had ever had such a label, which I do not feel that the evidence warrants us to believe, it was in 1865-66 unknown in Durham; had been abandoned even then for some four years; had never signified anything but tobacco sprinkled with Wright's decoction; and had never borne the valuable and creditable commercial signification which the climate and soil and good husbandry of North Carolina and the enterprise of a Durham manufacturer were about to give it.

By the several facts, of Wright's non-user of the label for eight years; of its never having, even as claimed by him, had any but an arbitrary significance as tobacco sprinkled with a species of artificial treacle; and of its having during a long period of disuse acquired a new, wholly different, and well and widely known geographical and commercial signification, Wright lost his right of using the label altogether. His use of it now operates necessarily to mislead and deceive the public as to the source of production and quality of the article bearing the label, thereby defrauding them; and the court will therefore make a decree of perpetual injunction against the further use of it.

As to the second question, whether Blackwell & Co. have an exclusive right to the use of the label described in the pleading, I think on the evidence submitted that they have. We have no hesitation in so deciding as against the defendant in this cause, and will incorporate in the decree of the court an order for an account of profits against the defendant as prayed for in the bill.

The label and trademark of complainants was established in 1865 by J. R. Green. His business and that of his successors built up the insignificant and obscure place, Durham's Station, into the flourishing town "Durham." The town grew up during the first four or five years of the use of the label, and owed its growth in chief part to the business indicated by the label. In that respect the case is similar to that of the trademark Cocoaine. Burnett v. Phalon, 3 Keyes [*42 N. Y.] 594. In respect to the commercial article bearing the geographical name, it is similar to that of the Akron cement. Newman v. Alvord, 51 N. Y. 189. The right of the complainants in this case has the double strength of that of the proprietors of the trademark Cocoaine, and of that of the Akron cement. The use of the principal characteristics of their trademark by manufacturers not conducting their business at Durham is a deception put upon the public, and may be enjoined on that ground alone, irrespectively of the trademark right. The use of the trademark invented by Green under which he and his successors built up his trade, and built up the town of Durham, like the use of the word Akron to the proprietors of the commercial article bearing that name, belongs exclusively to the successors of Green, and the court should secure its exclusive use to them.

I had some doubt whether in a litigation between Blackwell & Co., on the one hand, and defendants not doing business in the town of Durham on the other, it was competent for the court to decree that Blackwell & Co. have the exclusive right to the use of the word and symbol characterizing their trademark; but it is certainly competent for us to render a decree responsive to the issues made up by the allegations and denials of the bill and answer, one of which is this right of exclusive use claimed by Blackwell & Co. As between the complainants and defendants in this suit, therefore, we may so decree, even though other persons than the defendants to this record be not bound by the decree.

BOND, Circuit Judge, concurred in the decree, but is not responsible for every position taken in the opinion.

NOTE [from original report]. This trademark had been the subject of a previous suit in the circuit court of the western district of Virginia The * * * decision of Judge Rives on similar questions to those decided, as just reported by the circuit court of eastern district of Virginia, [will be found in Blackwell v. Armistead, Case No. 1,474.]

BLACKWELL (PATTON v.). See Case No. 10,831.

BLACKWELL (READING v.). See Case No. 11,612.

BLADEN (TREADWELL v.). See Case No. 14,154.

BLADEN (UNITED STATES v.). See Cases Nos. 14,605 and 14,606.

BLADEN (WATSON v.). See Case No. 17,277.

BLAG v. INSURANCE CO. See Cases Nos. 1,477, 1,478.

Case No. 1,476.

BLAGG et al. v. The E. M. BICKNELL.

[1 Bond, 270;[1] 3 Wkly. Law Gaz. 393.]

District Court, S. D. Ohio. June Term, 1859.

SALVAGE — DANGEROUS POSITION — EVIDENCE — WRITTEN INSTRUMENT OF ABANDONMENT—RISK —FORFEITURE OF INSURANCE.

1. In a suit for salvage against a boat and cargo, a written instrument of abandonment signed by the officers of the boat, is admissible in evidence to prove the perilous situation of the vessel.

2. If a forfeiture of insurance results from a deviation in navigation made for the purpose of rendering a salvage service, it might be legitimately considered in fixing the amount of allowance to the salvors, but where no such consequence has followed, the mere possibility that it might have happened is a contingency too remote and speculative to enter into the computation.

[3. The rescue of a steamer grounded in the Ohio river, and in imminent peril of loss, is salvage service, whether the salvors risk their lives or not.]

[See Spenser v. The Charles Avery, Case No. 13,232.]

[In admiralty. Libel for salvage by Jefferson Blagg and others against the steamboat E. M. Bicknell and cargo. Decree for libellants.]

Lincoln, Smith & Warnock, for libellants.

Fox & Fox, for respondents.

OPINION OF THE COURT. This is a libel for salvage, prosecuted by the owners and navigators of the steamboat Ohio No. 2, against the steamboat E. M. Bicknell and its cargo. The facts on which the libellants base their claim for salvage are, briefly, that the Bicknell, then being employed in navigating the Ohio river between the city of Cincinnati and the town of Parkersburg, the latter place being in the state of Virginia, on February 21, 1858, was proceeding up the river, laden with a cargo consisting of one hundred and thirty hogsheads of tobacco, three hundred sacks of wheat, two hundred and fifty barrels of flour, and some other articles of small value; and in attempting to pass up the channel, between Buffington's island and the Ohio shore, grounded on a sand-bar, near the foot of the island; and while aground, the boat was turned by the force of the current, which was strong, nearly square across the channel, its bow being towards the Ohio shore. The weather was excessively cold, and the channel was covered with thick, heavy, floating ice, which was rapidly increasing, and which, while the Bicknell lay in the position before described, struck with great force against its upper side, and had gorged about the middle of the boat, and was thrown up nearly as high as the guard. The officers and crew of the Bicknell had labored incessantly for about twenty-four hours to relieve the boat from its exposed situation, but wholly without success. In the evening of the next day, after the Bicknell had grounded, the Ohio No. 2, then running as a freight and passenger boat between Cincinnati and Marietta, in its downward trip, succeeded in passing down the channel between the stern of the Bicknell and the shore of the island, and at the request of the master of the latter boat, stopped and made fast his boat at the lower end of the island. The master of the Bicknell went on board the Ohio soon after, and requested the assistance of the latter boat in relieving his boat from its perilous situation. Capt. Blagg, the master of the Ohio, after consultation with the officers of his boat, refused to aid the Bicknell unless the boat and cargo were first formally abandoned to the officers and crew of the Ohio. This arrangement was assented to, and a written instrument of abandonment was signed by the master of the Bicknell, in which the other officers concurred in a separate writing. In pursuance of this arrangement, about eight or nine o'clock in the morning of the 22d of February, the Ohio was navigated with some difficulty up the channel to the Bicknell, and was made fast by lines to the stern of that boat and the shore of the island. In this situation, the officers and crew of the Ohio proceeded to lighten the Bicknell by the transfer of so much of its cargo as the Ohio could safely take, which the latter boat conveyed safely to, and landed on the shore at Ravenswood, some three or four miles below. The Ohio then returned to the Bicknell, and after taking a part of the remaining cargo succeeded in pulling the boat from the bar on which it was aground, towed it safely to Ravenswood, and replaced on it the part of the cargo which had been removed. The Ohio, with its officers and crew, was occupied in this service from eight or nine o'clock in the morning until ten or eleven in the evening, being in all about fourteen hours.

Without reference to the written abandonment, before noticed, and the protest signed by the officers of the Bicknell, the evidence leaves no room for a doubt that that boat and its cargo were in imminent peril when relieved by the libellants. It was so hard aground that there was no possibility of getting it afloat without taking out a large portion of its cargo. From its position, and the force with which the ice was striking it, the destruction of the boat and the loss of the cargo seemed inevitable. But any possible doubt as to the peril of the boat and cargo is removed by the terms of the written instrument of abandonment, which is in evidence before the court. This paper, after describing the situation of the Bicknell, substantially, as already stated, and reciting that every effort had been made to relieve the boat, without success, sets forth, "that unless said boat is speedily relieved from her present perilous situation, that the ice will

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

sink her, and thereby destroy both boat and cargo, and seeing no means of relief, I, for myself as captain and part owner of said steamboat, and as the agent of the other owners, underwriters, and whoever it may concern, hereby abandon to J. J. Blagg, and others, the said steamboat, E. M. Bicknell, and her cargo." At the same time the officers of the Bicknell signed a protest, which states, in nearly the same language contained in the abandonment, the extreme danger of the boat, as their reason for, and vindication of, the course they had adopted.

The service rendered by the libellants was a salvage service, beyond all question; and the only inquiry in the case is, what amount of compensation shall be awarded to the salvors. On this subject there is not, and cannot be, any fixed or invariable rule. Every case must necessarily depend on its peculiar circumstances. It has been recognized as a rule founded in sound policy, that salvage services should be so liberally rewarded as to afford encouragement to engage promptly, and even at great personal sacrifice and hazard, in saving property and life endangered by the perils of navigation. Courts of admiralty have, however, held it to be an indispensable element of a salvage service, that the danger to the property rescued, should have been actual and not speculative merely. This fact being satisfactorily established, there are other considerations which will affect and control the amount of the allowance. The value of the property saved, the promptness and energy with which the salvors have interposed, the hazard of life and property which they have encountered in the service, and the duration and arduousness of their labors, are proper elements in fixing the amount of remuneration.

In this case, the value of the Bicknell may be set down at $10,000, and the cargo at about $9,500. The libellants claim an allowance of twenty-five per cent. on these amounts, making $4.875. I am unable to perceive, from any view I can take of the facts of this case, any just ground for this large compensation. There is certainly nothing in those facts justifying the conclusion that these services place the salvors in the highest position of merit. Their interposition did not result from any generous impulse or desire to do a good act to a fellow creature in distress, but from a cool calculation of the profit to inure to them as salvors. They refused their aid unless the periled boat and cargo were first abandoned to them, so as to place their claim for salvage on an indisputable footing. It is true, the abandonment was the voluntary act of the officers of the Bicknell, and by their own admissions, was the best that could be done under the circumstances. And while it is no answer to the claim that this was a salvage service, it may well be regarded as detracting from its merits as such, and is entitled to consideration in determining the amount of remuneration.

The case also lacks another element, which, when found in a salvage service, will always enhance the amount of the allowance. It is not claimed by the libellants—nor does the evidence warrant the conclusion—that the salvors in their interposition incurred any hazard of life, or other personal injury, except what ordinarily pertains to such service on the western waters. Nor was the labor performed peculiarly exhaustive or arduous. It consisted in the transfer of a part of the Bicknell cargo to the Ohio, placing it on the bank of the river at Ravenswood, and returning it again to the Bicknell. While this labor required a good measure of muscular effort, it certainly involved no extraordinary hardship or suffering. It was performed mostly by daylight, and the time occupied did not exceed fourteen hours.

But, as before stated, the service rendered by the libellants was a salvage service, and was important and valuable to the owners of the Bicknell and its cargo. Both the boat and cargo were in imminent danger. The evidence well justifies the conclusion, that but for the interposition of the libellants they would have been wholly destroyed or rendered nearly valueless. It is also clear of doubt that in the performance of this service the Ohio and its cargo were to some extent put in peril. The exact degree of this peril cannot be readily determined from the evidence. But the position of the Ohio while taking on board a part of the Bicknell's cargo, and the force with which the ice was brought against it by the rapid current, leaves no room to question the fact that there was a hazard much greater in degree than that to which the Ohio would otherwise have been exposed. It is also in proof, that by reason of the intervention of the libellants, the Ohio was thrown out of place in the line of packets of which it was one, and thus subjected to expense and loss of time.

The considerations to which I have referred are entitled to weight in deciding upon the amount of compensation to be awarded. And I am not disposed to measure the sum to be allowed with great strictness. Although there is some evidence to show that one thousand dollars would amply remunerate the libellants for their services, the facts justify a more liberal allowance. I think that fifteen per cent. on $19,500, the estimated value of the boat and cargo, will be a fair compensation to the libellants. I am the more inclined to adopt this rate from the fact that the owners of the cargo have paid the libellants, and they have accepted this percentage on the cargo. This, it is true, was in the nature of a compromise, and not conclusive on either party as fixing the rate of compensation. But it is an admission by the owners of the cargo that they deemed the libellants entitled to the percentage paid for

the service rendered. Fifteen per cent. on the valuation of the boat and cargo amounts to $2,925. This sum is, however, subject to a deduction of $1,421, the amount paid and accepted as above stated, which leaves about $1,500 to be paid by the owners of the boat. For this sum a decree will be entered.

In thus fixing the rate of compensation to these salvors, I have not overlooked the reason urged as a ground for a largely increased allowance, namely, that the service rendered involved the hazard of a forfeiture of the insurance effected on the steamboat Ohio, and its cargo. It is insisted that this was such a deviation from the ordinary course of navigation, as that the insurers were thereby released from all liability on their policies. And the principle seems well settled by the cases referred to, in regard at least to the navigation of the ocean, that a deviation for the mere purpose of saving property where human life is not involved, will forfeit the policy of insurance. To what extent this doctrine is applicable to insurances of boats on western rivers, it is not necessary in this case to inquire or decide. Here was no actual loss or injury to the libellants, from their intervention in behalf of the respondents, except the loss of time, and the expense incident to the detention of the Ohio. And I can see no principle on which the possible forfeiture of the insurance can form a distinct element in determining the value of the salvage service. If a forfeiture had resulted from the deviation, it might be legitimately considered in fixing the amount of allowance to the salvors; but where no such consequence has followed, the mere possibility that it might have happened, is a contingency too remote and speculative to enter into the computation.

Case No. 1,477.

BLAGG v. PHOENIX INS. CO.

[3 Wash. C. C. 5.][1]

Circuit Court, D. Pennsylvania. April Term, 1811.

EVIDENCE—NEGOTIABLE INSTRUMENTS — BILL OF LADING AND INVOICE — OTHER WRITINGS TO CONTRADICT—MARINE INSURANCE.

1. A testamentary declaration of the captain of the vessel, not under seal, taken at Chagres, on the Spanish Main, by the governor pro tempore, who is also a judge authorized to take such declarations, there being no notary, and proved to be an original paper, in the usual form, there being no seal at Chagres, was admitted in evidence.

2. It is no objection to the testamentary declaration being given in evidence, that it contradicts other written [negotiable] papers signed by the captain.

3. The rule in Walton v. Shelley [1 Term R. 296, forbidding a witness to impeach negotiable paper to which he has given credit] is not authority in the United States, the case having been decided since the Revolution; and that rule has, since the decision, been much shaken, and it has been held to extend only to negotiable papers [which have been negotiated].

4. The bill of lading, and the invoice, are the ordinary evidence of property; but they may be contradicted, both as to their genuineness and authenticity, and as to their truth.

[Cited in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 403.]

[At law. Action by Blagg against the Phoenix Insurance Company upon a policy of insurance for the cargo of the schooner Splash. Verdict for plaintiff.]

Motion by defendants to continue. It appeared that a similar motion had been before four times made, with success. The affidavit stated no precise evidence expected in consequence of their commission to the Spanish Main, but, generally, that they expected to obtain material evidence under it: this had been before sworn to.

BY THE COURT. This appears to be a fishing commission, as it has been called elsewhere; and there is no other reasonable way to account for the commission not having been executed, but by supposing that the expected evidence could not be discovered; were we to continue a fifth time, it would amount almost to a denial of justice. The cause must come on.

The policy was on all kinds of lawful goods, laden or to be laden on board the schooner Splash, at and from her port of departure on the Spanish Main, to New-York; premium five per cent.; 10,000 dollars subscribed; policy open, containing warranties, the truth of which is not questioned. At or about the time that this insurance was made, the Splash lay at Chagres.

The questions were, whether the plaintiff had any, and what, interest on board, and whether she sailed on the voyage insured? The policy was dated the 1st of September, 1806; and the vessel has never been heard of since October, 1806.

To prove these points, on the part of the plaintiff, an invoice and bill of lading, with the signature of John Ferguson, the captain, dated the 20th of October, 1806, were produced, stating the return cargo taken on board to amount to 290 serooms of cocoa, at 4,500 dollars, and 10,000 dollars in specie; also, the depositions of two witnesses, to prove the handwriting of Ferguson to these papers; also, the testimony of one of those witnesses, who states that he was at Porto Bello whilst Ferguson was at Chagres, with whom he corresponded, and that he afterwards sailed from Porto Bello, looked in at Chagres, and that the Splash was not then there; that he believed from this that she had sailed; and that Ferguson died in 1806.

On the part of the defendants, evidence was offered to prove that the bill of lading and invoice are not in the handwriting of

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

Ferguson, but in that of the plaintiff; to repel which latter evidence, witnesses were examined to prove that these papers were not in the handwriting of the plaintiff.

To discredit the invoice and bill of lading, even though they should be considered as genuine papers, the will of Captain Ferguson, or rather his testamentary declaration, taken at Chagres, dated the day after the date of those papers, by the governor pro tempore, who is also a judge authorized to take such declarations where there is no notary. This paper expressed that there was none. It was fully proved by two witnesses, one a lawyer who had for many years been in practice in Peru, and acted as secretary to two or three governments, that the paper produced is an original paper; that it proves itself, and would be received in evidence in all the tribunals in that country; that it is taken in the usual form, by an officer authorized by law to take it; and is authenticated in the usual way, where there is no college of notaries, and that there is none at Chagres, or at any place within two hundred miles of it; that the officer who took this declaration has no seal, and that there is none belonging to Chagres, a trifling village on the coast; that to an original paper, no seal is or can be affixed.

The objections to the reading of this paper were—First; that as its tendency is to impeach the bill of lading and invoice, signed by the captain, the evidence would be a direct violation of the rule which forbids a witness or any other person, to impeach a negotiable paper, to which he has given credit. Second; that the paper is not properly authenticated, according to our laws.

In support of the evidence, were cited, for the defendants, 7 Term R. 601, 611; Chitty, 204; Baring v. Shippen [2 Bin. 154].

WASHINGTON, Circuit Justice. Walton v. Shelley [1 Term R. 296], which gave rise to the rule contended for, was decided long since the Revolution, and is therefore not a binding authority in this court. In respect to other than negotiable papers, it does not prevail even in England. But take the rule as acknowledged in England, or as it has been on some occasions, though much shaken by later decisions, and it can only apply in cases of negotiable papers, which have been negotiated. For, whilst the dispute is between the original parties, it is impossible to state a rational ground of difference between such a paper and one not negotiable; and so far from the person whose name is on the paper as a witness, or otherwise being incompetent to deny his signature, or otherwise discredit the paper, he seems to be of all men the most proper, and most to be credited.

As to the second objection; this testamentary declaration being taken by an officer of the Spanish government, authorized by law to take and to authenticate it,—being an original paper, authenticated by that officer in the legal and usual way practiced in that country, to make it evidence in the tribunals of that country,—by an officer who keeps no seal, and of course could affix none,—is proper to be given in evidence. This paper contains the declarations of the plaintiff's agent in relation to the business under his management, and may be read against the principal.

The paper, being read, contained a declaration that he, Ferguson, had sold his outward cargo for 9,000 dollars—that of that, he had 2,000 dollars in specie on board—that he had 1,450 dollars outstanding, in the hands of a person whom he named—and that the remainder of the amount he had laid out in the purchase of cocoa, which the purchaser was to deliver; that the vessel and cargo belonged to the plaintiff, but that he, Ferguson, was one-eighth concerned in both; and that the outward and inward duties yet remained to be paid.

This paper, it was contended, falsified entirely the bill of lading and invoice, and showed them to be spurious; of course there was no evidence of interest, nor any proof that the vessel had sailed on the voyage insured.

WASHINGTON, Circuit Justice, charged the jury. The insufficiency of the proof of the commencement of the voyage not having been much pressed in the argument, the principal question for the consideration of the jury, is the interest of the plaintiff in the cargo laden at Chagres, and the amount of that interest. This being an open policy, it is essential to the plaintiff's recovery, that he should satisfy the jury fully upon those points. He has produced an invoice and bill of lading of the cargo, supported by the testimony of two witnesses as to the handwriting of Captain Ferguson. This evidence is liable to be contradicted by other evidence, both as to the authenticity and genuineness of the papers themselves, and as to their truth. They have been attacked upon both grounds. To prove them not genuine, the handwriting of Captain Ferguson to other papers has been proved, and in part admitted; and you are left to test those now offered in evidence, by comparison of hands. This is an important part of the cause, and you will decide the fact upon the whole of the evidence laid before you.

But though you should be satisfied that these papers were signed by the captain, yet the verity of their contents is disputed; and in support of the objections to them, the testamentary declaration of the captain is relied upon. This paper is entirely at variance with those offered by the plaintiff. The latter are dated on the 20th of September, and state the cargo to have been taken on board, and to amount in value to upwards of 14,000 dollars. The former is dated the day after, and states that only 2,000 dollars were then on board, that 1,400 dollars were outstanding, and that the cocoa purchased with

the 6,600 dollars was then to be delivered. Both cannot be true: you may credit which you please, or may disbelieve both on account of their contradiction, except as to the 2,000 dollars in specie, which is proved by both. But at all events, you must be satisfied of the fact of interest, and the amount for which you may find your verdict.

Verdict for plaintiff for his full demand.

[A new trial was subsequently denied. Case No. 1,478.]

Case No. 1,478.

BLAGG v. PHOENIX INS. CO.

[3 Wash. C. C. 58.][1]

Circuit Court, D. Pennsylvania. April Term, 1811.

NEW TRIAL—EVIDENCE—CONDUCT OF JURY.

The court refused to grant a new trial, where the evidence submitted to the jury, and upon which their verdict was founded, was such as it was peculiarly their right to decide upon; and also, where the construction given by the jury to the evidence, appeared to be consistent with the justice of the case.

[Cited in U. S. v. Five Cases of Cloth, Case No. 15,110.]

[At law. Action by Blagg against the Phoenix Insurance Company upon a policy of insurance for the cargo of the schooner Splash. Verdict was given for plaintiff. Case No. 1,477. The hearing is now upon a] rule to show cause why a new trial should not be granted. [Rule discharged.]

WASHINGTON, Circuit Justice, delivered the opinion of the court.

As the objections made to the authenticity of the bill of lading and invoice, rested upon conflicting evidence, upon which the jury were alone competent to decide, and their finding is in favour of the plaintiff; we must take it for granted that those papers were signed by the captain, and are entitled to all the credit usually given to such instruments. They are, when proved, the ordinary evidence of property, and of the interest of the insured. In opposition to this evidence, the testamentary declaration of Captain Ferguson, was permitted by the court to go to the jury; which evidence, was inconsistent with the bill of lading and invoice. The court could do no otherwise, than leave it to the jury, to say which of the declarations of the same person, in one or the other of these instruments, was to be believed. In opposition to the credit claimed for the latter, it was urged at the bar, (and not without reason, we think,) that the declarations which it professed to record, were made by a man in extremis, in a language foreign to those who took them down; or, if in the same language, then, by one who might so express himself as to be misunderstood; and that possibly, he might not think it safe to acknowledge, that so large a sum in specie was about to be carried away, from a country whose policy it generally is to prohibit the exportation of it. These topics were submitted to the consideration of the jury, and have very prcbably had weight with them.

But that which has greater weight with the court is, that the testamentary declaration itself, is so far consistent with the justice of the case, as to raise a strong presumption that property sufficient in value to cover the sum insured, was put on board. The captain appears to have had nearly 10,000 dollars in specie and cocoa, partly on board, and partly ready to put on board; for, he expresses no doubt of receiving the 6600 dollars worth of cocoa which he had purchased, or the 1400 dollars, due from Paulens. It is highly improbable, therefore, that he sailed from Chagres, without the cocoa and money, either in specie, or its value in other articles. Now, although evidence of this sort, might not of itself have been sufficient to entitle the plaintiff to a verdict, unless it appeared that property to the amount of the sum claimed was actually on board, yet, it affords a strong reason, in a case circumstanced like the present, why a new trial should not be granted. Rule discharged.

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

Case No. 1,479.

BLAGGE v. MILES.

[1 Story, 426;[1] 4 Law Rep. 256.]

Circuit Court, D. Massachusetts. May Term, 1841.

TESTAMENTARY POWERS—EXECUTION — INTERPRETATION—FORMAL WORDS — INTENTION—WILLS—MASSACHUSETTS LAW.

1. The Revised Statutes of Massachusetts of 1835, (chapter 62, § 21,) providing for the case of a descendant, having no provision in the will of the ancestor, do not apply to cases, where the testator has a power of appointment over the estate to dispose of the inheritance, but only to cases, where it is the testator's own estate in fee.

2. It is the well settled doctrine of the law, that courts, in the interpretation of wills, are to regard the intention of the testator; and that technical words and set phrases are controlled by, and do not control, that intention, when clearly expressed or positively ascertained.

3. The same rule prevails generally in regard to the execution of powers, especially in regard to their execution by last wills and testaments. But the intention to execute the power must be clear. If it be doubtful, under all the circumstances, that doubt will prevent it from being deemed an execution of the power; although it is not necessary, that the inten-

[1] [Reported by William W. Story, Esq.]

tion to execute the power should appear in express terms or by recitals in the instrument.

[Cited in Warner v. Connecticut Mut. Life Ins. Co., 109 U. S. 366, 3 Sup. Ct. 225; Lee v. Simpson, 134 U. S. 589, 10 Sup. Ct. 637.]

4. A will contained a clause, by which the testatrix devised to A. one fifth of all her real estate, in trust for the entire use and benefit of B. during her natural life, the said fifth part to be subject to the absolute disposal of the said B. by her last will and testament, and if the said B. should die without having disposed of the same, then the remainder and reversion were devised to her heirs for ever. B. subsequently procured a resolve of the legislature of Massachusetts, authorizing the sale of a part of the real estate, which had been set off to her under the aforesaid will, the proceeds to be invested in other estate to be held upon the like trusts, and for the same uses and purposes, as the same estate was then holden. The proceeds were accordingly invested in real estate in New London, Connecticut. Subsequently B. died, having made her will, by which she bequeathed to E. "my house and land in New London, being the same which I purchased of." &c.; and then, by a residuary clause, "All the rest and residue" of her estate, of "every nature and kind," she devised to her three daughters and their heirs for ever. B. had no other real estate, except what was devised to her by the original will. Upon these facts, it was *held*, that the resolve by the legislature of Massachusetts was not an unconstitutional exercise of power.

5. That by the terms of the resolve, the substituted estate was to be held upon precisely the same trusts as the original estate.

6. Admitting the trustee (by the resolve) had no right to invest the proceeds of the sale out of the commonwealth of Massachusetts; yet if that investment was adopted by the appointees under the power, and the power had been well executed, third persons had no right to interfere and object to it.

7. That the words "all the residue of my estate, of every name and kind," in the residuary clause of the last will and testament of B., were sufficient to pass real estate.

[Cited in Lee v. Simpson, 39 Fed. 241.]

8. That the last will and testament of B. was a complete execution of the power in the will of A., and that the premises demanded in this action passed by it to the daughter of B., the tenant.

[At law. Action by Benjamin Blagge against Sarah B. Miles. Judgment for defendant.]

This was a writ of entry, in which the demandant claimed the demanded premises as grandson and heir of Sarah Blagge. The tenant claimed under the last will and testament of Sarah Blagge. The case came before the court upon an agreed statement of facts, and was argued by George M. Mason, for the demandant, and by Rufus Choate and George S. Hillard, for the tenant.

The facts in the case, as stated in the opinion of the court, were as follows:

Mrs. Hall, by a codicil to her will, duly executed, after revoking the devise of real estate in her will, devised as follows: "Item, to Elizabeth Jarvis aforesaid (the daughter of the testatrix) I give, bequeath, and devise one undivided fifth part of all my said real estate, in trust, nevertheless, for the entire use and benefit of my daughter Sally Blagge, for and during her natural life; the said fifth part to be subject to the absolute disposal of the said Sally by her last will and testament, and the income, rents, and profits thereof to be paid over and applied to her use annually; and if the said Sally Blagge shall die without having disposed of the same, then I give and devise the remainder and reversion thereof to her heirs for ever." The will and codicil, after the death of the testatrix, were duly proved and approved by the court of probate, in 1822. In January, 1836, Mrs. Blagge procured, on her petition, a resolve to be passed, by the legislature of Massachusetts, whereby one Fitz James Price was authorized to sell a part of the real estate in Boston, devised to her by Mrs. Hall, and which had been duly set off to Elizabeth Jarvis, in trust for her, upon a division of the estate by the judge of probate, he first to give bond with sureties to invest the net proceeds of said sale in other estate, to be held by him upon the like trust, and for the same uses and purposes, as the same estate was then holden. Price accordingly, under this resolve, sold the land stated in the resolve for $13,000. With the consent of the guardian of the demandant (who is a grandson and heir to Sarah Blagge) Price afterwards invested a portion of the proceeds of this sale in certain real estate in New London, Connecticut, one parcel of which was first conveyed by the grantor, Ezra Chappell, to Sarah Blagge, and by her afterwards to Price, and the other parcel was conveyed directly to Price by the grantor, George Erving; both conveyances were upon the very same trusts stated in the will of Mrs. Hall. Afterwards, in 1839, Sarah Blagge died, having first made her will in the same year, which was duly executed, proved, and approved; and by that will, after certain specific and pecuniary legacies, she made the following devises: "To my daughter, Eliza J. Caldwell, I give and bequeath my house and land in New London, being the same, which I purchased partly of Ezra Chappell, and partly of George Erving, during her natural life; and at her decease, I give and devise said house and land to my two grandsons, Charles H. B. Caldwell and Samuel Blagge Caldwell, and to their heirs for ever. All the rest and residue of my estate, of every nature and kind, I give, devise, and bequeath as follows, namely: one third part to my daughter, Sarah Miles, and her heirs for ever; one third part to my daughter, Margaret C. Drane, and her heirs for ever; one third part to my daughter, Eliza J. Caldwell, and her heirs for ever." In point of fact, the legacies in Mrs. Blagge's will are more than sufficient to exhaust the whole of her personal estate at the time of her death and of her making her will; and she owned no other real estate, except that devised to her by the will of Mrs. Hall, and

that purchased with the proceeds of the sale under the resolve above mentioned.

The demandant claims title as an heir of Mrs. Blagge to the demanded premises, which are parcel of the real estate set off to her in the division of Mrs. Hall's estate.

The arguments for the demandant were to the following effect:

1. Benjamin Blagge became entitled, on the death of Mrs. Blagge, to the same share of her estate, to which he would have been entitled, had she died intestate, by force of the 21st section of the 26th chapter of the Revised Statutes. The will of Mrs. Blagge comes within the language of this section; it must, therefore, be presumed to come within its meaning. It is true, it was not a disposition of her own estate, she having only a life interest. But she had power to dispose of the inheritance, as fully and completely, as if it had been her own estate. If the case meets the language of the statute, it cannot be said, that it was not intended to provide for it. If this had been originally her own property, and she had settled it upon herself in trust, in the same manner, that it is now settled, the reason and equity of the statute would hardly have been more applicable. She had power to dispose of this property, and provide for her descendants by will, in the same manner as if it had been originally her own property, and she has omitted to provide for the plaintiff. It is, therefore, the very case pointed out by the statute.

2. Benjamin Blagge takes as heir, in default of appointment. The devise in Mrs. Hall's will, gives a life interest to Mrs. Blagge, with a power to appoint the reversion; and in default of appointment, a remainder to her heirs, which became vested on her death. White v. Woodbury, 9 Pick. 136; Bradly v. Westcott, 13 Ves. 445. The law is well settled, that to make a good appointment under a power, the will must refer to the power itself, or to the subject of it; for it will be inoperative, unless considered as an execution of the power. Andrews v. Emmot, 2 Browne, Ch. 297; Doe v. Roake, 2 Bing. 497; 5 Barn. & C. 520; 6 Bing. 475; 4 Bligh, 17. In Andrews v. Emmot, Lord Thurlow says, "It must be impossible to impute to the testator any other intention than that of executing the power."

The only distinction between a power over personal and real property is, that in the former, the courts will not inquire, whether the testator had other property to satisfy the terms of the will. In the latter, they will allow such inquiry. The possibility, that the testator might contemplate property to be acquired after making his will, prevents a general disposition from operating as an execution of a power over personal property, although at the time of making the will, he has no property, on which it can take effect. Jones v. Tucker, 2 Mer. 533; Webb v. Honnor, 1 Jac. & W. 352. A devise of personal property is not specific. The will being ambulatory, will embrace all, that the testator has at his death. All real property is specific; the will takes effect only on that held at the time. As where the power was to appoint £4000 consolidated bank annuities, and the testator gave £2000 consolidated bank stock, it was held to be no appointment. Nannock v. Horton, 7 Ves. 391. And even though the will contains a bequest of the very sum, which the testator has a power to appoint, it is no appointment. As where the power was to appoint £100, and the testator gave £100, the power was held not to be executed, and an inquiry was refused as to the state of the property. Jones v. Tucker, 2 Mer. 533.

Mere general terms, as a general residuary devise, however comprehensive, will not execute a power. And the more general the terms, the less evidence is there of an intention to execute a power. In Lovell v. Knight, 3 Sim. 273, the words were, "The whole of my property, both real and personal, and whatsoever I may possess at the time of my decease." The vice-chancellor says: "I apprehend it to be perfectly settled, that wherever a will is couched in such terms, as that, upon the face of it, it appears to express an intention to pass the general property, which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property."

But every gift of land, even a general residuary devise, is specific. Nannock v. Horton, 7 Ves. 391. Now we contend, that the residuary devise, in this case, contains no gift of land, nor any reference to it. There is nothing, which refers to the power, nothing necessarily descriptive of the property, over which it existed. A residuary devise "of all my estate," may as well refer to personal, as real estate. Such a devise has never been held to be specific, where the power was to appoint real or personal estate. There is nothing specific in the description.

In Langham v. Nenny, 3 Ves. 467, the power was to appoint personal estate. The testator declaring his purpose to dispose of his estate or effects, which he had, or was interested in, gave all his estate. It was held to be no execution of the power; and Lord Alvanley expressed a decided opinion, that if it had been real property, it must have gone to the heirs. The word, estate, will not always, pass real property in an ordinary will. Timewell v. Perkins, 2 Atk. 102. And no case can be found, where the word "estate," has been held to be an appointment of real estate, subject to a power.

But the contrary has been held in a very modern case, that of Jones v. Curry, 1 Swanst. 67. This was the case of a power over real and personal property. The words of the will were "all my estate and effects of whatsoever denomination." The master of the rolls held, that the power was not exe-

cuted. His language is: "The words are not a specific description of any estate, or of any species of interest, but adapted to comprehend every thing, which was, and to exclude every thing, which was not a part of her property. This will contains no words, which will be without operation, unless referred to the power; on the contrary, the testatrix uses terms of generality,—'all my estate and effects of whatsoever denomination.' Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that."

In Standen v. Standen, 2 Ves. Jr. 589, the words were, "My estate and effects of what nature and kind soever, and whether real or personal, which I am possessed of or interested in." Here the word "real" rendered the devise specific, the testatrix having no other real estate, than that held under the power. The devise of real estate would, therefore, have had nothing to take effect upon, unless construed as an execution of the power.

In Churchill v. Dibben, 2 L. Keny. pt. 2, p. 68, the words were "all the rest of my goods, chattels, estates, and estate." Here, the word "estates" could only refer to real estate, and Lord Hardwicke lays particular stress on this word. This estate had been settled upon the testatrix by herself, and a power reserved. Lord Hardwicke says: "If this had been a power over the estate of another, it would be going a great way to say, that such an estate should pass under the general residuary clause. It is not to be presumed, that such could be meant." There is, then, no intention to be inferred from the language of the residuary clause of this will, to execute a power.

But it will be contended, that the devise of the New London estate is an execution of the power. This estate is no part of the estate, which belonged to Mrs. Hall, and over which she reserved a power. The trustee was not authorized by the resolve to invest the proceeds in land out of the state. The consent of the guardian could not give such authority. The act is, therefore, illegal, and no consequence can be derived from it. But the devise of this estate contains no evidence of an intention to execute a power. The words are: "I give and bequeath my house and land lying in New London, being the same, which I purchased partly of Ezra Chappell, part of George Erving." These words exclude all idea of such intention. She speaks of it as her own property, which she had purchased. Now, it appears, that a part of this land, with the house, was conveyed by Chappell to her, that she paid for it by her own notes, and mortgaged it back. She then conveyed it in trust to Price, reserving a power to dispose of it by will. The Erving lot was conveyed, not to her, but to Price, in trust for her, reserving a power to dispose of it by will in fee simple. Over the New London estate there were reserved two distinct powers. In the Chappell lot she had an interest and a power. It would, therefore, pass by force of the interest. This is the language of the authorities. Clere's Case, 6 Coke, 18. This case has always been held an authority to the following effect, as laid down by Hobart in the Commendam Case: "If an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the power." Hob. 39. The same rule is laid down in Parker v. Kett, 12 Mod. 469, and cited by Kenyon, M. R., in Andrews v. Emmot, 2 Browne, Ch. 303. To apply these authorities to our case, Mrs. Blagge, by the deed of Chappell, was seised of this lot in fee. She conveys it to the use of her will, reserving a power. She had then an interest and a power, and the land passed by force of the interest, the power not being referred to. The lot conveyed by Erving was not conveyed to her, as she evidently supposes, but to Price in trust for her, reserving a power to dispose of it by will. This, therefore, cannot pass by force of the devise, she having no devisable interest. Is it an execution of the power? All such intention is negatived by the language of the devise, which speaks of it as her own property, which she had purchased. She was evidently under a mistake in supposing, that this lot had been conveyed to her.

In Denn v. Roake, 5 Barn. & C. 720, Sarah Trimmer, being seised in fee of a moiety of certain premises in the city of London and county of Surrey, and tenant for life in the other moiety, with a power to appoint the same by will, devised the same, as follows: "I hereby give and devise all my freehold estate in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, on condition, that out of the rents thereof he do, from time to time, keep such estates, in proper and tenantable repair." It was held, that the devise did not operate as an appointment under the power over the one moiety, but only passed the moiety of which she was seised. The court say: "It may be, that she intended her will to work by her interest in the tenements. It may have happened, that she had entirely forgotten the settlement, and supposed, at the making of her will, that she was then seised of the entirety."

Now, in our case, it is clear, that Mrs. Blagge supposed she was seised of the entirety, and intended the will to work by her interest. Powell v. Loxdale, 2 Barn. & Ald. 291.

But supposing these powers to be executed, can any intention be inferred to execute another power over another estate? The powers, reserved over the New London estate, are not the powers reserved in Mrs. Hall's will, nor over the same estates. They are reserved by different persons, over different estates by different instruments. If

the powers over the New London estate are executed, it is by inferring the intention from a devise of it. But this inference cannot be extended to other estates not mentioned.

A disposition of part of the subject of a power, is no disposition of the other part, even though there be connected with it a general devise.

In Anson v. Lee, 4 Sim. 364, the testator devised all his real estate, also his mansion-house at Hartwell, which was part of property subject to a power. He had two roods and eighteen perches of his own land; it was held, that the last only passed by the general devise.

In Hughes v. Turner, 3 Mylne & K. 666, the master of the rolls states it to be well settled, that referring to part, or one of the subjects of a power, does not execute it as to those not referred to. In this case, Walker v. Mackie, 4 Russ. 76, is overruled. Lewis v. Lewellyn, 1 Turn. & R. 104; Napier v. Napier, 1 Sim. 28.

But no power was reserved by the resolve. It says nothing of powers. Powers and trusts are essentially different. Powers are optional. 1 Sugd. Powers, 173. The substitution of a trust, therefore, does not substitute a power. The effect of the resolve, if it had any, was to extinguish the power as to that portion of the estate, which it affected. Powers may be extinguished by a release, or fine and recovery. West v. Berney, 1 Russ. & M. 431. The resolve is unconstitutional. No case has gone this length. Mrs. Hall devises her estate in trust, reserving a power. Can the legislature destroy this power, and substitute it over another estate? Can they thus control and interfere with a testator's disposition of his estate? It impairs the obligation of a contract.

In the case of Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 698, it is said: "A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is an instance of a contract." A grant is a contract executed. A devise is a species of conveyance. Cowp. 305.

A devise, says Cruise (Dig. Devise, c. 1, §§ 1, 10), is considered not so much in the nature of a testament, as of a conveyance, declaring the uses, to which the land shall be subject, after the death of the devisor. This devise is a conveyance to uses. If then this is a contract, the resolve is clearly unconstitutional, since it destroys the subject matter, or transfers it to another. In the bill of rights (section 31), it is declared: "The legislative department shall never exercise the executive and judicial powers, or either of them."

It appears, that courts of chancery will authorize the trust estate of a minor to be changed from personal to real. Ashburton v. Ashburton, 6 Ves. 6. This, then, is a judicial power, and the legislature have, therefore, in passing this resolve, exercised judicial power. The case of Rice v. Parkman, 16 Mass. 324, does not go the length of this case. That was the case of a resolve authorizing the real estate of a minor to be converted into a personal estate. The power to authorize the estate of minors to be sold had long been conferred on the courts. If it was not judicial, it could not be exercised by them. If it was, it could not be exercised by the legislature.

The arguments for the tenant were to the following effect. The demandant is not entitled to a share of Mrs. Blagge's will by virtue of the Revised Statutes of Massachusetts (chapter 62, § 21), because that provision is applicable only to cases, in which the testator has an inheritance in the estate, and not a mere power of appointment. In default of a will, the heirs of Mrs. Blagge would have taken the estate by purchase, and not by descent, a power not being a descendible inheritance.

The resolve was not an unconstitutional exercise of power by the legislature of Massachusetts, it being a ministerial, not a judicial act. Wilkinson v. Leland, 2 Pet. [27 U. S.] 627. Besides, the question of constitutionality has nothing to do with the issue, which is the construction of a devise. If the power has been duly executed by Mrs. Blagge, the demandant has no title to the property under her will; and both parties are estopped to contest the constitutionality of the resolve, since it was passed at the request of Mrs. Blagge, under whom they both claim, the demandant as heir, and the tenant as devisee.

Was the will of Mrs. Blagge a due execution of the power of appointment under the will of Mrs. Hall? This depends upon the intention of the testatrix, to be gathered from the tenor and purport of the whole will. It is not necessary, that the power should be expressly referred to, or that the estate subject to it should be expressly described. It is sufficient, if the donee of the power uses words, which would have no operation except as an execution of the power. 4 Kent, Comm. 334; Denn v. Roake, 6 Bing. 475, 2 Bing. 497, 5 Barn. & C. 720. Where a devise of real estate is made, and the testator has no real estate, on which it can operate, but has a power of appointment over some real estate, which answers to the description, if any, there the power is held to be well executed, otherwise the words would be inoperative. 1 Sugd. Powers, 394, 395; Standen v. Standen, 2 Ves. Jr. 588; Jones v. Curry, 1 Swanst. 66; Napier v. Napier, 1 Sim. 28.

The devise is, "all the rest and residue of my estate of every nature and kind." Had she said, "real and personal," instead of "of every nature and kind," the power would clearly have been executed. For, since she had no other real estate, on which the devise could operate, it would fall distinctly under

the rule. The words used are sufficient to pass real estate, supposing the testatrix to have had a property in, and not a mere power over it. 2 Hill. Dig. p. 29; Barnes v. Patch, 8 Ves. 604; Doe v. Langlands, 14 East, 370.

The only question to be asked is, did not Mrs. Blagge intend to dispose of her real estate, by the clause in question? This intention is to be gathered from the whole will, and looking at it, as a whole, there are various considerations, which show, that such must have been her intention. In the case of each of the residuary devisees she makes use of words of inheritance, "heirs and assigns," usually applied to real estate, and not to personal property. Bullard v. Goffe, 20 Pick. 258. This is made more decisive from the fact, that these words are omitted in giving the various pecuniary legacies, mentioned in the former part of the will, showing the distinction between the two kinds of property to have been present in her mind.

One part of the will may be interpreted by the other. In the residuary clause, she says, "my estate of every nature and kind," and, in a previous clause, she uses a precisely similar expression in a specific devise to Mrs. Caldwell, "my house and land lying in New London." This is unquestionably a sufficient execution of the power, so far as that estate is concerned, and as a test to discover the intention, the similarity of the expressions in the two cases is a very strong argument to prove, that she meant to convey the real estate by the residuary clause. The force of this argument is attempted to be met by the counsel for the demandant on these grounds; because the resolve does not attach the power to any substituted estates after the sale; and because the investment in property in another state was not warranted by the resolve, and was therefore void. The first reason seems unfounded in fact, since the substituted estates, by obvious and elementary principles of law, are to be held upon the same trusts, as the property they represent, and are subject to the same equities, and the language of the resolve says so in so many words. As to the other objection, it is one, into which all inquiry may be waived, so far as the present issue is concerned, because the investment, whether right or wrong, was adopted by Mrs. Blagge, and third persons have no right to object; and the intent to convey, under the power is perfectly apparent; and the argument is just as strong, whether the investment in question be right or wrong. See Dillon v. Dillon, 1 Ball & B. 77.

A variety of cases have been cited in favor of the demandant, and some seem strongly in point. But it is impossible to extract from them a formula or principle, which shall decide all cases of the construction of wills. Each case must rest upon its own facts, and a slight change in facts may vary the decision in two cases, preserving the same principle in both. The case of Walker v. Mackie, 4 Russ. 76, is as strongly in favor of the tenant, as any one, that has been cited, is in favor of the demandant. Sir Edward Sugden, a very high authority, speaks of the number of instances, where the intention has been defeated by the rule distinguishing power from property, and by courts adopting a strict construction with a view to establish a certain rule; and his opinion is, that in many cases, the intention might have been carried into effect, without breaking in upon the general rule. It is evidently his opinion, that the cases of Lewis v. Lewellyn, 1 Turn. & R. 104; Napier v. Napier, 1 Sim. 28; Jones v. Curry, 1 Swanst. 66; and Lovell v. Knight, 3 Sim. 275,—were not rightly decided; and that the dispositions of property in these cases might have been supported, without infringing upon the principle correctly established by the cases of Wallop v. Portsmouth, 1 Sugd. Powers, 394; Churchill v. Dibben, Id. 407; Standen v. Standen, 2 Ves. Jr. 589; Morgan v. Surman, 1 Taunt. 289. In any conflict of authority, the great reputation of Sir Edward Sugden, and his profound investigations into this branch of the law, would give his opinion greater weight in our courts, than those of the judges, by whom the cases in question were decided. The authority of Jones v. Curry is greatly shaken by his observations. See 1 Sugd. Powers, pp. 418–429. The policy of the law in modern times, and in our own country, is to introduce liberal rules of construction, to clear away technical rubbish, and to diminish the interval, which separates real and personal property. Courts of law lean in favor of the execution of a power. See Warner v. Howell [Case No. 17,184]; Lippet v. Hopkins [Id. 8,380;] Archer v. Deneale, 1 Pet. [26 U. S.] 588; Bullard v. Goffe, 20 Pick. 258.

STORY, Circuit Justice. This cause has been very ably argued upon both sides. It turns principally upon a question, which rarely occurs in our jurisprudence, the due execution of a power of appointment; and the learning, appropriate to it, has been fully brought before the court in the course of the present discussion. The facts in substance are as follows. (Here the judge recapitulated the facts as before stated, and then proceeded.)

The main question, therefore, is, whether, under the circumstances, Mrs. Blagge, by the devise in her will, has duly executed the power, given her by the will of Mrs. Hall. If she has, then the demandant has no title whatsoever; if she has not, then he is entitled to recover in the suit.

Some other questions have, however, been raised at the argument, which should be disposed of before we proceed to that, which constitutes the main hinge of the controversy.

And, first, it is said, that even if Mrs. Blagge's will is a due execution of the power, the demandant is entitled to a share of her estate under the Revised Statutes of Massachusetts of 1835 (chapter 62, § 21), as a lineal descendant of Mrs. Blagge, who was unprovided for in her lifetime, and was unintentionally and by mistake or accident omitted to be named as a devisee in her will. The language of the statute is as follows: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to, if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it shall appear, that such omission was intentional, and not occasioned by mistake or accident." The argument is, that this clause is equally applicable to cases, where the testator has a power of appointment of the estate, to dispose of the inheritance, as well as to cases, where it is his own estate in fee. It does not appear to me, that this argument is maintainable. The language of the section seems to me clearly to point exclusively to a case, where the testator has an inheritance in the estate, and not merely a power of appointment over it. It supposes a case, where the omitted descendant would and could take a title by descent, as of an heritable estate of the testator, and under him, as his heir, in case of his dying intestate. But no person can claim an inheritance, as heir, in case of intestacy, where the ancestor has a power only, and not an interest. The party, if he can take at all, must take as an appointee under the power, and not as heir. A power is not a descendible inheritance. The property, which he is to dispose of, is in no just sense vested in the appointor. It is not an interest, right of, or title to, the property; but a mere authority given to the donee of the power, to be exercised over the property in a manner, and to an extent, which he does not otherwise possess. And such has been the uniform construction from the earliest period of the law on this subject. See Co. Litt. 342b, Butler's note 1; 1 Chance, Powers, §§ 1, 2; 2 Chance, Powers, § 1632; Co. Litt. 265b. The present power is technically a power in gross; that is to say, the estates, to be raised by it, do not fall within the compass of the estate for life devised to Mrs. Blagge. Co. Litt. 342b, Butler's note 1; Sugd. Powers (6th Ed.) § 4, pp. 43, 44. A power to dispose of an estate by an appointment among third persons in fee, may be given to a mere stranger; and it would certainly be utterly without the intent of the statute to create an inheritance in the appointor in the execution of the power, which should give his descendants an interest in the estate, upon which the power is to operate. It can make no difference in point of law, that the power, if executed, might be by an appointment among his own children or descendants. This would not change the nature of the power, but only its objects.

Then, as to another objection, which has been urged, that the resolve is an unconstitutional exercise of power by the legislature, because it is usurping the functions of the judiciary, contrary to the provisions of the bill of rights of the constitution of Massachusetts, which declares, that "the legislative department shall never exercise the executive and judicial powers, or either of them." Assuming that such a resolve might be construed, under some circumstances, to be an exercise of judicial power, it would be difficult to apply the doctrine to a case like the present, where it is passed, not in invitum, but at the solicitation of the very person, who, under the power, possessed a complete dominion over the disposal of the entire property. But, after the exercise of this authority by the legislature for more than sixty years, (for such, I am persuaded, has been the practice,) in very numerous cases of a like or an analogous nature, without any objection by the parties in interest, and with the entire acquiescence of the public, it is not, perhaps, too much to say, that it would be still more difficult to treat it as an exercise of judicial power, in the sense of the constitution. The case of Rice v. Parkman, 16 Mass. 326, seems to me directly in point, and establishes, that an authority, granted by the legislature to transmute real property into personal property, for purposes beneficial to the parties interested therein, is not properly the exercise of a judicial power; for it is not a case of controversy between party and party, nor is there any decree or judgment, affecting the title to the property. In short, the court, on that occasion, held it to be, not a judicial act, but a mere ministerial act. The case of Wilkinson v. Leland, 2 Pet. [27 U. S.] 627, 660, goes a great way to establish the same doctrine. There, an act of the legislature of Rhode Island, confirming a sale made by a foreign executrix, for the payment of debts of the testator, was held to be, not a judicial act, but an exercise of legislation; a legislative resolution, and not a decree. The case of Ashburton v. Ashburton, 6 Ves. 6, where the lord chancellor, upon the petition of a minor to have some of his money laid out in the purchase of lands, authorized the purchase to be made, by no means shows, that the act was exclusively judicial. It seems, being upon petition, to have been an act by the lord chancellor, not as a judge, but as the representative of the crown, as parens patriae, having the custody and care of the persons and property of infants. Besides: it is one thing to assert, that a power may be delegated and exercised by a court or judge; and quite another thing to assert, that every power, delegated to, or exercised by a court or judge is judicial, and not ministerial. Many powers, exercised by courts and

judges, are in no accurate sense judicial; as, for example, the power to make rules for the due order and arrangement of business. But it is the less necessary to dispose of this question absolutely, and therefore I give no positive opinion upon it; because, if the power has been duly executed by Mrs. Blagge, whether the resolve be constitutional or not, makes no difference in this case, since the demandant has no title whatsoever to the property under her will; and the constitutionality of the resolve is not contested by those, who alone are donees under the power.

Having disposed of these points, we may now advance to the main question involved in this controversy. Was the will of Mrs. Blagge a due execution of the power contained in that of Mrs. Hall? And this, after all, I take to depend upon her intention, as expressed in and derived from the language and object of the will of Mrs. Blagge. There was a long struggle in Westminster hall upon the point, whether in wills, the intention of the testator, as gathered ex visceribus testamenti, was to be followed in the interpretation of devises, or whether the technical construction of law, given to certain phrases, was to prevail over the intention. That struggle, at least, since the decision in Perrin v. Blake, 4 Burrows, 2579; Fearne, Cont. Rem., by Butler (9th Ed.) p. 156,—seems to have terminated. It is now admitted to be established, as the general rule, that the intention of the testator is the polestar to direct the court in the interpretation of wills, and that technical words and set phrases are controlled by, and do not control, that intention, when clearly expressed or positively ascertained. The consequence is, that decisions upon particular wills are of far less consequence now, than they formerly were supposed to be; unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies, by which to interpret the words of wills in new cases.

I apprehend, that similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is, to arrive at the intention and object of the donee of the power in the instrument of execution; and, that being once ascertained, effect is given to it accordingly. Bennett v. Aburrow, 8 Ves. 609. The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree, that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree, that it is not necessary, that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts, or deeds, demonstrating the intention. This was directly asserted, not only in Sir Edward Clere's Case, 6 Coke, 18; but it was positively affirmed in Scrope's Case, 10 Coke, 143b, 144, where the reason of the rule is stated, "Quia non refert, an quis intentionem suam declaret verbis, an rebus ipsis, vel factis." On the other hand, to use the language of Lord Chief Justice Best, in Doe v. Roake, 2 Bing. 497, 504, "No terms, however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power, unless they demonstrate, that a testator had the power in his contemplation, and intended by his will to execute it."

Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject, on which it is to be executed; (3) or, where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power. Langham v. Nenny, 3 Ves. 467; Bennett v. Aburrow, 8 Ves. 609, 616. It seems unnecessary to refer at large to the cases, which establish these propositions. They will be found collected, generally, in Mr. Chance's Treatise on Powers (volume 2, c. 13, §§ 1591–1714), and in Sir Edward Sugden's Treatise on Powers (volume 1, c. 6, § 2, p. 257 etc.; Id. § 7, p. 373, etc.; Id. § 8, p. 430, etc.), and in the opinion of the court, delivered by Lord Chief Justice Best, in Doe v. Roake, 2 Bing. 497. Lord Chief Baron Alexander, in delivering the judgment of the judges, in the house of lords, in Denn v. Roake, 6 Bing. 475, reversing the decision in the same case, in 2 Bing. 497, and affirming that of the king's bench (5 Barn. & C. 720), has enumerated the same classes of cases; and he has added, that in no instance has a power or authority been considered as executed, unless under such circumstances. Whether this be so, or not, it is not material to inquire; for there is no pretence to say, that, because no other cases have as yet occurred, there can be no others. That would, in fact, be to say, that the cases governed the general rule as to intention, and not the rule the cases. Lord Chief Justice Best has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof, required to establish the intention to execute the power; but they are not the only cases. Doe v. Roake, 2 Bing.

504. On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held, that the power is well executed, unless courts of justice are at liberty to overturn principles, instead of interpreting acts and intentions. I entirely agree with Lord Chief Justice Best, in his remark in Roake v. Denn, 4 Bligh (N. S.) 22, that, "Rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges." The lord chancellor, (Lord Lyndhurst,) said, that "It has been settled by a long series of decisions from the case, which has been referred to in the time of Sir Edward Coke (Sir Edward Clere's Case, 6 Coke, 18) down to the present time, that if the will, which is insisted on as an execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there be some other circumstances to show, that it was the intention of the devisor to execute the appointment by the will, under such circumstances the courts have uniformly held, that the will is not to be considered as an execution of the power." Certainly it is not. But then this very statement leaves it open to inquire into the intention under all the circumstances; which seems to me to be the true and sensible rule upon the subject; and when that intention is thus once ascertained, it governs. So, it was expressly held, in Pomery v. Partington, 3 Term R. 665; and in Griffith v. Harrison, 4 Term R. 737, 748, 749, the court expressly repudiated the notion, that any technical exposition was to be given to the words of a will, executing a power; and held, that the intention was to be collected from the words according to the ordinary and common acceptation thereof. And again, in Bailey v. Lloyd, 5 Russ. 330, 341, the court held, that the question of the execution of a power by a will, was a mere question of intention, and that intention was to be collected, not from a particular expression, but from the whole will. See 4 Kent, Comm. (4th Ed.) Lecture 62, pp. 333, 334.

Now, Sir Edward Clere's Case, 6 Coke, 18, is not only unquestionable law, and has so been always held; but it affords a strong illustration of the true doctrine. In that case, it was held, that the power was well executed, notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void. The testator had no estate in the property devised, but only a power over it; and so, ut res magis valeat, quam pereat, it was held, that he intended to execute the power. Nor is there any objection to the doctrine of Lord Chief Justice Hobart, in the Commendam Case, Hob. 159, 160, that if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the power. This is but saying, in other words, that where the terms of a devise are perfectly satisfied and inoperative, without any reference to the execution of a power, by working on the interest of the testator in the land, there it shall not be deemed, that he intended to execute the power; but merely to pass his interest. This proceeds upon the plain ground, that there is nothing in the will, which shows any intention to execute the power; and in cases of doubt the court cannot deem it a good execution of the power. Id.

Sir Edward Sugden (1 Sugd. Powers, c. 6, § 7, pp. 402, 428) has critically examined and commented upon all the leading authorities; and it appears to me, that his criticisms (and he is himself a very high authority upon this subject) are entirely well founded. The courts have, indeed, as he abundantly proves, proceeded in some cases upon very narrow and technical grounds, and in others have adopted a more liberal and just interpretation; and the cases do not all well stand together. The rule of ascertaining the intention, however, has been recognized at all times; and, as Lord Kenyon has well observed, in Pomery v. Partington, 3 Term R. 674, 675, if the judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not, that they have denied the general rule; but because some of them have erred in the application of the general rule to the particular case before them. In a conflict of authorities, I own, that I should choose to follow those, which appear best founded in the reason and analogies of the law. But, in cases of wills, where the intention is to govern, no authorities ought to control the interpretation, which the court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind, as applied to the other. If I were compelled to decide between the cases of Wallop v. Portsmouth, 1 Sugd. Powers, p. 394, c. 6, § 7; Hurst v. Winchelsea, 2 Ld. Keny. 444, by Harmer; Standen v. Standen, 2 Ves. Jr. 589; Lewis v. Lewellyn, 1 Turn. & R. 104; and the case of Jones v. Curry, 1 Swanst. 66,—if there be any dissonance between them, I should much incline to follow the former. But, in my view, all these cases stand upon their own particular circumstances, and neither is exactly like the present.

We must dispose of this case, then, upon principle; for I cannot admit, that it is governed by any positive controlling authority, or that it will trench upon any established doctrine, whichever way it is decided.

But before proceeding to discuss the terms of this devise, as an execution of the power, it is indispensable to dispose of an argument greatly pressed at the bar, and that is, that the New London estates, in no proper sense, fall within the scope of the power, which

only applies to the original devised property, and not to these substituted New London estates; first, because the resolve itself does not attach the power to any substituted estates after the sale; and secondly, if it does, still the investment in the New London estates, being out of the state, was not authorized by the resolve, and, therefore, cannot be deemed an execution of the power, but is an utterly void act. I cannot accede to this interpretation of the terms of the resolve. The language of it is, that Price, the trustee, is "to invest the net proceeds of said sale in other real estate, to be held by him upon the like trusts, and for the same uses and purposes as the estate above described is now holden." It seems to me impossible to entertain any real doubt, that the substituted estate was to be held upon precisely the same trusts, as the original estate, by the will of Mrs. Hall. The original estate was held expressly in trust for the use of Mrs. Blagge during her natural life, subject to her absolute disposal by her last will and testament, and if she should die without having disposed of the same, then the remainder and reversion to be to her heirs for ever. The language, then, of the resolve, is not only appropriate to fasten upon the substituted estate the like trusts, uses, and purposes as were attached to the original estate; but I am at a loss to understand, what other words could have been more directly expressive for this purpose. The power was attached to the original estate, and was to be served out of the original trust for the uses and purposes therein stated; and the moment the power was executed, it created a direct trust and use in favor of the appointees. The case of Wallop v. Portsmouth, 1 Sugd. Powers (6th Ed.) p. 394, c. 6, § 7, art. 34, seems to be strongly in point.

The other part of the argument may have a better foundation in law. It may be true, that the trustee had no right to invest the proceeds of the sale in any real estate out of the commonwealth of Massachusetts; and yet, if that investment has been adopted by the appointees under the power, and the power has been well executed, third persons have no right to interpose and object to it. It amounts, at most, but to a wrongful conversion of trust property, which, however, may, at the election of the cestui que trust, be followed, and the trusts attached thereto in the hands of the persons, holding the property. Nothing is more common in courts of equity, than for the cestui que trust, upon a wrongful conversion of the trust fund to follow it in its new forms, and hold it subject to the original trust. 2 Story, Eq. Jur. §§ 1258–1266, and cases there cited.

But it is wholly unimportant, in the present case, whether the investment was rightful or wrongful on the part of the trustee, so far as the present controversy is concerned. It was adopted and sanctioned by Mrs. Blagge, as an investment properly made, and upon the identical trusts created by the will of Mrs. Hall, and authorized in the substituted estate by the resolve. In making her own will, and therein devising the New London estate, Mrs. Blagge manifestly intended to execute the power reserved to her, (in conformity to the original trusts,) contained in the deeds of these estates to Price. She had no other right or title in or over the same to give effect to her devise; and this devise must, therefore, if at all, take effect solely as an execution of this power over the substituted property, as to this estate; and in this respect, then, the case falls directly within the rule already adverted to. It is a case, where, although the power is not referred to in terms, yet the subject matter is expressly disposed of, and the will is void and inoperative, except as an execution of the power.

The whole question is then narrowed down to the mere consideration, whether Mrs. Blagge intended a mere partial execution of the power, quoad the New London estate, or meant a full and entire execution of the whole power over all the property, to which it was attached. She speaks of this estate indeed as her own estate, "my house and land lying in New London;" but this does not change the proper interpretation of the words. The language is precisely that, which would ordinarily be used by the donee of a power, absolutely to dispose of the whole property, although without any interest in the property. Lord Loughborough, in Standen v. Standen, 2 Ves. Jr. 589, alluded to such a form of disposition, as not producing the slightest difficulty in construing the devise to be an execution of a power; and this is certainly now the received doctrine. But the true bearing of this language in this clause of the will of Mrs. Blagge most strongly applies to illustrate her meaning in the residuary clause, to which I shall presently allude. She treats the New London estate as her own property; but it was her own in the same sense, and in that only, as the other part of the unsold property, devised to her by the will of Mrs. Hall, that is, her property, as possessing the absolute power to dispose of it by her own will.

Now, immediately after the devise of the New London estate comes the residuary clause. "All the rest and residue of my estate of every nature and kind, I give, devise, and bequeath, as follows: viz. one third part to my daughter, Sarah Miles, and her heirs for ever; one third part to my daughter, Margaret C. Drane, and her heirs, for ever; one third part to my daughter, Eliza J. Caldwell, and her heirs and assigns, for ever." I do not dwell upon the circumstance, that here the language used, "heirs and assigns," applies peculiarly and emphatically to a devise of real estate; nor do I contrast it with the peculiar language in the numerous pecuniary legacies, named in

the preceding part of the will, where the words "heirs and assigns" are wholly omitted. Nor do I rely upon the fact, that the personal estate of Mrs. Blagge at her death, was insufficient to discharge these legacies; for that circumstance alone would not affect the present question; as, from the nature and fluctuation of personal estate, the amount, which would be assets at the death of the testatrix, must always be somewhat conjectural; and, on that account, has not, like real estate, been supposed to be within the contemplation of the testatrix as a specific bequest. Sugd. Powers (6th Ed.) c. 6, § 7, arts. 32, 33, pp. 393, 394; Andrews v. Emmot, 2 Brown, Ch. 297; Standen v. Standen, 2 Ves. Jr. 594; Doe v. Roake, 2 Bing. 497, 510; Jones v. Curry, 1 Swanst. 66, 71, 72.

But what may be relied upon is this, that Mrs. Blagge died possessed of no other real estate than that, which was attached to the power, and disposable by her under the same. Under such circumstances, if instead of the words "the residue of my estate of every name and nature," she had said, "the residue of my estate, real as well as personal," it was admitted at the argument, and, indeed, is conclusively established by the authorities, that the residuary clause would have operated upon the real estate, subject to the power, since in that way, and in that way alone, could it be operative. Sudg. Powers (6th Ed.) c. 6, § 7, arts. 33–38, pp. 393, 394. And, therefore, to effectuate the intent, it must be construed as a due execution of the power. The case of Standen v. Standen, 2 Ves Jr. 589, which was affirmed in the house of lords, would be decisive on this point; and, indeed, it is but following out the principle of Sir Edward Clere's Case, 6 Coke, 18. See, also, Doe v. Roake, 2 Bing. 509, 510.

There is no doubt, that the words "all the residue of my estate of every nature and kind," in Mrs. Blagge's will, are sufficient to pass real estate; and if she had left any interest in real estate, in her own right, that interest would have passed by the devise. This doctrine is clear upon the general principles applied to the interpretation of wills, and is also fully borne out by the authorities. It was admitted in Jones v. Curry, 1 Swanst. 66, 72, 73, and recognized in the very recent case of Saumarez v. Saumerez, 4 Mylne & C. 340. See, also, Church v. Mundy, 15 Ves. 396, and Doe v. Morgan, 6 Barn. & C. 516. Still, however, as the word "estate" is nomen generalissimum, it may be satisfied by the mere bequest of personal property, if the testator has no real estate, upon which it can operate; and, therefore, a residuary clause of this sort is not, per se, decisive as an execution of a power, as it may operate without touching real estate in the power of the party, but not in his interest.

But the view, which I take of the clause, is this, that it may include real estate, if the testator has any; and if the language then may justly admit of this interpretation, then we have a right to look to see, whether the testatrix did not, from other parts of the will, naturally, if not necessarily, mean to apply the residuary clause to real estate. If she did so intend, and it can be clearly seen, from the other provisions in the will, then it is the duty of the court to carry that intention into effect; and if it cannot be, except as an execution of the power, then it amounts to a due execution thereof. Now, it is precisely here, in my judgment, that the whole stress of the case lies. When I see, that Mrs. Blagge has, in the preceding clause of the will, executed the power, specifically, over certain real estate within the scope of the power, calling it "my house and land," and then immediately adding, "all the rest and residue of my estate of every nature and kind," it is plain to me, that she contemplated all the real estate within the scope of the power, as her own estate, and subject to her own absolute disposal, and that she intended to dispose of all of it by her will, by the very words, which she has used. I am not bold enough to fritter away such an intention, coupled with such acts, by resorting to any technical niceties and refinements. They partake too much of subtlety, and artificial distinctions, (and I say it with the utmost deference for other judgments,) to suit a just or even a reasonable administration of private justice. The case of Walker v. Mackie, 4 Russ. 76, was one of far less stringent circumstances; and yet the then master of the rolls (Sir John Leach) held the will a good execution of the power. In that case, the testatrix had power to appoint, by will, a certain leasehold estate, and certain 3 per cent. stock, standing in the name of the accountant general in chancery, she being entitled to both during her life. By her will, after certain pecuniary legacies, she gave "All the rest and residue of her bank stock to her daughter A., with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court. The master of the rolls held, that the will was a due execution of the 3 per cent. stock, and also of the leasehold estate. I am aware, that in a later case (Hughes v. Turner, 3 Mylne & K. 666, 697), his successor (Sir C. C. Pepys) disapproved of that decision. But I confess, that I am not prepared to join in this disapproval; and it be not reconcilable with Webb v. Honnor, 1 Jac. & W. 352, or rather with a dictum of Sir Thomas Plumer in that case, I am not at all disposed to surrender to the authority of the latter. See Sir Edward Sugden's remarks on this latter case. 1 Sugd. Powers (6th Ed.) c. 6, § 7, art. 28, p. 390. Be this as it may, the present case differs

from all these three cases in its circumstances, and, therefore, is not governed by the authority of either of them, whatever may be their weight.

The judgment of Sir Thomas Plumer, M. R., in Jones v. Curry, 1 Swanst. 66, has been greatly relied on, at the argument, as directly in point against the present case being a due execution of the power. I have already had occasion to suggest, that it is not so in point; but is fairly distinguishable in its circumstances. The language there was not the same, nor the power the same, nor the facts the same. There seems to me to be great force in the criticism of Sir Edward Sugden on that case. If the words were not sufficient to pass real estate, (which they clearly were,) the point did not arise. If they were sufficient, the case does not appear to have been well decided; for if they were sufficient to pass real estate, and the testatrix had none but under the power, then it might plainly be presumed, that she intended to pass real estate by her will; and if so, it could only be by an execution of the power. Sugd. Powers, (6th Ed.) c. 6, § 7, p. 425. Besides; Sir Thomas Plumer, in that case, strongly relied upon the fact, that there was no language in the will of the testatrix, which showed any intention to execute the power, even in relation to the personalty. There was no clear case of an intended part execution of the power. Here, the contrary is established; and the testatrix has executed her power as to the New London estate. And I cannot but consider the language of Sir William Grant, in Bennett v. Aburrow, 8 Ves. 609, 616, to contain the true doctrine; and it is strictly applicable to the present case. "This, (said that great judge,) is always a question of intention, whether the party meant to execute the power, or not. Formerly it was sometimes required that there should be an express reference to the power. But that is not necessary now. The intention may be collected from other circumstances; as, that the will includes something the party had not otherwise, than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power."

Upon the whole, my opinion is, that the will of Mrs. Blagge was a complete execution of the power, as to the premises in question; and, therefore, that judgment ought to be entered for the tenant.

NOTE [from original report]. It may not be unimportant to state, that all these refined and subtile distinctions, in relation to the execution of powers, are now swept away in England by the statute of wills (7 Wm. IV., and 1 Vict. c. 26, § 27), which has declared, that a general devise of real or personal estate, shall operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will. The doctrine, therefore, has at last settled down in that country, to what would seem to be the dictate of common sense, unaffected by technical niceties. J. S.

Case No. 1,480.

BLAGROVE v. RINGGOLD.

[2 Cranch, C. C. 407.] [1]

Circuit Court, District of Columbia. April Term, 1823.

JUDGMENT—OPENING AFTER TERM.

After the term in which a judgment has been entered, and the costs taxed, the court will not open the judgment to allow the costs of taking a deposition in New York.

After the expiration of the term in which the judgment was entered, Mr. Burr moved the court to allow the cost of taking a deposition, in New York, to be taxed.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the motion.

BLAIN (BULLENE v.). See Case No. 2,124.

BLAINE (SCOTT v.). See Case No. 12,525.

Case No. 1,481.

In re BLAIR et al.

[17 N. B. R. 492; [2] 10 Chi. Leg. News, 278; 25 Pittsb. Leg. J. 123.]

District Court, W. D. Pennsylvania. April 24, 1878.

BANKRUPTCY — CREDITORS' PETITION — QUORUM — OMISSIONS—AMENDMENT.

1. Where the petitioning creditors who hold debts exceeding two hundred and fifty dollars do not represent one-third of all the provable debts, every two hundred and fifty dollar creditor sinks into a common unit in the mass of creditors, and counts but one with the rest.

2. Where the name of a creditor is stated in the petition, asserting a claim by a proper averment, but omitting the amount, the claim may be amended by adding the amount, if done in good faith.

[In bankruptcy. In the matter of Brice X. Blair and Thomas Appleby, trading as Blair & Appleby. On petition of Detwiler & Co. and others. Heard on exceptions to the register's report. Sustained in part.]

On exceptions to the register's report. A creditor's petition in bankruptcy was signed by one creditor whose claim exceeded two hundred and fifty dollars, and eleven whose respective claims were less than that amount, the aggregate being one thousand six hundred and six dollars and ninety-five cents. The debtors' list showed four creditors over two hundred and fifty dollars, and fifty-six under that amount, and the total indebtedness four thousand six hundred and seventy-one dollars and three cents; but the debt of the two hundred and fifty dollar creditor was not one-third of all the provable indebtedness. The register held that a legal quorum had signed.

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

[2] [Reprinted from 17 N. B. R. 492, by permission.]

By SAM'L HARPER, Register:

[2] [The creditors' petition, the debtors' statement of debts, and their denial, have been referred to me for examination and report as to whether the requisite quorum of creditors have joined in the petition. Mr. Purviance, for the creditors, and Mr. Jennings, for the debtors, appeared before me and elaborately discussed the questions involved. There is no dispute as to the facts and the petition on the one side, and the statement of debts on the other, are to be taken as true for the purposes of this contest.

[Before entering into a discussion of the questions involved, I propose to determine as accurately as possible the correct interpretation of the statute upon the subject. Section 5021 of the Revised Statutes provides that any person committing the acts of bankruptcy specified, "shall be adjudged bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." Towards the end of the section a rule is given for determining that quorum. As it stands it is clear, simple, and easily applied; but the rule I refer to, whilst being, in my judgment, equally clear, simple, and as easily applied, has given rise to a very great deal of discussion which has tended to cast considerable obscurity around it. The rule in part is as follows: "And in computing the number of creditors as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned." Attempts have been made to make this rule say something very different from what a plain reading of it contemplates. One-fourth in number and one-third in value must join in the petition; but the rule says, in computing the number the smaller creditors in amount shall not be reckoned. Now this applies only to number, and not to amount, and yet it is contended that if the petitioners rely upon one-fourth of the larger creditors in amount, they must represent one-third of the entire amount provable. It must be remembered that all creditors whose debts are provable, have a right to become petitioning creditors, and when a petition is presented embracing both large and small creditors, the simple question is, do they constitute one-fourth in number, and one-third in amount? First, as to number: In computing number, we exclude creditors whose claims do not exceed $250 each, and if we find among the petitioners one-fourth in number of those whose respective claims are over $250, the requirement of the statute as to number is most certainly fulfilled, and if we find among the petitioners those to whom one-third of the total amount of provable debts is due, the requirement of the statute as to the amount is also most certainly fulfilled.

[The remaining part of the rule is as follows: "But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid." This provision is also very plain and simple. If there are no creditors holding claims over $250, the petition must be signed by one-fourth in number of all the creditors holding provable debts, and if the requisite number holding debts exceeding $250 fail to sign, the same rule operates. Under either branch of the rule the question as to the amount is in no wise affected—it is simply number.

[My conclusion on this point is this: That if there be found in a petition one-fourth in number of the creditors having debts exceeding $250, the petition as to number is sufficient, and there is no authority in the statute to inquire as to the aggregate of their claims; but the amount of the petitioning creditors' claims must be ascertained by taking the aggregate of all the petitioners' claims. Creditors both large and small have a clear right to sign, and under the first branch of the rule, creditors, whose claims do not exceed $250, are excluded from both petition and statement of debts in computing number, but in computing amount they are not excluded from either, and if included in one, they must be included in both, and that they are to be reckoned in both for amount, I have no doubt.

[Your honor, in Re Lloyd [Case No. 8,429], following numerous cases there referred to, held that the petitioners must represent in any case one-third in amount of the aggregate provable debts of the debtor. But you have not, to my knowledge, been yet called upon to decide whether or not in a case where the petitioners rely upon constituting one-fourth in number of the creditors whose claims exceed two hundred and fifty dollars, they must of themselves represent one-third in value of the provable debts, or whether or not they can join creditors whose claims do not exceed that amount, to make up the one-third in value.

[In order to introduce the important question in the matter in hand, I quote from the petition: "That your said petitioners, together with the other creditors of the said Brice X. Blair and Thomas Appleby, trading as Blair & Appleby, whose names are hereunto subscribed, or who not having signed this petition, herewith file petitions supplemental hereunto, constitute, as your petitioners verily believe, a number equal to, or greater than, one-fourth of the whole number of creditors of the said Brice X. Blair and Thomas A. Appleby, trading as Brice &

[2] [From 25 Pittsb. Leg. J. 123.]

Appleby, whose respective claims exceed the amount of two hundred and fifty dollars, and their claims constitute an amount equal to, or greater than, one-third part of the whole amount of the indebtedness of the said Brice X. Blair and Thomas A. Appleby, trading as Blair and Appleby, provable under the said acts of congress relating to bankruptcy."

[Upon this form of allegation the point is made that, inasmuch as several of the petitioning creditors have claims less than $250, the statement is not sustained that the petitioners constitute one-fourth in number of the creditors whose claims exceed $250. I am referred to In re McKibben [Case No. 8,859], in which Judge Brown, of the eastern district of Michigan, held that such an allegation was defective, and could only be cured by amendment. To the same effect is Roche v. Fox [Id. 11,974], decided by Judge Dyer, of the western district of Wisconsin. I have very carefully examined these two cases, and find myself unable to agree with their reasoning. The allegation in the first case was that "your petitioners constitute one-fourth at least in number, upon the basis of two hundred and fifty dollars and upwards," &c., and the court said that to make the petition stand as that of the five whose debts exceed $250, it "would have to be interpreted as though it read 'that such of petitioners as hold claims to the amount of $250 constitute one-fourth at least in number'—an allegation to which it is safe to say none of the seven petitioners supposed he was making oath." To my mind it seems entirely safe to say that that was the exact idea each of the petitioners had in view when making his oath. It was either that, or each of them must be regarded as alleging that his claim exceeded $250, and it is safe to say that not one of the petitioners whose claims were under $250 supposed he was making oath that his claim exceeded that amount.

[In the second case the court say: "The allegations in petition are entirely sufficient on this point, and show that creditors signing the petition constitute one-fourth at least in number of all the creditors whose claims exceed two hundred and fifty dollars, and the aggregate of the debts due the petitioners to at least one-third of all the debts provable. But when the names of creditors, and the amount of the claim of each, are set out, it appears that eight of fourteen creditors have each claims amounting to less than two hundred and fifty dollars. These cannot be reckoned on making up the one-fourth in number required by the statute. Nor do I think the court can presume that the remaining six creditors whose claims exceed two hundred and fifty dollars constitute the requisite one-fourth of all. Such is not the allegation in the petition, and the necessary inference is that the eight creditors whose debts do not exceed two hundred and fifty dollars must be counted to make up the one-fourth."

[The question is, do the creditors petitioning constitute one-fourth in number and one-third in value of the provable debts? That is all that the statute requires. That question is to be determined by the statutory method after the petition is filed. It is sufficient at the time the petition is filed that it alleges that the petitioners constitute one-fourth in number and one-third in amount, and I am unable to see how it can make any difference to add "on the basis of debts exceeding two hundred and fifty dollars," if in point of fact, one-fourth in number exceeding two hundred and fifty dollars, and one-third in amount have joined in the petition. The time for the court to determine the question as to the quorum is after the debtor has in writing denied the allegation as to number and amount; and after he has filed a full list of his creditors, the court shall "ascertain, upon reasonable notice to the creditors, whether one-fourth in number, and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." Section 5021, Rev. St. When the court so ascertains, the number will be computed according to the rule already quoted. At that time both the petition and the list of creditors will be before the court, containing the facts, and there will be no occasion for either the presumption or inference mentioned by Judge Dyer. If it should then be found that one-fourth in number of all the creditors in the list whose claims exceed $250, and one-third of the whole amount have joined in the petition, I am unable to see why the court should not so adjudge. It is a fact—the very fact required by the statute, and the very fact alleged in the petitions in the two cases referred to, that the petitioners constitute one-fourth in number of the creditors whose claims exceed two hundred and fifty dollars.

[I will now apply this reasoning to the matter in hand. Twelve creditors have joined in the petition, eleven of whom have claims under two hundred and fifty dollars, and whose aggregate is $1,029.89. The amount due to the twelfth creditor is omitted in the petition, the space it should occupy being left blank. The debtor in his lists states it at $577.06. An omission of this character is clearly amendable, and when so amended, the petition will stand as that of one creditor whose claims do not exceed two hundred and fifty dollars, and the aggregate of whose claims is $1,606.95. The debtors' list contains four creditors whose claims exceed two hundred and fifty dollars, and shows his aggregate provable debts to be $4,671.03, making necessary the petition of one creditor whose debt exceeds two hundred and fifty dollars, and $1,557.01 of the provable debts. But if it appears to the court, that the amount claimed by Messrs. Detwiler &

Co. cannot be inserted by amendment, then the petition must stand as that of eleven creditors, whose claims do not exceed two hundred and fifty dollars, and whose aggregate is $1,029.89. As the debtors' list contains sixty creditors in all, it is necessary that fifteen creditors should join, representing $1,557.01 as already stated. In that view, the requisite number and amount have not joined in the petition. But as I am clear that the petition can be amended by inserting the amount of Messrs. Detwiler & Co.'s claim, I am equally clear that when the petition is so amended, the necessary number and amount have joined.] [3]

W. K. Jennings, for Blair & Appleby, for exceptions.

W. S. Purviance, for petitioning creditors.

KETCHUM, District Judge. Exceptions first and second are sustained. The bankrupt law provides that a debtor upon certain conditions may be adjudicated a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debt provable under the act shall amount to at least one-third of all the debts so provable. And in computing the number of creditors aforesaid, who shall join in the petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. If there are no creditors whose debts shall exceed the sum of two hundred and fifty dollars, or if the requisite number have not joined in the petition, then those having debts of less amount shall be reckoned for the purpose aforesaid. In this case there are four creditors whose debts exceed two hundred and fifty dollars, but are not equal to all the debts provable. And there is in the petition one creditor whose debt exceeds two hundred and fifty dollars, but is not equal to one-third of the provable debts.

There are, altogether, large and small, sixty creditors on the list, but only twelve—one two hundred and fifty dollar creditor, and eleven having debts of less amount, have joined in the petition. These twelve creditors represent one-third of the amount of provable debts. It is conceded that, in any case, the aggregate of provable debts held by the petitioner must be equal to one-third of all the debts provable against the debtor. In this case there is but one petitioning creditor whose debt exceeds two hundred and fifty dollars. Of course he is one-fourth of the creditors holding debts exceeding two hundred and fifty dollars, but his debt is not equal to one-third of all the provable debts. Then, according to the act, we may count those having debts less than two hundred and fifty dollars—not solely to get one-third of the amount of the debts provable, but for the purpose aforesaid. What purpose aforesaid? The only purpose of any counting or computation is to determine if one-fourth in number of creditors holding one-third in amount of the provable debts have joined in the petition. Both in the two hundred and fifty dollar limitation in the clause, "computing the number of creditors aforesaid," and in the provision for counting those having debts of less amount "for the purpose aforesaid," the "aforesaid" relates directly back to the primary requirement of the act, one-fourth in number and one-third in amount, and so far as the primary requirement of the statute is modified by the two hundred and fifty dollar provision, the modification relates directly to numbers, and only incidentally to the aggregate amount of provable debts. But the register assumes that it matters not that one-fourth in number of the two hundred and fifty dollar creditors who have joined in the petition do not hold one-third of the provable debts, and that if one-fourth of the two hundred and fifty dollar creditors have joined in the petition, they are to be taken as the one-fourth of the creditors contemplated by the act in all cases, and that the only purpose of considering creditors having debts of less amount, is to secure the one-third of the aggregate of the provable debts without reference to the number who hold them. As in this case one single two hundred and fifty dollar creditor, who with his whole class, on the basis of two hundred and fifty dollars, amounts to nothing for want of the required amount of debts, is given a power equal, numerically, to one-fourth of any possible number of creditors, if, under this deadheading construction, small debts enough, together with this one two hundred and fifty dollar creditor's debt, can be found in the petition to make an aggregate of one-third of the provable debts, although the whole number of petitioning creditors who hold the one-third do not equal one-fourth of the creditors. In this case the debts in the petition are not held by one-fourth or by any number of two hundred and fifty dollar creditors. Nor are they held by one-fourth of all the creditors. There are debts enough, but not the statutory number of creditors representing them. Yet we have a quorum reported without one-fourth of the two hundred and fifty dollar creditors holding one-third of the provable debts, or one-fourth of the creditors holding one-third of the provable debts joining in the petition. All the debts, large and small, in the petition, amount to one-third of the provable debt; but all the petitioning creditors, large and small, do not amount to one-fourth of the creditors. The one two hundred and fifty dollar creditor is made equal to one-fourth of all the creditors, though he may not hold one fiftieth part of the provable debts. I cannot discover how this one creditor gets this transcendent power. The only purpose

[3] [From 25 Pittsb. Leg. J. 123.]

of the two hundred and fifty dollar limitation is to obviate the necessity for getting a large number of small creditors with their debts on the petition, often troublesome and sometimes impossible, and when that purpose fails by reason of the failure of the two hundred and fifty dollar creditor to represent one-third of the provable debts, the two hundred and fifty dollar provision fails altogether, and every two hundred and fifty dollar creditor sinks into a common unit in the mass of creditors, and counts but one with the rest.

Exception third is overruled. When the name of a creditor is stated in the petition asserting a claim by a proper averment, but omitting the amount, the claim may be amended by adding the amount, if done in good faith. It is a clerical error, which may be amended from the list of creditors or from the deposition or proof of the debt.

It is adjudged that a legal quorum is not made out by the petitioning creditors, and the petition will lie over ten days from the filing hereof, for additions.

Case No. 1,482.

In re BLAIR et al.

[The case reported under this title in 25 Pittsb. Leg. J. 123, contains only the certificate of the register, which will be found in Re Blair, Case No. 1,481.]

Case No. 1,483.

BLAIR v. ALLEN.

[3 Dill. 101.][1]

Circuit Court, E. D. Missouri. 1874.

TRIAL — ACT MARCH 3, 1865 — WAIVER OF JURY TRIAL—SPECIAL FINDING OF FACTS — MODE OF REVIEWING JUDGMENTS AT LAW OF THE DISTRICT COURT.

1. The act of March 3, 1865, (13 Stat. 501, § 4), as to waiving a jury and trying issues of fact by the court, applies exclusively to the circuit courts. Its provisions do not extend to the district courts.

[Cited in Wear v. Mayer, 6 Fed. 660; Town of Lyons v. Lyons Nat. Bank, 8 Fed. 373; Rogers v. U. S., 12 Sup. Ct. 94.]

2. The manner in which the proceedings and judgments of the district courts in actions at law must be revised and re-examined on error in the circuit court. [They cannot be so reviewed upon a writ of error where the facts are controverted, and no case is stated in the nature of a special verdict for the opinion of the district court as to the law arising thereon.]

[Cited in Wear v. Mayer, 6 Fed. 660; Town of Lyons v. Lyons Nat. Bank, 8 Fed. 373; Doty v. Jewett, 19 Fed. 338; Jackson v. U. S., 21 Fed. 36; Rogers v. U. S., 12 Sup. Ct. 94.]

3. A bank holding an indorsed note may, it seems, set off the same against the general deposit account of the maker.

[Cited in Robinson v. Wisconsin, M. & F. Ins. Co. Bank, Case No. 11,969.]

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

[In error to the district court of the United States for the eastern district of Missouri.]

This was an ordinary action at law by the plaintiff [Joseph H. Blair], as assignee in bankruptcy of one Husbands, under section 35 of the bankrupt act, to recover the sum of $1,600, alleged to have been paid to the defendant [Gerard B. Allen] or for his benefit by the bankrupt in violation of the provisions of that enactment. The substantial allegations of the petition were denied by the answer. In the district court the partner filed a stipulation waiving a jury and consenting to try the cause by the court.

The finding of the court as appears of record was as follows: "The court being fully advised now finds the issues joined herein for the defendant, and orders that judgment in accordance with such finding be now entered herein. It is therefore considered," &c. (here follows an ordinary judgment for the defendant).

Afterwards a bill of exceptions was filed, which, after setting out all the evidence, contains the following stipulations: "It is hereby stipulated by the parties that the opinion of the court, Treat, J., may be read in the circuit court on the hearing of this writ of error to show the finding of facts by the court and its rulings thereon" (which stipulation is signed by the parties). "Thereupon" continues the bill of exceptions, "the court took the case under advisement, and on the 3d day of March, 1874, found for the defendant and gave judgment accordingly, to which the plaintiff then and there duly excepted." This is all of the bill of exceptions. The parties have filed in this court as part of the record what they agree to be a copy of the opinion of Treat, J., which is as follows:

"The defendant was accommodation indorser of the bankrupt on a note discounted and held by the Mercantile Bank prior to and after the bankruptcy. On the day the note matured the maker informed the indorser that he (the maker) would be unable to pay the whole of the note, but could pay part, and in a short time from collections would pay the balance. He promised out of his funds on deposit with the bank to pay $1,000 on the note that day. The indorser said he would see the officers of the bank and arrange the matter. He did so, waiving notice and protest. The maker went to the bank the same day and paid, by check on his deposit, not $1,000 as agreed, but $800, which payment was indorsed on the note.

"Subsequently the indorser inquired at the bank if the balance due on the note had been paid, and was informed that only the $800 had been paid. He then inquired what amount the maker had on deposit, and was informed about $1,100. Thereupon he went to the maker and insisted that out of the amount the latter had on deposit he should apply a further sum toward the payment of the note. The maker said he had been

advised that he had done wrong in making any payments as it would work injustice to the indorser and the bank. The indorser said that he, the debtor, had been badly advised, and insisted on his making out of his funds on deposit in the bank, a further payment on the note. The maker then gave his check on his deposit at the bank for $800, payable to the order of the bank, to be applied to the note, which check the indorser took to the bank and had that sum also credited on the note. It seems that when the first payment on the maturity of the note was made, the accommodation indorser was induced to believe that the maker would, in a short time thereafter, if a little indulgence were granted, be able to pay in full, and as the indorser's ability to pay was unquestioned, the latter was left to arrange with the bank for the indulgence.

"In the state of the pleadings, and under the testimony offered, it may be doubtful to what extent the defendant was informed and charged with knowledge of the true financial condition of the maker of the note; but supposing he knew that the maker of the note was embarrassed, so that he requested as a merchant indulgence, in order to meet his maturing and matured obligations; that he was actually insolvent and disclosed his condition to his accommodation indorser, a question is presented in this case which differs from any heretofore decided. If a maker of a note has on deposit with the owner and holder thereof a given sum of money, which the latter has a right to retain and apply to the payment of the note, or use by way of set-off, and such application is made by the maker, even at the instance of the accommodation indorser, can the assignee in bankruptcy, if the maker is subsequently adjudicated a bankrupt, receive from the indorser the amount so paid?

"The bank holding the past due note with liability of indorser fixed, and at the same time having funds of the maker in their hands would, if it subsequently sued, without bankruptcy intervening, or proved its demand in bankruptcy, be entitled to recover or prove only the balance due it. It would not be bound to sue or prove for the whole amount of the note, to-wit:—$3000, and give no credit for the $1600 in its hands. The balance due it would be $1400, and it could not recover for a larger amount. Should it pay to the maker, no bankruptcy intervening, the $1600 on deposit, and then insist upon the indorser paying the whole $3000, what equity would there be in such a transaction in compelling the indorser to pay the entire amount and then turning over to the maker the $1600 which ought to have been applied to the discharge of the indebtedness? If in such a state of the case, the indorser should be held for only the balance, how does the subsequent intervention of bankruptcy change the legal relations of the parties?

"The case of Assignees of Lugman & Frank v. Thorner [Ahl v. Thorner, Case No. 103] is readily distinguishable from that now under consideration, even if its ruling be correct. In the case of Bean v. Laflin [Case No. 1,172] different legal views were expressed, but the point now in controversy was ex industria left undecided. In Traders' Nat. Bank v. Campbell, 14 Wall. [81 U. S.] 87, 97, the supreme court allude to the point involved in the matter now to be determined. That court says: 'It ($928.38) was received on collections made by the bank from drafts placed by the bankrupts in their hands in the ordinary course of business, and if they had retained them and appropriated it as a set-off against the debt of the bankrupt to them, an interesting question might have arisen as to their right to do so. But instead of doing this, they handed it over to the sheriff, who levied on it as the property of the bankrupt, by virtue of the same execution under which he levied on and sold the goods. By the act of the bank it was thus placed in the same category with the goods, and instead of exercising their own right of set-off by directing the sheriff to credit the execution with the sum received by them on the debt, they delivered it to him to be treated as the goods of the bankrupt, and subjected by him to their illegal judgment. This amount then must be treated in the same manner as the other money received by them from the sheriff on the sale of the goods.'

"That is the question here as to the second payment of $800 out of funds deposited after the first payment on the note due, and to some extent as to the first payment of $800 out of deposits on hand at the maturity of the note.

"Since the decision in [Traders' Nat. Bank v. Campbell] 14 Wall. [81 U. S. 87] the supreme court has decided the case of Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473]. The decision in that case calls on the district and circuit courts to review their opinions upon the true construction of sections 35 and 39 of the bankrupt act, where preferences are actually obtained. True, that case does not cover nor necessarily involve the precise question now under review, yet it indicates that the presumptions on which the district and circuit courts have heretofore acted, as ordinary propositions of law, are not to be followed and applied to alleged preferences under the bankrupt law. In Bean v. Laflin, this court expressed its dissent from many rulings had elsewhere, where indorsers were involved, and gave somewhat at length its views upon the subject. It is not to be supposed, as stated in that case, that the ordinary rules of the law merchant were intended to be overthrown by the bankrupt act, but that negotiable paper, instead of losing any of its force connected with banking operations, or otherwise, was to be more strictly upheld.

"The relations of maker, indorser, and holder of such paper are well understood. When the position of each is fixed, shall any

one of the three parties do an act whereby either of the parties is to be prejudiced? The primary duty is for the maker to pay, and if the holder has funds in his hands applicable to the payment, can he withhold their application after request to apply the same and compel the indorser to pay, what, if the holder had acted as requested, would not have remained unpaid?

"Funds in the hands of the holder, belonging to the maker, or coming into his hands while he still holds the negotiable paper unpaid, he is at liberty to apply to the discharge of the paper, or rather ought, as between himself and the indorser, so to apply. In a suit against the holder for the funds deposited with him, he could set off the amount due on the note, and why shall he part with these funds when requested to apply them to the payment of the note, and thus shift the payment to the indorser, regardless of the state of indebtedness between holder and maker? In such cases is not the indorser in the position solely of surety for the balance due, and has he not a right to insist upon such application of funds on deposit as will leave him to pay only the balance due? How otherwise can the equities of the bankrupt act and the law merchant as to negotiable paper and of sureties be reconciled?

"In this case, under the facts disclosed, the bank had a legal right to make the application named, at the instance of the maker or indorser, irrespective of the solvency or insolvency of the maker.

"As the bank could retain and apply the deposits, and as it did so, whether at the instance of the indorser or not, the note to the extent of such application must be considered as paid and extinguished. In one sense the bank was benefited by the payment, and so was the indorser; but neither the one nor the other was bound to meet more than the balance due, that is to surrender or cause to be surrendered, funds applicable to the particular payment any more than a secured creditor is bound to surrender his collaterals for the benefit of the general creditors.

"It is true there is difficulty in any solution of such cases which may be attempted, but that now presented seems to me the only sound one consistent with legal propositions."

J. H. Blair and G. M. Stewart, for plaintiff.

Krum & Patrick, for defendant.

DILLON, Circuit Judge. This was an action of law tried by consent by the court upon testimony adduced by both parties, and which is embodied at length in the bill of exceptions. The facts, so far from being admitted by the parties in the court below, were disputed. After the trial was concluded the court rendered a general judgment for defendant, and accompanied it with a written opinion stating therein its view of the facts and the law thereon arising. The parties stipulated in the court below that the written opinion of the judge might be read in this court on the writ of error, to show the finding of facts by the district court and its rulings thereon. This was probably done under the supposition that the act of March 3, 1865 (13 Stat. 501, § 4), applied to the district court as well as to the circuit court of the United States. Such however, is not the case, which, as it is a very useful enactment, is much to be regretted. The purpose and effect of this statute plainly appear in opinions of the supreme court in the cases below cited. Norris v. Jackson, 9 Wall. [76 U. S.] 125; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. [74 U. S.] 44; Flanders v. Tweed, 9 Wall. [76 U. S.] 425; Phoenix Ins. Co. v. Copelin, Id. 461; Coddington v. Richardson, 10 Wall. [77 U. S.] 516. It follows that rulings and judgments of a district court in actions at law can only be re-examined and revised by the circuit court on error, in the mode which obtained before the statute of March 3, 1865, and that mode is so well settled by the supreme court of the United States, that it is needful only to refer to a few of the numerous cases on this subject. Guild v. Frontin, 18 How. [59 U. S.] 135; Graham v. Bayne, Id. 60; Flanders v. Tweed, 9 Wall. [76 U. S.] 425; Campbell v. Boyreau, 21 How. [62 U. S.] 223.

In the case last cited the chief justice states the doctrine of the court and the grounds upon which it rests. He says: "By the established and familiar rules and principles which govern common law proceedings, no question of law can be revised and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment in the case), unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict stating the facts and referring the questions of law to the court. The finding of issues of fact upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act unless by virtue of a statute like that of 1865."

As the facts in the present case were controverted, and as no case was stated in the nature of a special verdict for the opinion of the district court as to the law arising thereon, it follows that no error of law committed by the district court appears of record. If we could act upon the stipulation of the parties that the facts of the case are stated in the opinion of the district judge (as was done under the statute of 1865 in Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. [74 U. S.] 44) the judgment below would still have to be affirmed.

There is no distinct finding and no stipulation of the parties that the defendant, when he received the payments or benefit of the payments which are alleged to give him an illegal preference, knew or had reasonable

cause to believe that the principal debtor was insolvent and that the payments were made in fraud of the bankrupt act, and without this, an essential element of liability is wanting.

The result is that the judgment must be affirmed without looking into the merits of the case. This is the less to be regretted because taking the facts as stated by the court below in its opinion the bank would have had the right to set off the note against the deposit (Bankrupt Act, § 20; Alsager v. Currie, 12 Mees. & W. 750; Bailey v. Finch, L. R. 7 Q. B. 34; Winslow v. Bliss, 3 Lans. 220; Sankey Brook Coal Co. v. Marsh, L. R. 6 Exch. 185), and other creditors or the assignee could not have objected. And unless the opinion of the supreme court in the Traders' Nat. Bank v. Campbell, 14 Wall. [81 U. S.] 87, 97, 98, decides differently, I should have been of the opinion that Husbands' consent to apply the money in the way the law would allow the parties to apply it, and his giving a check to that end, would not be fraudulent within the meaning of the act. Whether the case cited holds otherwise, it is not necessary, nor indeed proper, to inquire.

Judgment affirmed.

Case No. 1,484.

BLAIR v. BEMIS.

District Court, D. Connecticut. 1863.

ATTACHMENT — NONRESIDENTS OF THE DISTRICT—ACT SEPT. 24, 1789.

[In admiralty. This was a civil suit against inhabitants of the district of Massachusetts, none of whom were found in the district of Connecticut at the time of serving the writ. The power to issue process of foreign attachment under these circumstances was held not to exist under the judiciary act of September 24, 1789, § 11 (1 Stat. 78). Opinion by SHIPMAN, District Judge; nowhere reported, and not now accessible.]

[Questioned in Atkins v. Fibre Disintegrating Co., Case No. 600. Approved in Atkins v. Fibre Disintegrating Co., Id. 602. Questioned in Cushing v. Laird, Id. 3,508.]

Case No. 1,485.

BLAIR v. FIRST NAT. BANK.

[2 Flip. 111; 10 Chi. Leg. News, 84; 5 Reporter, 40; 2 Browne, Nat. Bank Cas. 173; 12 Bankers' Mag. (3d S.) 721.] [1]

Circuit Court, N. D. Ohio. Dec. 1, 1877.

NEGOTIABLE INSTRUMENTS — BANKS — AUTHORITY OF CASHIER—NOTE PAYABLE TO HIM—PRESUMPTION AS TO OWNERSHIP — INDORSEMENT OF PAPER BY HIM — PAPER NOT AUTHORIZED BY DISCOUNTING COMMITTEE—ACCOMMODATION PAPER—INDORSEMENT — OFFICERS MAY BORROW MONEY OF THE BANK.

1. A note payable to M., cashier, is a note payable to the bank.

[See Newberry v. Baldwin, Case No. 892.]

2. M., as cashier, has authority to assign notes.

[See Newberry v. Baldwin, Case No. 892.]

3. When the note is payable to M., cashier, the presumption is that it is the property of the bank; and if indorsed by the cashier to another bank for discount, it would be in effect asking the bank to discount it for the bank of which M. was cashier; and if discounted and the proceeds were received by the cashier it would be deemed the transaction of the bank, and within the scope of the cashier's duties and for which the bank would be liable. Nor does it matter what the defendant did with the money.

[See Newberry v. Baldwin, Case No. 892.]

4. The president, cashier or director of a national bank may borrow money of the bank as other persons.

5. Whether paper has or has not been authorized by the discounting committee of the bank does not in anywise affect parties who are bona fide indorsees before maturity.

6. A cashier has no authority to indorse accommodation paper so as to bind his bank, not passing through it in its usual line of business. The indorsement to bind the bank must be within the scope of his duties as cashier.

[See West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557.]

[At law. Action by James A. Blair against the First National Bank of Mansfield upon a promissory note. Hearings upon demurrer to defendant's answer. Demurrer sustained. Charge to jury. Verdict for plaintiff, and motion for new trial. Overruled. Judgment for plaintiff.]

Slade & Kline and L. R. Critchfield, for plaintiff.

M. R. Dickey and H. C. Hedges, for defendant.

WELKER, District Judge. This suit is brought against the bank upon the following promissory note: "$5,000. Mansfield, Ohio, August 11, 1873. Ninety days after date I promise to pay to the order of R. H. McMann, cashier, five thousand dollars, at the First National Bank of Mansfield, in New York Exchange. Value received. Willard Hickox." Indorsed: 1st. "Pay D. P. Dildine, Esq., cash or order.—R. H. McMann, Cashier." 2d. "Pay J. A. Blair, or order.—D. P. Dildine."

The petition alleged the assignment by R. H. McMann, cashier of the bank, for and on behalf of the bank, to D. P. Dildine, before due, and for a valuable consideration, and by said Dildine, before maturity and for a valuable consideration, to the plaintiff, and avers the proper demand and notice on maturity to the First National Bank, etc.

The defendant answers, as a defense, that the note was received by the said R. H. McMann without any consideration therefor, and endorsed to Dildine, cashier, without any consideration to said national bank, and solely as a matter of accommodation for said Hickox. That Hickox was largely indebted to the bank at the time of the execution of said note, and that he and said McMann un-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 5 Reporter, 40, and 2 Browne, Nat. Bank Cas. 173, contain only a partial report.]

lawfully and fraudulently colluded and combined to cheat the bank, and with said purpose and intent Hickox executed the note to McMann, and with said purpose and intent, and without any authority in law or fact therefor, McMann unlawfully and fraudulently endorsed and delivered said note to Dildine without receiving any consideration therefor for said bank.

To this answer the plaintiff files a general demurrer. The answer does not deny the assignment and transfer of the note by McMann, cashier, to Dildine, and by Dildine to the plaintiff, before maturity.

We may, therefore, in considering the plaintiff's demurrer, and the sufficiency of defendant's answer, regard the assignment to have been made before maturity and for valuable consideration paid by the plaintiff.

That being so regarded, all that part of the answer as to the consideration of the note, or its assignment to the plaintiff, constitutes no defense to the note in the hands of the plaintiff, if he be an innocent holder of the note.

The answer and demurrer raise two questions for determination: 1st. Whether the note payable to McMann, cashier, is a note payable to the bank? 2d. Whether McMann, as such cashier, had authority to assign the note? As to the first point: The Case of Bank of Genesee, 19 N. Y. 313, was a suit on a note payable to "the order of S. B. Stokes, Cash.," at the Bank of New York, and by him endorsed by the name of "S. B. Stokes, Cash." It was held by the court that the note was payable to the bank. Judge Denio in that case says: "In the absence of any evidence to connect the bill with defendant's bank, he would be regarded as the payee and indorser individually, and the abbreviation affixed to his name would be considered as descriptio personae. But when it has been shown that he was the defendant's cashier, the presumption would be that the note payable in that form, was the property of the bank, and when he endorsed it with the addition mentioned, and sent it to the plaintiff in an official letter, for discount, it was the same thing as requesting the plaintiff to discount on behalf of the defendant's bank."

It was also held in that case, "that there being nothing in the circumstances to put the endorser upon inquiry, and he having discounted the bill in good faith, he was entitled to recover against the bank, although the bill was endorsed for the accommodation of a third party: the bank having no interest in it, but its governing officer authorized the endorsement and application for discount."

In [Baldwin v. Bank of Newbury] 1 Wall. [68 U. S.] 234, it is held by the court: "That where negotiable paper is drawn to a person by name with addition of 'cashier' to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation."

These cases, I think, settle that the national bank was the owner of this note, although payable to McMann, as cashier; and that it was the paper of the bank.

2d. Had he authority to transfer and endorse the note?

In Morse on Banks and Banking (page 151) it is said, in speaking of the powers of a cashier, that "all its negotiable paper he may negotiate and transfer in its behalf, and to this end he may endorse it over, so as to bind the bank like any ordinary endorser on similar paper." Again: "The outside party dealing with him (cashier) in good faith, and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is the inherent power of the cashier, which he exercises simply by virtue of his office, to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon inquiry, to go behind this authority. If the agent exceeds it, the matter lies wholly between himself and principal." See, also, 29 N. Y. 554.

Again: "That the cashier, by his indorsement of negotiable paper on behalf of the bank, will always bind the bank to the full extent that any individual endorser of like paper and in like form, would be bound, unless the holder of the endorsed paper took it with actual notice of some fact rendering the endorsement irregular and invalid."

It will be seen by the authorities that the powers of a cashier are very large. He is the general agent of the bank for all its banking transactions. Whether he have specific authority to do certain things or not, if within the scope of his general duties, the outside world have a right to presume the authority, and his acts bind the bank.

In this case the note was payable to the cashier of the bank, and by him endorsed in the regular course of business, we have a right to presume, to Dildine, cashier of another bank, and by him to the plaintiff. What circumstances of suspicion were there about the transaction to put the plaintiff on his guard that appear in the answer? It is a common practice among banks to receive negotiable paper, and forward, after endorsement by the cashier to another bank, and there re-discount the same.

There is no allegation in the answer that any of the matter therein set up was brought to the knowledge of the plaintiff, or that there were such circumstances surrounding the transactions therein set forth to put the plaintiff upon inquiry in purchasing the note.

The admitted relation of McMann to the bank was such that any person had a right to suppose the transaction was in the usual course of business.

In the absence of these facts in the answer, I do not think it a good defense, and

the demurrer thereto will be sustained. The case was then tried by a jury.

WELKER, District Judge, in his charge to the jury, made the following legal points:

1. The note being payable to "R. H. McMann, Cash.," is a note payable to the bank of which he was cashier.

2. If the evidence shows that McMann was the cashier of the bank (defendant), the presumption is, that the note payable in that form was the property of the bank, and if the cashier endorsed it as such, and sent it to the savings bank in an official letter for discount, it would be the same thing as requesting the savings bank to discount it on behalf of the defendant (bank).

3. If the note of Hickox was the note of the bank and so received by the cashier, and afterwards for the purpose of re-discounting, was endorsed by McMann as such cashier, and discounted by the savings bank, and the proceeds sent to the defendant, that was a transaction within the scope of the duties of the cashier, and for which the bank is liable, and it does not make any difference as to the right of the plaintiff, what the defendant did with the money thus received.

4. The president, cashier or director of a national bank may borrow money from the bank, as any other person may, and execute a valid note for the same, that will bind them as well as the bank receiving it; and such note is not void, nor, in the absence of fraud, can such note be repudiated or avoided by the bank by reason of that relation.

5. If the plaintiff purchased the note before maturity and for a valuable consideration and in good faith, the defendant cannot set up any defense to the same growing out of the consideration of the note, or for want of authority to make the note or the endorsement, unless he took it with actual notice of some fact rendering the endorsement irregular and invalid; or unless there was something in the circumstances of the transaction throwing suspicion upon it to put the plaintiff upon inquiry as to the character of the transaction.

6. If the indorsement of this paper by the cashier, and its being sent to the savings bank for discount was in the ordinary and usual line of banking business, then, that fact was not such a circumstance as would put the plaintiff upon inquiry, for he had a right to suppose it was legitimate and proper.

7. If the note was payable to some person not connected with the bank, but assigned to the bank and endorsed by the cashier, and presented by an outsider, to the savings bank for discount, that fact would be a circumstance to put the endorser upon inquiry as to the transaction, and the authority of the cashier to make such endorsement to bind the bank.

8. An outside party dealing with the cashier of a bank, in good faith and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is the inherent power of the cashier, which he exercises simply by virtue of his office to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon the inquiry, to go behind this authority. If nothing appears upon the face of the paper, or in the circumstances connected with the assignment to throw suspicion upon it, the purchaser, before maturity, is not bound or required to make inquiry.

9. The fact whether paper has been authorized by a discounting committee to be discounted by a bank, or not so authorized, does not in any way affect an outside party who is a bona fide indorsee of the paper before maturity. Such action or want of action by the committee, does not in any way affect the validity of the paper when put into circulation.

10. Such committee being only part of the private machinery of the bank, devised for its own safety and advantage, the outside public is not in any way affected by its action in relation to commercial paper.

11. Accommodation paper in a legal sense means paper made without consideration therefor.

12. A cashier of a bank has no authority to endorse accommodation paper, not passing through his bank in its line of usual business, so as to bind his bank to the endorsee therefor. The endorsement to be binding upon the bank must be within the scope of his duties as such cashier.

13. If such circumstances of suspicion have been shown to exist as ought to have put the officers of the savings bank and the plaintiff upon inquiry before purchasing, they would be presumed to have either made the inquiry and ascertained the truth, or to have been guilty of a degree of negligence equally fatal to their claim to be considered bona fide purchasers.

14. That the fact that the plaintiff knew that Hickox, the maker of the note, was the president of the First National Bank (deft.) was not such a circumstance as would constitute notice to the plaintiff to destroy his character of innocent holder of the note, or put him upon the inquiry as to the character of the note.

15. The law presumes a consideration in every promissory note, because it is an obligation to pay money.

Verdict for the plaintiff.

Motion for new trial. 1. Because of error of the court in the law. 2. That the verdict was contrary to the law and the evidence.

Before EMMONS, Circuit Judge, and WELKER, District Judge.

EMMONS, Circuit Judge. The action is upon an endorsement by the defendant's

bank, as organized under the national banking law. The note was regularly endorsed in due course of trade, by the cashier of the defendant, for full consideration paid by the Tiffin Savings Bank. The latter bank transferred it for full consideration to the plaintiff before maturity. The defendant now moves for a new trial upon the ground that as it appeared the maker of the note was insolvent, was president of the bank, and, by connivance with the cashier, fraudulently obtained the discount of the note by the defendant, and that, in view of this fact, the court should have charged the jury, that inasmuch as the note was made by a person who was also president of the bank, that the discount per se was unlawful, and that the note on its face put the plaintiff upon inquiry, and authorized the defendant to prove, as against him, the want of consideration.

It is somewhat difficult to deal with such a proposition. If there is any possible defense in a case like this, it is only upon the broad ground that the president of a bank is incompetent in all cases to become a borrower from his bank, and that his paper is in all instances unlawful.

This is not a case of failure of consideration. The contract given in evidence is one for which the defendant received full consideration. The savings bank and its transferee, the plaintiff, have nothing to do with solvency or insolvency of the maker of the note. They dealt with the bank which endorsed it.

If there is any defense, it must be on the ground of illegality, that the transaction is ultra vires, or so at war with public policy as to become void at common law. If such grounds can be maintained, then, of course, all parties to an unlawful transaction can set that up as a defense.

No case has been referred to showing that a bank officer or director cannot borrow as freely as other persons, so as the loans are honest, and the borrowers do not themselves participate in authorizing the loan. On page 99 of Morse on Banking, after discussing the general doctrine, that so far as the bank itself is concerned (but not as to third persons), that it is unlawful for a director to vote upon a matter in which he is personally interested, it is added that: "In the absence of legislative prohibition there is no rule of the common law which prevents the making of a loan or discount to a director any more than to any other person." Cites Conyngham's Appeal, 57 Pa. St. 474.

The distinction is plain in principle, as it has always been recognized in actual administration, between being interested in a valuable contract and in borrowing money at a lawful rate of interest.

It has never been deemed a breach of trust for an officer of a corporation to borrow its money. Ang. & A. Corp. 296, 297, §§ 299, 300.

Cashier may transfer the securities of the bank in the usual course of business. It being entirely clear that a bank director or officer may, in the ordinary course of business, borrow money of the corporation, it would have been error for the judge to have charged the jury that the mere form of paper showing he had done so, was notice to the plaintiff of any fraud upon the bank. It is unnecessary to say that irregularities in the conduct of the internal affairs of a corporation do not bind third parties who had no notice, for here it does not appear that any irregularity had occurred. At the most, it is a fraudulent discount of paper to an insolvent party. In such a case the defendant concedes that a third party taking the paper from the bank itself, paying full consideration, may recover on its endorsement.

The motion for new trial is overruled, and judgment on the verdict.

BLAIR (MAYO v.). See Case No. 9,354.

BLAIR (UNITED STATES v.). See Case No. 14,607.

Case No. 1,486.

BLAIR v. WESTERN FEMALE SEMINARY.

[1 Bond, 578.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1864.

COURTS—JURISDICTION—CITIZENSHIP—REMOVAL TO ANOTHER STATE—DOMICILE.

The plaintiff, having left Cincinnati in 1856, with the purpose of permanently residing in Chicago, and having resided there till 1859, in the meantime exercising the right of voting in Illinois, was a citizen of that state in 1858, when this suit was brought, and had a right to sue in this court, though he afterward returned to Cincinnati. The fact, that his wife and younger children remained at Cincinnati did not, under the circumstances of this case, prevent the plaintiff from becoming a citizen of Illinois.

[See Cooper v. Galbraith, Case No. 3,193.]

[At law. Action by John Blair against the Western Female Seminary for breach of contract. Heard on a plea to the jurisdiction. Overruled.]

C. D. Coffin, for plaintiff.

S. J. Thompson, for defendant.

OPINION OF THE COURT. For some unexplained reason, this case has been pending in this court since the year 1858. It was brought by the plaintiff, as a citizen of Illinois, to recover an alleged balance due him on a contract for building the Western Female Seminary, an incorporated institution located at the town of Oxford, in Butler

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

county. The defendant has at length appeared to the action, and has filed a plea to the jurisdiction of the court, on the ground that the plaintiff was a citizen of the state of Ohio at the time suit was brought, and has since continued to be such. The plaintiff has joined issue with the defendant, and the question of jurisdiction is the only one now before the court.

The evidence seems to be conclusive, that the plaintiff, having previously resided with his family, at Cincinnati, was unfortunate in business as a brick-maker and brick-layer; and in the year 1856, removed to Chicago, leaving his family here, with the intention of taking them to Chicago at a subsequent time and making it his permanent residence. His purpose, as he states in his testimony, in leaving his wife, was that his younger children might be educated at the high school in Cincinnati. He continued at Chicago, in pursuit of his business, until 1859, intending, up to that time, to remove his family and continue his residence permanently there. His wife, however, being opposed to living at Chicago, in 1859 he came back to Cincinnati. The testimony is satisfactory to prove his intention to have been, in going to Chicago, to make that place his home. It is also proved, by those who knew him intimately, that while absent he was regarded as having his residence at Chicago. And, in support of this conclusion, it is proved that while there he voted for two successive years, including the year in which this suit was commenced.

It is clear that, in this state of facts, the plea to the jurisdiction is not sustained. The plaintiff was a citizen of Illinois in 1858, when this suit was brought, having gone there without any intention of leaving, and having there exercised the right of voting as a citizen of that state. He was not, therefore, at that time a citizen of Ohio, and had an undoubted right to sue in this court. The fact, that owing to his wife's opposition to living at Chicago he subsequently left the place, does not prove he did not go there for a permanent settlement, nor that he was not a citizen of Illinois when this suit was brought. His subsequently formed purpose of leaving Chicago can not affect or invalidate the evidence of his actual residence there at the time stated. Neither does the fact of his leaving a part of his family at Cincinnati, under the circumstances proved, negative the fact of citizenship in Illinois. [Shelton v. Tiffin] 6 How. [47 U. S.] 163, 185; [Ennis v. Smith] 14 How. [55 U. S.] 422.

The plea to the jurisdiction is overruled.

Case No. 1,487.

The BLAIREAU.

[See Mason v. The Blaireau, Cases Nos. 9,230 and 9,231.]

Case No. 1,488.

In re BLAISDELL et al.

[5 Ben. 420;[1] 6 N. B. R. 78; 42 How. Pr. 274.]

District Court, S. D. New York. Dec. Term, 1871.

BANKRUPTCY—DUTY OF ASSIGNEE—LIST OF CREDITORS.

The assignee in bankruptcy may be ordered by the register to furnish to the bankrupt a certified list of the creditors who have proved their debts, and must obey the order.

[Cited in Re Dole, Case No. 3,965.]

[In bankruptcy. In the matter of Alvah Blaisdell and others.]

In this case one of the bankrupts having applied for his discharge, his petition was referred to the register. The register gave him duplicate lists of the creditors who have proved their debts, one of which he left with the assignee to be certified as correct by him. The assignee having failed to do so, the bankrupt obtained from the register an order that the assignee show cause why he should not sign the lists. On the return of the order to show cause, the assignee failed to appear, and he did not sign the lists, whereupon the register certified the proceedings to the court, stating that he proposed to make an order that the assignee furnish and deliver the lists, duly signed, to the bankrupt within three days.

[2] [By JOHN FITCH, Register: This case is now pending before me. It is an involuntary proceeding. At the first meeting of creditors herein, John Mackenzie was duly chosen assignee and accepted said trust, his appointment was duly confirmed and the usual assignment of the bankrupt's estate and effects was made and delivered to him. That quite a large number of claims have been proven against the estate, which proofs of claims have been delivered to said assignee. That Alvah Blaisdell, one of the said bankrupts, on the 27th day of October, 1871, filed his petition for final discharge in the office of the clerk of this court in bankruptcy. That the said cause is before me in accordance with the rules and practice of this court. Whereupon said bankrupt applied to me for an order to show cause why he should not be discharged. I thereupon made and delivered to said bankrupt duplicate lists of all the debts proven against his estate, taken from my books, the record of this court. That it appears from the petition of said bankrupt, that said list of debts, &c., were delivered to and left with said John Mackenzie, assignee as aforesaid, for his signature, on or about the 29th day of October, 1871. That said petition further states upon information and belief that said list of debts were by said assignee delivered to one D. M. Porter, Esq., his attorney, who was called

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

[2] [From 6 N. B. R. 78.]

upon several times by one James J. Yates, Esq., on behalf of said bankrupt, for the purpose of obtaining said lists of debts, &c. That said D. M. Porter, stated to him that he would examine said lists at his leisure, and if he found them correct he would send them to the register. That said Porter did not send said lists of debts, &c., to me, and said bankrupt on the 8th day of November, 1871, applied to me by petition duly verified, for an order to show cause why said John Mackenzie, assignee as aforesaid, should not sign said lists of debts, &c., and deliver the same to me. Whereupon I issued an order to show cause, directed to said John Mackenzie, assignee, requiring him to show cause before me on the 14th day of November, 1871, at 12 o'clock noon of that day, why he should not sign said lists of debts, &c.

[That a copy of said petition and order to show cause was duly served upon said assignee, on the 9th day of November, 1871, as appears by affidavit. That on the return day of said order to show cause, to wit, November 14, 1871, said assignee failed to appear either in person or by attorney; neither did he sign or deliver said lists of debts, &c., to me of said bankrupt.

[The bankrupt is, by the rules and practice of this court, entitled to an order to show cause and the certificate, as it is necessary to file with the petition for discharge a list of the creditors who have duly proved their debts, and it is also the duty of the assignee to certify the same, as notice to the creditors who have proven their debts must be sent by mail to all such creditors. Gazz. Bankr. 135. It has been the uniform practice in this district for the assignee to make such certificate, which certificate most certainly comes within the word "instrument," as per section of the bankrupt act, and it is not reasonable that he should do so, as many claims as are proven before the courts, other than of the district in which the cause is pending, and sent directly to the assignee in the case, instead of being first sent to the register in charge, to be by him adjudicated upon, entered upon the record of the court, and then delivered to the assignee, as they should first be entered upon the records of the court. It has been the uniform practice in this district to have such certificate signed both by the register and the assignee, in order to enable the bankrupt to have a correct list filed with the clerk, so that all the creditors may receive the notice of the order to show cause, thus enabling them to oppose the bankrupt's discharge, and also freeing the bankrupt from any imputations of filing an incorrect list, or of withholding the name of any creditor; also leaving his discharge free from any taint of fraud and avoids the appearance of any evil intent.

[I hold it to be the duty of the registers in the trial of the causes before them to see that the rules and practices of the court shall be complied with, and that the proceedings had before them should be in conformity with the rules of the court, the general orders and the bankrupt law. [Act March 2, 1867; 14 Stat. 517, c. 176.] This doctrine is held by the court in Re Bushey [Case No. 2,227]. This motion is properly made before the register, as the register is the court before whom it must be heard. In re Carow [Id. 2,426]; In re Heller [Id. 6,339].

[The bankrupt has a right to make this motion, as the refusal of the assignee, or his neglect to give such certificate operates as a stay of proceedings, as the certificate is a necessary proceeding in the case in order to enable the bankrupt to obtain the order to show cause why he should not be discharged, and to notify the creditors entitled by law to such notice. This proceeding is ex parte. The bankrupt is entitled to the order as a matter of right. It is the duty of the register to grant it. It is an application to the court to require the assignee, who is an officer of the court, to do his duty. A creditor has no right to oppose it, and no notice of it is required to be given to any one but the assignee. Should the assignee be dissatisfied with the decision of the register, he has the right to appeal from the order at chambers to the special term, the same as a creditor would have from the decision of the register, allowing amendments to schedules. In re Hill [Case No. 6,481]; In re Orne [Id. 10,582]; In re Jones [Id. 7,447]; In re Levi [Id. 8,296]; In re Patterson [Id. 10,814]; In re Morford [Id. 9,796]; In re Watts [Id. 17,293].

[The decision of this motion necessarily involves the question of the duties of an assignee and the power of the courts over them and their proceedings. The law and practice of the courts give sufficient power to the courts for all practical purposes to compel the assignee to obey its orders. It arises in these proceedings before me to certify the same to the courts. The English authorities hold an assignee to be a person appointed by the court during the pendency of the suit to do and perform certain acts under the direction and order of the court, or under the provision of some statutory enactment. Wyatt, Pract. Reg. 355; also, see Gazz. Bankr. Dig. He is an officer of the court (In re Burke, Ball & B. 74), and cannot be disturbed by any body without leave of the court. His appointment was provisional only, and was subject at all times, upon proper cause shown, to removal by the court. Skip v. Harwood, 3 Atk. 564; Cooke v. Gwyn, Id. 690. He was appointed by the court as an indifferent person and as an officer of the court to act on behalf of the parties interested.

[The supreme court of this state at a general term, first judicial district, Ingraham, J., held that an assignee was an officer of the court, and it was the duty of the court to make all orders to secure the proper fulfillment of his duties, and such has been the

uniform decision of all our state courts. The rights, duty and power of the court to control the action of assignees is clearly given by section 18 of the bankrupt act, and it is also in the inherent power of the court to exercise a sound discretion and controlling jurisdiction of its officers and suitors, as well as the subject matter of the action in any proceeding pending before it. 18 Wend. 652; 1 Denio, 659; 11 Johns. 254; 1 Grah. Pr. (3d. Ed.) 661–675; Gazz. Bankr. Dig.

[By rule 19 of the general orders in bankruptcy, the duties of an assignee are defined, and his actions governed by the orders of the court. In a recent decision by the supreme court of the United States, Chase, C. J., held in the opinion of the court, all the justices concurring: "That an assignee must do his duty, and it is but fair to hold, that if he neglects or refuses to do his duty, the court will, on motion, compel him to do so which can be done by the judge or register as the circumstances of the case require." In a case like this, it is clearly the intention of the bankrupt act, that the register should exercise this authority while the case is pending before him.

[By section 18 of this bankrupt act, an assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

[Any person interested in the acts of an assignee may apply to the court for an order requiring of such assignee the specific performance of any of his duties; and that in this case the register has the power to grant the order asked for. In re Gettleson [Case No. 5,373]; Gazz. Bankr. Dig.

[It was plainly the intention of congress to give the registers, as assistant district judges, the same power in all respects, in cases pending before them, that the district judges have. Such have been the uniform decisions of all the district judges, and the registers who have written on the subject. Such power was absolutely necessary to be given to the registers, in order to enable them to discharge the judicial duties devolving upon them. In re Kingon [Case No. 7,-815]. The assignee does not, either in person or by attorney, show any cause why this motion should not be granted; therefore, admits the facts stated in the motion papers, and that the bankrupt is entitled to this specific relief. It is but reasonable and right that he should give the certificate, and the refusal to do so, especially after the notice of this motion is improper, and a lack of good faith as assignee and the nonperformance of a plain and imperative duty and calls at once for the imperative order of this court requiring him to do his duty. I propose to grant the following order, and ask the direction of the district court thereon, which order will be binding on the assignee, and it will be his duty to obey it or be punished for contempt of court. At the request of the bankrupt I certify the fact of the nonperformance of duty on the part of the assignee to the district court.

[Upon the motion papers, proceedings in bankruptcy, and application of Alvah Blaisdell, one of the said bankrupts, and upon all the proceedings under the order to show cause of November 8th, 1871, it is ordered that John Mackenzie, the assignee herein, furnish and deliver to Alvah Blaisdell, one of the above named bankrupts, a list of all the debts and claims proved against the estate of said bankrupts, which have come into his hands, with the places of residence and post office addresses, when stated, duly signed by said John Mackenzie as assignee herein, within three days after the service of a copy of this order upon him.

[First. Upon the motion papers and the proceedings in this case before me, I decide, as a matter of law, that this motion to compel the assignee to perform a duty merely to give the usual certificate of the names of the creditors, who have proved their claims herein, is one which he has a right to make ex parte, and the register the right to hear and determine, and that none but the assignee and bankrupt has a right to be heard upon the motion.

[Second. That the bankrupt is by the rules and practice of this court, and the bankrupt law, entitled to the usual certificate, giving the names of the creditors who have proved their claims, and that the assignee in this case sign a certificate setting forth the names of the creditors who have proved their claims as per form.

[In this case the relief asked for by the bankrupt is necessary in his proceedings. It is the duty of the assignee to make the required certificate; he has been duly requested to make it. He has failed to do so. The motion of the bankrupt is granted.] [2]

BLATCHFORD, District Judge. I think that the register has power to make the proposed order, and that it will be the duty of the assignee to comply with it.

Case No. 1,489.

BLAISDELL v. DOWS.

[4 Ban. & A. 499.] [1]

Circuit Court, D. Massachusetts. Sept., 1879.

PATENTS—VALIDITY — FORCE OF PRIOR DECISION.

The validity of a patent which has been once upheld by the court must be taken for granted, on a motion for a preliminary injunction, in another suit for the infringement of the same patent, unless some new evidence, not accessible before, or some other reason for doubting the soundness of the result reached in the former case, is brought forward.

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

[2] [From 6 N. B. R. 78.]

[In equity. Bill by John H. Blaisdell against Gustavus D. Dows for infringement of letters patent. Temporary injunction granted.]

T. W. Clarke, for complainant.
D. B. Gore, for defendant.

LOWELL, Circuit Judge. The validity of Blaisdell's patent to the extent of certain narrow claims having been upheld by this court [in Blaisdell v. Tufts, Case No. 1,491], must be taken for granted in deciding this motion, unless some decidedly new evidence, not accessible before, or some other reason for doubting the soundness of the result reached in the former case, is brought forward. The defendant will have every opportunity for contesting all questions, but the prima facie case on this point is with the plaintiff.

I think the apparatus of Dows, made under his patent of 1864, is within the fourth claim of Blaisdell's patent of 1863, his cup being, so far as I can see, a movable diaphragm operating substantially like the fixed diaphragm, U, of the patent.

Temporary injunction granted.

[NOTE. Patent No. 40,811 was granted to J. H. Blaisdell, December 8, 1863. For another case involving this patent, see note to Blaisdell v. Tufts, Case No. 1,491.]

Case No. 1,490.

BLAISDELL v. PUFFER.

[4 Ban. & A. 500.][1]

Circuit Court, D. Massachusetts. Sept., 1879.

PATENTS—INFRINGEMENT — USE OF UNNECESSARY PART OF MACHINE.

An objection, that the construction of one part of the patented apparatus, in a particular form, is unnecessary, will not avail a defendant who uses the form claimed in the patent.

[In equity. Bill by John H. Blaisdell against Calvin D. Puffer for infringement of letters patent. Temporary injunction granted.]

T. W. Clarke, for complainant.
D. B. Gore, for defendant.

LOWELL, Circuit Judge. As to the validity of the patent, I refer to my remarks in the case against Dows. [Blaisdell v. Dows, Case No. 1,489.]

The soda pipe or apparatus, which is exhibited as having been bought of the defendant, appears to me to infringe the fourth claim. If it be true, as was suggested at the argument, that the contraction in the chamber is unnecessary, then the defendant can easily change the form of the chamber and escape the patent; but his apparatus, as it now stands, seems to have a chamber like what was decided to be the fourth claim of the patent, and to be valid.

Temporary injunction ordered.

[NOTE. Patent No. 40,811 was granted to J. H. Blaisdell, December 8, 1863. For other cases involving this patent, see note to Case No. 1,491.]

Case No. 1,491.

BLAISDELL v. TUFTS.

[3 Ban. & A. 521;[1] 15 O. G. 881.]

Circuit Court, D. Massachusetts. Oct., 1878.

PATENTS—SODA-WATER APPARATUS.

Letters patent No. 40,811, granted to John H. Blaisdell, December 8th, 1863, for an improvement in soda-water apparatus, in view of the state of the art, *held* valid.

[In equity. Bill by John H. Blaisdell against James W. Tufts for infringement of letters patent. Interlocutory decree for complainant.]

Thomas W. Clarke, for complainant.
George L. Roberts and R. L. Roberts, for defendant.

LOWELL, District Judge. The complainant is the patentee, in patent No. 40,811, for an improvement in soda-water apparatus, granted December 8th, 1863. One part of the invention, relating to the supply of syrups, is not in issue. The second, divided into three claims, is for an arrangement for drawing the soda through two different deliveries with but one manipulation on the part of the operator. The inventor describes a compression-cock, working upon a washer and diaphragm, so that by turning the cock a short distance the soda-water is admitted into a small pipe, through which it is discharged into the tumbler with considerable velocity, in order to mix the syrup. By a further movement of the same cock the soda-water is permitted to enter a chamber surrounding the pipe, and through the chamber it flows down more slowly to fill the tumbler. The purpose of this construction is to dispense with the use of the condensing-bottle, and to save time, and thereby improve the beverage.

The claims said to be infringed are the first, third and fourth: "1. I claim, in a soda apparatus, the arrangement of one outlet for soda within another, substantially as described." "3. Also, the arrangement, in a soda apparatus, of a diaphragm, n, and disk, q, or the equivalent thereto, so as to act under pressure, as described, to admit into two or more passages, and to shut off therefrom, the soda applied from a common source. 4. Also, the formation of a chamber in a soda-discharge pipe, so as to operate to check the velocity of the discharge

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under pressure, and thus supersede the employment of the condensing-bottle, substantially as set forth."

The defendant is licensed by Mr. Gee, whose patent is some months older than the complainant's, and during the long time that this case has been pending, he has made no draft tubes like the complainant's, as we understand. But he did make some such tubes several years ago, and has thereby infringed the patent to some extent.

The evidence shows clearly that the patentee was not the first to invent a mode of discharging soda-water which should avoid the necessity of using the condensing-bottle. The Gee apparatus delivers two streams of soda, one small and rapid and the other large and slow, into the tumbler without the use of a condensing-bottle, and the defendant contends that it is a much better working device than that of the plaintiff. There is some reason to suppose that it has proved a better device, but it is specifically different, because it makes use of two cocks instead of one. The question in the case is: What, if anything, is left to the plaintiff in the light of the evidence in the record?

Construing Blaisdell's patent, as we try to do all patents, ut res valeat, we think it can be sustained upon a narrow construction, which will give him his exact improvement.

We think his chamber is a somewhat different contrivance from any pipe which was used before, and may properly enough be distinguished by the name "chamber;" and that it is so described as to distinguish it, by giving it an enlargement followed by a contraction.

It is true that in one passage of the specification it is spoken of as a "chamber or enlargement;" but taking into consideration the drawings, and the other part of the description, in which a collar or diaphragm is mentioned, we think we may say that a mere enlargement does not satisfy the patent, unless it should be clearly proved that it has all the useful effect of an enlargement followed by a contraction, which we do not think is proved. This sustains the fourth claim. The first and third claims may, we think, be sustained in like manner, by confining them to the form of device which the plaintiff made—that is to say, the third as a diaphragm and disk, operating to admit the soda to two separate deliveries, and the first as being for a small outlet within a larger chamber, substantially as described.

The Gee apparatus, in the form in which Gee first tried it, but which he abandoned as being inferior to that which he patented, comes very near the plaintiff's invention; but we think the chamber and valve both somewhat different, and doubt whether the whole tube would operate satisfactorily to effect the purpose described in the patent. It was used so short a time that it is not clear that it actually had the mode of operation, to a sufficiently practical purpose, to avoid the patent.

Interlocutory decree for the complainant.

[NOTE. Patent No. 40,811 was granted to J. H. Blaisdell, December 8, 1863. For other cases involving this patent, see Blaisdell v. Dows, Case No. 1,489; Blaisdell v. Puffer, Id. 1,490.]

BLAISDELL (UNITED STATES v.). See Case No. 14,608.

Case No. 1,492.

In re BLAKE.

[2 N. B. R. 10 (Quarto, 2).][1]

District Court, W. D. Michigan. July 2, 1868.

BANKRUPTCY—EXAMINATION OF BANKRUPT—WITNESS—ACT OF 1867.

1. The examination of the bankrupt must be regarded in the nature of the examination of a witness; there is no good reason why anyone possessing information may not be required to submit to an examination.

[Cited in Re Krueger, Case No. 7,942.]

2. A witness cannot rightfully object to being sworn or refuse to be examined upon any matters which shall be within the subjects mentioned in section twenty-six of the United States bankrupt act of 1867.

[Cited in Re Krueger, Case No. 7,942.]

In bankruptcy. This was a case of involuntary bankruptcy. Adjudication was made June 10th, 1868. On the 1st day of July the petitioning creditors applied to the district judge for a summons for one Charles H. Hackley to appear before the register, Col. E. H. Thompson, and submit to an examination under section twenty-six of the bankrupt act; their application showing, among other things, that the said Hackley had knowledge of the location, situation and condition of the bankrupt's property and of the disposal thereof in fraud of said act. The summons was issued and Mr. Hackley appeared in pursuance thereof, attended by counsel, who objected to his being sworn for the following reasons:

First. The act authorizes the examination of persons other than the bankrupt as witnesses only.

Second. There being no issue in this case and no fact in dispute, this person cannot be examined as a witness.

Third. Only the bankrupt can be examined generally as to his affairs under section twenty-six [of the act of March 2, 1867 (14 Stat. 529)]; other persons not until an issue is found.

Under the advice of his counsel, and on the above ground, the witness refused to be sworn.

WITHEY, District Judge. By the twenty-sixth section of the bankrupt act, the court may, upon application of the assignee or a creditor, or without any application, "at all

[1] [Reprinted by permission.]

times," require the bankrupt to attend and submit to an examination in reference to the subjects embraced in the first paragraph of the section. And may "in like manner," that is, upon like application, or without any application, and "at all times," require the attendance of any other person as a witness. The examination of the bankrupt must be regarded in the nature of the examination of a witness, and there is no good reason why any one possessing information may not be required to submit to an examination. What can the person examined as a witness be examined concerning? Clearly it must be concerning the same subject in reference to which the bankrupt may be examined, so far as he has knowledge. No other matter is referred to in the section as the subject of inquiry and examination.

Disclosure is the object of any examination under section twenty-six, and in a case of involuntary bankruptcy it may not be possible to obtain the presence of the bankrupt for examination. If, then, a person other than the bankrupt cannot be examined generally upon the subjects embraced in this section, the purpose of the section may often be defeated, even where there are known parties who possess the requisite information concerning the bankrupt's estate. There is nothing in the section or the act indicating that a person other than the bankrupt cannot be required to attend as a witness and testify until an issue is made up or some fact is in dispute. I am of the opinion, therefore, that the witness cannot rightfully object to being sworn or refuse to be examined upon any matters in the application made and filed for his examination which shall be within the subjects mentioned in section twenty-six, in reference to which the bankrupt may be required to submit to an examination. * * *

BLAKE, The JULIA. See Case No. 7,578.

Case No. 1,493.

BLAKE v. ALABAMA & C. R. CO. et al.

[6 N. B. R. (1873) 331.] [1]

Circuit Court, D. Alabama.

COURTS — CONCURRENT JURISDICTION OF FEDERAL AND STATE COURTS — EFFECT OF ACQUISITION OF JURISDICTION.

1. On review of a motion in the United States court to appoint a receiver to take possession of the property of a corporation already ordered to be delivered to a receiver appointed by a state court. *Held*, that the jurisdiction of the two courts was concurrent; that the jurisdiction of the state court was first invoked and asserted, consequently no court of concurrent jurisdiction can or ought to interfere with it.

[Cited in Bruce v. Manchester & K. R. R., 19 Fed. 345.]

2. Motion continued, to allow the defendants to set up the facts in regard to the proceedings of the chancery court of Sumter county by formal answer.

[In equity. Reargument of motion to appoint a receiver of defendant, a bankrupt. Denied.]

Rice, Morgan & Southworth, for complainant.

Elmore, Walker, Brooks, O'Neil, Stone & Troy, for defendants.

WOODS, Circuit Judge. I have listened with interest and attention to the re-argument of the motion for the appointment of a receiver in this case, and upon the points argued and decided at the first hearing have not been able to reach any different conclusions from those already announced. On the re-argument, however, a fact in the case was stated and pressed upon the attention of the court, which was not stated in the first argument, or if it was, must have been overlooked. It is now stated, and the statement is supported by affidavits, that on the fourth day of September, eighteen hundred and seventy-one, a bill was filed in the name of the state of Alabama, complainant, in the chancery court of the state of Alabama for the county of Sumter, against the Alabama & Chattanooga Railroad Co. and others, defendants, seeking a foreclosure of the first mortgage executed by said railroad company upon its property and franchises, on account of interest due on the bonds secured by mortgage, which interest has been paid by the state of Alabama, in default of payment by the railroad company, and praying the appointment of a receiver of the property and effects of said company. That upon the motion for the appointment of a receiver, said cause had been heard by the chancellor of the western division of the state of Alabama, who had sustained the motion, and appointed Charles Walsh, receiver, and that Walsh had accepted said trust and given bond. The interlocutory decree of the state chancellor, appointing a receiver, directs him to take possession of all the property both real and personal, within the state of Alabama, of said railroad company, and if the same is not delivered that a writ of possession be issued by the register of the court, and a writ of attachment against all persons refusing to deliver said property.

The bill in this case now on hearing was not filed until the twelfth day of September, eighteen hundred and seventy-one, eight days after the filing of the bill in the state chancery court. The motion is now to appoint a receiver to take possession of the property already ordered to be delivered to Walsh by the state chancery court.

On a motion addressed to its sound discretion, ought this court to make the order prayed for? The state court had jurisdiction of the subject matter of the suit before it and of the parties. Its jurisdiction was first invoked and asserted. It is too well

[1] [Reprinted by permission.]

settled to need citation of many authorities that as between courts of concurrent jurisdiction that which first acts is entitled to exercise its jurisdiction to the exclusion of the others. The courts of the United States and those of a state have concurrent jurisdiction in many cases, but when persons or property are liable to seizure or arrest by the process of both that which first attached is entitled to the preference. Ex parte Jenkins [Case No. 7,259]; Smith v. McIver, 9 Wheat. [22 U. S.] 532; Shelby v. Bacon, 10 How. [51 U. S.] 56; Taylor v. Carryl, 20 How. [61 U. S.] 583; Mallett v. Dexter [Case No. 8,988]; The Robert Fulton [Id. 11,890]; Ex parte Robinson [Id. 11,935].

In Wiswall v. Sampson, 14 How. [55 U. S.] 52, the supreme court held that when certain lands were held in the hands of a receiver appointed by the chancery court of Alabama in a case pending before it they could not be sold by the marshal upon process of execution issuing out of the circuit court of the United States for that district, although the judgment upon which the process issued was a lien upon the land, and the execution was laid before the receiver obtained actual possession of the property. In the same case the court says: "When a receiver has been appointed his possession is that of the court, and any attempt to disturb it without leave of the court first obtained will be a contempt on the part of the person making it. This was held in Angel v. Smith, 9 Ves. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way the course has been either to give him license to bring an ejectment or to permit him to be examined inter esse suo."

So in Peale v. Phipps, 14 How. [55 U. S.] 374, under note of the legislature of Mississippi, the charter of the Agricultural Bank had been declared forfeited, and the plaintiff in error appointed trustee. Commissioners, also, were at the same time appointed to audit the accounts, who rejected the claim sued on. Upon their refusal to allow it the defendants in error instituted proceedings in the circuit court of the United States for the eastern district of Louisiana. Upon these facts the court says: "We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order. He had given bond for the performance of this duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer, and has been placed there by the laws of Mississippi; and while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

The case of Williams v. Benedict, 8 How. [49 U. S.] 107, is also in point: By a law of Mississippi, if it appeared to the orphans' court that the estate of a deceased person was insolvent, it was made the duty of the court to direct the property to be sold by the executor or administrator, and to appoint commissioners to audit the claims of creditors, and to distribute the proceeds of the property among the creditors in proportion to the sum due them respectively. The appellant was the administrator of the intestate whose estate had been declared insolvent by the orphans' court. But the appellees had obtained a judgment against the administrator in the district court of the United States for the northern district of Mississippi, before the adjudication of insolvency by the orphans' court, and issued an execution, and laid it upon property upon which his judgment was a lien in case the estate was not insolvent. And upon a bill filed by the appellant to obtain an injunction staying proceedings upon this execution the appellees insisted that the estate was not insolvent, but had been wasted by the administrator, and that the proceedings in the orphans' court under the law of Mississippi were in bar to his recovering in a court of the United States, and the district court was of that opinion, and dismissed the appellant's bill. But the decree was reversed by the supreme court of the United States upon the ground that the jurisdiction of the orphans' court had attached to the amounts, and that they were in gremio legis, and could not be seized by process from another court.

The result of these authorities is, that when a court having jurisdiction has exercised and has taken possession of property rightfully, and is in the process of administering it, no court of concurrent jurisdiction ought to interfere with it, or can interfere. The chancery court of Sumter county is a court of general equity jurisdiction. It has obtained jurisdiction over the person of the defendant, the Alabama and Chattanooga R. R. Co., in a bill to foreclose a mortgage on property within its territorial jurisdiction. It has made a decree for the appointment of a receiver, and has directed him to take possession of and administer the property of the railroad company within the state of Alabama. Whether he has taken actual possession is a matter of no consequence. He has the right as the officer of the court, and it is his duty to take possession. How, then, can this court interfere with his lawful authority, and the lawful powers of the court by whom he is appointed? Suppose this court appoints a receiver, as prayed, how is he to get possession of the property which is in course of admin-

istration in another court? Suppose the receiver of that other court resists, as is his duty, the authority of the receiver appointed by this court? We should have a scandalous spectacle of a contest between courts of concurrent jurisdiction, which it is the imperative duty of such courts to avoid, a contest in which this court would be clearly in the wrong. For in these matters qui prior in tempore potior est in jure.

I have examined the cases cited by counsel for complainant (Buck v. Colbath, 3 Wall. [70 U. S.] 334; Watson v. Sutherland, 5 Wall. [72 U. S.] 74; Payne v. Hook, 7 Wall. [74 U. S.] 425; Covington Drawbridge Co. v. Shepherd, 21 How. [62 U. S.] 112), and can find in them no warrant for such action as is asked of this court. It is to be noted that the purpose of this bill is to obtain the appointment of a receiver to take possession of and administer property which is already in the hands of another court and in process of administration. This court could not even enjoin, on a bill filed for that purpose, the proceedings of the state court, much less can it interfere with its action in an irregular and forcible manner. For unless the proceedings in the Sumter chancery court are void, the question between that court and this on the appointment of the receiver here prayed for, would be a question of force to be decided by wager of battle. The Sumter court has this property in hand to be administered in a certain way for a certain purpose. Because this court desires to administer it in the different way it would not be authorized to interfere with the proceedings of the state court.

There is but one ground upon which this court would be justified in the action invoked, and that is, the want of jurisdiction in the state court, and as a consequence, the invalidity of its proceedings.

The state is authorized by section 3323, Revised Code, to sue a citizen of the state or a domestic corporation, in chancery, and the suit is to be governed by the same rules as suits between individuals. The state has a mortgage lien upon the property of a domestic corporation, the Alabama and Chattanooga Railroad Co. She may, under this clause, foreclose her mortgage by bill in equity. This is a right which all mortgagees have for default in payment of either principal or interest, secured by the mortgage. If it should turn out to be true that neither principal nor interest was due on the mortgage, that is a matter of defense which would not oust the jurisdiction of the court. It would have jurisdiction to try the question whether the principal or interest was due. And if the defendant should set up by way of defence that the state had, under a contract not to foreclose until the entire amount secured by the mortgage, both principal and interest, became due, such defense, even if established, would not oust the jurisdiction of this court. It would have jurisdiction to try the question whether the state had made any such contract. The proceedings to foreclose would not be void for want of jurisdiction, because the defendant might have a good defense.

But I am quite clear that the state has made no contract by which she has denied herself the right to foreclose her mortgage for non-payment of interest. The law authorizing her to sue in equity was in the statute book when the internal improvement act was passed. The remedies granted by that act appear to be merely accumulative, leaving the state her option either to follow them or to pursue her rights as a mortgagee.

I am satisfied that the state had the right to sue; that the chancery court of Sumter county had jurisdiction of the person of the defendant, and of the subject matter of the suit, and that this jurisdiction is not ousted by the fact that the defendant claims that the state cannot now maintain her action—in other words that her suit is premature. Whether the defence is a good one is for the decision of the court where the suit is pending.

There appears to be no obstacle to prevent the complainant in this case from making himself a party to the suit in the state court. The law authorises the state to file its bill in equity against a domestic corporation and the suit is to be governed by the same rules as suits between individuals. All persons, whether residents of the state or not, who are interested in the subject matter of the suit, may be, on petition, made parties defendant, and being made parties, they have the same right against the state as in a suit between individuals. They are authorised to make their defence according to the practice of court of equity, and if a cross bill is necessary to his complete defence, to file a cross bill. If this right were denied them the suit would not be governed by the same rules as suits between individuals.

The relief, then, for which the complainant seeks in this case, he may obtain by becoming a party defendant to the suit in the Sumter chancery court, which has first obtained jurisdiction of the subject matter. But even if he could get a larger and more satisfactory measure of relief in this court, that would not justify this court in an interference with the jurisdiction and proceedings of another court of concurrent power. I can find no authority for such action. No case has been shown where a court of chancery has undertaken to wrest property from another court of chancery of concurrent jurisdiction, because it thought its own power better fitted to give complete and ample relief. If this court fails to respect the jurisdiction and proceedings of the state courts, how can it claim immunity for its process and proceedings from them? If the wise and salutary rule, that the court first obtaining jurisdiction shall have the preference, is disregarded, we shall have the unseemly

spectacle often presented of violent conflicts between courts of concurrent jurisdiction, disgraceful to the administration of the law and promotive of conflict and disorder.

I find, therefore, in the action of the state chancery court for the county of Sumter, an insuperable obstacle to the granting of the motion for a receiver in this case, at this time, and the motion will be continued, to allow the defendants to set up the facts in regard to the proceedings of the chancery court of Sumter county by formal answer.

[NOTE. For denial of a similar motion, see Alabama, etc., R. Co. v. Jones, Case No. 127. For reversals of the adjudications of bankruptcy against defendant, see In re Alabama, etc., R. Co., Id. 124; Alabama, etc., R. Co. v. Jones, Id. 126.]

Case No. 1,493a.

BLAKE et al. v. BOISSELIER et al.

[5 Ban. & A. 352;[1] 16 O. G. 854.]

Circuit Court, E. D. Missouri. March Term, 1879.

PATENTS—INFRINGEMENT—EVIDENCE—PRELIMINARY INJUNCTION—PRIOR SUIT.

Upon a motion for a preliminary injunction in this case, it appeared that complainants' patent had been upheld by the court in another circuit, and the defendants in that case adjudged to have infringed its first claim, but it did not appear that the alleged infringing articles, complained of in this suit, were the same as the infringing articles in the other suit. The defendant denied the infringement and set up another patent. The moving papers contained no evidence of infringement. The court, under these circumstances, denied the motion, but ordered the defendant to keep an account.

[In equity. Bill by Charles F. Blake and others against Elizabeth E. Boisselier and others for infringement of letters patent. Heard on motion for a preliminary injunction. Denied.]

Charles F. Blake, for complainants.
Samuel S. Boyd, for defendants.

TREAT, District Judge. The questions for consideration under the motion for a provisional injunction are, first, as to the validity of complainants' patent, and, second, as to the infringement.

The United States circuit judge for the western district of Pennsylvania, in passing upon a number of patents involved in the same suit, upheld the validity of this special patent, and decided that the defendant in that case infringed this special patent as to its first claim. There is not before this court anything by which it can be determined that the contrivance used by the defendants is the same as that before the said circuit judge for the western district of Pennsylvania. Again, the defendants are using a California patent, the validity of which, so far as known to this court, has not yet been judicially determined. It is suggested, however, that the complainants in this case instituted proceedings in the United States circuit court for the district of California against the use of the said California patent, the result of which was a dismissal of the complainants' bill, whether on hearing or for want of prosecution is unknown. Hence, while complainants insist that defendants infringe the complainants' patent, not as to the first claim alone, but as to all of the claims in said patent, yet the affidavit filed in support of the bill refers only to the first of said claims, while the affidavit filed by the defendants sets up the California patent and denies all infringement.

In that condition of the record this court is asked to grant a provisional injunction generally with regard to all of the claims made in the complainants' patent. But there is nothing to show or tending to show any infringement as to other than the first claim; and when we look to what is said with reference thereto there is no evidence of any infringement by defendants, even with respect to that claim.

The obscurity and uncertainty resulting from what is said with respect to the decision of the United States circuit court for the western district of Pennsylvania leaves this court with no sufficient light by which rulings should be governed. I stated to the counsel for the complainants when he was here that the rule certainly never obtained in this circuit, and ought never to obtain; that where a party has some vague and indistinct right for a provisional injunction he may have an injunction simpliciter without giving bond or security, and thus destroy the business of the defendant, which is not necessary for the maintenance of the complainants' demand, and may be ruinous to the defendants.

Therefore, to preserve the status of the parties until a final hearing, without any injury resulting, the order will be simply that the defendants keep an account of the articles manufactured by them and also of those by them sold. There is not a sufficient showing in the application to grant an injunction simpliciter without giving bond.

Mr. Boyd. Is there any provision for reporting, or simply to keep an account?

THE COURT. No, sir; only for an accounting. The court will compel you to report at the proper time, if it is necessary.

[NOTE. For other cases involving this patent, see Blake v. Robertson, Case No. 1,500.]

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

BLAKE v. CARGO & MATERIALS OF THE H. J. MAY. See Case No. 3,494.

Case No. 1,494.

BLAKE v. EAGLE WORKS MANUF'G CO.

[3 Biss. 77; 3 Chi. Leg. News, 353; 4 Fish. Pat. Cas. 591.][1]

Circuit Court, N. D. Illinois. July Term, 1871.

PATENTS—PRIOR USE—EVIDENCE—COMBINATION—MECHANICAL EQUIVALENTS — BLAKE STONE BREAKER.

1. Where a single witness testified to the existence of a prior machine, some twenty years before, in a large town where it was said to have been publicly used, and where its use must have been known to many; but neither the machine nor a model of it was in existence, and it never came into general use, although the invention was of great value: *Held*, that the patent ought not to be invalidated without additional and corroborative testimony.

2. The patentee having constructed a practicable machine and produced important results by the combination of various parts, it was within the scope of mere mechanical skill to vary the mode of connection in different ways without changing the principle of construction and combination, even though one method, that of the defendants, might involve a loss of power and a gain of quicker motion.

3. Letters patent for "improved machines for breaking stones," reissued to Eli W. Blake, January 9, 1866, examined and sustained.

[Cited in Blake v. Rawson, Case No. 1,499; Blake v. Robertson, Id. 1,500.]

4. A machine having a movable jaw in the center and a fixed jaw on each side, *held* to be an infringement of the Blake patent.

In equity. This was a bill in equity [by Blake and others against the Eagle Works Manufacturing Company] to restrain the defendants from infringing letters patent for an "improved machine for breaking stones" granted to Eli W. Blake June 15, 1858, and re-issued January 9, 1866. The facts and the claims in the patent appear in the opinion, and are also fully stated in Blake v. Stafford [Case No. 1,504].

H. T. Blake and S. A. Goodwin, for complainants.

George Scoville and George Gifford, for defendants.

DRUMMOND, Circuit Judge. This is a bill filed by the complainants as inventors of and assignees of a patent for an improved machine for breaking stone, Eli W. Blake, one of the complainants, claiming to be the inventor and the patentee. The patent has heretofore been before the courts and sustained (Blake v. Stafford, [Case No. 1,504]) by Shipman, J., and afterwards, on a motion for a new trial, overruled by Mr. Justice Nelson, of the supreme court of the United States. It is claimed that there were some errors of fact committed by the court in the description of some machines then before that court, and now before this. However that may be, I do not understand that the counsel for the defense very seriously contest the validity of the patent on the ground that its subject-matter was wholly covered by previous machines, unless it may have been by that of Forward, referred to by the witness Johnson as having been constructed in Louisville, Kentucky, in 1847.

[The patent was originally issued to Blake, June 15, 1858, and afterwards surrendered and reissued January 9, 1866][2]

The examination of the specifications of the patent and the mode of operation of the machine described, together with a comparison of the various other machines with that of the patentee, which have been introduced in evidence, and which, it is claimed, anticipate it, have left no doubt in my mind, not only of the validity of the patent, but of the great value of the machine itself.

The only testimony in relation to the Forward machine is given by one witness, James B. Johnson, who was examined before an examiner upon interrogatories sent to California in 1869. He says he made the pattern in the summer of 1847 for the castings of the machine, and assisted in its construction, and afterwards made a model in contemplation of Forward's application for a patent. Annexed to his deposition was a pen sketch of the machine, which he describes. He says: "I saw the machine in actual operation several times, and it did good service in crushing stone for macadamized roads, for which it was designed. I left Louisville in October, 1850, and have never heard of the machine or model since." This witness recounted his recollection of what took place twenty-two years before. He made his sketch and gave his description, not having seen the machine or the model, or even heard of them for twenty years or more. The machine was said to have been built in Louisville, a large town, and if it operated publicly in macadamizing roads, it must have been known to many. It is difficult to realize that if such a machine—one that it is said in all essential particulars anticipated that of Blake—had been constructed and publicly used, all traces of it would have been lost, except what remains in the memory of one witness. No patent was ever applied for, and no such machine ever came into use in Louisville or elsewhere, so far as this case shows. It is not claimed that Blake ever heard or knew of this machine. I do not feel inclined to invalidate a patent on such testimony as this. I think the defense, under the circumstances, should have introduced some additional and corroborative testimony in relation to this solitary machine. It is the less worthy of confidence because Blake's machine, which it was said to anticipate, was one of great value. The only question, therefore, is whether the defendants have infringed the patent of Blake, and to some extent that involves its construction.

[1] [Reported by Josiah H. Bissell, Esq., and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus is from 4 Fish. Pat. Cas. 591, and the statement and opinion from 3 Biss. 77.]

[2] [From 4 Fish. Pat. Cas. 591.]

The re-issued patent consists of three claims. The first two only are involved in this controversy. The patentee gives this general description of his machine:

"My stone-breaker, so far as respects its principle, or its essential characteristics, consists of two jaws between which the stones are to be broken, having their acting faces so nearly in an upright position that stones will descend by their own gravity between them, and convergent downwards, one towards the other, in such manner that while the space between them at the top is such as to receive the stones that are to be broken, that at the bottom is only sufficient to allow the fragments to pass when broken to the required size; and of a revolving shaft driven by steam or other power, which is made to impart to one of these jaws a continual vibratory movement, causing it to alternately advance toward and recede from the other jaw through a short and definitely limited space; hence when the shaft is revolved and a stone is dropped into the space between the jaws, it falls down until its further descent is arrested between their convergent faces; the movable jaw advancing, crushes it, then receding, liberates the fragments and they again descend, and if too large are again arrested and crushed, and so on until all the fragments, having been sufficiently reduced, have passed out through the narrow space at the bottom."

After giving a minute description of the various parts with reference to drawings, he presents, as his first two claims:

"I. The combination, in a stone-breaking machine, of the upright convergent jaws with a revolving shaft, and mechanism for imparting a definite, reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth.

"II. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth."

Does the defendants' machine infringe these claims or either of them? It is double, having a movable jaw in the center and a fixed jaw on each side, thus forming a double crusher instead of one. The defendants' counsel admit that it has the revolving shaft, the pulley, the crank and the fly-wheel of Blake's machine, but deny that it has the jaws, the toggle mechanism or the spring described or claimed in Blake's patent.

The difference between the double and single jaw is not insisted on. The jaws of the Blake machine are straight and corrugated, the corrugations running vertically, and there can be no doubt the patentee intended the machine should be so constructed and used, and that without such structure it would be less efficient.

In the defendants' machine the jaws are all curved, the stationary jaws smooth, without corrugations or teeth, and the movable jaw has what are called upright corrugations, but which may properly enough be called vertical. Such a modification as this by the defendants in the form of the jaws does not of itself destroy its identity with the Blake machine. It is not a substantial change.

Instead of the toggle mechanism of the Blake machine by which the crank shaft is connected with a movable jaw, the defendants use a rod and lever to produce the connection; but it seems to me that when Blake constructed his machine, and thus produced such important results by the combination of the various parts, it was competent for mere mechanical skill to vary the mode of connection in different ways without changing the principle of its construction and combination, even though it might be true that one method —such as that of the defendants—might involve a loss of power and a gain of a quicker action.

And I think the defendants' machine has something different in its structure and mode of operation from the Hamilton and the other old machines which have been introduced in evidence, and which it has borrowed from Blake's machine.

On the whole, therefore, I conclude that the defendants infringe the first two claims of the Blake patent, and the decree of the court will be accordingly.

Injunction granted.

[NOTE. For other cases involving this patent, see note to Blake v. Robertson, Case No. 1,500.]

Case No. 1,495.

BLAKE v. ELIZABETH.

[2 N. J. Law J. 328.]

District Court, D. New Jersey. Oct. 14, 1879.

ATTORNEY AND CLIENT — FEES AND EXPENSES — COUNSEL FEES—SERVICES ON APPEAL.

1. Counsel fees, as such, are not recoverable without express agreement, but the fees and expenses of another may be recovered, and in these expenses may be included a reasonable sum paid to counsel for his services. The amount of this sum may be determined by the jury from the circumstances of the case. Schomp v. Schenck, 11 Vroom [40 N. J. Law], 195, followed.

2. The employment of an attorney may be proved by circumstances.

3. An appeal is a new employment [of an attorney], not a part of the original engagement.

At law. This was an action of assumpsit [by Blake against the city of Elizabeth] to recover an amount claimed for services and disbursement by the plaintiff, as an attorney at law. It was tried Oct. 13, 1879, before Judge Nixon and a jury, and resulted in a verdict of $6,103.32 for the plaintiff.

Mr. Wetmore, for plaintiff.

B. Williamson, for defendant.

NIXON, District Judge, charged the jury as follows:

The plaintiff claims $5,611.40, for expenditures made and services rendered as an attorney in conducting an appeal from this court to the supreme court of the United States, in a cause in which the defendant was a party. The suit was for infringement of a patent. Certain street improvements were going on in the city of Elizabeth in the year 1870. Parties owning patents for wooden pavements were anxious to secure the adoption of their inventions by the city. Among them were Mr. Tubbs and the N. J. Wood Paving Co., who owned the Brocklebank and Trainor patent, and some questions were then raised about the validity of that patent. The N. J. Wood Paving Co. entered into contracts with the city to lay down pavements under that patent, giving a bond at the same time to indemnify the city against all damages and costs.

The American Nicholson Pavement Co. brought a suit in this court in 1870 against the city, the paving company, and Mr. Tubbs, its president, for infringement. Mr. Tubbs and the paving company retained Messrs. Keller and Blake of New York, eminent counsel, experienced in patent causes, to defend this suit, and on the death of Mr. Keller, in the progress of the suit, Mr. Blake engaged Mr. Keasbey as counsel. The suit continued for nearly four years, and resulted in October, 1874, in a decree sustaining the validity of the complainants' patent, and directing the payment of about $75,000 profits, for which all the defendants, including the city, were held responsible. [American Nicholson Pav. Co. v. Elizabeth, Case No. 309.]

At this time the paving company had become insolvent and was unable to pay Mr. Blake his fees remaining due. In 1873, before the final decree, that company, in order to secure the amount then due, and to become due, made a note and mortgage to Keller & Blake for $10,000, no part of which has been paid—the land mortgaged proving to be of little value.

After the decree, the counsel who had been defending the suit advised the city to appeal, and the common council, by resolution, determined to appeal and indemnify the necessary sureties. Mr. Blake prepared the appeal papers, sent the bond for execution, and perfected the appeal—the bond having been executed by the city. No formal express contract to employ Mr. Blake, as the attorney of the city, in conducting the appeal, is proved. It is insisted on the part of the city, that at the time of the appeal they were assured by Mr. Tubbs that the fees had been paid, or secured, and that the city would be put to no expense, and that Mr. Tubbs communicated this to Mr. Blake. But Mr. Blake denies any knowledge of such an arrangement, and shows that soon after the appeal he wrote to the city solicitor for his retaining fee, to which he received no reply. It appears that after this the city counsel was in frequent communication with Mr. Blake and Mr. Keasbey concerning the appeal, and was advised of their proceedings, and that no other counsel was employed to take charge of the appeal.

The case was argued in the supreme court in 1878, and the decree reversed in part. The court said in substance, that all three defendants had infringed, that the patent was valid, and that all were liable for damages, but that as the bill was so drawn that the plaintiff could only recover profits, and as there was no evidence that the city or Mr. Tubbs had made any profits the decree was wrong, as to them, and must stand against the paving company.

This suit is brought against the city to recover for services and expenditures as attorney in conducting this appeal. The law makes a distinction between attorney's and counsel fees, and it has lately been decided by the supreme court in this state, that counsel fees as such cannot be recovered without an express agreement. The plaintiff's bill of particulars embraces a charge of $2,500 for money paid to Mr. Keasbey, as counsel in the appeal case, and it is insisted that the importance and intricacy of the case were such as to justify this expenditure, and to make the payment of this amount for counsel fees proper and necessary in the discretion of the attorney conducting the case. Without stating the facts more fully, I will state my views of the law in my answers to the several requests to charge handed up by the counsel for the plaintiff.

As to the first request, I charge that in determining whether there was any agreement between the city of Elizabeth and the plaintiff, the jury should consider that Mr. Blake was the solicitor of record for the city, as well as of the other defendant; that the city passed resolutions authorizing the appeal; that Mr. Blake presented his bill for a retainer to the city; that the city attorney had interviews, more than once with Messrs. Blake and Keasbey in behalf of the interest of the city in the appeal, recognizing them as acting for the city; that the pecuniary interests of the city were largely involved in the appeal; and that unless Mr. Blake was acting as attorney for the city, the city had no attorney in the appeal.

As to the second request, that the burden of proof is upon the plaintiff, to satisfy the jury that the city of Elizabeth in fact employed the plaintiff to prosecute the appeal in its behalf, but the jury may infer the employment by circumstances, and if they find, that after the city, by resolution, ordered the appeal, its agents communicated with the plaintiff, in behalf of the interests of the city, or stood by while the plaintiff performed the service for the city without explaining that the city was unwilling to pay what the jury find the service to be reasonably worth to the city.

As to the third request, I charge that the statements of Mr. Tubbs to any of the officers of the city, not communicated to or assented to by Mr. Blake, are not binding on him.

The fourth, fifth, sixth and seventh requests all refer to the bond and mortgage given by N. J. Wood Paving Co. to secure a note of $10,000 for services in the suit then pending between the Nicholson Pavement Co. and the N. J. Wood Paving Co., Tubbs and this defendant. In regard to these it is sufficient to say that they were given in 1873, while the first suit was pending, and doubtless had reference to the payment of services rendered in the first suit, and, although it may have been given in excess of what was then due, there is no evidence that the plaintiff has been able to realize from it more than sufficient to pay for his services in the first suit.

As to the eighth request I charge that if the jury is satisfied from the evidence that Mr. Blake was employed by the city or its agent to conduct the appeal, and if they are also satisfied from the evidence that the matters involved were of sufficient importance to justify him in employing aid, then the employment of Mr. Keasbey was proper, and the jury must judge whether the sum paid for his services was reasonable and proper in amount.

As to the ninth request I charge that if the jury is satisfied that the attorney of the city received the notice from Mr. Blake by letter of April 5, 1875, that he demanded a retainer on the argument of the appeal, such letter was notice to the city that Mr. Blake understood that he was acting in behalf of the city; and there being no reply thereto, and the city afterwards acquiescing in Mr. Blake's proceedings and acting as attorney for the city, the city is now estopped for refusing to pay a reasonable sum for disbursements and services in the cause.

As to the tenth request I charge that the jury is the judge of the value of the services rendered, from the evidence, and where the evidence is that the charges are reasonable, and there is no conflicting testimony, the jury must be slow to set up their judgment against the evidence in the case.

As to the eleventh request I charge as requested that an appeal is a new employment, not covered by the original engagement.

As to the twelfth request I charge that, except the fee paid to Mr. Keasbey, which I charged upon in request eighth, the items are proper charges for a solicitor to make, and if the jury is satisfied that the charges are reasonable for the city to pay, they should find a verdict for the plaintiff.

BLAKE (FITZHUGH v.). See Case No. 4,840.

BLAKE (FULTON v.). See Case No. 5,153.

BLAKE (GOODYEAR v.). See Case No. 5,560.

Case No. 1,496.

BLAKE v. GRAMMER.

[4 Cranch, C. C. 13.][1]

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

LANDLORD AND TENANT — SALE OF PROPERTY BY LANDLORD—SUBSEQUENT ACTION FOR RENT.

The lessor's title ceased by a sale of the property. The tenant did not attorn nor in any manner acknowledge himself to be tenant to the vendee, but continued to use and occupy the premises for five years after the sale; the vendee not having taken possession, or demanded the rent: *Held*, that the lessor, the plaintiff, could not recover from her tenant, in an action for use and occupation, the rent for the time he thus continued to use and occupy the premises.

At law. This was an appeal [by Betty H. Blake against G. C. Grammer] from the judgment of a justice of the peace who nonprossed the appellant in an action for $25, for the use and occupation of certain premises for five years, at five dollars a year, under a sealed lease from the plaintiff to the defendant. [Affirmed.]

The facts of the case appeared to be as follows: Mrs. Blake, the appellant, being the executrix of her late husband, Doctor James H. Blake, on the 27th of October, 1819, made a deed of trust to Alexander Kerr, of the lot in question, among others, to secure a debt due to her husband to the Bank of the Metropolis, with power to sell, in default of payment; but, until sale, she was to continue in the enjoyment of the estate. On the 24th of March, 1821, by an agreement under seal she rented to the defendant, G. C. Grammer, a part of one of the lots, upon which he was to put up a fence at his own expense, and use the ground as an entrance, or alley to his own lot; for which he was to pay Mrs. Blake an annual ground-rent of $5, for every year he should occupy that part of the lot; and it was "particularly understood that at any time Mrs. Blake disposes of the lot by sale or otherwise, or in case she wished to build upon it, said Grammer is to clear and relinquish whatever he may have inclosed belonging to said lot, and then the above covenant does not terminate." He continued to pay the rent until the 24th of March, 1824. The property was sold by Mr. Kerr under the deed of trust, on the 7th of September, 1824.

Long after the sale, but whether before or after the justice's warrant was issued in this cause the witness could not recollect, Mr. Kerr, in conversation with the appellee, told him that the bank was entitled to the rent, to which he made no objection. The bank never demanded the rent, and the appellee never promised to pay it to the bank, and has not paid it, and never attorned to the bank, or in any manner acknowledged himself tenant to the bank.

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

Mr. Wallach, for the defendant, contended that the plaintiff was not entitled to recover the rent which accrued after the sale made by Mr. Kerr under the deed of trust, and cited Parry v. House, 1 Holt, N. P. 492, note, England v. Slade, 4 Term R. 682, and Doe v. Watson, 2 Starkie, 230, Serg. & L. 328 [3 E. C. L. 389].

Mr. Morfit, for the plaintiff, contended that the tenant who has used and occupied the premises under the lessor cannot dispute his title, and cited Balls v. Westwood, 2 Camp. 11; Wilson v. Townshend, 2 Ves. Jr. 696; Doe v. Smythe, 4 Maule & S. 347. The cases cited by Mr. Wallach, are cases of ejectment; this is for use and occupation. The defendant is bound to pay the rent until he is evicted.

CRANCH, Chief Judge. In ejectment the defendant may show that the plaintiff's title has expired, because the plaintiff can only recover by the strength of his own title; and, by bringing the action, has admitted that the possession of the defendant is adverse. In replevin the plaintiff can show that the defendant's title has expired, because he must have a reversionary interest to entitle him to distrain. But in an action for use and occupation the tenant cannot deny the title of his landlord. He has had the use and enjoyment of the property, and cannot deny the validity of the title under which he has had that enjoyment. His possession is the possession of his landlord, and if a stranger brings ejectment, his landlord is to defend the suit, and will be answerable for mesne profits if the stranger should recover.

In the present case Mr. Grammer has enjoyed the use of the property under the possession given him by Mrs. Blake. That possession has not been changed or disturbed. He has continued to hold from year to year, and his term, as I understand it, has not expired. It is true that he covenanted to clear and relinquish the property if, at any time, Mrs. Blake should sell or dispose of the lot, or in case she should wish to build; and that upon his so clearing and relinquishing the lot, the covenant should terminate. But this seems to me to be a covenant for the benefit of Mrs. Blake; and if she does not require him to clear and relinquish the lot, and he still keeps possession, it is not for him to say that the covenant is terminated. The bank might have brought ejectment against Mrs. Blake, and afterwards recovered from her the mesne profits, for which Mr. Grammer would be liable to her, to the extent of the rent reserved. If he refused to attorn to the bank, or if the bank never demanded of him either the rent or the possession, he continued to hold under her.

I am therefore of opinion that she is entitled to recover for the five years' use and occupation for which she has sued. But if not entitled to the whole five years' rent, she is certainly entitled to recover for rent due before the sale which appears to be at least six months; perhaps a year, if he was entitled to six months' notice to quit.

But THE COURT was of opinion that the covenant had terminated with the sale, and that as the contract was under seal, this must be considered as an action of covenant.

CRANCH, Chief Judge. The covenant was not terminated until Mr. Grammer "cleared and relinquished what he had inclosed." For Mrs. Blake was liable for the mesne profits until the bank should get possession, (which, it does not appear that they have yet obtained,) and therefore has a right to look to Mr. Grammer upon his covenant and occupation.

Judgment affirmed, with costs.

Case No. 1,497.

BLAKE v. GREENWOOD CEMETERY.

[14 Blatchf. 342; 3 Ban. & A. 112;[1] 13 O. G. 1046.]

Circuit Court, E. D. New York. Oct. 19, 1877.

PATENTS—INFRINGEMENT—INJUNCTION—DEFENSES.

1. An application was made for a preliminary injunction, to restrain a cemetery corporation from using a stone breaking machine, in infringement of a patent. The machine was used to break stone to keep in repair the roads of the cemetery. The defendant set up a license. The plaintiff exercised his monopoly by granting licenses to use his machine. The defendant offered to pay into court the amount of the license fee on its machine, to abide a final decision on the question of the existence of a license: *Held*, that, on such payment into court, the application must be denied.

[Cited in Smith v. Sands, 24 Fed. 472.]

[2. Cited in Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896, to the point that, if the cessation of the alleged infringement would be injurious to the public, it would constitute sufficient reason for denial of an injunction.]

[See Bliss v. Brooklyn, Case No. 1,544; Ballard v. City of Pittsburgh, 12 Fed. 783.]

[In equity. Action by Eli W. Blake against the Greenwood Cemetery for infringement of a patent. Plaintiff's motion for a preliminary injunction denied.]

Henry T. Blake, for plaintiff.

Benjamin E. Valentine, for defendant.

BENEDICT, District Judge. This action is brought against the Greenwood Cemetery, to obtain an injunction and damages for the use, by the defendants, of a certain stone-breaking machine. The case is now before the court, upon the plaintiff's motion for a preliminary injunction to restrain the defendants from using the machine during the pendency of the action. The facts are not in dispute. It is not denied that the machine in use by the defendants is an infringement

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 112; and here republished by permission.]

upon the plaintiff's patent, as set out in his bill, and the validity of the patent is not disputed. As to these questions, there could be no dispute, for, not only this patent, but this identical machine, has formed the subject of a former action in this court, brought by this plaintiff against the maker of this and three similar machines, in which action the validity of the plaintiff's patent was declared, and the machine in question decided to be an infringement. [Blake v. Robertson, Case No. 1,501.] That decision having been since affirmed by the supreme court of the United States, upon appeal, (Blake v. Robertson, 94 U. S. 728,) furnishes the law of this case in respect to the question of infringement. But, in that action, brought, as it was, against the maker of the machine, to recover damages for its construction, with others, and in which the damages were fixed in pursuance of a stipulation between the parties in respect thereto, inasmuch as the evidence offered to prove the damages failed to show any amount of damages sustained by reason of the construction of the machines complained of, the recovery was limited to one dollar, as nominal damages. In this action, that former action, together with the payment of the one dollar there awarded, is set up by way of defence, and it is contended that the defendants, by reason of the said recovery, are entitled to use the machine in question, as a licensed machine, without further payment to the patentee. Pending the determination of the question thus raised, which the defendants are entitled to have determined upon final hearing, and not upon this motion, there is a difficulty in granting a temporary injunction, arising out of the nature of the use to which the machine in question is devoted. The machine complained of is a powerful and expensive stone-crusher, used solely for the purpose of breaking the stone needed to keep in repair the roads of that cemetery called Greenwood, where are the graves of nearly two hundred thousand dead—the dead of every state in the Union, and of almost every nation on the earth. Some nineteen miles of roads border the burial lots of this great city of the dead. These roads are constantly travelled by the living, upon the saddest of all their errands. There is no part of the cemetery which may not be, at any moment, required to be used for the purposes of interment, and the necessity is absolute, that its ways and paths be unimpeded and in good repair. The duty of maintaining these roads belongs to the defendants, but it is, in no proper sense, a private obligation. The machine in question cannot fairly be said to be employed for the profit of any one, but for the convenience of the public, to the end that the people, without annoyance or obstruction, may bury their dead. Such a use, it is plain, should not be interfered with by the court, unless such intervention by the court is an absolute right of the plaintiff. In this stage of the case, the plaintiff can have no such absolute right. His papers show that he does not derive profit for his patent by using his machines, but that he charges a fixed royalty or license fee, according to the size of the machine. The amount of this royalty upon the machine in question the defendants now offer to pay into court, to abide the decision of the question raised by their answer. Such a payment of his royalty will fully protect the rights of the plaintiff; and the offer to make the payment renders it impossible for the plaintiff successfully to contend that a temporary injunction is necessary to prevent irreparable injury to him. The motion must, therefore, be denied, provided the defendants pay into the registry of this court, to abide the event of this action, the amount of the plaintiff's royalty upon the machine in question.

[NOTE. For other cases involving this patent, see note to Blake v. Robertson, Case No. 1,500.]

BLAKE (HOWLAND v.). See Case No. 6,792.

BLAKE (HUGHES v.). See Case No. 6,845.

Case No. 1,498.

BLAKE v. McCARTNEY.

[4 Cliff. 101;[1] 10 Int. Rev. Rec. 131; 16 Pittsb. Leg. J. 210.*]

Circuit Court, D. Massachusetts. May Term, 1869.

INTERNAL REVENUE — SUCCESSION—ACT JUNE 30, 1864—DEVISE IN TRUST.

1. B., being possessed of certain real estate, devised the same to the plaintiff, in trust, among other things, to pay a residue of the rents and profits to her son H., during his natural life, to and for his sole use and benefit; but if he deceased, leaving a wife, then in trust for his wife in like manner during her natural life. B. died in 1847. H. died in 1867 leaving a wife, the cestui que trust of the plaintiff. *Held*, that under the act of June 30, 1864 [13 Stat. 223], the income of the said life-estate was subject to assessment.

2. Where the following conditions concur, to wit: a part-disposition of real estate by will, deed, or the laws of descent; that by reason of such part-disposition of real estate the person taxed became beneficially entitled, in possession or in expectancy, to the real estate or the income thereof; that the person taxed became so entitled to such real estate upon the death of the person making such part-disposition of the same; that the person making such part-disposition of such real estate died after the passage of the act under which the tax was imposed; they confer upon any person entitled by reason of such part-disposition of real estate a succession within the meaning of section 126 of the act of June 30, 1864 [13 Stat. 287].

At law. Action to recover back from a collector of internal revenue in this district money paid under protest as a succession tax under the act of June 30, 1864 [13 Stat. 223].

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

The case was submitted upon the following agreed statement of facts. This action was commenced Oct. 21, 1868, in the state court (and removed to the circuit court), to recover back the sum of $863.82 paid by plaintiff, as trustee for Mrs. Marianne Blake, widow of James H. Blake, who died Aug. 10, 1866. She was married to James H. Blake, on May 12, 1835. The return under which the tax was assessed was made under protest, May 20, 1868. An appeal was made to the commissioner of internal revenue, May 25, 1868, and acknowledged by him June 20, 1868. The plaintiff is trustee under the will of Mrs. Sarah Blake, who died April 10, 1847,—and the following extracts are made from said will, viz: "I give, devise and bequeath one other fifth part of all the said rest, residue, and remainder of my property and estate, real and personal, including one fifth part of all such real estate as I may hereafter acquire, to the said Edward Blake," in trust, among other things, "to pay all the residue of the rents and income of said last devised trust property to my son, James Henry Blake, quarter-yearly, in every year during his natural life, to and for his sole use and benefit. And if he the said James Henry Blake shall decease, leaving a wife, then in trust, in like manner, after his decease, and during her life, to collect and receive the said rents, income, dividends and profits of the said last devised trust property; and after deducting therefrom the charges and expenses aforesaid, to pay the residue thereof, to her, quarter-yearly, in every year during her natural life, to and for her sole use and benefit, and for the maintenance and education of the children of said James Henry Blake, upon her own separate receipt, without the interference of any husband, or being subject to his debts or control. And at and upon her decease, or upon the decease of the said James Henry Blake, if he should die unmarried, having survived his wife, then in further trust to convey and transfer the trust property (lastly above devised in trust), or so much thereof as may then remain undisposed of, to the child or children of the said James Henry Blake (if any) then living, and to the issue then living of any deceased child or children of the said James Henry Blake, by right of representation, share and share alike; such issue to take the same share which his, her, or their parent would take if then living. To hold the same to them, their heirs and assigns forever. And in default of any such child, children, or issue, then living, then in trust to convey and transfer the same to my heirs-at-law; to hold the same to them, their heirs and assigns for ever." Said tax was assessed on the life estate of said Marianne in certain real estate in said Boston, of which said testatrix died seised, and which was in the settlement of her estate set off to be the share of said James. The plaintiff, being called upon by the assistant assessor to make return of said life estate, appealed, March 25, 1868, to the commissioner, upon the ground that said interest in said real estate was not taxable, because the person from whom it came, viz: Mrs. Sarah Blake, died April 10, 1847, and none of the property came from said James H. Blake. That the legal right of the widow of said James vested in 1847, and that it did not come under the internal revenue laws. The commissioner, under date of April 4, 1868, decided against the plaintiff upon the ground that "said Sarah Blake is the predecessor, and the widow of James H. Blake, having become entitled in possession of the income of the real estate referred to upon the death of the life tenant, dying after June 30, 1864, is liable to the succession tax under [Act June 30. 1864] section 127 [13 Stat. 287], without relation to the time when the succession vested any more than in the case contemplated in the proviso. Section 137 [Id. 289]." Upon receipt of notice of said decision, plaintiff, under date of April 10, 1868, protested against further proceedings to assess said tax. May 25, 1868, plaintiff addressed a communication to the commissioner that in consequence of his decision, under date of May 20, 1868, a return had been made under protest, and an additional appeal was made, if such was necessary, and a request was made for information whether any other preliminary measures were necessary to enable plaintiff to contest the validity of the tax. An answer to this was received from the commissioner under date of June 20, 1868, referring plaintiff to the provisions of section 19 of act of July 13, 1866, p. 28 [14 Stat. 102], of compilation of internal revenue laws. A suit brought by plaintiff to the October term of said court was dismissed, and thereupon this suit was brought. Should the court be of opinion, upon the foregoing statement, that said tax was not legally assessed, judgment shall be rendered for the plaintiff that he recover of the defendant the amount of said tax, with interest from the time of payment, and costs of court; otherwise, judgment shall be entered for the defendant.

Edward Blake, pro se.

John C. Ropes, Asst. U. S. Atty., for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Succession is defined in general terms by section 126 of the act of June 30, 1864 [13 Stat. 287], to "denote the devolution of title to any real estate," but section 127 of the same act provides that every part-disposition of real estate, by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passage of that

act, shall be deemed to confer on the person entitled by reason of any such disposition, a succession, and the term successor shall denote the person so entitled; and the term predecessor shall denote the grantor, testator, ancestor, or other person, from whom the interest of the successor has been or shall be derived. 13 Stat. 277, 278 [287, 288]. Real estate was owned by Sarah Blake, and the agreed statement shows that she devised certain portions of the same to the plaintiff, in trust, among other things, to pay all the residue of the rents and profits to her son James Henry, during his natural life, to and for his sole use and benefit; but if he deceased leaving a wife, then in trust in like manner, after his decease, to his wife, during her natural life, to and for her sole use and benefit. Sarah Blake died April 10, 1847, and her son James Henry, having previously married, died August 10, 1867, leaving a widow, Marianne Blake, the cestui que trust of the plaintiff. Formal demand of the plaintiff was made by the assistant assessor on March 25, 1868, for a return of the said life estate of his cestui que trust for the purpose of assessing the income; and on that day the plaintiff appealed to the commissioner from the decision of the assistant assessor, upon the ground that the income of the life estate was not taxable; but the commissioner sustained the views of the assistant assessor. Return was accordingly made by the plaintiff under protest, and the taxes having been duly assessed, he paid the same, and brought an action of assumpsit in the state court to recover back the amount, as having been illegally assessed and exacted.

Federal questions being involved in the nature of the claim, the cause was removed into this court, and at the regular session of the present term was submitted to the court upon an agreed statement of facts. Discussion as to the technical meaning of the term succession, as used at common law, is unnecessary, as the question before the court depends entirely upon the conditions specified in section 127 of the act under which the taxes were levied. Congress has power to lay and collect taxes, duties, imposts, and excises, and having exercised that power in passing the law under which the taxes in question were assessed, the question of liability depends upon the construction of that law.

The views of the plaintiff are, that a tax can never be regarded as a succession tax, unless it is imposed on the direct transfer of property from the dead to the living, and that it consists, in all cases, in the division of a succession between the state and the heirs or devisees of the property; but the decisive answer to that abstract proposition is, that the question of liability in this case depends upon the construction of an act of congress. Secondly, the plaintiff contends that a tax under that section can never be justified except when it appears:—

1. That the party taxed became beneficially entitled to the real estate by devolution of title.

2. That he became so entitled by means of the death of another.

3. That he became so entitled by means of the death of another, happening after the passage of the tax act.

Based on these postulates, his argument is, that the present tax is not justified by the tax act, because the trust settlement was made long before that act was passed, which shows to a demonstration that he employs the phrase "devolution of title" in the strict common-law sense, and not in the sense in which it is used in the act of congress. If read carefully it will be seen that the act of congress negatives the deduction made by the plaintiff from his second proposition; and when carefully analyzed, it will appear that the tax is justified by the section under consideration, because it is within every one of the conditions therein specified.

Those conditions are as follows, as applied to this case. That there was a part-disposition of real estate by will, deed, or the laws of descent. That by reason of such part-disposition of real estate, the person taxed became beneficially entitled, in possession or in expectancy, to the real estate, or the income thereof. That the person taxed became so entitled to such real estate upon the death of the person making such part-disposition of the same. That the person making such part-disposition of such real estate died after the passage of the act under which the tax was imposed, and the provision in the same section is, that where all those described conditions concur, the part-disposition of real estate shall be deemed to confer on the person entitled by reason of any such part-disposition of real estate, a succession within the meaning of that act [June 30, 1864]. 13 Stat. 288.

Such part-disposition of the real estate must, by the express words of the section, be either in possession, or in expectancy; but the beneficiary is not subject to the payment of any income tax until the expectancy terminates, and he or she comes into the possession and enjoyment of the use of the real estate.

In this case, the cestui que trust of the plaintiff became beneficially entitled to the real estate in expectancy, and not in possession, and in such cases it is immaterial whether the part-disposition of the real estate was made before or after the passage of the tax act, provided it appears that the beneficiary became so entitled upon the death of the predecessor, and that the predecessor who made such part-disposition of the real estate died after the passage of the tax act.

The argument for the plaintiff is, that the tax can only be imposed by virtue of the section in question, where the death of the predecessor is the cause of the successor's being entitled to possession of the real estate, and not where it is merely the occasion, as

in this case; but the proposition finds no support in the language of the provision, and the rule in the exchequer court of England is well settled the other way. Attorney General v. Gell, 3 Hurl. & C. 628; Attorney General v. Middleton, 3 Hurl. & N. 134; Attorney General v. Fitzjohn, 2 Hurl. & N. 465; Wilcox v. Smith, 4 Drew. 40.

Suggestion is made that the second section of the act of 16 & 17 Vict. c. 51, differs from the corresponding provision in the act of congress under which the tax in this case was assessed, but the differences pointed out do not affect the questions before the court. Attorney General v. Gell, 3 Hurl. & C. 621, note b. Strong support to the construction adopted by the court is also derived from two other sections of the same act, but it is not necessary to pursue the subject. [Act June 30, 1864;] 13 Stat. 288, 289, §§ 128, 137. Pursuant to the agreement of the parties there must be judgment for the defendant.

BLAKE (McGUNNIGLE v.). See Case No. 8,816.

Case No. 1,499.

BLAKE et al. v. RAWSON.

[Holmes, 200; 3 O. G. 122; 6 Fish. Pat. Cas. 74; Merw. Pat. Inv. 444.] [1]

Circuit Court, D. Massachusetts. Jan., 1873.

PATENTS—EFFECT OF PRIOR DECISIONS—INFRINGEMENT—MECHANICAL EQUIVALENTS — NOVELTY—ANTICIPATION —EVIDENCE — STONE-CRUSHER—SCOPE OF INVENTION.

1. Where the answer set forth, and counsel contended that the facts and law applicable to certain prior machines, as compared with the patented combination, were not properly presented to the judges who tried and decided former cases under the patent, and where some additional facts were adduced and proved, not presented in the other cases, the court considered the whole testimony, without regard to any previous action on the patent, as if it had never been tried and adjudicated upon.

2. The machine patented frequently has a broader scope than the particular form of the machine described as the form used by the patentee.

3. The question of novelty is to be settled by a comparison of prior machines with the machine patented, rather than the form of the machine in use.

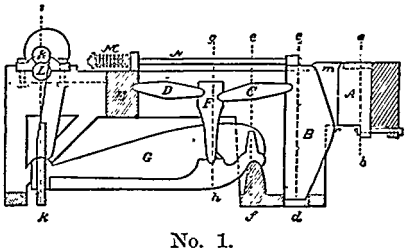
4. It is not always enough, to prove that two combinations of elements are equivalent, to show that each element of the combination in one may be regarded, under some circumstances, as the equivalent of the corresponding element in the other, when the elements are separately considered. If the mechanical combinations of the members of the two machines be such that the action and mode of operation differ in the two machines, then one is something more than a mere mechanical equivalent for the other.

5. Although Hamilton's stone-crusher is a combination of certain elements, which, separately considered, do not materially differ from the elements of the combination described in the Blake patent, yet it neither embodies the arrangement nor mode of operation of the Blake machine, but operates upon a different principle, and is not an anticipation.

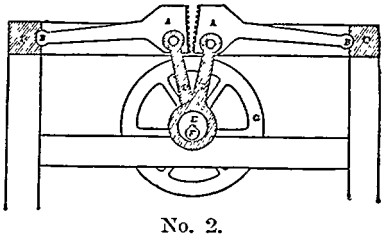
6. Where a machine, similar to that described in the plaintiff's patent, existed twenty years before, and a single person only testified to more than an experimental use of it, and it was soon after abandoned: *Held*, that it did not invalidate the patent.

[In equity. Bill by Eli W. Blake and others against George W. Rawson for infringement of letters patent.] Final hearing upon pleadings and proofs. Decree for complainants.

[2] [This suit was brought upon letters patent for "improvement in machinery for breaking stone," granted Eli W. Blake, June 15, 1858, and reissued January 9, 1866. The patent had been previously sustained. See cases of Blake v. Stafford [Case No. 1,504], and Blake v. Eagle Works Manuf'g Co. [Id. 1,494]. The principal devices brought forward to anticipate the patent in the two former cases, as well as the present, were the Forward machine, used at Louisville, Kentucky, for a short time in 1847, and the Hamilton stone-crusher, patented January 3, 1854. The engravings, Nos. 1, 2, and 3, represent respectively the Blake, the Forward, and the Hamilton machines.



No. 1.



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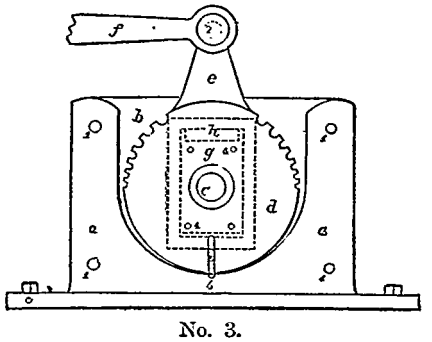


No. 3.

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and statement are from 6 Fish. Pat. Cas. 74, and the opinion from Holmes, 200. Merw. Pat. Inv. 444, contains only a partial report.]

[2] [From 6 Fish. Pat. Cas. 74.]

[In No. 1, A and B are the jaws between which the stone is crushed. A is stationary, while B, by means of a revolving shaft and fly-wheel, and the toggle-levers D, C, with intervening mechanism, is made to advance and recede alternately through a definitely-limited space, thus crushing the stones and releasing them after they are crushed.

[In No. 2, A A are the two jaws, both of which move, and in the same manner. By means of the arms D, D, and eccentric E, on shaft F, they are caused to rise and fall in the arc of a circle, thus crushing the stone that comes between their faces. G is a fly-wheel to steady the motion.

[In No. 3, there is a cylindrical roller, which is made to rock upon its central shaft by means of the arm shown.] [3]

H. T. Blake and G. W. Baldwin, for complainant.

Sherman & Drew, for defendant.

SHEPLEY, Circuit Judge. This bill in equity is brought for an alleged infringement of the reissued patent of Jan. 9, 1866, to Eli W. Blake, for a new and useful machine for breaking stones for road and other purposes. This patent has already been before the court; and has been sustained by Judge Shipman in the case of Blake v. Stafford [Case No. 1,504], whose decision in that case was sustained by Mr. Justice Nelson on a motion for a new trial; and also in a case before Judge Drummond, Blake v. Eagle Works Manuf'g Co. [Id. 1,494].

The principal points relied upon in the present case by the learned and able counsel for the defendant, are those which are also set up in the answer in relation to the alleged prior inventions of James Hamilton, as described in letters-patent of the United States, issued to him on the 3d of January, 1854, for "improvements in machinery for crushing and grinding quartz and other hard substances;" and also of one Samuel Forward (or Forwood), of Louisville, Ky., who constructed a machine for breaking stones for roads in Louisville, in the year 1847.

The answer sets forth, and counsel contend, that the facts and law applicable to these two machines, as compared with the combination patented to the complainants, were not properly presented to the judges who tried and decided those cases; and also shows, that some of the facts adduced and proved by this defendant, in support of some of the allegations now made by this defendant, were not made and proved in either of the causes above named. For these reasons, we have carefully considered the testimony of the witnesses and the opinions of the experts in relation to the quartz-crusher of Hamilton and the rock-breaker of Forwood, without regard to any previous action on this patent by any court, as if it had never been tried or adjudicated upon.

The essential characteristics of Blake's stone-crusher are two jaws between which the stones are to be broken, having their acting faces so nearly in an upright position that stones to be broken will descend by force of gravity between them; and convergent downward, one toward the other, in such manner that, while the space between them at the top is such as to receive the stones to be broken, the space at the bottom is only sufficient to allow the fragments to pass, when broken, to the required size; and a revolving shaft, with a fly-wheel driven by steam or other power; and such intervening mechanism between the revolving shaft and the movable jaw as shall impart to the jaw a definite vibratory movement, causing it to advance with great power toward the other jaw through a short and definitely limited space, and alternately to recede and advance, so that the stones fall down between the jaws until their descent is arrested between the convergent faces, when the movable jaw, advancing, crushes the stones, and, receding, liberates the fragments; and they again descend, and, if too large to pass through the space at the bottom of the jaws, are again arrested and broken by the advancing movable jaw, until the fragments are sufficiently reduced in size to pass through. The patentee does not claim the manner of supporting the jaws in their proper relative position, or his particular mode of imparting the definite motion with the required power to the movable jaw from the revolving shaft. These, he claims, may be varied indefinitely, without affecting the principle of the operation. After describing the invention which he claims, the patentee describes the form in which he embodies his invention; and it is evident from the claims in his patent, taken in connection with the specification to which they refer, that, although he describes a crank, lever, and toggle-joint as one mode, and the mode adopted by him of communicating a definite motion to the movable jaw from the revolving shaft, no construction can properly be given to the patent, such as is suggested by defendants, which would limit it to the toggle-joint mechanism, which is described by the patentee as the particular form in which one element of the patented combination is constructed and embodied in one form of his machine. The machine patented frequently has a broader scope than the particular form of the machine described as the form used by the patentee. The question of novelty is to be settled by a comparison of prior machines with the machine patented, rather than the form of the machine in use.

The Hamilton quartz-crusher, relied upon as an invention antedating the complainants', is a combination of certain elements which, separately considered, do not materially differ from the elements of the combination described in the Blake patent. All the elements of the combination are old in both machines. The novelty in both con-

[3] [From 6 Fish. Pat. Cas. 74.]

sisted in the peculiar mechanical combination of the members of the contrivance, and the resultant mode of operation. The movable jaw in the Blake machine advances toward and recedes from the fixed jaw in a direction substantially at right angles with the faces of the jaws, so that, when advancing, the stones are nipped and crushed between the jaws, and, when receding, the stones are liberated. In the Hamilton quartz-crusher there is a cylindriçal roller or pestle in a basin having its sides eccentric to the circle of the movement of the roller or cylindrical pestle, the inner sides at the bottom of the curved basin gradually approximating to the circle of movement of the cylindrical roller. This cylinder is made to move around its central shaft with a reciprocating vibratory movement, but, being cylindrical and turning upon a fixed central axis, can only move in the direction of the periphery of the cylinder. The surfaces of the cylinder operate upon the material by a grinding process tending to rotate the stones on their own axis, and at the same time to draw them down into a space where, by reason of the eccentricity of the opposite surfaces, they are nearer to each other than at the point where they begin to operate on the stones to be crushed. In the Hamilton machine, every point on the acting face of the roller moves in the segment of the circle of the periphery. In the Blake machine, it is strictly correct to say that the points in the movable jaw advanced toward the fixed jaw in the arc of a circle, but the whole movable jaw advances toward and recedes from the fixed jaw, and the space through which it moves is so small compared with the periphery of the circle which would be described if its rotation were continued, that the operation upon the material is substantially the same as if the movable jaw were advanced toward the fixed jaw in a direction at right angles with the face of the jaw, nipping and crushing the material at the points of impact without any tendency to a rotating or grinding action upon it. In the Hamilton crusher, the surface of the rotating cylinder passes laterally by the surface of the basin, reducing the material both by the grinding operation and by moving it into a space progressively narrower, as if it was passing between rollers. The mode of operation is different in the two machines. It is not always enough, to prove that two combinations of elements are equivalent, to show that each element of the combination in one may be regarded under some circumstances as the equivalent of the corresponding element in the other, when the elements are separately considered. If the mechanical combination of the members of the two machines be such that the action and mode of operation differ in the two machines, then one is something more than a mere mechanical equivalent for the other. A careful examination of the evidence in the case, and close comparison of the working models of the two machines, has resulted in forcing upon my mind the same conclusion arrived at by Mr. Justice Nelson, in the case of Blake v. Stafford [Case No. 1,504], when he says: "Hamilton's quartz-crusher neither embodies the arrangement nor mode of operation of the plaintiff's machine, but operates upon a different principle and embodying a different set of ideas."

The Forward machine is not in existence; and no such machine is proved to have been in existence within twenty years. There is no evidence tending to show that more than one Forward machine was ever made or used. Only two persons testify to having seen that machine. Only one witness testifies to anything which can possibly be claimed to have been any other than an experimental use. The model introduced in evidence, constructed to correspond with the description of the machine as testified to by these two witnesses, according to their recollection, after the lapse of twenty years, does not in some important particulars correspond with the drawings given by one of the witnesses; and the two witnesses differ also materially in their statements. The principal feature of the Forward machine was, that it had two horizontal jaws, each from six to seven feet long, whose opposite bearings were from twelve to fourteen feet apart. The crushing-faces of these jaws were proximately segments of a circle, the radius of which is represented by the length of the jaw. In the downward movement of the two jaws they operated in the crushing process upon the material as if it were passing between two cylinders of a diameter of twelve or fourteen feet. The idea of the machine seems to have been, by use of two segments of cylinders of this diameter, to avoid the use of such cumbrous and expensive devices as two cylinders of such great diameter and great weight and expense as their requisite strength would have involved, and at the same time to obtain the same result. There was no lateral movement by which the jaws could be made to recede from each other after the crushing process resulting from the downward movement. The upward movement of the jaws was one which threw them against and lifted the whole mass of superincumbent material. In view of this obvious feature of the machine, it is impossible to credit the testimony of Johnson, or to agree with the opinion of the expert, that this was ever a practically successful machine. The inference that it was not is also strengthened by the fact that it was immediately abandoned, and never appears to have been used afterward; and there is no evidence that a second one like it was ever made. It is difficult to see how Blake could have been aided in the development of the ideas embodied in his structure by any suggestions he could possibly have received from Forward's machine, if that had been in existence and known to

Blake when he was developing his invention.

It is too clear to require any extended remarks, that no one of the other machines referred to in the answer anticipated the invention of Blake. He is therefore to be considered as the original and first inventor of what he claims in his patent. Applying the construction already given to those claims, the infringement by the Rawson machine is obvious.

Decree for complainants.

[NOTE. For other cases involving this patent, see note to Blake v. Robertson, Case No. 1,500.]

Case No. 1,500.

BLAKE v. ROBERTSON et al.

[6 Fish. Pat. Cas. 509; 11 Blatchf. 237.][1]

Circuit Court, E. D. New York. July 2, 1873.

PATENTS—INFRINGEMENT — MECHANICAL EQUIVALENTS — IMPROVEMENT — PRIOR DECISIONS—INJUNCTION—STONE-CRUSHER.

1. Blake having patented in his patent of June 15, 1858, reissued January 9, 1866, a "machine for breaking stones," which machine has two upright converging jaws—one fixed and the other moved forward by an iron connecting-rod—between which jaw the stone is broken by the approach of the movable jaw to a specified distance, the patent is infringed by the stone-crusher patented by Austin H. Smith, November 7, 1871, in which the movable jaw is moved forward by a column of confined water, to which pressure is applied by a plunger.

2. In such a combination, the column of compressed water is the mechanical equivalent of the iron connecting-rod.

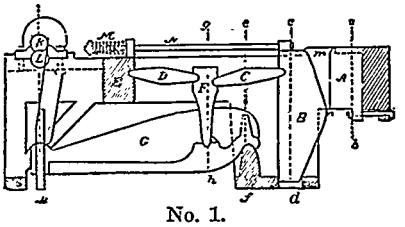
3. The provision in the Smith machine for the escape of the water, so as to prevent breakage when the stone to be crushed is harder than the iron used to crush it, may be a patentable improvement, but still the machine infringes the patent granted Blake.

4. Though the validity of the patent has been sustained by repeated adjudications, and the infringement by defendants seems clear, yet, as complainant's rights in the present case will be as well protected by a bond, the defendants are required to file an account once in three months of all machines made and sold, and give bond to complainant to pay him such sum as may ultimately be found due him.

[In equity. Bill by Eli W. Blake against John Robertson and others for infringement of letters patent.] Heard on motion for preliminary injunction, which was denied.]

Motion for provisional injunction. Suit brought on reissued letters patent granted Eli W. Blake, January 9, 1866, for "improvement in machinery for crushing stones," as a reissue of the patent originally granted him, June 15, 1858. The patent had been extended after a vigorous opposition, and had been sustained by several adjudications in the courts. See Blake v. Stafford [Case No. 1,504]; Blake v. Eagle Works Manuf'g Co. [Id. 1,494;] and Blake v. Rawson [Id. 1,499].

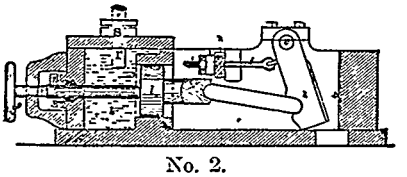
The Blake machine, as patented, is shown in the following engraving:



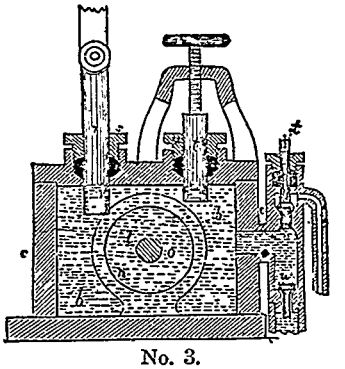
No. 1.

The claims of the patent are stated in the opinion of the court.

The defendants were manufacturing and selling stone-crushers, as patented by Austin H. Smith, November 7, 1871, in which there were the fixed and movable jaws, but the movable jaw was impelled by means of pressure applied to a column of water. The following engravings show the Smith machine:



No. 2.



No. 3.

Charles F. Blake, for complainant.

Benjamin E. Valentine, for defendants.

HUNT, Circuit Justice. The claims of the patentee are founded upon combinations only. He asks no protection for the discovery of original principles or inventions. The validity of his patent has been adjudicated in several suits brought against alleged infringers other than the defendants. Blake v. Stafford [Case No. 1,504]; Blake v. Eagle Works Manuf'g Co. [Id. 1,494]. It is admitted by the defendants' counsel, that it is to be taken to be a valid patent, for the purposes of this motion. The only question is, whether the defendants have infringed upon it.

The claims in the specification of the patent are as follows: "1. The combination, in a stone-breaking machine, of the upright convergent jaws, with a revolving shaft and

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and statement are from 6 Fish. Pat. Cas. 509, and the opinion from 11 Blatchf. 237.]

mechanism for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth; 2. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth; 3. In combination with the upright converging jaws and revolving shaft, imparting a definitely limited vibration to the movable jaw, so arranging the jaws that they can be set at different distances from each other at the bottom, so as to produce fragments of any desired size."

The answer to the alleged violation is based, first, upon the allegation, that the defendants use no fly-wheel. This is a question of fact, upon which the affidavits differ, the balance being with the complainant. The second and more important defence is, that the Smith machines, manufactured and sold by the defendants, do not create, or impart to the movable jaw, a definitely limited motion, while this result is admitted to be the effect and the intent of the Blake machine.

The modus operandi of the Blake machine is this, so far as it is necessary to specify it. The one jaw of the machine is fixed, the other movable, and, by the approach of the latter to a specified distance, the stone is crushed to the required size. The precise distance of this approach is regulated at pleasure. The motion is produced by a revolving shaft, an iron connecting rod and a crank, a return motion being secured by spiral springs. The revolution of the crank gives a short and definitely limited vibration to the movable jaw. The vibration is limited in its extent, but the distance indicated must necessarily be passed over by the movable jaw. It is alleged, that, whereas, in the Blake machine, this motion is accomplished by means of an iron rod, having no power to stop short of the distance limited, whatever may be the result to the machine itself, this bad consequence is obviated, in the Smith machine, by the use of water as the motive power. In the latter machine, instead of applying the force to the movable jaw by an iron rod, the effect is produced by water. A plunger is forced into a strong vessel filled with water, the water is forced through a passage against the movable jaw, and the motion is thus communicated to it. Connected with this is a safety valve, which opens, in the event of an excess of pressure, and allows the water to pass into another reservoir. In my view, the principle of the two machines is the same, and the operation is the same, speaking in general terms. This principle and this operation is to move the loose jaw by the mechanical force described, and with a given power, to within the specified distance of the fixed jaw, thus breaking the stones into the required size. Whether the force is applied by hand power, water power, or steam power, in principle, is unimportant. Whether the force is applied to the jaw by its contact with a wooden beam, with an iron rod, or with a column of water, is unimportant, in principle. These are mechanical equivalents, and a patentee cannot be deprived of the benefit of his invention by the substitution of one in the place of another. In the Smith machine, the column of confined water produces the same result as the iron rod in the Blake machine. There is no evidence before me, that a column of compressed water is not as powerful as an iron rod. I have no reason to suppose that it is not so.

I am not called upon to determine whether the Smith machine does not possess an advantage over the Blake machine, in that a mode of escape is provided, when the stone to be crushed is harder than the iron used to crush it, and thus a breakage of the latter is avoided. This may be an improvement, for which a patent could be obtained. It does not, however, affect the proposition, that, up to this point, the machines are the same. I think they are the same, and that the defendants are infringing the patent of the complainant.

The machines in question are expensive and bulky, and cannot, in their nature, be the subjects of extensive sale or manufacture. The complainant's rights will be as well protected by an order requiring the defendants to render an account, once in every three months, of the machines manufactured or sold by them, and to give security to the complainant to pay him any sums that may ultimately be found due to him for the causes in the bill of complaint stated, as by an injunction. Let an order to that effect be entered.

[NOTE. Patent No. 20,542 was granted to E. W. Blake June 15, 1858, was reissued (No. 2,145) January 9, 1866, and has been the subject of litigation in the following cases: Blake v. Stafford, Case No. 1,504; Blake v. Eagle Works Manuf'g Co., Id. 1,494; Blake v. Rawson, Id. 1,499; Blake v. Robertson, Id. 1,501; Blake v. Greenwood Cemetery, Id. 1,497; Blake v. Boisselier, Id. 1,493a; and Blake v. Robertson, 94 U. S. 728.]

Case No. 1,501.

BLAKE v. ROBERTSON et al.

[6 O. G. 297.]

Circuit Court, E. D. New York. July 8, 1874.[1]

CIRCUIT COURTS—FOLLOWING PRECEDENT OF OTHER CIRCUIT—PRESUMPTION — PATENTS — OPERATION — INFRINGEMENT — MECHANICAL EQUIVALENTS.

1. No circuit court is bound to follow the decisions of the courts of other circuits. Nevertheless, where a patent has been sustained in the circuit courts of four different circuits, and no appeal from the decision has been taken in

[1] [Affirmed by the supreme court in Robertson v. Blake, 94 U. S. 728.]

either case, a strong presumption arises that the parties were satisfied with the soundness of the decisions; and it is incumbent on the parties who seeks to bring another court to a different conclusion to point out indisputable grounds for it.

[Cited in Worswick Manuf'g Co. v. City of Kansas, 38 Fed. 241.]

[See Rumford Chemical Works v. Hecker, Case No. 12,133; American Middlings Purifier Co. v. Christian, Id. 307; Hammerschlag v. Garrett, 9 Fed. 43; Edgarton v. Furst & Bradley Manuf'g Co., Id. 450; Worden v. Searls, 21 Fed. 406.]

2. The machine embraced in James Hamilton's patent of January 3, 1854, operates in a method substantially different from that of the machine described in E. W. Blake's patent of June 15, 1858, and constitutes no objection to its validity.

[See note at end of case.]

3. A stone-breaking machine in which the movable jaw is actuated by an hydraulic press operating through a piston-rod, is an infringement of a patent for a similar machine in which the movable jaw is actuated by a pair of toggle-levers, operated by a lever and crank-rod; although in the former a safety-valve, is provided for relieving the pressure when such resistance is encountered as to endanger the breaking of the mechanism.

[See note at end of case.]

[In equity. Bill by Eli W. Blake against John Robertson and others to enjoin infringement of patent. Decree for complainant.]

H. T. Blake, for complainant.

B. E. Valentine, for defendants.

BENEDICT, District Judge. The decision of this case must depend upon the determinations of two questions. One is whether the patent issued to Eli W. Blake, for an improvement in a stone-breaker, dated 15th June, 1858, is void for want of novelty, because of the prior invention described in letters patent issued to James Hamilton on the 3d of January, 1854, for improvements in machinery for crushing and grinding quartz and other hard substances. The other question is whether the machine described in the specification of letters patent issued to Austin H. Smith, No. 120,784, dated November 7, 1871, for improvement in stone-crushing apparatus, is an infringement upon the Blake machine above mentioned.

The first of these questions has been heretofore determined in favor of the Blake patent by Judge Shipman, by Mr. Justice Nelson, by Judge Drummond, and by Judge Shepley, in other actions which have come before these judges; and as it does not appear that the supreme court has been called upon to reverse any of those decisions, it would seem a fair inference that those decisions are acquiesced in as correct by the parties to those actions. It is nevertheless true that those decisions do not bind this court, and the parties to this action have the right to a determination of the question by this court in this action. It is, however, incumbent on the party asking this court to differ upon such a subject from the learned judges above mentioned, to point out indisputable ground upon which such difference may be based. The argument presented to me based upon the Hamilton machine, although not without force, does not appear to me to justify a different conclusion from that arrived at by the other judges who have determined the same question in other cases. It may be that, with the light derived from the operation of the Blake machine, the idea embodied in that invention can now be in some sort carved out of the Hamilton machine; nevertheless, I have been unable to come to the conclusion that the patent of Blake should be declared void, as being in principle identical with the Hamilton machine; on the contrary, I incline to the opinion that the Hamilton machine was devised and constructed to operate according to a method substantially different from that found in Blake's machine. It would be a waste of time to spread on paper the grounds of my opinion, in the presence of the opinions of so many other judges learned in this branch of the law.

The remaining question is that of infringement. The difference between the defendants' machine and that invented by Blake is that in the defendants' machine a column of water is used as the medium of communicating motion from the revolving shaft to the movable jaw. To this a safety-valve is attached, and so weighted that, in the event of a substance of unusual hardness dropping between the jaws, water will escape through the valve, and breakage of the machine thus be avoided. By the introduction of water as an element of their combination, the defendants claim to have invented a new combination different from Blake's. They insist that, used with water as described by the defendant, the function of the revolving shaft in their machine is different from the function of the revolving shaft in the Blake combination, because, in the Blake machine, the revolving shaft necessarily defines and limits the movements of the jaw, while in the defendants' machine the revolving shaft simply imparts power without limiting or defining the movements of the jaw. The defendants' machine, therefore, they insist, presents the feature of irregularity of movement in the jaw, both in range and limit, accomplished by the use of hydraulic power. But this theory is not supported by the facts. I do not discover any irregularity of movement in the jaw of the defendants' machine produced by the use of a column of water instead of an iron rod. The revolving shaft in the defendants' machine, by the aid of the plunger and the column of water, imparts a motion to the jaw which is as certainly defined and limited by the action of the revolving shaft as it is in the Blake machine, and it is a movement not irregular, but regular. Both machines present the same definite vibrating movement produced by substantially the same combination. It is true the use of a column of water in place of a rod of iron may have

some advantage, and that a safety-valve attached may enable the machine to stop its motion in a certain contingency, and so avoid breaking; but stopping the movements of the jaw is not giving to it an irregular movement. The character of the movement imparted to the jaw is the same in both machines.

But the defendants say that water is not mechanism, and that water, as used in defendants' machine, is not a mechanical equivalent for the iron rod in Blake's machine. If this be so, then the defendants' machine without the safety-valve attached would be a different machine from Blake's. And yet, as the defendants seem to concede, a column of water closely confined without a safety-valve substituted in place of an iron rod for the purpose of communicating power, would act in the same way, produce the same definite limited motion, and accomplish the same result, as does the iron bar which in Blake's machine transmits the power from the revolving shaft to the movable jaw. It seems clear, therefore, that water so used is a mechanical equivalent. And it is none the less so when a safety-valve is attached, which will in a certain contingency release the water from its confinement and thereby stop the machine. Such a machine may be an improvement on the Blake machine, but my judgment is that it contains the idea which Blake conceived and secured, and is an infringement upon his patent.

The plaintiff is entitled to a decree in his favor and for an injunction. He cannot recover damages for he has proved no license fee.[2] The profit realized on the machines he sold does not fix the amount of damages here sued for, for those machines contained other patents than the one sued on, and the profits so realized may also, for anything that appears, embrace a manufacturer's profit.

Furthermore, there is no proof that the complainant stamped his machines with the word "Patent," or that he gave such notice as is required by section 38 of the patent act of July 8, 1870 [16 Stat. 203].

[NOTE. Mr Justice Swayne, in delivering the opinion of the supreme court affirming this decision, after stating that the Hamilton invention had been practically abandoned, but two of the machines ever having been made, further said, on the question of infringement:

["There are numerous points of similarity, and indeed of identity, in the respondent's machine. * * * The only point of diversity is that the vibratory movement in the Blake machine is limited and unvarying, while in the machine of appellants it is not of this invariable character. * * * What is employed in appellants' machine is the obvious and exact equivalent of what is so dispensed with in the Blake machine.

["Where an original machine and an improvement on it are both patented, neither patentee can use what does not belong to him without the requisite authority from the owner. The appellants having embodied all the ideas of Blake's invention in their machine, the valve which supplemented it, whether good or bad, is outside of the case, and cannot affect the result. The infringement is clearly made out." Robertson v. Blake, 94 U. S. 728.

[For other cases involving this patent, see note to Blake v. Robertson, Case No. 1,500.]

[2] The parties to this cause stipulated that the amount of plaintiff's recovery should be determined by the court from the evidence in the case at the final hearing.

BLAKE (SAMSON v.). See Case No. 12,284.

Case No. 1,502.

BLAKE et al. v. SMITH.

[4 Betts, C. C. MS. 14.]

Circuit Court, S. D. New York. 1845.

PATENTS FOR INVENTIONS—INFRINGEMENT OF PART OF PATENT—UTILITY—SPECIFICATION—TRIAL—INSTRUCTIONS—MISDIRECTION — SETTING ASIDE VERDICT—DEPOSITION—CERTIFICATE OF JUDGE.

[1. A deposition taken under Act Sept. 24, 1789, § 30 (1 Stat. 88), cannot be received in evidence unless the judge before whom it was taken certifies that it was reduced to writing by himself, or by the witness in his presence.]

[2. In an action for infringement of a patent for an improvement in the construction of a castor and bearings, an instruction by the trial judge, that the specification did not set forth or claim the bearings as a necessary part of the construction, was misleading, where the trial judge, in a previous portion of his charge, had adopted the conclusions of the judge in another circuit, in an action on the same patent, that the invention was useful, that the patent was valid on its face for an improvement in the construction of a castor and bearings, and that the specification was sufficiently full and explicit to satisfy the requirements of the patent law.]

[3. In such case the trial court erred in ruling that it would not be an infringement of the patent to make and vend the bearings unless they constituted a necessary part of the invention, since the trial court had admitted that the invention was useful, and the law does not require that each part shall be invariably useful, or that it shall always be used.]

[4. The bearings being a part of the invention embraced within the patent, it is an infringement of the patent to use the bearings separately, though the whole be not used.]

[5. A verdict will be set aside for misdirection by the judge, when the misdirection may have noticeably affected the verdict.]

[At law. Action by Philos Blake and others against Walter M. Smith for infringement of patent. Verdict for defendant. Plaintiffs move, on exceptions taken at trial, to set aside the verdict, and for a new trial. Granted.]

Seely & Baldwin, for plaintiffs.

J. C. Alberton and J. W. Edmonds, for defendant.

BETTS, District Judge. A bill of exceptions was taken in this cause, to the exclusion of testimony by the judge on the trial, and his charge to the jury. The evidence excluded was a deposition purporting to have been taken before Chief Justice Cranch at

Washington, under the 30th section of the act of congress of September 24, 1789 [1 Stat. 88], upon the ground that the certificate of the judge did not state that the deposition had been reduced to writing by the judge or by the witness in his presence. It is contended by the plaintiff, on a suggestion in the first edition of Judge Conkling's treatise (page 275), that the statute did not render it indispensable that the officer should certify to the manner of reducing the deposition to writing when the deposition is sent by him to the court, that a party may supply the omission by extraneous proof, and that accordingly the judge erred on the trial in absolutely excluding the deposition.

The bill of exceptions does not state that any other evidence was offered of the due taking of the deposition than the certificate of the judge, and the question cannot, therefore, be raised now, whether other evidence would have been competent and ought to be admitted by the court. [Hinde v. Longworth] 11 Wheat. [24 U. S.] 199, 209. The very point as to the sufficiency of such a certificate has been discussed in the supreme court, and the court decided that the deposition could not be received for want of that part omitted in this. Bell v. Morrison, 1 Pet. [26 U. S.] 356. And the same point had been entertained years before by Judge Washington at the Pennsylvania circuit. Pettibone v. Derringer [Case No. 11,043]. The intimation cited from Judge Conkling's treatise is omitted in his second edition. Conk. Pr. 255, 256. There is accordingly no foundation in law for this exception.

The other exception relates to the charge to the jury. The opinion had been expressed in this court in October, 1843, on a bill for an injunction, founded upon this patent, that upon the true construction of the patent the patentee's discovery and claim was the application or construction of the castor, as constructed by him, with furniture, and was not for any invention in the construction of the castor or its parts. On the trial of the case, evidence was offered by the plaintiffs to show that the late presiding judge of the court, on a trial at law at Hartford on the same patent, had instructed the jury that the patent was good on its face as a claim to the castor and bearings constructed according to the specification. The defendant also offered evidence as to the terms of those instructions, representing them to have been directly adverse to the validity of the patent. But, as the district judge associated on the trial certifies his understanding of the charge to be according to the construction of it by the plaintiffs, and as his opportunity from consultation and conference at the time with Judge Thompson would be far best for a correct understanding of the tenor of the charge, I adopted his view of it, and for the purpose of this trial defend the opinion before expressed, as such decision of Judge Thompson. This was not done because a nisi prius instruction to the jury by the presiding judge of this court in another circuit is to be regarded as authoritative law, but out of deference to the opinion of that learned judge, and for the purpose of securing, if possible, uniformity in the rulings of courts so nearly the same, and more especially in order that the questions of fact involved in the case, and to which much testimony had been adduced by both parties, might be passed upon by the jury under the decision of the main point of law most favorable to the plaintiffs. The charge therefore adopts the conclusion that the invention is useful, and that the patent, upon its face, is valid for the improvement in the construction of the castor and bearings, in adapting them for application to furniture, and that the specification is sufficiently full and explicit to satisfy the requirements of law.

Exception was taken to the charge at large by the plaintiffs. The particulars in the rulings and instruction of the judge as pointed out by the argument to support the exception resulted substantially in one point: That the judge erred in charging that the making and vending the bearings, though that part of the castor be by itself a new discovery, would be no infringement of the plaintiffs' patent. This paragraph is only the concluding part of the instruction given on that point. The whole sentence is: "That the metallic bearings, not being set forth in the specification as a necessary part of the construction, if according to the specification the article may be used with or without them, then although that part by itself be a new discovery, yet making or vending them would be no infringement of the plaintiffs' patent." This instruction embraces two propositions of law and one inquiry of fact. First, it asserts that in judgment of law the specification does not set forth or claim the bearings as a necessary part of the article invented and constructed; and refers the inquiry to the jury whether, conformably to the description of the specification, the article may be used without (as well as with) the bearings, and, if this is found so, then, though the bearings be a new invention, it could be no infringement of the patent to make or vend them. This instruction I consider erroneous, inasmuch as it departs from the position acceded to by the judge, that the patent was to be construed according to Judge Thompson's ruling, as valid on its face, and as embracing the claim to the construction of the castors, of which the bearings were an essential part, according to the specification. The judge had waived his own opinion for the purposes of the trial, and was seeking to have that of Judge Thompson, as certified by the district judge of Connecticut, govern the case on this trial. He had accordingly, in a part preceding the instruction under consideration, stated the main question on the construction of the patent to be whether the plaintiffs' invention was the mode of con-

structing the castor with or without bearings, or was a new combination of the article with furniture, and had adopted the first hypothesis as that which was to be the law of this particular case. To assert, then, that the specification does not set forth or claim the bearings as a necessary part of the construction, was receding from that position, and placing a conflicting interpretation of the patent before the jury, and was calculated to mislead them, and give a wrong direction to their inquiries.

I think, also, there is error in ruling that it would be no infringement of the patent to make or vend the bearings, unless they constituted a necessary part of the invention. This language was stronger than the authorities justify. It being admitted here that the plaintiffs' contrivance is useful, and that all the particulars of their discovery may be employed in producing the result aimed at, the law does not require that each part shall be invariably useful when employed, nor that it should be always used. Morgan v. Seaward, 1 Webster, Pat. Cas. 187. To the same effect are the American decisions. 1 Mason, 302 [Bedford v. Hunt, Case No. 1,217]; 4 Mason, 6 [Earle v. Sawyer, Case No. 4,247]; 1 Mason, 182 [Lowell v. Lewis, Case No. 8,568]; 1 Pet. C. C. 480 [Gray v. James, Case No. 5,719]; 2 Mason, 112 [Moody v. Fiske, Case No. 9,745]; 1 Paine, 203 [Langdon v. De Groot, Case No. 8,059]. Upon the doctrine that the bearings are claimed by the patent as a part of the invention, the patentee is not bound to show them to be a necessary part. It is enough if in any circumstances they may be used serviceably, and it will not vitiate his title to the invention, though he states his opinion to be that other methods pointed out by the specification may be more advantageous than to use the bearings. His judgment as to the degree of utility of one method over another, indicated by his specification, will not affect his right to all the plans or methods described therein, provided they be novel and any way useful. It was accordingly, under the construction of the patent adopted by the court, a misdirection to the jury, and was also presenting an immaterial issue, to submit to their inquiry whether the castors could be used without the bearings. If by that it was intended to have the jury pass upon the question of utility in the invention as one of fact, the instruction was not sufficiently explicit to draw their attention to that view of the case, for it would not follow, as a legal consequence, that the invention was useless, because the other parts might be used without adding this.

The concluding instruction, founded upon the hypothesis that the jury should find that upon the specifications it was indifferent whether the bearings are used or not, I conceive to be erroneous also, because, it being assumed that the bearings are a part of the invention embraced within the patent, and it is an infringement of the patent to use any separate part, though the whole be not used. 9 Car. & P. 334, 1 Webster, Pat. Cas. 271. Had the patent been construed to be only for a new combination of known parts, the rule would be the reverse. [Prouty v. Ruggles] 16 Pet. [41 U. S.] 336.

The argument also comments upon the misapprehension of the nature of the plaintiffs' invention, under which the judge was supposed to labor, in not regarding the plaintiffs' method of application of the castor as patentable, without their proving some new mechanical invention or contrivance in the construction of the article itself. But though the exception is taken to the entire charge, and would have afforded an opportunity to call for the judgment of the court on that particular, yet the specific points of objection are limited to the instructions given to the jury in relation to the bearings,—whether they formed a compound part of the castor, or whether, under the circumstances, using or vending them was an infringement of the plaintiffs' patent. On these two subjects I am satisfied, on a careful reconsideration of the charge, that it does not lay down to the jury the rule of law acknowledged on the trial by the judge, and acceded to as that adopted by Judge Thompson in the construction of the same patent. It is impossible, therefore, to say that the few facts referred to the jury, as to the novelty, utility, and originality of the discovery, were the sole matters considered by them in forming their verdict for the defendant, nor but that their verdict rested upon, or was particularly affected by, the question whether the castors, according to the specification, could be used without the bearings, and upon the right of the defendant to make or vend the bearings as no part of the patented invention. I may have no doubt in my own mind that the jury decided on the general question of the validity of the patent according to the plaintiffs' claim, independent of the particular instruction excepted to, but, adjudging now the point upon the case made, it is clear that they may have put their finding upon other ground, and that the misapplication of the rule of law may have had an important influence in shaping their verdict. It is believed the rule is of general, if not unusual, force, that, when the misdirection of the judge may noticeably affect the verdict, it will be set aside for that cause. 6 Com. Dig. 223; 10 Johns. 447; 5 Mass. 287; 5 Day, 279; [Greenleaf v. Birth] 9 Pet. [34 U. S.] 292; [Tracy v. Swartwout] 10 Pet. [35 U. S.] 80; [Livingston v. Maryland Ins. Co.] 7 Cranch [11 U. S.] 506. I shall accordingly order the verdict rendered in this cause to be set aside, and a new trial to be had, the costs to abide the event of the suit. The conflict of opinion between this court and the circuit court of Connecticut as to what construction the patent must receive being of that vital character that the rights of the

parties can never be definitely settled until the judgment of the court of last resort shall be had on this case, it is important that the decision of the judge at the circuit shall be so shaped as to enable one party or the other to present the contested questions upon the patent, for the final determination of the supreme court. It may not be inappropriate to add that I shall not hold myself concluded, by the provisional ruling on the last trial, from considering the questions of law as open for argument and decision, if the case comes again before me, in any form.

[NOTE. Patent No. 821 was granted to Philos Blake, June 30, 1838, and was also the subject of litigation in Blake v. Sperry, Case No. 1,503.]

Case No. 1,503.

BLAKE v. SPERRY.

[2 N. Y. Leg. Obs. 251.]

Circuit Court, D. Connecticut. June 29, 1843.

PATENTS—SUBJECT OF PATENT — IMPROVEMENTS—COMBINATION—SPECIFICATION.

1. The plaintiffs obtained a patent to manufacture casters for bedsteads; the only difference between the casters ordinarily used and those of the patentees consisted in the adoption of such a mode of construction and applying casters that the length of the vertical axis might be extended at pleasure without materially enhancing their cost. In an action for an infringement of the patent a verdict was found for the plaintiffs. On motion for a new trial, to set aside the verdict on the ground that the patent embraced what was not the subject of patent, *held*, that as the subject of the patent was new, although it was involved in parts of a machine which was used before, the patent was valid.

[See Park v. Little, Case No. 10,715.]

[2. Where a patent is obtained for parts of a machine, involved with other parts which may have been used before, it is essential that the new parts be so distinctly pointed out, that the claim may not cover any parts that are old.]

[See Barrett v. Hall, Case No. 1,047; Brooks v. Bicknell, Id. 1,944; Hovey v. Stevens, Id. 6,746; Sullivan v. Redfield, Id. 13,597; Phillips v. Page, 24 How. (65 U. S.) 164; Parks v. Booth, 102 U. S. 96.]

At law. This was an action [by Philos Blake and others against Alvin Sperry] for an alleged violation of a patent, by the manufacture and sale by the defendant of a specific quantity of the articles which the patentee claimed the exclusive right to manufacture and sell.

It appeared that the patent was dated the 30th June, 1838, and was entitled "Blake's new and useful improvement in the mode of constructing casters and applying them to bedsteads."

The specification is in the following words:

"To all whom it may concern: Be it known, that we, Philos Blake, Eli W. Blake, and John A. Blake, of New Haven, in the county of New Haven, and state of Connecticut, have invented a new and useful improvement in the mode of constructing casters, and applying them to bedsteads; and we do hereby declare that the following is a full and exact description thereof: Our improvement consists chiefly in the adoption of such a mode of constructing and applying casters that the length of the vertical axis (on which the excellence of casters very much depends) may be extended at pleasure without materially enhancing their cost, which is effected in the following manner: We make the roller of the caster of metal or other material, in the same manner and form as the rollers of casters heretofore in use. The piece or part which receives the roller, like the corresponding part of casters heretofore in use, consists of two arms, one on each side of the roller, to receive the ends of the axis about which the roller revolves; which arms, running obliquely, unite together beyond the rim of the roller, and, being then rounded and extended upward perpendicularly, constitute the pintle or vertical axis of the caster. This pintle we make 4 inches long, and one-half inch diameter at the lower end, and, tapering to one-fourth inch diameter near the upper end, it terminates in a conical point. The caster, thus constructed, we apply to the bedstead post in one of the following methods:

"We bore a hole one-half inch diameter, and nearly 4 inches deep, into the center of the post. We then insert into this hole an instrument which cuts out a conical cavity in the wood, at the bottom of the hole; the base of said cavity being nearly or quite equal to the diameter of the hole; the angle of its vertex somewhat more obtuse than that of the conical point of the pintle. The pintle being then inserted, if the hole is of the proper depth, the weight of the bedstead will come wholly upon the point of the pintle, while the conical cavity in which it stands will maintain the coincidence of its axis with that of the post, in opposition to the lateral strain. This method is believed to be sufficient where the post is of hard wood, as is usually the case.

"Or, secondly: We bore the hole which is to receive the pintle five-eighths of an inch deeper than above specified, and insert a cylinder of cast iron or other metal, five-eighths of an inch long, having a conical cavity in its lower or outer end, and being a little larger in diameter than the hole, so that it may be firmly held by the wood when driven to the bottom of the hole; thus giving a metallic bearing to the upper end of the pintle.

"Or, thirdly: In addition to the metallic bearing to the upper end of the pintle, as just described, we make a metallic one of the lower, and also by simply bushing the lower end of the hole to the depth of an inch. The bush may consist of a strip of sheet iron of proper length, bent round into a hoop, the ends being barely butted together. One edge of this hoop being bevelled off on the outside, and placed over the hole, and driven in, the bush will be retained

firmly by the compression of the wood. If the wood of the post be very hard, the hole may require to be slightly enlarged at its outer extremity, in order to receive the bush.

"Or, fourthly: We propose to dispense with the upper metallic bearing, retain only the lower one, as on further experience we may find advisable.

"Casters applied in either of these methods may be instantly taken off and replaced at pleasure, which we esteem to be an advantage, especially in putting up and taking down the bedstead. If, however, it should be preferred to have them fastened in, this may be effected in several ways: The pintle, instead of terminating in a conical point, may terminate in a wire or pivot running up through a hole in the upper metallic bearing, and secured there by a collet, over which it is riveted; or the pintle may be encircled by a small flange near its lower extremity, and a piece of sheet iron, fastened to the bottom of the post, may reach under the flange; or the flange may be located on the pintle above the bush which makes the lower metallic bearing; and this bush may be made in two semicircular pieces, which, when put together, embrace the pintle below the flange; and both may be introduced together into the hole in the post.

"The caster constructed and applied as above described differs from other casters heretofore known and used, in the following essential and characteristic particulars, which, as applied to casters, we claim respectively as our invention, and desire to secure by letters patent: 1. In that the upper and lower bearing of the vertical axis, being distinct pieces, are both or either of them inserted or supported separately in a hole bored in the post or leg to receive that axis, the leg itself being relied upon to hold them respectively in their proper position in relation to each other, or to the axis. 2. In that the upper end of the vertical axis sustains the weight of the bedstead in the manner and under the circumstances as follows, to wit: By bearing either directly upon the wood, at the bottom of a hole bored in the leg to receive that axis, or upon a distinct piece of iron inserted at the bottom of said hole, and unconnected with the lower lateral bearing of vertical axis. 3. In that the upper end of the vertical axis receives the weight of the bedstead, and is at the same time controlled or governed in opposition to the lateral strain, in the manner, and under the circumstances, following, to wit: By being formed into a conical point, and inserted into a conical cavity in the wood at the bottom of a hole bored in the leg to receive that axis, or into a similar cavity in a distinct piece of iron, inserted into a hole, and supported there separately from, or independently of, the lower lateral bearing of that axis."

The cause was tried before the circuit court in September, 1842, and a verdict rendered for the plaintiffs in the sum of fifty dollars. Application was now made for a new trial on the ground that the patent embraces what is not the subject of patent, inasmuch as the patent had been obtained for that which had, previous to the obtaining thereof, been known to the public.

R. J. Ingersoll, in support of motion.

R. S. Baldwin and William Hungerford, contra.

JUDSON, District Judge, delivered the opinion of the court.

The motion to set aside the verdict proceeds upon the ground, substantially, that the patent does in fact embrace what is not the subject of the patent. In other words, the patent covers what had long been in use anterior to the patent. The claim thus set up requires a particular examination of the patent, and the language by which the right is supposed to have been secured to the patentees. It is a principle too well settled to require discussion or examination, that, if a patent cover matter not patentable the whole patent is void. It then becomes important, in deciding this case, to know with precision what is secured in this patent. To do this, we must first see what the patentees do not claim.

First, the roller is not claimed. The roller is disclaimed in these words: "We make the roller of the casters of metal, or other material, in the same manner and form as the rollers heretofore in use." The arms are disclaimed: "The piece or part which receives the roller, like the corresponding part of casters heretofore in use, consists of two arms, one on each side of the roller, to receive the ends of the axis about which the roller revolves." The pintle is also disclaimed: "Which arms, running obliquely unite together beyond the rim of the roller, and being then rounded and extended upward perpendicularly, constitute the pintle or vertical axis of the casters."

Having before us the various specimens of casters constructed prior to Blake's patent, this language may be well understood to exclude from the patent in question all claim to the "wheel," the "arms," and the "pintle," as each of them had been used in some form, prior to the right set up by the patent in question.

The plate caster is that which has been longest in use, and this has the wheel in all respects like the wheel used by the Blakes, but the process of attaching it to the furniture differs materially. The plate caster is attached by screws running through the plate, depending entirely on the screws to keep it fast and preserve its motion. Blake's patent differs from the plate caster.

The socket caster has for its pintle a metallic sheath or socket, covering the entire pintle. To use this caster, the socket must first be let into the leg of the bedstead, or the furniture with which it is to be used.

The sheath or socket increases the expense, and to use it too much of the leg of the furniture must be cut away.

The French caster is always incumbered with a large, heavy and expensive iron frame and braces. The pintle and wheel of the French caster are not unlike Blake's wheel and pintle, but the difference consists in that Blake's can be, and is in fact, used without the heavy, costly and cumbrous iron frame and braces. Blake's is simple, and the French caster is complicated, and in its use requires a covering of wood or cloth to hide its deformities. This heavy frame work is a part of the caster, and in a description of the French caster this frame work is embraced. Not so with Blake's.

The center-pin caster varies but little from the common old fashioned plate caster. It has the same wheel, arms and plate, with a short horn rising from the center of the plate, designed to steady the movements, but still the plate and screws are always used with the center-pin caster, and upon them alone depends the security of the caster to the furniture. In this Blake's differs materially.

The invalid caster has the same form of wheel and pintle as Blake's, but has never been used in the same manner. This, in its use and operations, has been attacked by a kind of wood frame instead of an iron frame. The pintle is much longer than Blake's, but as the pintle in itself is not claimed as any part of the present patent, the difference consists in the peculiar application of Blake's casters to the furniture. It is found that the wood frame and fixtures belong to, and always must be used with, the invalid caster; but these are now entirely dispensed with by Blake's invention.

The safe caster is the only remaining one to be considered. This, again, has the wheel and pintle similar in form and material, yet the method of applying it to the furniture and using it with the bedstead is so entirely diverse that its antecedent use can constitute no objection to this patent. If this were to be used upon the bedstead as it has been used on the safe for many years, its application to the bedstead would be to the outside of the leg, and would be confined there by some sort of metallic clasps or staples. Blake's patent differs from the safe caster in that it dispenses with all metallic fixtures and external irons, such as clasps, staples or sockets.

It was shown on the trial, by unquestionable evidence, that each and every other caster was so constructed and applied as to require either plates, frames, straps, staples or thimbles. Blake's invention allows the caster to be applied directly to the center of the foot and leg of the furniture, without any of the attendants or parts of the old machinery, always in use with all other casters. By the simple process of boring a hole in the leg of the bedstead, Blake's caster may be used without any frame work whatever. When the wood is soft, it only requires the use of the bearings.

In the statement of the case, it was remarked, that the present suit seeks to recover damage for the manufacture and sale of Blake's caster with the bearings. The proof before the jury was that the defendant had manufactured and sold a quantity of Blake's casters with the bearings. It may be proper, in this aspect of the question, to define more particularly what may be called "Blake's casters and bearings." It is the old wheel and pintle so adapted to, and arranged with, the leg of the bedstead, by inserting it in its center, that the top of the pintle may be received in the conical cavity of the upper metallic bearing driven to the top of the hole, while the lower metallic bearing constitutes a bush to the lower end of the hole. The top point of the pintle sustains the weight, while the lower bearing secures the pintle against the lateral motion.

The peculiar device or invention secured by these letters patent seems to consist in a new adaptation and arrangement of a part of an old caster with the furniture, in a manner heretofore unknown. This device dispenses with the old plate and screws by which the plate caster was attached; it dispenses with the iron frame belonging to, and a part of, the French caster; it dispenses with the wood frame and braces used with, and a part of, the invalid caster; it dispenses with the clasps and staples used with, and a part of, the safe caster; it dispenses with the sheath which was a part of the socket caster. This new arrangement is quite visible when in operation. By it the furniture is moved with ease and facility. The modus operandi is peculiar to itself. Its simplicity and cheapness render the invention useful.

That part of the invention which is new appears "with reasonable certainty on the face of the patent." When a patent is obtained for parts of a machine involved with other parts which may have been used before, it is essential that the new parts should be so distinctly pointed out that the claim may not cover any parts that are old. This motion assumes the ground that this patent is defective in this particular. But an examination of what is claimed, and what is disclaimed, on the face of the patent, leads to the conclusion that the patent in question is not subject to this objection. The "old parts" are very clearly stated, and substantially there is nothing claimed to be new except the arrangement of these old parts of a caster with, and their adaptation to, the furniture, without the other parts of other casters, which have ever and at all times been used with the old casters.

It is not necessary, at this late day, to go into the consideration of what may be denominated the principle of this invention. That may be seen in the modus operandi,

and, according to well settled authority, that is enough.

In determining this motion it is not necessary for the court to settle what might be its construction of the patent, were the action brought for the manufacture, sale or use of Blake's casters without the "bearings." As has already been remarked, this action seeks to recover damages sustained by the plaintiffs in consequence of the manufacture and sale of Blake's casters with the "bearings." It may not be improper, however, to add that the arrangement of the "upper and lower bearings," and the manner by which the same were attached to the wood, are claimed to be embraced within the "new invention," but the use of both these "bearings" may be dispensed with when the wood is sufficiently hard to resist the friction, as the patentees claim. In the case on trial there was no proof that the defendant had sold the article to be used without the bearings. It is not necessary, therefore, to go farther in this case than to determine that this patent for Blake's caster with the bearings is a valid patent.

Motion for new trial denied.

[NOTE. Patent No. 821 was granted to Philos Blake, June 30, 1838, and was also involved in Blake v. Smith, Case No. 1,502.]

Case No. 1,504.

BLAKE v. STAFFORD.

[6 Blatchf. 195; 3 Fish. Pat. Cas. 294.][1]

Circuit Court, D. Connecticut. Oct. 8, 1868.

PATENTS—INFRINGEMENT—NOVELTY — SURRENDER AND REISSUE—VALIDITY OF CLAIMS—AMBIGUITY — CONSTRUCTION — DECISION OF COMMISSIONER OF PATENTS—FINALITY — NEW COMBINATION OF WELL-KNOWN PRINCIPLES — FRAUD—PLEADING.

1. The privilege of surrender and reissue is invaluable to inventors, for, without it, they would often lose that protection for the offspring of their skill and labor which it is the immediate object of all patents to afford. As the law now stands, the decision of the commissioner is final and conclusive, in cases of reissue, unless impeached for fraud in his or the patentee's acts, or for some irregularity arising on the face of the papers, or a clear repugnance between the original and reissued patents.

[Cited in Chicago Fruit House Co. v. Busch, Case No. 2,669.]

[See Hussey v. Bradley, Case No. 6,946; Middleton Tool Co. v. Judd, Id. 9,536; Swift v. Whisen, Id. 13,700; House v. Young, Id. 6,738; Crompton v. Belknap Mills, Id. 3,406; Jordan v. Dobson, Id. 7,519; French v. Rogers, Id. 5,103.]

2. Under the act, the commissioner has the power to decide, and in every acceptance of surrender and reissue does decide, that the original patent was inoperative and invalid by reason of a defective specification, or by claiming too much, and that the error arose by inadvertency, accident or mistake, and without any fraud or deceptive intention. He is authorized to grant a new patent for the same invention, and for no other; and, when he grants the new one, the presumption is that it embraces the same invention as the original.

3. The issue of fraud can only be raised by distinct and special allegations in the plea or answer. The allegation that the "claim is fraudulently and falsely made broader and more general and comprehensive than his invention" does not properly present any material question of fact, or raise any question of fraud.

4. The averments that the specification of the reissue "is vague, ambiguous, and uncertain, and does not in a full, clear, and exact manner, or with sufficient certainty describe the invention of the said Blake, or the manner of making the machine mentioned in his declaration, * * * that it contains more than is necessary to produce the desired result, * * * that the claim for a mode of breaking stone is frivolous, * * * and that for divers other reasons the patent is void," do not raise any question of fact, except the one whether the construction of the machine is sufficiently described to enable one skilled in the art to make it.

5. The office of the claim is to define the limits of the patented discovery claimed by the inventor as his exclusive property. The language of the claim need not, unless the peculiar nature of the subject matter require it, be expressed with technical exactness. If by the use of good sense and the ordinary rules of interpretation the court can clearly see the nature and limits of the invention, the claim will be upheld.

6. If the claim is so ambiguous and uncertain that its true meaning cannot be made out without resorting to conjecture, or if it includes that which is old, and therefore not within the power of the patentee rightfully to claim, then the patent is void.

[See Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co., 114 U. S. 447, 5 Sup. Ct. 941.]

7. Whether the claim is vague and uncertain is a question of law to be determined by the rules of construction applied in the light of the state of the art. Whether it claims too much is a question of law to be determined in the same way. The element of fraud is not essential to the determination of either of these questions by the courts.

8. The good faith of the patentee is a material question for the commissioner, when deciding on the surrender and the reissue. But when the patent is brought to the test of a litigation, ambiguity or excess in the specification and claim is to be determined by construction.

9. Ambiguity, which defies construction to elucidate, is fatal, and it is unimportant whether it had its origin in the mala fides of the patentee, or in haste or incompetency of the draftsman.

10. A claim which clearly embraces what is old is void, whether introduced purposely or by mistake.

11. The fact that the patent is ambiguous, or claims too much, is the vital test of its validity, and not the motive or circumstance in which such ambiguity or excessive claim originated.

12. The rule of liberal construction rests upon public policy, and not upon cases of individual merit.

13. It may be that the ground covered by the reissue is enlarged beyond that embraced in

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq.; and here compiled and reprinted by permission. Statement and opinion from 6 Blatchf. 195, and syllabus from 3 Fish. Pat. Cas. 294.]

the original. But the true question is, whether it is broader than the original invention.

14. The question is not whether the elements of the patented combination are new, but whether the combination is new.

15. Though the separate parts are all as old as the mechanic arts, if they are organized into a new machine having a new mechanical operation, and the organization of this new machine involved the exercise of original thought and is productive of useful results, then it is patentable. If no inventive skill, but only mechanical dexterity, was necessary to produce the machine, then it is not patentable.

[See Crosby v. Lapouraille, Case No. 3,424; Latta v. Shawk, Id. 8,116; Lee v. Blandy, Id. 8,182; Emigh v. Chicago, B. & Q. R. Co., Id. 4,448; Woodman v. Stimpson, Id. 17,979; Rees v. Gould, 15 Wall. (82 U. S.) 187.]

16. Blake's patent for machinery for breaking stones, granted June 15, 1858, and reissued January 9, 1866, is valid.

[Cited in Blake v. Eagle Works Manuf'g Co., Case No. 1,494; Blake v. Rawson, Id. 1,499; Blake v. Robertson, Id. 1,500.]

This was an action at law [by Eli W. Blake against Charles W. Stafford], for the infringement of reissued letters patent granted to the plaintiff, January 9th, 1866, for an "improvement in machinery for breaking stones," on the surrender of original letters patent, granted to him as inventor, June 15th, 1858.

The action was tried before SHIPMAN, District Judge, without a jury.

SHIPMAN, District Judge. The specification of the original patent granted to the plaintiff, gave the following general description of the mechanism of his machine: "My stone-breaker, so far as respects its principle, or its essential characteristics, consists of a pair of jaws, one fixed and the other movable, between which the stones are to be broken, having their acting faces nearly in an upright position, and converging downward, one toward the other, in such manner that, while the space at the top is such as to receive the stones that are to be broken, that at the bottom is only sufficient to allow the fragments to pass when broken to the required size, and giving to the movable jaw a short and powerful vibration through a small space, say one-fourth of an inch, more or less. By means of this form and arrangement of the jaws, and this motion of the movable jaw, when a stone is dropped into the space between them, it falls down until its farther descent is arrested between their convergent faces, the movable jaw, advancing, crushes it, then, receding, liberates the fragments, and they again descend, and, if too large, are again crushed, and so on until all the fragments, having been sufficiently reduced, have passed out through the narrow space at the bottom. The details of the structure of the machine, other than those already specified, relating to the manner of supporting the jaws in their proper relative position, and giving motion with the required power to the movable jaw, may be varied indefinitely, without affecting its principle of operation." The inventor then proceeded to give a detailed description of all the parts of the machine, and concluded with the following claim: "What I claim as my invention in the herein described machine, and desire to secure by letters patent, is the combination of the following features in the construction, arrangement, and movement of the jaws, to wit: 1. Making the acting faces of the jaws upright, or so nearly so that stones will descend by their own gravity between them; 2. Making the acting faces of the jaws convergent, in such manner that, while the space between them at the top is sufficient to receive the stones that are to be broken, that at the bottom shall be only sufficient to allow the fragments to pass when broken to the required size; 3. Giving a short, vibratory movement to the movable jaw. I disclaim the above three features severally, and limit my claim to their joint co-operation, as herein described, in a machine for breaking stones or other hard substances."

In the specification of the reissued patent, the general description above cited from the original, is enlarged, by introducing the words, "and of a revolving shaft driven by steam or other power, which is made to impart to one of these jaws a continual vibratory movement," &c. There are some other unimportant verbal changes in this part of the description. The claim of the reissue is as follows: "1. The combination, in a stone-breaking machine, of the upright convergent jaws, with a revolving shaft and mechanism, for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth; 2. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth; 3. In combination with the upright converging jaws and revolving shaft, imparting a definitely limited vibration to the movable jaw, so arranging the jaws that they can be set at different distances from each other at the bottom, so as to produce fragments of any desired size."

The material difference between the specification of the original and that of the reissue consists in introducing into the general description in the latter the revolving shaft; and in an entire reconstruction of the claim. The specification and claim of the reissue are referred to in the notice filed under the general issue, in two places, and in different forms of allegation. The good faith of the plaintiff in surrendering the original and obtaining the reissue, and the identity of the two, were questioned on the argument. As the questions attempted to be raised in this part of the case are so often mooted in suits of this character, I deem it proper to recall

attention to the legal status of reissued patents in their relation to the originals, and of questions of fraud growing out of imputed motives for obtaining reissues, as well as out of alleged corrupt or deceitful practices by inventors or owners of patents, in availing themselves of the privilege conferred by the surrender and reissue clause of the act of congress.

The 13th section of the act of July 4th, 1836 (5 Stat. 122), provides, that when a patent "shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming, in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, * * * in accordance with the patentee's corrected description and specification." Under this section, patents are constantly being surrendered and reissued; and it is not to be denied that the practice is frequently attended with embarrassment to the courts and the public. Inventors are not usually sufficiently skilled in the art of nice composition, to enable them to accurately draft their own specifications. They must, therefore, resort to others; and it not unfrequently happens that the draftsman employed to describe a particular invention, either through want of skill, or from haste or ignorance of the state of the art, gives, in the specification, a very imperfect description of the thing invented. He sometimes narrows the scope of the inventor's ideas and combinations, and at other times expands them over instruments and devices which are not the product of his original thoughts. He may fail to set forth some feature of the invention which at the time is deemed unimportant, and which subsequently may be proved to be vital, or at least of great value. If the invention is of considerable pecuniary consideration, the public examine it with scrutinizing eyes, and, if an inch of ground within the true scope of the discovery is unoccupied by the specification, it is at once seized upon by parties to whose business the new improvement has a near relation. If a fatal or damaging error has crept into the description, that fact is soon ascertained by those who desire to avail themselves of whatever improvement has been discovered. The privilege of surrender and reissue is, therefore, invaluable to inventors, for without it they would often lose that protection for the offspring of their skill and labor which it is the immediate object of all patent laws to afford. It is, indeed, to be regretted that so great a proportion of the industry and intellectual acumen expended upon patents should be devoted to assailing, circumventing or defeating them, rather than to their original construction. But the greatest skill and most untiring patience would not always be able to guard against all error. The privilege of surrender and reissue is, therefore, necessary for the protection of inventors, and the act of congress has explicitly stated the cases to which it shall extend, and conferred upon the commissioner the power of determining when a patentee has brought himself within its provisions. As the law now stands, I regard the decision of the commissioner as final and conclusive, unless impeached for fraud in his or the patentee's acts, or for some irregularity arising on the face of the papers, or for a clear repugnance between the original and reissued patents. Under the act, the commissioner has the power to decide, and, in every acceptance of a surrender and every reissue, does decide, that the original patent was inoperative and invalid by reason of a defective specification or by claiming too much, and that the error arose by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. He is authorized to grant a new patent for the same invention and for no other, and, when he grants the new one, the presumption is that it embraces the same invention as the original. The jurisdiction of the commissioner is final and conclusive, unless, as already stated, fraud or collusion somewhere is proved, or some irregularity is apparent on the face of the papers, or there is a plain repugnance between the old and new specifications.

The issue of fraud can be raised only by distinct and special allegations in the plea or answer. Woodworth v. Stone [Case No. 18,021]; Allen v. Blunt [Id. 216]; Potter v. Holland [Id. 11,330]; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448; Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 380. Now, the allegations in the notice under the general issue in this case, raise no question of fraud. The averments, that the specification of the reissue "is vague, ambiguous, and uncertain, does not, in a full, clear, and exact manner or with sufficient certainty, describe the invention of the said Blake, or the manner of making the machine mentioned in his declaration, * * * that it contains more than is necessary to produce the desired result, * * * that the claim for a mode of breaking stone is frivolous, * * * and that, for divers other reasons, the patent is void," do not raise any question of fact, except the one whether the construction of the machine is sufficiently described to enable one skilled in the art to make it. Nor does the allegation that the "claim is fraudulently and falsely made broader and more general and comprehensive than his invention," properly present any material question of fact. The office of the claim is to define the limits of the patented discovery claimed

by the patentee as his exclusive property. The language of this part of the instrument need not, unless the peculiar nature of the subject-matter requires it, be expressed with technical exactness. If, by the use of good sense, and the ordinary rules of interpretation, the court can clearly see the nature and limits of the invention, the claim will be upheld. If it is so ambiguous and uncertain that its true meaning cannot be made out without resorting to conjecture, or if it includes that which is old, and, therefore, not within the power of the patentee rightfully to claim, then the patent is void. Lowell v. Lewis [Case No. 8,568]; Barrett v. Hall [Id. 1,047]; Moody v. Fiske [Id. 9,745]. Whether it is vague and uncertain is a question of law, to be determined by the rules of construction, applied in the light of the state of the art. Whether it claims too much is a question of law, to be determined in the same way. The element of fraud is not essential to the determination of either of these questions by the courts. The good faith of the patentee is a material question for the commissioner, when deciding on the surrender and the reissue. But, where the patent is brought to the test of a litigation, ambiguity or excess in the specification and claim is to be determined by construction, and the instrument must stand or fall under this test. Ambiguity which defies construction to elucidate, is fatal; and it is unimportant whether it had its origin in the mala fides of the patentee, or in the haste or incompetency of the draftsman. A claim which clearly embraces what is old is void, whether introduced purposely or by mistake. The fact that the patent is ambiguous, or claims too much, is the vital test of its validity, and not the motive or circumstance in which such ambiguity or excessive claim originated. It might be said that, if a fraudulent intent to make the specification or claim obscure, were proved by extrinsic evidence, the court ought not to give the patentee the benefit of the liberal rule of construction which prevails in favor of inventors. But this rule of construction rests upon public policy, and not upon cases of individual merit. Its application to the instrument is necessary before it can be determined whether or not the alleged defect exists. To withhold its application would be to punish before the corpus delicti is proved.

It follows, from these views, that there is no question of fraud in fact presented in this case, which is cognizable by the court. The propriety and validity of the reissue are not open questions, in the present state of the pleadings, unless presented on the face of the papers. No irregularity is discovered in the written proceedings connected with the surrender and reissue; and, after a close and careful comparison of the original and new specifications, I find no such repugnance between them as would warrant me in saying that the commissioner has exceeded his jurisdiction by reissuing the patent for a different invention from that embraced in the original. The specification of the reissue differs, of course, from that of the original. The object of the surrender was to modify the description, or claim, or both. It may be, as the defendant insists, that the ground covered by the reissue is enlarged beyond that embraced in the original. But the true question is, whether it is broader than the original invention. The first branch of the claim is, for "the combination, in a stone-breaking machine, of the upright convergent jaws, with a revolving shaft and mechanism, for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth." The second branch claims a subordinate combination of the movable jaw with the revolving shaft and fly-wheel. The first part of the third branch of the claim purports to be for a combination, but the whole sentence shows nothing more than the arrangement of the jaws and their adjustability, so that they can be set at different distances from each other at the bottom, in order to fix the size of the fragments to which the stones are to be reduced. The whole claim, when read in the light of the specification and drawings, discloses plainly the organized mechanism which the inventor has patented. It consists of two strong upright, or nearly upright, convergent jaws, fixed in a suitable frame, one of the jaws being stationary and the other movable, the movable jaw being connected with a revolving shaft and mechanism, whereby, when the motive power is applied, a definite reciprocating and vibratory movement is imparted to the movable jaw, by which it alternately advances and recedes from the fixed jaw, crushing the stones as it advances and liberating them as it recedes, so that they drop out from between the bottom of the jaws, of a size substantially determined by the distance by which they are separated when the movable jaw is drawn back. This distance, and consequently the size of the fragments, may be varied, by adjusting the machine as described in the specification.

The only difference that I can discover between the mechanical construction of the vital part of this machine and of that of the defendant is, that every part of the movable jaw of the latter advances and recedes through an equal range of motion, while, in the plaintiff's, the movable jaw is so hung and operated that the range through which it moves is greater at some points than at others. In both, the whole body of the movable jaw advances towards and recedes from the fixed jaw at every throw of the machine. By this advancing and receding motion, the stones are alternately crushed and liberated. The intervening mechanisms, by or through which the motive power is imparted, are well-known mechanical equivalents, and the common property of the mechanical world.

But the combination of these upright convergent jaws, so constructed and adjusted, with a revolving shaft, by which this action of the movable jaw is produced, appears, upon the proofs before me, to have originated with this plaintiff; and, as already stated, the only difference, in this part of the mechanism, between his machine and that of the defendant is, that the movable jaw of the former is both vibratory and reciprocating, and that of the latter reciprocating only, giving an equal range of motion to every part. It may be, that the simple motion of the defendant's jaw is preferable to the combined motion of the plaintiff's. But, assuming that to be the case, it is only an improvement on the latter. This improvement can give the defendant no right to use what the plaintiff first discovered. In my judgment, therefore, the machine of the defendant infringes on the grant secured to the plaintiff by his patent.

I have carefully examined the various patents, drawings, and models of other machines offered in evidence, to antedate the plaintiff's invention, but I do not find the same combination and arrangement of parts, nor the same mode of operation. I will here notice some of them.

The ice-breaker exhibited on the trial has a stationary and a movable jaw, but the latter is not hung, nor does it operate, in the way that the plaintiff's does. It is pivoted at a different point, and, as it moves forward, has, also, a downward motion. It is provided with sharp teeth, for penetrating and splitting the ice. Neither the whole machine, nor the movable jaw, is combined with a revolving shaft. Its arrangement and organization differ widely from the plaintiff's, and could not perform the work of breaking stone, as does the latter.

The iron squeezer, or alligator jaws, for compressing puddle balls and expelling their impurities, is still more unlike the plaintiff's machine. It operates like a lemon squeezer reversed, and gradually compresses the material partially softened by heat. It has none of that sudden, definite movement found in the plaintiff's machine, which may be termed a compound of pressure and blow, by which hard, brittle stones may be nipped and crushed to a particular size, [as found in Blake's machine.] [2]

In Ohnmacht's coal breaker, the two portions which are said to resemble the jaws in plaintiff's stone breaker are clearly different, and perform their work in a different way. One is perforated with holes, and, on the other, opposite the holes, are sharp teeth, which split the coal and force it through the opposite apertures. The coal is not reduced to fragments by compression between two solid surfaces, as in the stone breaker, but by teeth projecting from one surface driven against the pieces as they pass over the open spaces of the opposite surface. It certainly has not been proved, and it may well be doubted whether it could be proved, that this coal breaker, however massive and strong its organization, can perform successfully the work which the plaintiff's stone breaker performs, and performs well.

Poor's coal breaker has still less resemblance to the plaintiff's machine.

Hamilton's quartz crusher operates upon a different principle from the machine of the plaintiff. The work is done by a cylinder rotating on a central axis, within an eccentric stationary concave. As the cylinder oscillates, the stones in its grooves are carried around and pressed in between the cylinder and the internal surface of the approaching concave, and ground or crushed. The oscillating cylinder, which alone can perform any function similar to the plaintiff's movable jaw, has no vibratory or reciprocating motion carrying it towards a fixed object. Its oscillations describe the segment of a perfect circle. Its surface comes near, or recedes from, that of the concave, solely by reason of the eccentric sweep of the latter. It is hardly necessary for me to say that I do not find the organized mechanism described in the plaintiff's patent, in this machine of Hamilton's.

Considerable was said on the argument touching the fact that some or all of the elements included in the plaintiff's combination are old. But this is not material. The question is not whether the elements are new, but whether the combination is new. Though the separate parts are all as old as the art of the mechanic, if they are organized into a new machine, having a new mechanical operation, and the organization of this new machine involved the exercise of original thought and is productive of useful results, then it is patentable. If no inventive skill, but only mechanical dexterity, was necessary to produce it, then it is not patentable. Originality is the test of invention. If that is successfully exercised, its product is protected; and it is immaterial whether it is displayed in greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought, or slowly dawned on his mind after groping his way through many and dubious experiments. It it needless to remark, that originality may be found as well in new combinations of old elements as in the production of new ones. I think the plaintiff's machine embodies a new combination. The utility of the invention is clearly proved.

No specific damages are proved, and they are, therefore, assessed at the nominal sum of one dollar. Let a judgment for the plaintiff for that sum be entered, with costs.

Subsequently, a motion for a new trial was made by the defendant, before the court when held by NELSON, Circuit Justice, and SHIPMAN, District Judge.

[2] [From 3 Fish. Pat. Cas. 294.]

NELSON, Circuit Justice.[3] The amendment made on the surrender of the patent consisted in remodelling the claim. The descriptions and drawings are not only substantially but almost literally the same. The first amended claim embraces the first two original claims, and corrects the third original claim, which was imperfectly set forth in the first patent. The third original claim was a claim for giving a short vibratory movement, in the abstract. The second and third amended claims are well warranted from the description in the patent.

The only real question in the case arises out of the defence of want of novelty in the improvement. It has been strongly argued, that it is found substantially in one or more machines already in use—the ice breaker, or the coal breaker, or Hamilton's quartz crusher. Judge Shipman, before whom the case was tried without a jury, and who had an opportunity to examine the experts, and, also, these several machines, in connection with the testimony of the experts, came to the conclusion that the machine of the plaintiff was substantially different in combination and arrangement, and also in its mode of operation. My examination of these machines has led me to the same conclusion. Hamilton's quartz crusher embodies neither the arrangement nor the mode of operation of the plaintiff's machine, but operates on a different principle, embodying a different set of ideas; and that, I believe, is the only one produced which was intended to crush stone. The patent of the plaintiff has been before Vice Chancellor Wood, in England, on a petition for an injunction to protect it from infringement. The novelty of the machine was disputed, but the patent was sustained, and an injunction was granted.

On the whole, we are satisfied with the finding of the court, and must deny the motion for a new trial.

[NOTE. For other cases involving this patent, see note to Blake v. Robertson, Case No. 1,500.]

Case No. 1,505.

BLAKE CRUSHER CO. v. WARD.

[1 Am. Law T. Rep. (N. S.) 423.]

Circuit Court, E. D. Michigan. Jan., 1874.

EQUITY PLEADING—VERIFICATION OF BILL—CONTENTS OF NOTARIAL CERTIFICATE—NOTARY PUBLIC—TAKING DEPOSITIONS—ENTITLING OF AFFIDAVITS.

[1. The verifying of a bill in equity, and the taking of a deposition before a notary public, are "acts in relation to evidence," within Act July 29, 1854, (10 Stat. 315.)]

[Cited in Re McKibben, Case No. 8,859. See In re Bailey, Case No. 727; In re McDuffee, Id. 8,778; contra, under Rev. St. §§ 1778, 5596, see Buerk v. Imhaeuser, Id. 2,107.]

[2. An affidavit entitled as in a cause pending and taken before such cause existed cannot be read in evidence with the entitling, nor after the rejection of the entitling if the rejection renders material portions meaningless.]

[3. Where an agent of a corporation signs and verifies a bill for a preliminary injunction, the notarial certificate should show that the person making oath was the person who signed the bill; that he was agent of the corporate complainant; and that he signed it for one of the reasons required by equity rule 95; and should designate the portions sworn to on knowledge, and those on information and belief.]

In equity. Motion for a preliminary injunction on bill of complaint and accompanying affidavits, to restrain the defendants from an alleged infringement of a patent for a stone crusher. The affidavits were made, some in Connecticut and some in Pennsylvania, and were all sworn to before notaries public. They were all made before this suit was commenced. They are, nevertheless, all entitled in a cause the same as is the entitling of this case, notwithstanding that no such cause was pending or in existence at the times the affidavits were made.

The bill was signed and the verification of the same was by an agent and director of the complainant corporation; and the verification appears also to have been made before a notary public of the state of Connecticut.

No answer has been put in nor counter affidavits filed, but at the hearing of the motion the defendants appeared by counsel and opposed the granting of the motion on the grounds: 1. That the verification of the bill and the affidavits were not entitled to be read and used because they were not taken before an officer authorized to take the same to be used in this court. 2. The affidavits are entitled in a cause which had no existence when they were made. 3. That the verification of the bill is insufficient because it is upon information and belief only, and is otherwise defective.

Mr. A. Russell, for complainant.

Mr. H. B. Brown, for defendant.

LONGYEAR, District Judge. First. As to the officers before whom the verification and affidavits were taken. The act of congress of July 29th, 1854 (10 Stat. 315), provides, "that notaries public be and they are hereby authorized to take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgment of bail and affidavits may now lawfully take or do." I think it safe to assume that taking of verifications to bills and answers, and of affidavits in support of or to oppose motions for injunction, are "acts in relation to evidence," within the meaning of the above provision; and, therefore, the verification and affidavits were properly taken before such officers. By the previous acts of September 16th, 1850 (9 Stat. 458), the signature and

[3] [Opinion of Mr. Justice Nelson, on motion for a new trial, reported in 6 Blatchf. 206.]

official seal of the notary was recognized as sufficient evidence of his official character and the genuineness of his acts; and as the act of July 29th, 1854, was supplementary to the act of 1850, the same recognition must be extended to the signature and seal of the notary under that act. See, also, Goodyear v. Hullihen [Case No. 5,573]. In the present case, the jurats to the verification of the bill, and to the affidavits, all have the signatures and official seals of the notaries, and are therefore sufficiently authenticated.

Second. As to the entitling of the affidavits as in a cause pending when no such suit was in existence at the time. By an unbroken current of decisions, some of which are cited below, in England and in this country, such affidavits are not entitled to be read or used for any purpose whatever. The test, and the main ground of their rejection is, that there being no such cause in existence at the time, the affiant could not be convicted of perjury if the affidavit is false. Regem v. Jones, 1 Strange, 704; Rex v. Pierson, Arch. [Andrews,] 313; Rex v. Harrison, 6 Term R. 60; King v. Cole, Id. 640; 1 Daniell, Ch. Pr. 891; Humphrey v. Cande, 2 Cow. 509; Haight v. Turner, 2 Johns. 371; In re Bronson, 12 Johns. 460; Milliken v. Selye, 3 Denio, 54; Hawley v. Donnelly, 8 Paige, 415. In Re Bronson two of the judges thought the entitling might be rejected as surplusage, but the majority of the court decided otherwise, and the affidavits were rejected. And in some of the English cases cited, the question of rejecting the entitling as surplusage was mooted, and it was held that, even if competent in any case, it could not be done in those cases, because it would render many material portions of the affidavits meaningless on account of references to "the said defendant," &c. That is precisely the case here. It results, therefore, that, with the entitling retained, the affidavits cannot be read; with the entitling rejected, they are in many material portions meaningless. The affidavits must therefore be rejected.

Third. As to the verification of the bill. This is evidenced only by the jurat of the officer before whom the verification was made. The jurat is as follows:—"United States of America, District of Connecticut,—ss.: New Haven, 4th October, 1873. Then personally appeared before me John A. Blake, agent and director of the orators in the foregoing bill of complaint, and made solemn oath that the same, and the allegations therein contained, are true, upon his knowledge, information, and belief. (Signed) George Sherman, Notary Public. (Notarial Seal.)"

Without this verification there is no proof of the allegations of the bill as to complainant's title to the patent in question, the novelty of the same, complainant's use and enjoyment, of the decisions of courts sustaining the same, all material to be proven on an application for a preliminary injunction. 2 Daniell, Ch. Pr. 1644. The question of the validity of the verification is therefore important. Equity rule ninety-five is as follows: "That bills in equity may be verified by the agent or solicitor of the complainant: —First. When the party is at the time absent from the district. Second. When the facts are within the personal knowledge of the agent or solicitor." Aside from this rule (and it is doubtful if this rule can be applied to bills by corporations, as in this case), there is no rule or provision of law, by act of congress or otherwise, prescribing the manner of verifying bills, or even requiring them to be verified at all, in any case. Beyond all doubt, however, the material allegations of injunction bills, especially in patent and copyright cases, upon which a preliminary injunction is moved, must be verified in some manner. In England, this appears to have been done by affidavit, subscribed and sworn to in the usual form (1 Daniell, Ch. Pr. 392, and note; 3 Daniell, Ch. Pr. 2165); and in the absence of any law or rule to the contrary, such should be the practice here. Equity Rule 90.

A practice has grown up, however, in the equity courts of the United States, and is of long standing in this district, and no doubt in most of the others, of verifying bills by the complainant, his agent, or solicitor, making oath to the truth of the bill itself, the officer administering the oath adding his jurat, or certificate of the fact, as was done in this case. And I am inclined to the opinion that such practice has been of sufficiently long standing, and of such uniformity, as to give it the authority of a rule of practice, and therefore to hold that this manner of verifying bills is competent in this court.

The certificate or jurat of the officer should show clearly and specifically that all those things necessary for the court to know and be informed of were sworn to. It should appear that the person making oath is the same person who signed the bill; and when the bill is signed by an agent or officer of a corporation complainant, or by an agent or the solicitor of the complainant, it should appear that the person made oath that he was such agent, officer, or solicitor; and when by the agent or solicitor of complainant (except perhaps in the case of a corporation complainant) it should appear that such agent or solicitor made oath to the reason for his making the oath instead of the complainant, in order that the court may see that such agent or solicitor was competent to make the oath under equity rule nine-five; it should also appear, although perhaps this is not essential, that the person making oath made oath to his knowledge of the contents of the bill; and when he swears partly upon his knowledge, and partly upon his information and belief, it should clearly appear what portions of such contents he so swears to upon knowledge, and what portions upon information and belief.

Apply these tests to the jurat to the pres-

ent bill and fatal defects are at once apparent—so apparent as to avoid the necessity of specifying them here.

It results that the motion cannot be granted as the case now stands. It will not, however, be dismissed, but it will be allowed to stand over, with leave to complainant to have its bill properly verified, and to file and serve affidavits in support of the motion within thirty days, and to the defendants to file and serve affidavits in opposition within ten days thereafter. Ordered accordingly.

BLAKEMAN v. The PACIFIC. See Case No. 1,571.

BLAKEMORE (ESTILL v.). See Case No. 4,538.

BLAKENEY (EVANS v.). See Case No. 4,553.

BLAKESLEE (WRIGHT v.). See Case No. 18,073.

BLANC (LASTRAPES v.). See Case No. 8,100.

Case No. 1,506.

BLANCHARD v. BEERS et al.

[2 Blatchf. 411.][1]

Circuit Court, D. Connecticut. Sept. 24, 1852.

PATENTS—COMBINATION—INFRINGEMENT—TESTS—IDENTITY OF MACHINES.

1. The claim in Thomas Blanchard's patent of January 20th, 1820, for "a machine for turning and cutting irregular forms," construed and defined.

2. A person who uses the combination claimed by Blanchard, though in a machine which will make only wagon-spokes, infringes the patent.

[Cited in Thompson v. American Bank-Note Co., 35 Fed. 204.]

3. The proper tests for determining the identity of one machine with another, on the question of infringement, defined.

[Cited in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 866.]

At law. This was an action [by Thomas Blanchard against Philo S. Beers and Albert Goodyear] for the infringement of letters patent granted to Thomas Blanchard, January 20th, 1820, for "a machine for turning and cutting irregular forms." The history of the patent and a copy of its specification are set forth in 1 Blatchf. 258, 259, 261–269 [Blanchard's Gun-Stock Turning Factory v. Warner, Case No. 1,521]. This action was brought upon an extension of the patent granted by congress by special act, passed February 15th, 1847 (9 Stat. 683), for fourteen years from January 20th, 1848.

Charles M. Keller, for plaintiff.

Roger S. Baldwin, for defendants.

NELSON, Circuit Justice, in charging the jury, remarked as follows:

As regards the several renewals of Mr. Blanchard's patent by acts of congress, some reflections have been indulged in by the learned counsel for the defendants, by way of prejudice to the patentee's claim, on account of the length of time for which his invention has been secured to him. It is, therefore, proper to say that, so far as the court and jury are concerned, those acts must be regarded as having been properly passed. Independently of the discretion that congress may exercise in respect to any particular patent, the statute provides, and such is the practice of the patent office under it, that if a patentee, near the expiration of the term of his patent, can satisfy the commissioner of patents that he has not been remunerated by the profits of his invention, over and above the losses and expenses incurred and the time bestowed upon the subject, it is the duty of that officer to extend the term, so as to enable the inventor to derive, from the sale of his invention, a reasonable compensation for his genius and his labor; and it is very probable that, in view of these considerations, founded upon the case presented by Mr. Blanchard, congress became satisfied that it was fit and proper that his patent should be continued. Very likely the great litigation to which the patent has been subjected, and the enormous expenses necessarily attending suits of the description of the one now before you, satisfied that body that Mr. Blanchard had not been reasonably compensated for the great benefit his invention had conferred upon the country, and they therefore deemed it their duty to prolong the term.

The patent is for an improvement in a machine for cutting, out of wood or other materials, irregular forms, such as gun-stocks, axe-handles, shoe-lasts and other articles requiring irregular forms in their construction and use. The first thing to inquire into and ascertain and settle in your minds is, the thing invented, so as to enable you to determine, when examining the machine of the defendants, whether or not that machine is an infringement, or, in other words, embodies the same ideas in its arrangement. You must first comprehend the discovery made by Blanchard, for, until you comprehend that, you will not be able, upon examining the machine of the defendants, to determine whether or not that machine is substantially the same invention, embodying the same principle which was discovered by Blanchard and embodied in his machine.

I do not intend to take up much of your time in going over the description given by Blanchard in his specification. The subject is not new in this court, as the patent has unfortunately been one of much litigation. The first part of the specification is devoted to a description of the various parts which constitute the organized machine, so as to enable a mechanic of ordinary skill and intelligence to construct a machine. Under the second head in his specification, the pat-

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

entee explains the principle embodied in his machine, in other words, the novel characteristics or inventive elements of the machine, by which he claims it to be distinguished from all previous machines then in existence; and, in the conclusion of that head, it is stated that, as to the mechanical powers by which the movements of his machine are obtained, he claims nothing new. These movements, he says, may be effected by the application of various powers which would be furnished by a skilful mechanic when called upon for that purpose. Neither does he claim as new the cutter-wheel, or the friction-wheel, or the guide-wheel, or the model, separately or in the abstract. All these are common property, and anybody may use them. But he claims, as his invention, the method or mode of operation in the abstract, as explained in the second article, whereby an infinite variety of irregular forms may be cut or produced.

The principle or inventive element to be found in this machine is this: It is the cutting or turning of any given article of an irregular form longitudinally and transversely, by one joint operation. This is the novel idea struck out by Blanchard in 1820, and which he embodied in a practical working machine, which, as it has been shown, produces almost every variety of irregular form in the way mentioned. It has been suggested that this was no very great discovery after the existing state of the arts in that branch of knowledge. Yet it is historically true that, although we were in the beginning of the nineteenth century, no person had discovered that idea; or, if it had been discovered, no person, down to that time, had embodied it in a practical machine. There had been machines for cutting irregular figures or forms transversely alone, and there had also been machines for cutting irregular forms laterally or lengthwise. All these had already been discovered and had already been produced; but the idea of cutting such forms both longitudinally and transversely, by a joint operation, had never been discovered. That is the idea which occurred to Blanchard, and which has produced the extraordinary results that have been disclosed in the course of this trial. It is not surprising, therefore, that the government and the country should have been kind to one of whom it may well be proud; because, the very first application of this discovery, the fruits of his genius, was for the benefit of that government, namely, in manufacturing the gun-stock, which, down to that time, had been made by hand, and which has since been made by his machine.

It will be found, on looking at the description of this invention, contained in the patent, as well as by an examination of the organized machine, that this idea, which first occurred to Blanchard, has been embodied in a practical machine, which he has perfected by experiment and practice. The invention consists in the combination of four instruments in the mode pointed out in the patent, by which the machine cuts irregular forms longitudinally or lengthwise, and transversely or crosswise, by a joint operation. The gun-stock, as a product of the machine, strikingly exemplifies this combination. So do the shoe-last, the wagon-spoke and the axe-handle, though the last two do not in so marked and distinct a manner, because the irregularities, either longitudinally or transversely, in the wagon-spoke and in the axe-handle, are slight compared with those in the others, as is obvious upon a slight examination of the different instruments.

I had intended to call your attention somewhat particularly to the two old machines produced on the part of the defendants, as it was supposed that the originality of Blanchard's discovery was intended to be contested. I was aware that, upon some previous trials, these machines had been used and relied on with that view by the defendants; but, inasmuch as it has been stated that they have not been introduced for the purpose of contesting the originality of Blanchard's invention, I shall not take up your time with them, but shall assume that he is the inventor of this combination, and is entitled not only to the merit of it, but to be protected in the enjoyment of its exclusive use, so long as his patent continues.

The only material question, therefore, involved in the case, for the consideration of either the court or the jury, is, whether or not the machine of the defendants is an infringement of the plaintiff's patent—that is, whether it is substantially the same or substantially different. This question is often one of great difficulty, and is usually the most embarrassing question involved in the trial of these patent cases. It calls, therefore, for patient and attentive examination and great care on the part of the jury, in looking into the evidence in the case, and into the several machines furnished by the parties for our information.

The machine of Blanchard embraces, in its scope and operation, the cutting of almost every species of irregular form, embracing any given extent of irregularity of form, as you have already seen, such as gun-stocks, lasts, &c., by means of the application of the combination or principle which he has discovered; and it is claimed, on the part of the plaintiff, that the defendants have appropriated this combination or principle, in order to obtain the benefit of one of the uses of his machine, namely, for making wagon-spokes. This raises the particular question in the case for your consideration.

As I have already stated, the invention of Blanchard consists in the combination of four instruments, the model, the rough material, the tracer or friction-wheel, and the rotary cutter, in the mode he has particularly described, by means of which the machine cuts irregularities, longitudinally and trans-

versely, by one joint operation. This combination thus formed may be and is applied successfully to the turning of wagon-spokes; and it is insisted by the plaintiff, that the defendants have embodied this combination in their machine, and are, by means of it, enabled to do the same work. If this be so, they have infringed upon the rights of Blanchard, although their machine has been so constructed as to perform but one of the functions of Blanchard's. For, if they can appropriate the plaintiff's combination for one of the uses or functions of his machine, because it is performed separately, another person may appropriate another function, and so on, until there is nothing embodied in his machine left unappropriated. The question then comes to this: Have or have not the defendants incorporated in their machine, in substance, the combination or principle of Blanchard? If they have, they are guilty of an infringement. If they have not, they are not guilty.

In examining a machine, with the view to ascertain whether or not it is an infringement of a previous one, the similarity or dissimilarity of the mechanical construction is not necessarily conclusive or controlling. Its structure may be apparently very similar in form, and yet its principle and operation and result may be very different. So, on the other hand, its structure and appearance may be very different to the eye and in point of fact, and yet it may, in reality and in principle, be the same as the previous machine. The mere mechanical construction and form of a machine are not, therefore, always a test of its identity or want of identity, and it would be unsafe for a court or a jury to act upon the idea that, because two machines are different in their mechanical structure, either in appearance or reality, they are not substantially the same. The principle embodied in a machine, and which gives to it all of its utility, may be put in successful practical operation by different mechanical contrivances, depending more upon the skill of the mechanic than the genius of the inventor. Hence, it is unsafe to rely upon the mere difference in the mechanical construction. The sure test, and the one the jury should be guided by in all cases of this kind is, whether or not the defendant's machine, (whatever may be its form or mechanical construction,) has incorporated within it the principle or the combination or the novel ideas which constitute the improvement to be found in the plaintiff's machine. If it does, then, no matter what may be its mechanical construction or its form, it is an infringement—an appropriation of the ideas of another, simply in a different form. You will, therefore, in view of this consideration, examine these machines, and the evidence that has been produced in the course of the trial, as well as the opinions of the experts, given to aid you in determining the character of the machines, and ascertain whether or not the combination or principle which I have stated to you as constituting the invention of Blanchard is found incorporated substantially in the machine of the defendants—whether you there find substantially the model, the rough material, the tracer and the cutter, by the means and combination of which a wagon-spoke of irregular form, longitudinally or transversely, is produced by one joint operation. The plaintiff claims that this combination—this new idea—is incorporated in the defendants' machine and gives to it its useful effect in manufacturing wagon-spokes.

Coming down more closely to the point in controversy between the parties, it will be seen that the question is even more narrow than the one I have already stated. It is, whether or not the defendants' machine embraces the combination or principle by which the irregular form of the spoke is cut longitudinally and transversely by one joint operation. They insist that they do not use the same means as Blanchard, either formally or substantially, for the purpose of producing this irregular form longitudinally; and they deny that there is any such operation as a longitudinal cut upon their spoke, in the operation of the machine. You have before you the products of both machines. That this irregular form lengthwise is impressed upon the spokes which the defendants manufacture, is certain; and the question is, whether or not this form is produced by substantially the same principle or the same combination as that used by Blanchard. The defendants claim that they do not use the same combination, that they do not use a model, and that they have discovered new and different means for accomplishing this purpose, namely, an arrangement of cutters, and the use of cams and a tracer on the rail upon which the vibratory lathe containing the rough material is moved from one stage of cutting to the other, so that the rough material may approach to or recede from the cutters from one end to the other. This combination is claimed to be substantially different from the combination used by the plaintiff.

It is material, at this stage of the case, to recall your attention to a principle already stated, namely, that whether or not the one machine is an infringement of the other does not necessarily depend upon whether their mechanical structures are different. But the question is, whether (whatever may be the mechanical construction) the later machine contains the means or combination found in the previous machine—whether, taking the structure as you find it, you see the new idea embodied in it. If the combination of Blanchard is found substantially incorporated in the defendants' machine, then, its mechanical construction, whatever it may be, is, as matter of law, but an equivalent for the mechanical construction

of Blanchard's machine. No man can appropriate the benefit of the new ideas which another has originated and put into practical use, because he may have been enabled, by superior mechanical skill, to embody them in a form different in appearance or different in reality. For, although he may not have preserved the exterior appearance of the previous machine, he may have appropriated the ideas which give to it all its value.

Undoubtedly, in the construction of a machine for the purpose of producing one of the functions or results of the plaintiff's machine, there may be very great departures from it, and still the new machine may contain his principle of operation. His machine is constructed to cut almost every variety of irregular forms, and hence, from necessity, there must be a single and narrow knife or cutter, to enable him to cut the minuter sinuosities of the article required, such for instance as the shoe-last or the human face. A tool used in Blanchard's machine for the purpose of cutting the last or the human face, or any other exceedingly irregular surface or form, must be small, and, when it is used for all purposes, as it is in the original machine of Blanchard, of course, in cutting irregular forms where the irregularities are small and few, the cutting must be comparatively slow. But, when the principle of Blanchard's is embodied in a machine constructed for and applied to one of the purposes of his, such as making spokes or axe-handles, it requires no great observation to see that in the case of a Blanchard machine so made, to accomplish but one of its purposes, and where the irregularity is simple and the lines diverge longitudinally but little, it would not be necessary to use the narrow knife that would be necessary to cut the form of the human face or any other very irregular body, but that a wider one might be used, by which the work could be done more readily. Take, for instance, the case in hand —the idea of constructing a machine to be devoted exclusively to the cutting of wagon-spokes. It is clear that the knife might be made broad enough to cut the principal part of the spoke by one operation, because the irregularity is small and the lines are nearly straight; and then a smaller knife might be used for the purpose of finishing the remainder of the article.

I call your attention to this consideration because it is unfair, I think, to take Blanchard's machine constructed for the purpose of cutting any irregular form, however great the irregularity may be, and contrast it with one that has been made for the purpose of performing only one of the functions which is performed by Blanchard's. The machine and the tools to be used, when the object is to cut any irregular form, must be constructed with regard to the minute sinuosities of some of the articles that it may be necessary to make. It is, therefore, unfair, when the question is between Blanchard's machine thus organized and a machine organized for one particular purpose, and to produce one particular result of Blanchard's machine, such as the wagon-spoke, to hold that, because the machine organized for that specific purpose is differently constructed, and dissimilar in appearance, and can produce the particular thing more rapidly, it therefore necessarily fails to embody the same idea or combination. We know that any machine constructed to accomplish a particular object or purpose may be often materially changed from the original construction, and yet do the work very well. There are mechanical equivalents, by the use of which the whole features may be changed and a great departure made from the apparent principle and combination of the machine, and yet it may operate well. In view of this consideration, it should be particularly noticed in this case, that the defendants' machine has been constructed for one object—for the purpose of turning wagon-spokes of slight irregularity of form, and, therefore, as is obvious, may admit of very material changes from the original machine.

It will be proper, therefore, for you to look into these two machines, and see whether or not the change in the organization of the defendants' machine from the plaintiff's might not have been the production of the skill of a mechanic examining and studying the Blanchard machine, with a view to reorganize it and adapt it to the performance of one of its functions, namely, producing an axe-handle or a wagon-spoke. Because, whenever a defendant sets up that he has substantially departed from the existing machine, so as to avoid the consequence of an infringement, it is necessary that he should satisfy the court and jury that his departure has been such as involves invention and not mere mechanical skill, in order to entitle him to a patent for the discovery. There must be mind and inventive genius involved in it, and not the mere skill of the workman.

It must be admitted, that the machine of the defendants does cut the article in an irregular form longitudinally and transversely, by one joint operation. There is an irregularity both lengthwise and crosswise, as it respects the two first sections of the spoke, and the question is, whether or not the defendants have used, in thus cutting the spoke, substantially the means and combination of ideas used by Blanchard in his machine in producing the same article.

These views present all that I mean to trouble you with upon the main question in the case. As to the fact that the defendants' machine can cut a greater number of spokes in a given time than the plaintiff's, the law is as stated by the counsel on both sides. That fact may be taken into consideration in examining into the question whether or not the principle or combination of the two machines is substantially the same. If it is,

then, without regard to the result, and although a greater number of spokes can be made by the defendants' machine in a given time, that machine would still be an infringement. This superiority is sometimes produced by a superior construction of the machine; or, it may in this case be the result of making one adapted exclusively to the accomplishment of one of the purposes of Blanchard's; or, it may be the result of an improvement on his; but this will not entitle its author to use the principle or combination of Blanchard's.

There has been very little evidence, in the course of the trial, on the question of damages, and I presume that the counsel on both sides regard the main question in the case as the important one.

[NOTE. For other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515, and note at end of Blanchard Gun-Stock Turning Factory v. Warner, Id. 1,521.]

Case No. 1,507.

BLANCHARD v. BROWN.

[1 Wall. Jr. 309.] [1]

Circuit Court, D. Pennsylvania. April 16, 1849.

JURY—PRACTICE—PEREMPTORY CHALLENGE.

No peremptory challenges are allowed in this court where the jury has already been struck on both sides.

This cause coming before a jury which had been struck on both sides, Mr. Hirst asked permission to make two more peremptory challenges, in the way allowed in the state courts under the act of their legislature (Act April 4, 1809, § 2) which provides "that in all civil suits each party shall be allowed to challenge two jurors peremptorily." He said that the state practice had been uniformly adhered to in this court for twenty years; a statement in which Mr. Randall and other gentlemen of considerable experience, had confirmed him in a previous case (White v. Brown [Case No. 17,538]), where the right was a good deal insisted upon, as part of the settled practice of the court.

GRIER, Circuit Justice. I have allowed these challenges to be made once or twice by consent of parties; but it is in violation of common sense and of the spirit of the decision of the supreme court of Pennsylvania which refused to extend the privilege in the case of special juries further than the letter of the act required, Shwenk v. Umstead, 6 Serg. & R. 351. Their language is thus, and we entirely agree with it: "The sense and spirit of the privilege is, that a party shall possess the power of challenging at least two persons who may be obnoxious to him, but against whom there is no legal exception as jurors. This is a proper indulgence even to prejudice; but the reason ceases when he has an opportunity of striking off twelve. If a practice had not prevailed to the contrary, I should much doubt this right in any case of special jury. Why should this indulgence and arbitrary discretion be extended to fourteen? Why should the suitor, after striking out at his pleasure, one full jury, have the right, on the trial, to strike out two jurors more without cause? He has, in the words of the venire, put himself on the jury so struck."

If the state practice has been adopted here it has been through inattention; and now that its incorrectness is pointed out, will not be allowed any more. I may further say that I believe that even in the state, the practice is confined to the south eastern part of it. It does not, I know, prevail in the west. Challenges refused.

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

Case No. 1,508.

BLANCHARD et al. v. The CAVALIER.

[38 Hunt, Mer. Mag. 325.]

District Court, S. D. New York. Nov., 1857.

ADMIRALTY—LIBEL FOR POSSESSION—ATTACHMENT OF RES—NOTICE TO CLAIMANT.

[In admiralty. Attachment issued against the ship Cavalier on a libel by Alfred Blanchard and others for possession. Notice was to have been given to all persons claiming the ship, but no person or party was designated to whom such notice should be given. Messrs. Snow & Burgess move to discharge the attachment for irregularity in not having been taken out against them and served on them specifically by name. Granted.]

The libel is averred to be "in a cause of possession civil and maritime," and alleges that the libelants are owners of the ship by purchase at a marshal's sale, and that ever since such purchase possession thereof has been wrongfully withheld from them by Snow & Burgess, of this city, on the pretence of having some claim or interest in her, as owners or otherwise.

BETTS, District Judge. The libelants have proceeded as in an ordinary action in rem grounded upon a lien on the ship in which adverse parties in interest need be admonished or cited only by arrest of the vessel and publication of a general notice thereof to all concerned. This is a misapprehension. The 20th rule of the supreme court directs that in such cases the process shall be an arrest of the ship and admonition to the adverse party to appear and make answer. This constitutes a proceeding in a suit "in personam" to be litigated between the parties individually, the vessel being placed under attachment only for the purpose of being adjudged to the possession of the party who shall establish his right against his adversary. It must accordingly

be instituted and conducted in the mode appropriated to that form of proceeding, and not as an action "in rem." The applicants having put in their answer and being ready to bond the vessel, they can be permitted to do so forthwith without the ship being subject to the cost of re-attachment. Motion to vacate attachment granted with costs, and attachment discharged on the execution of such bond by the claimants.

Case No. 1,509.

BLANCHARD v. ELDRIDGE.

[47 Jour. Fr. Inst. 259.]

Circuit Court, E. D. Pennsylvania. March 8, 1849.

PATENTS—SPECIFICATIONS — DESCRIPTION — CONSTRUCTION OF PATENT — LIMITATION—MACHINE FOR TURNING IRREGULAR FORMS.

[1. While the patent law requires that the patentee shall show in his specifications the most beneficial mode of applying his invention, it does not require that he shall point out all the possible contrivances by which the principle can be applied.]

[2. The Blanchard patent for a machine for turning irregular forms, being properly construed, covers in substance a tracer so arranged as to pass in a spiral or helical line over the surface of a revolving model, while the rough material revolves in a similar line under a cutter guided by the tracer, but acting with an independent, rapid motion; and infringement cannot be avoided by changing the cutter in details of construction or method of operation.]

[In equity. Suit by Thomas Blanchard against Eldridge for infringement of complainant's patent for a machine for turning irregular forms. Decree for complainant. Defendant's motion for a new trial denied. Blanchard v. Eldridge, Case No. 1,510. Plaintiff now moves for attachment against defendant for breach of injunction. Attachment awarded.]

Saunders Lewis, for complainant.
W. L. Hirst, for respondent.

KANE, District Judge. The patent right of Mr. Blanchard has been the subject of examination before me in two trials at law, the present defendant being a party. Although no verdicts were rendered, I was fully satisfied by the evidence, that the patent was a highly meritorious one, of ancient date, and that the defendant had violated it. I did not hesitate, therefore, to grant an injunction against him, upon the proper proceedings being executed in equity. This injunction being still in force, the defendant devised a new machine, and is now using it as the complainant asserts, in violation of the injunction. The question is thus presented, whether the new machine of the defendant infringes the complainant's patent right.

In my charge to the jury on the other side of this court, I spoke of Mr. Blanchard's machine as follows: "It is a turning machine, capable of producing with rapidity from the rough material, by a single operation, an irregular form, similar or proportional in all respects to a given model. It consists essentially of a model revolving in contact with a friction tracer, while the rough material revolves, with the same velocity, in like contact with a rapidly moving cutter wheel; either the model and material, or else the friction tracer and cutting wheel, having a progressive lateral motion, so that by the revolutions of the model and the material, all the points of their respective surfaces are presented in succession to the touch of the friction tracer and the action of the cutter respectively; that is to say, all the points on the surface of the model successively to the touch of the tracer, and the corresponding points on the surface of the material to the action of the cutter wheel. Its value consists in this, that it combines the accurate imitation of a slowly revolving model, with the rapid action of a cutter wheel. Its principle is the combination of the cutter wheel, model, and friction tracer, with the arrangement for effecting the lateral motion."

Between this and the respondent's present machine, there appears to be but a single point of difference. "The peculiar novelty of the respondent's machine, according to the report of the commissioner, William W. Hubbell, Esq., appears to be in the formation, suspension, and matter of propelling the cutting instrument, to shape the last from the rough block, without finishing. The cutting instrument consists of a double edged curved knife of about the same curve or periphery as the friction column; it is bolted to a perpendicular iron bar, about an inch square, which plays up and down between and through two iron straps, fastened to the main transverse carriage. This cutting instrument receives its motion from a pitman, attached to a crank, put in very rapid revolution, and thereby with great velocity moves the cutting instrument in a straight perpendicular line up and down, which being sharp on both the upper and lower edges, in passing the rough material, cuts it both in its ascent and descent. Attached to the crank shaft are a fly wheel and a balance weight."

The two machines, then, have the same object; and they attain it by the same means, operating in the same manner, except that Mr. Blanchard's cutters are set on the periphery of a wheel, and act in the curved line of its motion, while in Mr. Eldridge's, the circular motion is transferred to a shaft, and the cutters, being affixed to this, act with an alternating movement in a right line.

It is not contended that the shaft is an improvement on the wheel, that it is more economical of structure or use, or that it does its work more effectively or rapidly. On the contrary, it is evident that, if well made, it must be more costly at first, that it must exact the expenditure of more power in working, must do the work less rapidly

and less perfectly, and must be less durable. The only question to be decided is whether it differs in principle, or by a modification of details merely, a substitution of equivalents, —whether, in a word, it is or is not an evasion of the complainant's patent.

I have heretofore spoken of the principle of the patented machine, as involving the combination of a cutter wheel with certain other parts. This language was sufficiently accurate, perhaps, for the purposes of the occasion, since there was then no controversy regarding a machine without a cutter wheel. But it was rather a description of Mr. Blanchard's machine as in use, than a definition of its principle. In his specification he says: "Moreover the cutters may be made sharp on both edges, and the cutter wheel may be made to turn a quarter circle or less, backward and forward, and so the cutters be made to cut by both edges, but the continued circular movement is believed to be preferable to any other."

Now, when the cutters are acting with this alternate or reciprocating motion, they can scarcely be considered as moving on a cutter wheel, implying, as this does, the idea of continuous rotation. The abstract principle, therefore, that shall include both forms of structure, cannot recognize the cutter wheel, strictly speaking, as an element of the combination, but rather a cutter, or series of cutters, deriving motion from a circle, and acting in a circular arc. If this were the correct definition of Mr. Blanchard's principle, the difference between the two machines would be resolved very easily. One, the patented, applies the revolving power, immediately to its work, in the most simple, convenient, economical, and effective mode;—the other, the defendant's, interposes between the revolving power and the work an additional member, that serves no purpose whatever, unless to avoid identity with the patented machine.

The patent law would give but an illusory protection to the meritorious inventor, if it respected devices like this. It requires of a patentee, that he shall disclose in his specification the most beneficial mode of applying his principle that is known to him. Neilson's Patent, Webster, Pat. Cas. 337. But it does not require of him to go further, and point out all the possible contrivances by which the machine that illustrates his principle can be rendered less beneficial or less perfect. The more fully matured his discovery, the more complete in all its parts, the more signally and immediately profitable to the community,—the greater will be the number of the defects it has avoided or provided for, and the greater, of course, the number of changes for the worse that may be grafted upon it by a froward ingenuity. For surely ingenuity may be so styled, when it toils with inverted energies, not to improve or advance, but to devise something less useful and more costly than that which was known before.

But in truth, the principle of Mr. Blanchard's invention calls for a less restricted definition than that which I have for the moment assumed. Strike out from his specification all the details of structure, or look through them into the inventive idea, the essential principle that resides within, and what do we find? A tracer, so arranged as to pass in a spiral or helix line over the surface of a model, while the rough material revolves in a similar line under a cutter, guided by the tracer, but acting with independent, rapid motion,—the combination of these for a declared purpose; this is the principal of the Blanchard patent. All the rest is detail, properly introduced into the specification, as exhibiting "the most beneficial mode of applying the principle," but essentially forming no part of it.

Now although it be true, that, technically speaking, an inventor cannot claim a patent for the principle he has discovered, yet it is equally true that, if he has embodied it in any clear, definite and distinct form, others will not be permitted to take that principle and embody it in some other form merely copied from his; "and thus," as well argued in the case I have cited, "you may attain a result which is practically equivalent to the patenting of a principle;" for when you have put your intention into shape, no person will be allowed to come in and steal the spirit of your invention, by putting it into some other shape, which, though different, is imitated from yours.

The defendant in this case has mistaken his legal rights; and the sooner he is advised of his error, the better for him and the public. He is obviously possessed of considerable mechanical ingenuity, which, if applied in a different direction, may advance his own interests, while contributing incidentally to the interests of art. But he has confounded the details of Mr. Blanchard's machine with its principle; and in seeking to escape from the operation of the patent, he has violated the law by which it is guarded. It is possible that he may have been misled by the language of the charge, when his case was before me on the law side of the court. Abstract propositions are liable to inaccuracy, when elicited in the haste of a trial at bar; and however accurate, they are not suited to the purpose of imparting instruction to a jury. I prefer, therefore, generally to employ illustrations, derived from the case itself, to convey the legal principle which should rule it, rather than to announce the law in general and abstract terms. It is enough for me if I can succeed in teaching all that belongs to the circumstances and the time. This consideration, however, of the possibility of my having been misunderstood, will have its influence with me in the future stages of this proceeding; and the attachment which I feel it my duty to award will be set aside on payment of costs, upon my receiving an assurance from the defendant, that he will de-

sist from violating the complainant's patent any further.

Attachment awarded.

Case No. 1,510.

BLANCHARD v. ELDRIDGE.

[1 Wall. Jr. 337; 2 Robb, Pat. Cas. 737.][1]

Circuit Court, E. D. Pennsylvania. April Sessions, 1849.

ASSIGNMENT OF PATENT RIGHT—PARTIES TO SUE.

Where a transfer of certain specified privileges, part of larger privileges secured by patent right, does not confer a legal title to the whole, or to an undivided portion of the right, nor grant the entire or exclusive right within a specified part of the United States, a suit for an infringement of one of the privileges transferred, is properly brought at law, in the name of the original holder. For example: B. having a patent for turning irregular forms generally, grants to C. the full and exclusive license, right and permission, to use it for turning shoe lasts. D. having infringed the patent by turning shoe lasts, it was held—that suit for the infringement was properly brought at law in B.'s name.

[Cited in Gayler v. Wilder, 10 How. (51 U. S.) 477; Adams v. Burks, 17 Wall. (84 U. S.) 458; Wilson v. Chickering, 14 Fed. 918; Hewitt v. Pennsylvania Steel Co., 24 Fed. 369; Dick v. Struthers, 25 Fed. 104.]

[See Suydam v. Day, Case No. 13,654; Goodyear v. Bishop, Id. 5,558; Grover & Baker Sewing Mach. Co. v. Sloat, Id. 5,846; Bogart v. Hinds, 25 Fed. 484.]

At law. Thomas Blanchard had brought a suit, in his own name, at law, and recovered damages for an infringement of a patent he had obtained for turning every kind of irregular forms. [Defendant moves for a new trial. Denied.]

In the course of the trial, the defendant was allowed to show, that prior to the bringing of the suit, Blanchard had assigned to one Carter, "the full and exclusive license, right and permission to have, hold, use and enjoy Blanchard's patent for turning irregular forms, &c., so far as said improvement is or may be used for turning shoe lasts, boot and shoe trees and hat blocks, and also for turning spokes for wheels of all kinds of carriage wheels, and all other articles that form any part in the construction of carriages. To have and to hold the said right and license exclusive of all others, except such persons as have received grants or licenses before the date hereof," &c. The infringement proved on the trial was, that of making shoe lasts, that is to say, an infringement of one of the rights and interests granted exclusively to Carter.

Mr. Hirst, for defendant, having moved for a new trial, relied, among other reasons for it, upon the facts of this transfer to Carter; his argument being, that as Carter was the "party injured," and had the "exclusive right," he was the only person entitled to an action; and that the plaintiff, having parted with all right to use the machine for the purpose of making lasts, &c., over the whole United States, could not support an action for the infringement. The patent law (Act July 4, 1836, § 11; 5 Stat. 121), it is requisite here to state, enacts, "that every patent shall be assignable in law either as to the whole interest or any undivided part thereof, &c., which assignment, and also every grant and conveyance of the exclusive right under any patent to make, use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be," &c., and makes no other provision about assignments. Id. § 14. And also that the act requires the action for an infringement to be "brought in the name or names of the person or persons interested, whether as patentee, assignees, or as grantees, of the exclusive right within and throughout a specified part of the United States."

Mr. F. W. Hubbell and Mr. Saunders Lewis, cited a MS. report of a recent decision in the New York circuit, upon this identical assignment, in which it was held by Judge Nelson, that suit was properly brought in Blanchard's name.

GRIER, Circuit Justice. The point here raised by the defendant's counsel is not without its difficulty, and the force of his argument cannot be evaded if his assumption be true, that this deed transfers the legal title to Carter of that portion of the patent, which it purports to vest in him. But if it does not so operate, it cannot be noticed in a court of law and cannot affect the case.

As the grants of the crown were, at common law, construed with the greatest strictness, the privileges granted by a patent for a monopoly, would probably not have been treated as capable of assignment, unless made so by the letter of the grant. Since the statute 21 Jac. I. c. 3, § 5, patents for useful inventions (notwithstanding the statute itself mentions the "inventor" only,) have always granted the privilege or monopoly to the inventor, his executor, administrator and assigns. These monopolies are, therefore, assignable as other personal chattels, by force of the grant which creates them.

As a chattel also, it might be held by two or more joint owners: Hence any undivided portion or interest in the whole as an unity might be assigned, and if the original grantee died, such assignees might join in an action for an infringement of their right. Boulton v. Bull, 2 H. Bl. 463. "But the patent right itself was insusceptible of local subdivision." Whittemore v. Cutter [Case No. 17,600]. As a privilege or monopoly, it was an entire thing, indivisible, and incapable of apportionment. Brooks v. Byam [Id. 1,948].

But the act of congress of 1836 [5 Stat. 121, § 11] has regulated the assignment of patents. The eleventh section provides, that a patent shall be assignable: 1st. As to the

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

whole interest. 2d. As to any undivided part thereof, and 3d. An exclusive right may be granted throughout any specified part or portion of the United States. The fourteenth section requires the action for an infringement of the patent, to be brought "in the name or names of the person or persons interested, whether as patentee, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States." The word "assignees," in this section, must be construed by reference to the eleventh section, already referred to, which defines in what way a patent may be assigned—to wit: either the whole or any undivided portion of the whole. This statute also renders the monopoly capable of subdivision in the category of its locality, but in no other way. The patentee is not allowed to carve out his monopoly, which is an unity, into a hundred or more, all acting in the same place, and liable to come into conflict. The grant to Carter by the deed under consideration, is not of the whole monopoly, nor of any undivided portion of the whole, and though for an "exclusive right," it is not exclusive of all others within a certain district, or specified part of the United States: on the contrary it is an exclusive right to use the machine for a specified purpose. A machine for turning irregular figures may be used for numberless purposes. If the patentee or his assignees can assign to A. an exclusive right to use the machine for making shoe lasts, to B. for turning spokes, to C. for axe handles, and so on to the end of the alphabet, then may he, out of his one monopoly carve out a thousand others, each subdivision, like a polypus, being itself a several monopoly, and having a separate existence in the same place. What endless perplexity and confusion must necessarily arise from the establishment of such a doctrine. Suppose the monopoly granted by this patent parcelled out to some twenty submonopolists, with an exclusive right to each to use his machine for certain purposes, in any given place: what remedy could A. have against B. for an infringement of his special privilege? The patentee or grantor, might restrain his grantee of a machine for a special use, by a covenant; but as between the several grantees no action could lie, although they alone might suffer from a breach of the covenant.

But it is sufficient for purposes of the present inquiry, that the act of congress has not given a legal sanction to such transfers or assignments, nor subjected even a pirate of the machine to fifty different suits by fifty several assignees, whose several interests might be affected, if a patent could be thus split up into numerous exclusive rights, or submonopolies. Whether the deed confers on Carter and his assigns more than a special license, or what remedy a court of equity might be disposed to extend to him, where his rights are infringed, it is not necessary now to inquire. As it does not confer a legal title to the whole, or an undivided portion of the patent, nor grant "an exclusive right within a specified part of the United States," it cannot be received to affect this case. It was wholly irrelevant and ought not to have been received in evidence.

It adds to my confidence in the correctness of this view, that, as I have been informed, my Brother Nelson has ruled the question in the same way in the second circuit. New trial refused.

[NOTE. For other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515. For opinion subsequently rendered on motion of plaintiff for attachment for disregarding an injunction, see Blanchard v. Eldridge, Id. 1,509.]

Case No. 1,511.

BLANCHARD v. HAVEN et al.

[1 Mason, 346.][1]

Circuit Court, D. New Hampshire. May Term, 1818.

PRIZE—CAPTURE BY PRIVATEER AFTER ABANDONMENT OF ORIGINAL CRUISE—RESPECTIVE RIGHTS OF OLD AND NEW CREWS TO SHARE IN PRIZE MONEY.

Where a cruise was broken up by the wrongful desertion of the crew, after the privateer returned to her home port in consequence of distress, and the owners were thereby obliged to abandon the cruise, and a new one was undertaken by a crew composed partly of the old crew, and partly of other persons, it was held that the first cruise was completely determined, and that no persons employed in the first cruise, and not in the second cruise, were entitled to shares in prizes made in the second cruise.

In admiralty. This case [by Amos Blanchard against Thomas Haven and others] came on to be heard upon a statement of facts agreed by the parties as follows. On the 7th of November, 1814, the plaintiff entered as prize master on board the privateer Macedonian of Portsmouth, Penn Townsend commander. The agreement between the owners, officers, and crew, contained among others the following articles; viz. "Art. 5. That the cruise shall be where the owners may direct. If they see cause to leave it to the captain, he shall have full power to alter or prolong the cruise; and it shall not be considered as ended until the arrival of said vessel at Portsmouth." "Art. 12. It is agreed that this cruise shall be considered not more than one hundred, nor less than ninety days. The captain is to end the cruise, whenever all his men that can be spared are put on board prizes." "Art. 15. And finally we do by these presents bind ourselves each to the other, for the faithful performance of all and singular the provisions and covenants above specified, in consideration of our becoming the crew of said schooner Macedonian, and it shall be binding upon us to

[1] [Reported by William P. Mason, Esq.]

all intents and purposes, as if we had received monthly wages for the time fixed for said cruise." "Art. 8. Should any man desert, or not render himself on board, after verbal notice by the agents, or by publishing the same in one public newspaper, he shall forfeit all his share or shares." The plaintiff signed these articles of agreement, and was entitled by the same to four shares of the crew's moiety of the prizes.

In pursuance of said articles, the said privateer sailed on a cruise in said month of November, being duly commissioned, and with the plaintiff on board. On the 16th of said November, she captured and manned out a prize, and put the plaintiff on board as prize master thereof. After cruising a short time, the said privateer sprung her bowsprit, and put into said Portsmouth to refit, where she arrived on or about the 8th of December, 1814.

On the 8th of December the owners of said privateer met, and passed the following vote, viz.: "Voted, that the agents be requested to inform the officers and crew in some public newspaper, that the first cruise is not considered up, and request them to repair on board when notified." The officers and crew were notified accordingly by the agents to repair on board by a certain day, after which, on the 23d of said December, the said owners again met, and passed the following votes, viz.: "Voted, that whereas only ten officers and four men rendered themselves on board the Macedonian on the day, which they were notified, agreeably to the articles of agreement, and whereas we have by such notification given an opportunity to all purchasers of seamen's shares, to bring forward those of whom they have purchased; and whereas we are compelled in consequence of their not appearing as aforesaid, to give up the first cruise. Therefore, voted, that we now proceed to the choice of officers for the second cruise of the Macedonian." The meeting then proceeded to the choice of officers, when the following gentlemen were unanimously chosen, viz. Penn Townsend, Esq. Captain; Mr. John H. Davis, first lieutenant; Mr. Robert Blunt, second lieutenant. "Voted, that the agents proceed to ship about eighty men, including officers, for the second cruise of the Macedonian."

The facts contained in said votes are true. The same persons chosen for captain and lieutenants for said second cruise, were captain and lieutenants the said first cruise. The agents, pursuant to the vote aforesaid, shipped eighty men, including officers for said cruise, who signed articles of agreement on the 7th of January, 1815; the 5th, 8th, 12th, and 15th articles of which were the same as the articles executed on the 7th of November, aforesaid, which have been recited.

Before the sailing of said privateer on her said second cruise, the plaintiff came to Portsmouth, and the officers and agents were desirous that he should go, but he remained at home, stated that he considered himself as on parole. On or about the said 7th of January the said privateer sailed on her said second cruise. On her said second cruise she captured several prizes, one within ninety days from the time that she commenced her said first cruise, and the residue after the expiration of the said ninety days.

The facts stated in Joseph Benson's deposition were admitted to be true, and the deposition was made a part of this case; and also the cartel for the exchange of prisoners of war between Great Britain and the United States. It was also admitted that the votes of the proprietors were known to Blanchard. The deposition of Benson was as follows: I, Joseph Benson, do testify and say that I was a seaman on board the privateer Macedonian, on her first cruise; of which privateer Penn Townsend was commander. That a few days after the said privateer was out, she captured a prize, and that Amos Blanchard was put on board the prize as prize master, and this deponent as one of the prize crew. That on the third day after we were put on board the prize, we were recaptured by the Newcastle, British frigate. Said Blanchard and myself were put on board the Newcastle, where we remained three weeks, when Blanchard was put on shore at Cape Cod. That a day or two before Blanchard was put on shore, Blanchard told the deponent that he, Blanchard, was going ashore, and that he would try to get the rest clear. That he, Blanchard, was going ashore to carry some clothes and money to a British midshipman, who was a prisoner in the hands of the United States forces at Salem, who had been recaptured in going on shore in a boat. On the morning of the day when Blanchard was put on shore, I saw Captain Stewart, the commander of the Newcastle, deliver to Blanchard some clothes and a letter; and heard him tell Blanchard to deliver the clothes and money himself to the said midshipman, and not intrust them to any body else. And he also told Blanchard, that he was not to take up arms against the English flag during the war, and Blanchard told him, that he should not, for he could live at home without it. I further testify, that at the time Blanchard was sent on shore, there was a Mr. Chapman on board the Newcastle, a prisoner, who had been a prize master in an American prize, and recaptured, who was desirous of going on shore, but Captain Stewart refused, saying he did not make the war, and would not make peace; and that he should not let Blanchard go, but to carry the clothes and money to the midshipman. Chapman was sent to Halifax, and detained till the close of the war. I was also sent to Halifax, and detained till the close of the war. On the same day that Blanchard went ashore, we were put on board a vessel to be sent to

Halifax. Blanchard was sent ashore in one of the Newcastle's boats.

The questions submitted to the court upon the above facts are: 1st. Whether the plaintiff is entitled to four shares of the proceeds of all the prizes captured by said privateer after the said 7th of January, which are to be distributed among the crew? 2dly. Whether the plaintiff is entitled to share as aforesaid, in the prize captured as aforesaid, after the said 7th of January, and within ninety days from the commencement of the said first cruise? If the court should be of opinion that the plaintiff is entitled to share in the whole, or a part of the prizes captured after the said 7th of January, then judgment accordingly is to be rendered for the plaintiff, for such sum as shall be agreed upon by the parties, or as a commissioner or commissioners, to be appointed by the court, shall report in default of such agreement. If the court should be of opinion that the plaintiff is not entitled to share as aforesaid, judgment is to be rendered against him, as in case of nonsuit.

Pitman, for the plaintiff, contended that the first cruise was wrongfully broken up by the original crew; and that the second cruise was to be considered so far as respected, that portion of the crew who were parties to the shipping articles for the first cruise, as a mere continuation of the first cruise. That the coming into Portsmouth on account of distress, did not legally put an end to the first cruise; and that the plaintiff, not having been concerned in the wrongful act of the crew in deserting the privateer, was to be considered as a prize master, entitled to share in the prizes made during the second cruise; which, upon the ground already stated, was but a continuance of the original cruise. And he cited The Brutus [Case No. 2,060].

E. Cutts, Jr., was to have argued for defendants.

STORY, Circuit Justice. This case differs in several important particulars from that of The Brutus [Case No. 2,060]. There the cruise was attempted to be broken up in a foreign port by the officers and crew, without the consent of the owners of the privateer. And it was held, that the officers and crew could not set up their own wrongful act as a dissolution of the cruise. It was material also in that case, that the homeward voyage was within the scope of the original articles; and the cruise was in fact continued by the original crew. It is true, that by the return of the privateer to Portsmouth in distress, the cruise of the Macedonian was not legally terminated. But it was in fact broken up by the desertion of the crew. The owners did not concur in that wrongful proceeding. They acted with good faith; and certainly had a right to employ their own vessel on a new cruise, when the former cruise was entirely abandoned by the officers and crew. But even if the owners had wrongfully put an end to the cruise at Portsmouth, I do not know, that it would have helped the plaintiff. He might then have been entitled to an action for damages for the injury sustained by him by such wrongful act. But it seems to me, that the owners have a right to the possession and use of their own vessel; and that from the nature of the service, they have a right to break up a cruise in the home port, taking the consequences of such act, if it be a breach of any covenant, into which they have entered. Suppose the case of an agreement in the nature of a charter-party for a voyage, are not the owners at liberty to prevent their vessel from proceeding on the voyage, taking their chance of an action for the breach of their contract? Does such a contract devest the legal ownership of the property during the voyage? But in the present case, it is conceded, that the owners are in no default. The first cruise was in fact terminated. New engagements were entered into for a new cruise by parties, who were competent to make such engagements. How then can the court say, that the second cruise was a continuation of the first? The first cruise was abandoned, wrongfully indeed, by the original crew, but still in point of fact and law completely abandoned.

This is an attempt to claim prize proceeds, earned in the second cruise, to which the plaintiff was no party, either in law or in fact. He entered into no contract with reference to it; nay, he declined having any thing to do with it. It is, in fact, an action for damages, for the illegal act of breaking up the first cruise, in the shape of an action for money had and received. As to the shares of the owners and the new crew engaged in the second cruise, it is admitted, that the plaintiff is not entitled to claim any deduction. But he claims to deduct from the shares of each of the crew shipped on the first and second cruises, an amount equal to the shares he would have been entitled to, if the prizes had been made in the first cruise, or if the first cruise had not been wrongfully broken up by their desertion. Undoubtedly by their desertion they forfeited all claim to the prizes captured on the first cruise. And it may be, that an action for damages lies against them in favor of the plaintiff. But certainly there is no specific claim or lien on their property earned in the second cruise, to respond for those damages. Suppose, instead of shipping in the Macedonian a second time, they had shipped in some other privateer, can there be any pretence, that the prize money earned in such a cruise could have been held to respond these damages? In what possible way could it be considered as money had

and received to the use of the plaintiff? In point of law, I do not distinguish between the case put and the case at bar. The cruises were as distinct, as if they had been made in different privateers.

On the whole, the district judge and myself are clearly of opinion, that the action cannot be sustained. We adhere to the case of The Brutus [supra] and feel no inclination to abandon any of its positions. But this case is not governed by any principle decided in that. Let the plaintiff be nonsuited according to the agreement of the parties.

Case No. 1,512.

BLANCHARD v. HAYNES.

[6 West. Law J. 82.]

Circuit Court, D. New Hampshire. 1848.

PATENTS FOR INVENTIONS—EXTENSION OF PATENT BY SPECIAL ACT—CONSTRUCTION.

[The patent of 1820, to Thomas Blanchard for a machine for turning irregular forms, was renewed in 1834 (6 Stat. 589, 748), by special act of congress, for a further term of 14 years; but as the act was not passed until after the expiration of the first term, leaving a space of about four months in which no patent existed, it contained a proviso that all persons who had erected machines in the interval should have a right to use them. In 1847 (9 Stat. 683) the patent was again extended by special act, but without any such proviso. *Held*, that a person who built a machine in the interim had no right to use it after the second extension took effect.]

[See Jordan v. Dobson, Case No. 7,519. Compare Bloomer v. McQuewan, 14 How. (55 U. S.) 549; Bloomer v. Millinger, 1 Wall. (68 U. S.) 340; and Chaffee v. Boston Belting Co., 22 How. (63 U. S.) 217.]

This was a bill in equity [by Thomas Blanchard against John Haynes], praying an injunction to restrain the defendant from using a certain last machine built by him, and which was alleged to run in violation of the plaintiff's patent. [Injunction granted.] The plaintiff was the inventor and patentee of the celebrated machine for turning irregular forms, long extensively used in this country. It appeared that the original patent was issued in 1820,—that in 1834, it was renewed by a special act [6 Stat. 589] by congress for the term of fourteen years. In the act of renewal, a clerical mistake was made, which was corrected by another act passed in 1839. The act of 1834 was not passed, however, till after the expiration of the first term, leaving a space of about four months, during which no patent existed. The acts of 1834 and 1839 [6 Stat. 748] accordingly contained a proviso, that all persons who had erected, or had commenced erecting machines during that period, should have the right to run them, notwithstanding the renewal. Before the expiration of the fourteen years named in these acts—the patent was again renewed by the act of congress of 1847, for the further term of fourteen years, from the expiration of this second term.

The act of 1847 [9 Stat. 683] provided expressly that the renewal should "enure to the use and benefit of said Thomas Blanchard, his executors and administrators, and to no other person whatever," with certain exceptions in favor of bona fide assignees; but contained no proviso similar to that in the former acts, in favor of persons who had erected machines during what was called the free period. It was admitted that the defendant built his machine after the expiration of the first term of the patent, and before the first act of renewal of 1834; and the principal question argued by counsel and considered by the court, related to the defendant's right to the continued use of his machine, notwithstanding the act of 1847.

M. S. Clarke and C. B. Goodrich, for plaintiff.

Franklin Pierce and Richard Fletcher, for defendant.

The opinion of the court was given by WOODBURY, Circuit Justice, at the late term at Exeter. In giving the opinion of the court, his honor said that the complaint was for using the machine since the statute of 1847—that this statute contained no grant to persons situated like the respondent, nor any exception to cover cases like his. Congress might have supposed that the use of the machine for fourteen years was a sufficient allowance to remunerate persons situated like the respondent. It conferred the same favor on assignees who had bought and paid for rights under the first patent. But in the second renewal it gave no additional term to them without paying for it. That the question depended upon the construction of the above special acts, and not upon the provisions of the general act of March 30, 1839. It was admitted that congress had the constitutional right to confer a new and further term on the patentee. Such cases have frequently occurred. See [Stimpson v. West Chester R. Co.] 4 How. [45 U. S.] 402; [Evans v. Jordan] 9 Cranch [13 U. S.] 199; [Grant v. Raymond] 6 Pet. [31 U. S.] 240; and other cases. They have done so in this case by the acts of 1834 and 1839, in which the privilege was renewed, under which the defendant had used his machine, during the term thereby conferred. That by the true construction, in the opinion of the court, of those statutes, the rights and privileges thereby created in favor of free machines, were co-extensive only with the term of fourteen years created by them. That the duration of the exemption, in the proviso of the statute, was limited by the duration of the term granted in the main section, the one being made virtually to relieve from the operation of the other. That the plaintiff now claimed under the act of 1847, which contained no grant or privilege in favor of the respondent

or persons situated like him. The legislature may have supposed he had enjoyed privileges enough under the former acts, while they appear to have intended to grant to the plaintiff the benefit of the further term provided in this act. That as to the equities of the case, it was proved that the free use of the machine for one term would amply remunerate the respondent for his expenses in building. Besides, that it was some gratification, that while this decision would give to the inventor and patentee, under the statute of 1847, the reward for his genius and expenses, which congress appear to have intended, it takes away from the defendant no invention or patent of his own creation, and gives no use of his machine to the plaintiff till the defendant has been amply remunerated for any expenses in building his machine.

The injunction prayed for was granted.

[NOTE. For other case involving this patents, see note to Blanchard v. Reeves, Case No. 1,515.]

BLANCHARD (JOLLY v.). See Case No. 7,438.

Case No. 1,513.

BLANCHARD et al. v. The MARTHA WASHINGTON.

[1 Cliff. 463;[1] 25 Law Rep. 22.]

Circuit Court, D. Maine. Sept. Term, 1860.

SHIPPING—PUBLIC REGULATIONS—CONVEYANCE OF VESSEL—PLACE OF REGISTRY — REGISTRY ACT JULY 29, 1850—CONSTITUTIONALITY.

1. By the act of December 31, 1792 [1 Stat. 287], the permanent register of every American vessel must issue from and be recorded in the office of the collector of the home port, which by law is defined to be the port at or nearest to which the owner, if there be but one, or if more than one, the husband, or acting, or managing owner, usually resides.

[Cited in Morgan v. Parham, 16 Wall. (83 U. S.) 475; The Jennie B. Gilkey, 19 Fed. 129; The Samuel Marshall, 49 Fed. 760.]

2. The office of the collector at the home port is the proper place for the registry of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, within the meaning of the act to provide for recording the conveyances of vessels and for other purposes.

[See The John T. Moore, Case No. 7,430.]

3. The provisions of the act of congress of July 29, 1850 [9 Stat. 440, c. 27, § 1], concerning the registry of vessels, is constitutional and valid.

[Cited in White's Bank v. Smith, 7 Wall. (74 U. S.) 656; In re Scott, Case No. 12,517.]

[4. Cited in Thurber v. The Fanny, Case No. 14,014, to the point that admiralty has jurisdiction of petitory as well as possessory actions, and has often been called upon to adjudicate on the title to ships.]

[5. Distinguished in Britton v. The Venture, 21 Fed. 928, from cases alleged to hold that a mortgage of vessel to secure purchase money is a maritime contract, under which a court of admiralty will either decree a foreclosure or enforce the mortgagee's right of possession.]

[Appeal from the district court of the United States for the district of Maine.]

This was an admiralty appeal. The libel [by Alfred Blanchard and others] was filed to try the title to one-fourth part of the brig Martha Washington. Answers were made by William Anderson as master and part owner, by Phebe J. Flood, Amos D. Dolliver, George H. Coggins, Jacob Anderson, and Ferdinand McFarland. The libellants claimed to own five eighths of the brig; but according to the answers they owned but six sixteenths at the time of filing the libel; and the rest was owned as follows: three sixteenths by Phebe J. Flood, two sixteenths by Joseph H. Perley, one sixteenth by William Anderson, one sixteenth by George H. Coggins, one sixteenth by Jacob Anderson, one sixteenth by Ferdinand McFarland, and one sixteenth by Amos Dolliver. Libellants contested the four sixteenths claimed by Flood and Dolliver, but the district court entered a decree for respondents. The case was submitted in the court upon an agreed statement of facts as follows: It is admitted that the brig was built at Surrey, in the collection district of Frenchman's bay, state and district of Maine, in the year 1853; that at that time, and on the 5th of December, 1853, the majority in interest of the owners resided in Trenton and Surrey, within said collection district; that on that day she was permanently registered at the custom-house in said district; that on the 25th of October, 1855, the majority in interest of the owners still resided as aforesaid; that on that day her register was surrendered, and she was permanently enrolled in said custom-house, enrolment No. 60; that at that time the libellants were owners of two tenths; William Coggins, then living at Surrey, since deceased, owned one half, William Anderson three sixteenths, and George H. Coggins, Jacob Anderson, and Ferdinand McFarland, one sixteenth each, of said brig; that on the 7th of December, 1855, the said brig being at Norfolk, and no one of the owners, except the said William Anderson, her master, being there, he being the owner, at that time, of three sixteenths, and desiring to proceed on a voyage to the West Indies, she was temporarily registered in the town of Norfolk, within and for the collection district of Norfolk and Portsmouth, as appears by the copy of the register, which makes part of the case; and said brig continued to sail under said register during the whole of the year 1856, and most of the year 1857; that on the 27th of March, 1856, the said William Coggins, then living, and a resident of Surrey, aforesaid, conveyed to the said Phebe J. Flood, by mortgage bill of sale, three sixteenths of said brig, which bill of sale was, on the 1st of April, 1856, recorded at the custom-house at Ellsworth, in the collection district of Frenchman's bay; that on or about

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

the 1st of September, 1856, the said Coggins conveyed to the said Amos D. Dolliver, by mortgage bill of sale, one-sixteenth part of said brig, which bill of sale was, on the 2d of said September, duly recorded at the custom-house at Ellsworth, in the collection district of Frenchman's bay; that on the 21st of November, 1856, the said William Coggins, then a resident of Surrey, where he continued to reside till his death, conveyed to the libellants, by mortgage bill of sale, four-eighths parts of said brig, which bill of sale was duly recorded on the 27th of the same November, at Ellsworth, in the collection district of Frenchman's bay; also, on the 11th of May, 1857, at Norfolk, in the collection district of Norfolk and Portsmouth; also, on the 18th of November, 1857, by the clerk of the town of Surrey, in the records of mortgages of that town, but after the decease of said Coggins.

All the mortgages, enrolments, and registers make a part of the case, but need not be copied. It is agreed that none of the mortgages have been paid, and that they had all become fully foreclosed at the time of filing the libel, so as to vest the title absolutely in the several mortgagees; also, that the two mortgages to the said Phebe J. Flood and Amos D. Dolliver were never recorded by the town clerk of Surrey, in the records of mortgages of that town. Failing to show that the libellants had actual notice of the transfer, as was alleged in the answer, the claimants insisted that the libellants had constructive notice of the same; because, they insisted, the bills of sale to them were duly and properly recorded at the custom-house in the district comprehending the port to which the vessel belonged. To this the libellants replied, first, that the custom-house at Norfolk, in the state of Virginia, and not the one at Ellsworth, was the proper place for recording the respective bills of sale, and inasmuch as the claimants' bills of sale were not recorded at Norfolk, the registry was a nullity and inoperative as a constructive notice of the conveyance; second, that the act of congress of July 29, 1850 (9 Stat. 440), is unconstitutional and void, and that their title to the four sixteenths was valid, because their bill of sale was duly recorded, pursuant to the state law, in the office of the town clerk where the mortgagor resided when the instrument was executed.

Fessenden & Butler, for libellants.
Shepley & Dana, for Dolliver and Flood.

CLIFFORD, Circuit Justice. In considering the first question, which is purely one of construction, it must be assumed that the act of congress under consideration is valid and obligatory. Referring to the first section of the act [9 Stat. 440] it will be seen that it provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Relying upon the closing paragraph of the section, the libellants insist that the respective mortgages of the claimants were not duly recorded according to that provision; that the proper office for registering the same was that of the collector of Norfolk, from which the temporary register of the vessel issued, and not that of the collector at Frenchman's bay, where the vessel was built, originally registered, and permanently enrolled. On the other hand, the claimants insist that by the true construction of the provision, the registry of every such transfer must always be made at the custom-house of the home port of the vessel where the permanent register or enrolment was obtained. Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner usually resides. [Act Dec. 31, 1792] 1 Stat. 288 [section 3]. Permanent registry, therefore, as manifestly appears by that provision, is required to be made at the home port of the vessel, and what is meant by the home port is clearly and plainly defined. That requirement is also accompanied by another, which it becomes important to notice in this connection, and which is scarcely less significant than the one just recited. Registry must be made at the home port; and the same section provides that the name of the ship or vessel, and of the port to which "she shall so belong," shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and the owner or owners are made liable to a penalty of fifty dollars for neglecting to comply with that requirement. All persons interested, therefore, have the means of ascertaining the name of the vessel and her home port; and her shipping-papers, which include a copy of her register or enrolment, are by law required to furnish the same information. Matters requisite to the registering of any ship or vessel are required to be recorded, and for that purpose the collector of the district comprehending the port to which the ship or vessel belongs is required to keep in some proper book a record or registry thereof, and to grant an abstract or certificate of the same according to the form prescribed in the ninth section of the act. Other provisions also of the same act show that every ship or vessel has a home port, and that all persons interested are by law referred to that port for their permanent registers or enrolments. Citizens of the United States may become the owners of a ship or vessel entitled to be reg-

istered, while the vessel is in a district other than the one where the purchaser usually resides, and in that contingency it is provided, by the eleventh section of the act, that such ship or vessel shall be entitled to be registered by the collector of the district where she may be at the time of the conveyance; but in that event it is provided that whenever such ship or vessel shall arrive within the district comprehending the port to which she "shall belong," the certificate of registry which shall have been obtained as aforesaid shall be delivered up to the collector of such district, who, upon the requisitions of this act, in order to the registry of ships or vessels being duly complied with, shall grant a new one in lieu of the first, and the certificate so delivered up shall forthwith be returned by the collector who shall receive the same to the collector who shall have granted it. These references to the act of the 31st of December, 1792 [1 Stat. 287], are believed to be amply sufficient to show that every ship or vessel of the United States has a home port, and that her permanent register must issue from, and be recorded in, the office of the collector of such home port, which by law is defined to be the port at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner, usually resides. Regulations to the same effect are prescribed by the act of the 18th of February, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries. 1 Stat. 305. By the first section of that act it is provided in effect that, in order for the enrolment of any ship or vessel, she must possess the same qualifications as are made necessary for registering the same, and the same requisites must in all respects be complied with as on application for a register. Every licensed ship or vessel also is required to have her name and the port to which she belongs painted on her stern, in the manner as is provided for registered ships or vessels; and if any licensed ship or vessel be found without such painting, the owner or owners thereof are made liable to a fine of twenty dollars. Section 11, p. 309. Collectors of the several districts are authorized by the third section of the act to enroll and license any ship or vessel that may be registered, upon such registry being given up, or to register any ship or vessel that may be enrolled, upon such enrolment and license being given up as therein required. Undoubtedly these reciprocal changes may be made upon the application of the master or commander, when the ship or vessel is in a district other than the one to which she belongs; but in every such case, the master or commander is required to make oath that, according to his best knowledge and belief, the property of the vessel remains as expressed in the register or enrolment proposed to be given up. Whenever such exchanges are made, it becomes the duty of the collector making the same to transmit the register or enrolment given up to him to the register of the treasury; and the same section provides that the one granted in lieu of the one given up shall within ten days after the arrival of such ship or vessel within the district to which she belongs be delivered to the collector of said district, and be by him cancelled; and the master or commander is made liable to a penalty of one hundred dollars if he shall neglect to deliver the register or enrolment and license as therein required. Registers or enrolments granted under that provision are temporary in their operation, and consequently are so denominated as contradistinguished from those granted at the office of the collector of the district where the ship or vessel belongs. Change of ownership, where the new owners reside in a district other than the one in which the former owners resided, or a majority in interest of the vessel, will authorize a corresponding change of the home port, and of the permanent register or enrolment; but in that case, if the ship or vessel has undergone no alteration in burden since her last registry, it will not be necessary to produce the certificate of a master carpenter, or the surveyor's certificate of admeasurement. When application for the new certificate of registry is made, the former certificate must be surrendered to the collector to whom the application for such new registry is made, and be by him transmitted to the register of the treasury for cancellation; and it is expressly required that the new certificate of registry shall refer to the prior certificate for the admeasurement of such ship or vessel. 1 Stat. § 14, p. 294; Reg. Rev. Laws, pp. 17, 18; 1 Stat. p. 498. Corresponding change, of course, must be made in the name of the port to which the ship or vessel belongs, as painted on the stern of the vessel; but the name of the vessel cannot be changed, under existing laws, without an act of congress. [Act Jan. 17, 1859] 11 Stat. p. 375. Reference is made to these provisions as showing that ships or vessels once documented as vessels of the United States never cease to have a home port while they retain their character as American vessels. Whether sailing under the permanent register, issued from the office of the collector of the home port, or under a temporary document issued from the office of the collector of some other district in the course of the voyage, every such ship or vessel bears upon her stern the name of the port to which she belongs; and although sailing under such temporary document, still it recites the name of her home port, and expressly refers to the permanent register or enrolment, reciting all the material facts upon which the latter was founded. Permanent registers are very properly defined in the treasury regulations as being those granted by collectors to ships and vessels belonging to ports within their respective districts; and, by the same authority, temporary registers are defined to be those granted by collectors

to ships and vessels belonging to ports in other districts. Practically, the one is distinguished from the other by the word "permanent" or "temporary," according to the fact, being written on the margin of the document immediately above the number, but they may also be readily distinguished by their material recitals; the former is founded either upon the certificate of the master carpenter, and that of the surveyor, or upon the representation of a change in the ownership of the vessel, and in the residence of the owners; while the latter is uniformly founded upon the former certificate and the suppletory oath of the master or commander, certifying, among other things, that the vessel is bound on a voyage which necessarily calls for a change of the documents. Such temporary certificates always give the name of the vessel and the name of the port to which she belongs, and clearly they are, in contemplation of law, but temporary substitutes for the permanent documents. No better illustration of the proceeding can be found than is furnished by the papers in this case. Desiring to change the employment of the vessel and go on a foreign voyage, the master made and filed in the office of the collector for the district of Norfolk and Portsmouth the requisite oath to enable him without returning to the home port of the vessel to obtain a register in lieu of the enrolment under which she was sailing at the time of the application. Accordingly he made and subscribed an oath, stating the names of the owners, the proportion owned by each, the name of the place where and the time when she was built, the port to which she belonged, and that she was bound on a foreign voyage, and referred to her permanent enrolment to confirm his statements. Having made oath to those facts, and given the bond required by law, the temporary register was issued by the collector, and it was clearly but a temporary substitute for the permanent enrolment which was surrendered. Documents of permanent character are granted to ships and vessels built or owned by citizens of the United States, to confer upon them the character of American vessels, and to secure to their owners the benefits and privileges belonging to vessels entitled to that designation. Temporary registers or enrolments are authorized by law in the course of the voyage at the ports of districts other than the one where the vessel belongs, as matter of convenience to the owners, to save the loss of time and the expense which must otherwise be incurred by a return of the vessel to her home port merely for the purpose of changing her papers. Permanent documents, whether registers or enrolments, are uniformly granted at the home port, but temporary ones are never granted, except when the vessel is in the port of a district other than the one to which she belongs; and hence the requirement that the former shall be recorded in some proper book to be kept by the collector granting the same. No such requirement is made in regard to the latter, but the provision is, that the collector to whom the register or enrolment and license may be given up shall transmit the same to the register of the treasury, and the register or enrolment and license granted in lieu thereof shall, within ten days after the arrival of the vessel within the district to which she belongs, be delivered to the collector of said district and be by him cancelled. Registry of bills of sale of ships or vessels surely need not be recorded in more than one office, and the unbroken practice of seventy years points to the office of the collector of the home port as the proper place for such registry, and consequently as the one contemplated by the act of congress under consideration. Every ship or vessel regularly documented is registered or enrolled at the port of the district where she belongs; and that remark is correct, although she may be sailing under a temporary register or enrolment granted at the office of the collector of some other port. Such a temporary document always refers to the permanent one, and is founded upon it, and indeed would be of no validity if the permanent one did not exist. Confirmation of this construction is derived from the language of the second section of the act. Collectors of customs are required by the second section to record the bills of sale, mortgages, hypothecations, and conveyances mentioned in the first section; and also all certificates for discharging and cancelling any such conveyance, in a book to be kept for that purpose, in the order of their reception. They are also required to note in said book, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received, and certify on the instrument of conveyance, or certificate of discharge or cancellation, the number of the book, and the page where recorded. 9 Stat. p. 440. Notice, undoubtedly, is one of the objects of these requirements, in order to prevent fraud upon subsequent purchasers or encumbrancers.

But let it be conceded that the views of the libellants are correct, and it at once becomes obvious that the requirements are substantially useless; a compliance with them would seldom or never accomplish the object for which they were enacted. Ships or vessels absent from the home port may change their papers at any other one of the hundred and fifty custom-houses established under the revenue laws of the United States. Such changes occur of course while the vessel is absent from the port of the district to which she belongs, and in many instances without the knowledge of those owning a majority in interest of the vessel. Purchasers, under such circumstances, would hardly find it practicable to make search at all the custom-houses in the United States in order to learn the state of the vessel's papers, and unless they did so the dishonest vendor, on the theory of the libellants, might

easily secure the fruits of a second sale. Congress, it is believed, could not have intended to adopt any such theory; and, in view of all the provisions of law upon the subject, I am of the opinion that the office of the collector at the home port is the proper place for the registry of any such bill of sale, mortgage, hypothecation, or conveyance, within the meaning of the act to provide for recording the conveyances of vessels, and for other purposes.

Congress, by the express words of the constitution, has power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Able counsel maintained in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 3, that the power of congress in this behalf was limited to the interchange of commodities, and that it did not comprehend navigation. Responding to the argument on that point, Marshall, C. J., said, if commerce does not include navigation, the government of the United States has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen; yet this power has been exercised with the consent of all from the commencement of the government, and has been understood by all to be a commercial regulation. All America, says the late chief justice, understands and has uniformly understood the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed; and finally, he affirms that the power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." But the case of Sinnot v. Davenport, 22 How. [63 U. S.] 242, is more directly in point, and perhaps ought to be considered as decisive of the question. On that occasion the court had under consideration the question, whether the law of the state of Alabama requiring owners of steamboats navigating the waters of the state to file in the probate office of the county of Mobile a statement specifying the name of the vessel, the name of the owner or owners, his or their place of residence, and the proportion owned by each, was or not constitutional; and the court unanimously held that it was not, because it was in conflict with the law of congress providing for the registering and enrolling of vessels. Speaking directly upon the question involved in the case, the court say: "Congress, therefore, has legislated upon the very subject which the state law has undertaken to regulate, and has limited its regulations in the matter to a registry at the home port." That opinion was given in 1859, more than eight years after the act of congress in question was passed. Undoubtedly the means of ascertaining the names and citizenship of the owners of ships and vessels, and of perpetuating and authenticating the evidence thereof, are regulations of commerce within the meaning of that term, as defined by the decisions of the supreme court; and if so, then it clearly follows that the regulations of congress are paramount to those enacted by the state.

For these reasons, I am of the opinion that the act of congress under consideration is valid, and consequently that the decree of the district court must be affirmed.

BLANCHARD (OWEN v.). See Case No. 10,628.

Case No. 1,514.

BLANCHARD et al. v. PUTTMAN et al.

[2 Bond, 84; 3 Fish. Pat. Cas. 186.] [1]

Circuit Court, S. D. Ohio. March, 1867.[2]

PATENTS — COMBINATION — INFRINGEMENT — EVIDENCE — PRESUMPTIONS — RIGHTS OF LICENSEE.

1. The patent of Thomas Blanchard, of December 18, 1849, reissued November 15, 1859, is for a combination of the parts composing the wood-bending machine described in his specification.

2. A patent is prima facie for a new and useful invention. The plaintiff is entitled to the benefit of this presumption, and so is the defendant if he claim under letters patent.

[See Knight v. Baltimore & O. R. Co., Case No. 7,882; Parker v. Stiles, Id. 10,749; Latta v. Shawk, Id. 8,116; Morse Fountain Pen Co. v. Esterbrook Pen Manuf'g Co., Id. 9,862; Judson v. Cope, Id. 7,565; Johnson v. Root, Id. 7,409; Wing v. Richardson, Id. 17,869; Brodie v. Ophir Silver Min. Co., Id. 1,919; Jordon v. Dobson, Id. 7,519; Cook v. Ernest, Id. 3,155; Crouch v. Speer, Id. 3,438; Proctor v. Brill, 4 Fed. 415.]

[See note at end of case.]

3. A licensee is entitled to offer in evidence the letters patent of his licensor as a defense to an action against him for infringing a prior patent.

[See note at end of case.]

4. The patent of John C. Morris, of March 11, 1856, reissued May 27, 1862, for improvements in wood-bending machines, explained in its relation to the patent of Thomas Blanchard.

5. Blanchard's patent is for a wood-bending machine with a rotating form, and does not include a stationary form.

6. A patent for a particular structure intended to accomplish a particular end does not import an exclusive right to every possible mode of accomplishing the same end.

[See Whitney v. Mowry, Case No. 17,592; Waterbury Brass Co. v. Miller, Id. 17,254.]

[7. The question of the identity of two machines depends, not on their appearance or form, but on whether the alleged infringing machine is a mechanical equivalent of the other, or whether it produces the same result by substantially the same principle or mode of operation.]

[See Brooks v. Jenkins, Case No. 1,953; Eames v. Cook, Id. 4,239; Parker v. Stiles, Id. 10,749; Crompton v. Belknap Mills, Id.

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[1] [Reported by Samuel S. Fisher, Esq., and by Lewis H. Bond, Esq., and here compiled and reprinted by permission.]

[2] [Reversed by the supreme court in Blanchard v. Putman, 8 Wall. (75 U. S.) 420.]

3,406; Judson v. Cope, Id. 7,565; Swift v. Whisen, Id. 13,700; Converse v. Cannon, Id. 3,144.]

At law. This was an action on the case [by Alonzo V. Blanchard, John D. Blanchard, and Franklin Blanchard against Antoine Puttman, Conrad Weaver, and John Bittinger], tried before the court and a jury, for the infringement of letters patent [No. 6,951] for an "improvement in bending wood," granted to Thomas Blanchard, December 18, 1849, reissued [No. 853] November 15, 1859, and extended December 18, 1863. [Verdict for defendants.] The material portions of the specification and claim were as follows:

"In the machines heretofore contrived for the purpose of bending timber, the bed-piece upon which the stick was placed, and the lever by which the bending was effected, have not been so connected together as to hold them at fixed distances from each other, and consequently when the piece of timber being bent was of varying stiffness, or when it contained knots, it was liable to rise up and leave the mold whenever there was a weak place in the stick, and if the first part of the operation was successful and the part bent was followed by a stiffer portion, the former was liable to be thrown out of place by the more rigid and unyielding portion, and thus an imperfect curve was the result. And these difficulties were not remedied by the employment of flexible bands of metal, or other devices intended to prevent the breaking of the timber on the outside of the bend. The above-mentioned difficulties were in most cases enhanced, if not caused, to a considerable extent, by the fact that the power by which the timber was bent, was applied to the timber itself as a means of communicating the power to the parts to be bent. While in the improvements to be hereinafter described the timber is passive, and the bending is effected by power applied through the mechanism employed. These machines were also defective in another particular, if the attempt should be made in them to apply any considerable pressure to the end of the timber to be bent, instead of consolidating the material and causing the fiber thereof to be condensed, such pressure would only increase the tendency to bulge up the timber from the mold and break it. All these difficulties have been remedied by my improved method of bending, which I will now proceed more particularly to describe. The operation of the machine is as follows: The mold lever is thrown open at right angles with the bench, as shown in fig. 2; the timber of handle G is placed with its round end between the chain and the mold and in contact with the bar J, the key L is then driven in (fig. 5), to hold it in its place, but still allow it to slide endwise sufficient to upset; the draft-screw I is then turned to bring the end of the handle and end of the chain firm against the mold; the set-screw K is then turned up to bring the beam E against the back of the chain to give it proper support; the tender then applies his hand to the upsetting screw H, and turns it forward and presses the handle endwise, driving the rounded end firm against the slide J, which is connected with the first link of the chain. This operation tightens the chain, and completes the preparations for the bending process; power is then applied to bring the mold lever round, which draws the sliding beam forward with the handle as the curve is formed, the upsetting screw co-operating with the chain and mold lever, to keep the plow handle up to the bar J, so as to insure the bend at the extreme end while the fiber in the inner part of the curve is consolidated, and that which forms the outer part of the curve is prevented from breaking. During the operation it is usually found necessary to relax the upsetting screw a little to prevent the timber on the inside the curve from crippling, when the mold lever is brought home to its place; the spring-catch N takes hold of the end of the lever and prevents it from going back, and the work is completed. That part of the plow-handle which is bent is of an oval form, and is turned or wrought in proper shape before it is bent; it is formed deepest and thickest transversely to the curve; consequently the links or blocks that form the chain are made hollow to conform to the outside of the curve, the lever-mold having a corresponding hollow to fit the inside. The chain may be dispensed with in bending large curves with flat sides, such as felloes for wheels. Where the sides have flat surfaces a metallic strap may be substituted, and a number of pieces can be bent at once in the same mold, or a whole plank of suitable thickness may be bent at once and be sawed into felloes afterward; in that case there would be no side twist or winding in the operation of bending, but if they are sawed into squares before being bent the wind or side crook may be prevented by placing a number together, and the side spring may be prevented by side clamps to keep them in the right direction while they are being bent; these side clamps may extend around the mold, which will prevent the side movement while receiving the proper curve, either cylindrical or elliptical, or of any figure required, and instead of actuating the mold by a lever, cog-wheels may be used and any species of power applied to drive the machine. The upsetting power must be given by the screw or other mechanical power when the timber is first placed in the mold and while in its straight form, by screwing or pressing against the ends of the timber, and care should be taken to prevent its crippling, by having clamps attached to the sliding bed. The amount of end-pressure should be sufficient to condense the fibers on the inside of the curve without crippling the timber, and to prevent the fibers on the outside of the curve from being drawn

apart. When the timber is in danger of being crippled by the end-pressure, which particularly occurs in short curves or where the stick is thick, the upsetting screw should be relaxed gradually, as the bending proceeds, to a sufficient extent, to relieve the timber of the excessive end-pressure and prevent the crippling, as before stated. Having thus described my improved method of bending wood, and having shown one form of machine embodying the same, adapted to the bending of plow-handles, it is obvious that the same method may be applied to the bending of a great variety of forms, adapted to a great variety of purposes, and that the details of the mechanism may be greatly varied without departing from the principles of my invention. What I claim as my invention, and desire to secure by letters patent, is my improved method of bending wood, substantially as hereinbefore described."

The infringement alleged was in the use, by defendants, of a machine for bending chair-stuff, felloes, etc., constructed by John C. Morris, under his letters patent. See Morris v. Royer [Case No. 9,835].

George M. Lee, for plaintiffs.
S. S. Fisher, for defendants.

LEAVITT, District Judge. Charge of the court:

This suit, gentlemen, is brought by the plaintiffs as the assignees of the administrator of Thomas Blanchard.

It is based on a patent for an improvement in bending wood, issued to said Blanchard, December 18, 1849, reissued to him November 15, 1859, and extended December 18, 1863, and assigned to plaintiffs. The declaration alleges that the defendants have infringed the exclusive right under this patent thus vested in plaintiffs.

No question as to the title of the plaintiffs arises in this case.

The defendants are licensed under one John C. Morris; that is, they use and have a license to use a wood-bending machine which they say is covered by a patent issued to Morris, March 11, 1856, and reissued to him May 27, 1862.

The defendants insist, by way of defense: First, that the Blanchard patent is void for want of novelty; and, secondly, that the machine constructed under Morris' patent, and used by them, does not infringe the patent of Blanchard, and that therefore they are not liable in this action.

I will first call your attention to the question of the novelty of Blanchard's invention. You are doubtless familiar with the principle of patent law, that the novelty of an invention is an essential element of a valid patent. Patent rights are only granted upon the theory that the thing discovered, and for which the party asks for an exclusive right, is new as well as useful; in other words, that it is the invention of the party who claims a patent for it, and was not known before his invention.

In this connection I may say, as a principle of law familiar to every one at all conversant with the subject, that the emanation of a patent from the proper authorities of the government affords a presumption that the invention patented is new and original with the patentee. This presumption arises from the fact that all patents must be issued with certain formalities, and that the officers charged with the administration of the patent laws are required very astutely to investigate every claim. The applicant is, moreover, obliged to swear that he is the original inventor of that for which he asks a patent; and it is only upon a compliance with these requisitions of law that the commissioner of patents is authorized to make the grant.

But it is proper to state that while this presumption does exist, it is competent for one charged with an infringement to show that, in point of fact, the invention was not new, and that the party ought never to have had a patent for it; and if he succeeds in making this proof, he establishes the invalidity of the patent, and it is a mere nullity. Now, it is claimed, under the first issue to which I have referred, namely, the novelty of the invention of Blanchard, that there is evidence of other machines in use prior to the date of his invention, which anticipated, or were substantially the same as that for which he procured a patent. This is a question for the jury, for it is a question of fact depending upon the evidence.

To substantiate the position taken by the defendants impeaching the novelty of Blanchard's invention, there has been a good deal of testimony adduced, and various wood-bending machines and models have been exhibited to the jury.

I shall merely refer to these without attempting to analyze or dissect them.

There is one patented to E. Reynolds in July, 1835, and another patented to Jonathan Mulford in the same year. Evidence has also been introduced of a rejected application made by one May, in 1846, for a patent for a wood-bending machine; and there is also evidence of a machine patented to Abel Gardner, in 1849, for bending hames; also, of a machine not patented, which was first constructed by one David Gans, and used, as it appears, in 1845, and for some years subsequently, in the state of Illinois.

Now, in regard to several of these machines, you have the models before you, and I may remark here that models are oftentimes the very best evidence that can be adduced. There is nothing, perhaps, more satisfactory upon questions involving the identity of several mechanical structures than the exhibition of the machines or accurate models of them. They are silent witnesses, but they are usually very reliable.

In reference to the Gans machine, one of

the witnesses, an expert, introduced on the part of the defendants, says it is substantially the same as Blanchard's, and involves essentially the same principles and mode of operation. But other witnesses express a different opinion. It is for the jury to pass upon that question, and they will do it of course upon the evidence which they have before them.

I may state here a familiar principle: that this question of identity, as has been very truly stated by the counsel, does not depend upon the appearance or form of the two structures claimed to be identical. It depends simply upon the question whether they are the same in their mode and principle of operation, and whether one is a mechanical equivalent for the other. For it is obvious that there may be two machines very dissimilar in structure and appearance, which yet act upon precisely the same mechanical principles.

The question for the jury, in such case, is to ascertain, if possible, whether the two structures are, in all substantial particulars, the same; or whether there is, or is not, a substantial difference in their mode of operation.

Upon this subject, in relation to these various machines or structures, the jury will probably conclude that none of them combine all the elements of the Blanchard invention. The Gans machine is, perhaps, the only one that will create any doubt in the minds of the jurors on this question. It will be for them to say whether that combines all the elements or parts of the Blanchard improvement.

Without detaining the jury further upon the question of novelty, I may remark that where a machine has been long in public use, under a patent which has existed for a number of years, unchallenged and undisputed, a jury should hesitate before coming to the conclusion that the patent was void on the ground of want of novelty. I mean by this that a jury should be clearly satisfied in their own minds that the invention in controversy was anticipated by something known before the date of the patent, in order to come to the conclusion that the patent was void on the ground adverted to.

It becomes necessary, gentlemen, that the court should give a construction to the claims of the Blanchard patent with a view to this question of novelty. One point in controversy in regard to it, as I understand it, is, whether it is for an entire machine, or a machine as an entirety, or whether the patent is to be construed as a patent for a combination; that is, a combination of different parts so arranged as to produce a new and useful result.

In my view of this question, the patent to Blanchard can only be regarded as a patent for a combination of different parts or elements.

It is called in the patent itself, "a new and useful improvement in bending wood." In the specification it is designated as "a new and improved method of bending wood." The specification, which has been read in your presence, is exceedingly elaborate and minute.

The patentee refers to the fact that in all the prior modes of bending wood there were great and manifest defects. He does not claim that he was the original inventor of the art of bending wood, or of the separate parts of the machine which he describes. The claim is that he has, by a union of those parts, improved upon all methods before known for that purpose.

Now, if I am right, in my construction of this patent—if it is for a combination of the various parts or elements of the structure described—there is applicable to this case this principle, which it becomes important for the jury to consider, namely, that there can be no infringement of such a patent unless the person charged with the infringement has appropriated and used all the parts of the combination.

To illustrate my meaning: A person obtains a patent for a machine containing three different elements in combination. Those three elements, separately, are none of them new, but the patentee, by his ingenuity and study, has contrived to combine them so as to produce a new and useful result, and that is a patentable subject under our patent laws.

But one charged with an infringement of that combined machine is not liable, unless he has used all of the three parts that constitute the combination. If he takes one of them only, or two of them, leaving out the third, it is not an infringement. These are very familiar principles, and, I suppose, will not be controverted. So, on the other hand, if the patent to Blanchard is for a combination it is not impeached for want of novelty, unless the jury find that the machines exhibited or proved have all the elements or parts of the Blanchard machine.

I come now to the question of infringement, which I have partially anticipated in the remarks which I have already made. This, like that of novelty, is a question exclusively for the jury, depending altogether upon the evidence.

It is for the plaintiffs to establish, to the satisfaction of the jury, the fact of infringement; and this involves directly the question of the identity of the Blanchard machine and the Morris machine. Are they substantially, in their principle and mode of operation, alike?

I may remark here that both these parties are patentees, and the presumption equally applies to both, in relation to the novelty and utility of their inventions. There is a presumption from the issuance of a patent to Morris, years after the date of the Blanchard patent, that he had invented something different from the invention for which a pat-

ent had been previously granted to Blanchard; for, if the commissioner had come to a different conclusion, it would have been his duty to have rejected the application.

The first claim of Morris' patent is for a combination composed of three distinct elements. It reads as follows: "A wood-bending form, to which timbers are made to conform by bending them from the center or inner end of the desired curve outward, when used in combination with abutments or clamps, to prevent or regulate end expansion, and levers or handles, or their equivalents, to guide the bending, substantially as described."

The second claim is for "a stationary or poised wood-bending form in combination with the cords, levers, and drum, or their equivalents, and the eccentric clamp, or its equivalent, in the manner and for the purposes set forth."

The third is as follows: "In combination with the stationary form, levers, and abutments, I claim the employment of hooks, or hooks and pins, or their equivalents, that shall embrace the ends of the wood, to restrain the wood in shape and permit the removal of the abutments after each operation."

He says, in the beginning of his specification: "The machines for bending wood may be divided into two principal groups or classes; the first including all machines in which the bending process commences at one end of the wood, and is continued in the direction of the other; and the second including those in which the form or mold is first applied at or near the center of the piece to be bent, and the bending process is continued from that point toward each end, which I call bending outward." And then after making this classification, he goes on to say which class of machines he regards as the superior. In a part of his specification he says: "Having thus fully described my improvements, I do not wish to be understood as claiming them in connection with the machines for bending wood where the bending is effected by the rotation of the form, but what I claim as new," etc., and then follow the claims which I have already read.

Of that machine, described by Morris, patented to him, and used by the defendants, the jury have before them what is admitted to be a correct model. There is some contradictory testimony in regard to its identity with machines made under the Blanchard patent. There are two gentlemen who have testified as experts, Mr. Hibberd and Mr. Doane, who say that they regard them as substantially the same. On the other hand, there are three witnesses for the defendants, Mr. Knight, Mr. Renwick, and Mr. Morris, who state distinctly and explicitly that they regard them as essentially different in their mode of operation, and as involving wholly different principles in their action.

The jury having the models before them, with the aid of the testimony of the experts, will be able to decide whether they are substantially the same in principle.

I will state very rapidly some of the points in which it is claimed by the counsel for the defendants that there is a substantial difference between the two structures.

In the first place, it is claimed that the Morris machine bends from the center to outer end, whereas the Blanchard machine bends from the end inward. The jury have seen the operation of these machines, and are doubtless prepared to say whether, in that respect, the two machines are alike.

It is also claimed that the application of the power, in the operation of bending, is different in the two machines, and that the effect upon the timber bent by these two methods is different; that in timber bent under the Morris patent there is less disturbance of the fibers of the wood; that bending from the center outward to the end leaves the fibers more firmly set than they are by the operation under the Blanchard invention. If the jury should be satisfied of this difference in the operation of the two, it will be for them to say whether it does or does not constitute a substantial difference in the principle of the machines.

It is also contended that there is a substantial difference in this: that it is one of the main elements of the invention patented to Blanchard, that there is provision made for end relaxation when the end pressure is too great, and that, upon the principle and theory of the Morris machine, there is no necessity for this relaxation, and therefore no provision is made for it.

Another difference very strongly insisted upon by counsel for the defendants, and worthy of the consideration of the jury, is in regard to the form of the mold. Now, it is insisted, on the part of the plaintiff, that the stationary mold is fairly to be included within the claim of the Blanchard patent. Not only does it include, the counsel contends, the rotating form or mold, but also, by a fair construction, the stationary form or mold. Upon that point, from the best consideration I have been able to give to the question, I am clearly of the opinion that by no fair construction of the Blanchard patent can it be held to comprehend a claim for a stationary form or mold. It is unreasonable to suppose that Blanchard had anything of that kind in his mind when he was preparing his specification. It would naturally be expected, if it were a part of his conception, he would have said, in so many words, that though he gave the preference to the rotating form, yet he intended to embrace also the stationary form. But we look in vain throughout the entire instrument for any intimation that he ever thought of a stationary form, while all that he does say relates to a rotating form.

I make this brief statement of my construc-

tion of the Blanchard patent in this particular, that the counsel for the plaintiff may have the full benefit of my ruling. It belongs, legitimately, to the court to decide whether the patent, by a fair construction, embraces the claim for a stationary mold or form; and I announce distinctly, as my opinion, that it can not be so construed.

Mr. Lee. I ask your honor to say to the jury, that if an equivalent is substituted by the defendants for any part of the Blanchard machine, it is an infringement of his patent.

THE COURT. The idea I intended to convey to the jury was, that if they found the Morris machine to be substantially the same, or a mechanical equivalent for the other, then they would come to the conclusion that the two machines were identical in principle and operation. There is one principle true, beyond all question, that a patent for a particular structure, intended to accomplish a particular end, does not necessarily import an exclusive right to every possible mode of accomplishing the same end. The doctrine is simply this, as stated in the opinion of the supreme court, read in the hearing of the jury, that in order to make out the fact of infringement there must appear to have been a substantial identity; that the parts of the machine which are claimed to be an infringement of the patented machine must appear, to the satisfaction of the jury, to be substantially the same; that is, that the same result must have been produced by substantially the same principle or mode of operation. If there is a difference in this respect, then it goes to establish the want of identity between the structures. I will now briefly recapitulate the points to which you are to direct your attention. First, is the invention, this combination patented to Blanchard, new and original? If the jury answer this question in the affirmative, their next inquiry would be, whether that combination has been infringed by these defendants; in other words, whether the Morris structure is identical, in principle and operation, with that of Blanchard.

I have no doubt that Thomas Blanchard, now deceased, was an ingenious mechanic, and a man of much more than ordinary inventive talent. I have no doubt that the machine that he invented, and for which he obtained a patent, is a valuable invention, creditable to him and useful to the public. And I am equally clear that Morris, in his machine, has exhibited inventive talent of a high order, and has produced a useful and practical wood-bending machine. It is to be regretted that these parties did not permit each one to go in the enjoyment of his grant under his particular patent, and that it should have been found necessary to resort to litigation to settle their rights.

It is understood that the plaintiffs claim nominal damages only.

The jury found a verdict for the defendants.

[NOTE. This case was reversed by the supreme court on the grounds—First, that the court erred in admitting in evidence the patent granted to Morris, May 27, 1862, which was offered by defendants as the foundation for the introduction of evidence to show that the machine or machines used by them were constructed by them under a license from the patentee in accordance with the specifications and claims of that patent as reissued, as its admission presented an immaterial issue on the question of infringement, which was not involved in the pleadings, and therefore calculated to mislead the jury by withdrawing their attention from the real subject in controversy; second, that the admission of testimony on the part of defendants to prove the existence and use in 1858, in Illinois, of a machine for bending plow handles, for the purpose of showing an anterior public use, was likewise erroneous, defendants having failed to comply with the fifteenth section of the patent act (5 Stat. 123), requiring a defendant who defends on previous invention, knowledge, or use of the thing patented, to give notice of "the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used." Mr. Justice Clifford, who delivered the opinion, after assigning the foregoing reasons as grounds for reversal, proceeded: "Compliance with that provision being a condition precedent to the right of the defendant to introduce such evidence under the general issue, it necessarily follows that the onus probandi is on him to show that the required notice was given to the plaintiff thirty days before the trial; and, if he fails to do so, he cannot introduce any evidence to controvert the novelty of the patent. * * * The letters patent, when introduced by the plaintiffs, afforded a prima facie presumption that the assignor of the plaintiffs was the original and first inventor of the improvement; and, as the defendants had not given to the plaintiffs the required notice that they intended to offer evidence at the trial to overcome that presumption, they had no right to introduce any such evidence, and it necessarily follows that the court had no right to submit any such question to the jury." Blanchard v. Putnam, 8 Wall. (75 U. S.) 420.

[Patent No. 6,951 was granted to Thomas Blanchard, December 18, 1849, and was reissued November 15, 1859 (No. 853).]

Case No. 1,515.

BLANCHARD v. REEVES et al.

[1 Fish. Pat. Cas. 103.][1]

Circuit Court, E. D. Pennsylvania. Sept. Term, 1850.

PATENTS—INFRINGEMENT — PRELIMINARY INJUNCTION—WHEN GRANTED.

1. Upon motions for preliminary injunction, if, after a careful and impartial examination of the case, the court is of opinion that the plaintiff is entitled by law to the writ, it is their duty to grant it without evasion.

[Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 679.]

[See Goodyear v. Hullihen, Case No. 5,573; Thayer v. Wales, Id. 13,871; Cary v. Lovell Manuf'g Co., 24 Fed. 141.]

2. In order to ascertain the true nature and value of an invention, we must separate the substance and principle of it from its accidents, its essence from its modes. A mere change in the latter, while the former are retained, will

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

not acquit the party making it from the charge or guilt of piracy.

[See Blanchard v. Puttman, Case No. 1,514.]

3. The invention of Thomas Blanchard for turning irregular forms construed and explained.

In equity. This was a motion [by Thomas Blanchard] for a provisional injunction to restrain the defendants [Biddle Reeves, Charles Reeves, Isaac B. Eldridge, and others] from infringing upon letters patent granted to Thomas Blanchard, January 20, 1820, for "a machine for turning and cutting irregular forms," and extended, by act of congress for fourteen years from the expiration of the first term. The nature of the invention and of the alleged infringement is fully explained in the opinion of the court.

S. Lewis, for complainant.

W. L. Hirst, for defendants.

GRIER, Circuit Justice. The validity of the complainant's patent having been established by numerous verdicts, and long use, the only inquiry on the present occasion will be whether the machine of the defendant is an infringement of the patent. The question of identity or infringement is often one of difficult solution, and more especially where the subjects to be compared are complex machines, or new combinations of well-known mechanical devices for the purpose of producing certain results. Identity may be said to be a question merely of fact, to be determined by persons skilled in mechanics. But when the comparison to be instituted depends not merely on form or external appearance, but in ascertaining the substance, principle, or mode of operation of the machine invented, and in giving a correct construction to the words of the patent and specification, it is apparent that the question to be answered, though primarily one of mechanics and science, may be also mixed with law, inasmuch as the construction of all written instruments belongs to the court, and not to the jury.

I should have had much less difficulty in arriving at a conclusion satisfactory to my own mind, in the present case, but for the opposite opinions expressed by gentlemen of the highest reputation for learning, judgment, and practical skill in mechanics.

The court might have considered themselves sufficiently excused for any error of judgment, when supported by the opinions of men of such eminence, as may be found on either side of this question. The report of the learned commissioners appointed by this court was held conclusive, in the case in which it was made, and the motion for an attachment peremptorily refused. But, in the present case, the motion is founded on affidavits of other gentlemen of acknowledged ability and acquirements, who fully established a case which would entitle the plaintiff to his injunction. The report of our commissioners in the former case, being assumed to be in the knowledge of the court, has been referred to, in the depositions of complainant's witnesses. Hence we are compelled to notice it in the consideration of this case.

Technically, it may be said, not to be before the court as evidence, but in fact and in its moral effect, if the court believe it correct in its results, they will be unwilling to grant an injunction, on evidence which, though formally sufficient, has not produced conviction on their minds. It is true that the court might have evaded the question by saying we will not grant an injunction in a case where "learned doctors disagree," but wait till a jury shall solve the difficulty. This course, I must confess, coincides, both with my known antipathy to the writ of injunction, as well as natural indolence in such hot weather. But I consider that the complainant has a right to the judgment of the court on the matter presented before them, and the evasion of the question would be an evasion of duty, and if, after a careful and impartial examination of the case, the court is of opinion that the plaintiff is entitled by law to the writ now prayed for, it is their duty to grant it without evasion.

Having had before us models of the patented and offending machines, with the testimony and opinion of men of skill and learning, it is almost impossible that any future investigation can add any thing which can throw greater light on the question. The whole case is as fully before the court as it can be. The mere accumulation of opinions on either side will add no weight to the evidence already before us.

Indeed the difference of opinion which appears in this case, seems to result from the construction given to the specification of complainant's patent, and in assuming that "the only method proposed by Mr. Blanchard, is that in which the friction wheel or tram describes a spiral line over the whole surface of the model, and causes the cutters to act in a similar direction."

But we think that this is too narrow a construction of the patent. In every combination of mechanical devices to perform certain functions so as to constitute a new machine or a new and useful invention, it is impossible to enumerate, in a specification, all the various modes by which the machine may be made to operate, so as to produce a useful result. Many of its parts may be changed or substituted by other mechanical equivalents or devices, which either improve or deteriorate its value, while the original idea, principle, or mode of operation of the inventor is manifestly preserved. The inventor usually sets forth what he conceives the best form or mode under which his machine may be used to produce the required result. In order to ascertain the true nature and value of his invention, we must separate the substance and principle of it from its accidents; its essence from its

modes; a mere change in the latter, while the former are retained, will not acquit the party making it from the charge or guilt of pirating the invention.

The machine of complainant is described in the patent as "an engine for turning and cutting irregular forms out of wood, brass, etc., called Blanchard's self-directing machine." I use the words of Professor Treadwell nearly verbatim. The invention consists in arranging and combining together—1st, a model; 2d, a guide; 3d, a cutter-wheel; and 4th, a rough block, in such a manner, and under such relations that when the machine is in oporation the guide shall be made to touch successively every part of the surface of the model, and that it shall, at the same time, govern the cutter-wheel, by permitting or causing it to advance or recede from the axis of the rough material, having, in this, a constant relation to the distance of the face of the guide from the axis of the model; by which means the cutters remove, by their own independent motion, from the rough block, every part of the same which projects into or beyond the line or path of the cutters in their revolution, so that the rough block is at length reduced to a certain conformity and resemblance in shape to the model. The mode of producing this result in the concrete, which we have thus stated in the abstract, and the combination of mechanical devices or agents, necessary to reduce it to practice, are fully set forth in the specification.

Now the machine of the defendants contains the four essential members of the complainant's machine, which we have just enumerated, viz.: the model, the guide, the cutter-wheel, and the rough material, combined in the same relations, and affecting each other in the same manner substantially. But, in the subordinate agents or devices by which these four principal members are made to operate, provision is made for the following differences in defendants' machine, viz.: In complainant's machine, the model and the rough block have a continuous rotary motion connected with a lateral motion; the former produced by belts and pulleys, the latter by screws. Under these combined motions the guide turns upon the model in a spiral or helical path, and the cutter-wheel, likewise, removes the superfluous material from the rough material, in a spiral course. In defendant's machine, the model and rough block rotate by an intermittent motion, and move laterally by a rectilinear reciprocating motion, the former being produced by a rag or rachet-wheel, and the latter by a crank.

Now, it is true, that the complainant's specification describes a machine, which effects its result by a combination of lateral and rotary motion, to form a helical course or track in the operation of the machine. But is that of the essence or substance of his invention? or is it not merely an accident to that particular form of the machine described? Suppose this lateral motion, which, combined with the circular, constitutes the helical, had been reduced from almost nothing to 0, or zero, and the cutter, after performing the absolute circle, has shifted by an intermittent motion, so as to move in parallel rings, would that have altered the principle or substance of the invented machine—to change it, in one of its accidents only, and that for the worse? There could be but one answer to this question. But the only difference in that case is that the rotary motion of model and rough material is reduced to 0, or zero, and changed to an intermittent one. The change of form in the tram, from a circle to the segment of a circle, or mere tangent line, is of no importance—it but accommodates it to its lateral motion. The substitution of the rachet-wheel for the belt and screw, is but a change of equivalents to suit the changed motions of the tram and cutter-wheel. Such a change in the subordinate agents or devices, affecting the motions of the model and guide only in the figure of their path, or the relative lines of their movements, in no case changes the principle, essence, substance, or character of the machine. We can not shut our eyes to the fact that the defendants have pirated the invention of the complainant in all its essential parts. Whether the changes made constitute an improvement of the plaintiff's machine we need not inquire. The defendants have (not in this case only) exhibited singular ingenuity and skill in endeavoring to evade complainant's patent, which possibly might have been better, or at least more profitably employed.

The complainant is therefore entitled to his injunction, on conditions which will be hereafter considered, if necessary.

[NOTE. Patent was granted to T. Blanchard, January 20, 1820, and was renewed by special act of congress of June 30, 1834 (6 Stat. 589, 748), and further by act of February 15, 1847 (9 Stat. 683). For other cases involving this patent, see Blanchard v. Sprague, Cases Nos. 1,516–1,518; Blanchard v. Eldridge, Id. 1,509, 1,510; Blanchard v. Haynes, Id. 1,512; Blanchard v. Beers, Id. 1,506; Blanchard's Gun-stock Turning Factory v. Jacobs, Id. 1,520; Blanchard's Gun-stock Turning Factory v. Warner, Id. 1,521.]

Case No. 1,516.

BLANCHARD v. SPRAGUE.

[1 Cliff. 288.][1]

Circuit Court, D. Massachusetts. June Term, 1859.

PATENTS — LICENSE —WHAT CONSTITUTES—ADDITIONAL LICENSE FEE — REMEDY AT LAW — ENJOINING LICENSEE—EQUITY JURISDICTION—WITNESSES—COMPETENCY OF PARTIES.

1. Parties to a suit in equity are not competent witnesses in their own behalf, under the

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

existing legislation of congress, in the circuit court.

[See Ferson v. Sanger, Case No. 4,752. Contra, Rison v. Cribbs, Id. 11,860.]

2. When a patentee knowingly and for a considerable length of time acquiesced in the use of his patented machine by another, who had previously constructed and used the same by his permission, and actually and voluntarily accepted a compensation for such use from the person in possession, as just payment for such use, those acts of the patentee were *held* to be evidence from which a license may be inferred, unless controlled by other facts and circumstances.

[Cited in Herman v. Herman, 29 Fed. 94, American Paper-Bag Co. v. Van Nortwick, 3 C. C. A. 274, 52 Fed. 757.]

[See Cressler v. Custer, Case No. 3,388.]

3. And where, as in this case, the only reservation made when the payment was received, was the right on the part of the patentee to claim an additional sum for such use of the machine, it cannot be *held* that the acts of the respondent in using the machine under such circumstances, prior to the time when such payment was made, were unlawful.

4. Where a party in accepting a certain rate of tariff on articles manufactured by his patented machine, reserved the right to claim a certain additional tariff on such articles, and claimed that by reason of such reservation he was entitled to receive such additional tariff as compensation for the use of his machine, *held*, the claim furnished no ground for an injunction, presupposing, as it did, that the use of the machine was not unlawful, but presented a case on which the complainant had an adequate remedy at law.

[Cited in Dowell v. Griswold, Case No. 4,041; Hartell v. Tilghman, 99 U. S. 554; White v. Lee, 3 Fed. 224; Teas v. Albright, 13 Fed. 413.]

5. Wherever a contract is made in relation to patent rights, which is not provided for and regulated by an act of congress, the parties, in case of dispute, stand upon the same ground as other litigants in respect to the jurisdiction of the court.

[Cited in Dowell v. Griswold, Case No. 4,041; Teas v. Albright, 13 Fed. 413; Albright v. Teas, 106 U. S. 620, 1 Sup. Ct. 556.]

[See Goodyear v. Union India Rubber Co., Case No. 5,586; Bloomer v. Gilpin, Id. 1,558; Merserole v. Union Paper Collar Co., Id. 9,488.]

This was a bill in equity brought by [Thomas] Blanchard, who was a citizen of Massachusetts, against [Chandler] Sprague, who was a citizen of the same state. The bill charged the respondent with the infringement of certain patent rights owned by the complainant, and prayed for an account and for an injunction. The pleadings and testimony disclosed the following facts: January 20th, 1820, letters-patent were issued to Blanchard for a machine for cutting irregular forms, such as shoe-lasts and boot-trees. Various acts of congress were passed extending the patent, by the last of which it was renewed for fourteen years, from January 20, 1848. Prior to the year 1851 the respondent, with the permission of the complainant, constructed one of his machines, and used it in the manufacture of shoe-lasts and boot-trees under a written license for one year, renewable yearly, at a tariff of one and one half cents for each article manufactured, payable quarterly. Renewals had been omitted some years, but the tariff had been regularly paid and received without objection. The license contained a provision that the complainant might raise the tariff from one and one half cents to two cents, upon giving six months' notice. July 15th, 1857, the complainant notified the respondent of his intention to restrain him from using the machine, unless he should, on or before January 20th, 1858, obtain a new license from the complainant, in which the rate of tariff should be two cents instead of one and one half. Nevertheless the respondent continued to use the machine up to the time of the filing of the bill and afterwards, and the complainant voluntarily received from him the tariff of one and one half cents at the end of each quarter up to April 1st, fifteen days after the bill was filed. The tariff for the last quarter was received after a tender of it had been once refused, with the proviso expressed in the receipt given for the same, that it was received without thereby waiving the right, if any he had, to recover one half cent more for each last turned. Much testimony was introduced tending to show that the complainant had waived his right to increase the tariff; but from the view of the case taken by the court, it is not necessary to reproduce it here. The depositions of the complainant and of the respondent were both taken to be used as evidence in the case. Counsel for respondent objected to the deposition of the complainant, on the ground that he was interested in the event of the suit. After argument, the parties agreed that, if this objection were sustained by the court, the deposition of the respondent should also be considered as having been objected to.

Lemuel Shaw, Jr., and Sidney Bartlett, for complainant.

J. P. Healey and B. R. Curtis, for respondent.

CLIFFORD, Circuit Justice. By the general rules of law, the parties to a suit, being interested in the event, are not competent to testify in their own favor, and there is no law of congress relieving them from that disability. In trials at common law, the laws of the states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, furnish the rules of decision in the federal courts in cases where they apply. It is expressly so provided in the thirty-fourth section of the judiciary act [1 Stat. 92], and it has been so held by the supreme court on so many different occasions, that the point cannot now be regarded as open to dispute. McNiel v. Holbrook, 12 Pet. [37 U. S.] 89; Wayman v. Southard, 10 Wheat. [23 U. S.] 1; McKeen v. Delancy, 5 Cranch [9 U. S.] 31; Polk's Lessee v. Wendal, 9 Cranch [13 U. S.] 98;

Thatcher v. Powell, 6 Wheat. [19 U. S.] 127; McCluny v. Silliman, 3 Pet. [28 U. S.] 277. Beyond question, therefore, state laws furnish the rules of evidence in the federal tribunals in civil cases at common law, subject to the exception specified in the judiciary act. Parties are made competent witnesses in civil suits by the laws of Massachusetts, and consequently they are so, subject to the exceptions before mentioned, in the federal courts holden in that district in trials at common law. But the chancery jurisdiction, practice and rules of evidence in the circuit courts of the United States are the same in all the states, and no state statute upon the subject has been adopted by any law of congress, unless that construction be given to the provision of the judiciary act already recited. Suits in equity are plainly distinguished from trials at common law in the constitution, and they are so distinguished in a very pointed manner in repeated instances in the judiciary act. They are so, in the first place, in the eleventh section of the act which describes and defines the jurisdiction of the circuit courts. By the language of the section, jurisdiction is conferred upon the circuit courts in suits in equity as something in addition to suits of a civil nature at common law. So also, in the twenty-second section, it is provided that judgments and decrees in civil actions and suits in equity may in certain cases be re-examined and reversed or affirmed in the supreme court. Actions at common law are also pointedly distinguished from causes in equity and of admiralty and maritime jurisdiction by the thirtieth section of the same act, and from its whole tenor I am satisfied that the thirty-fourth section of the act does not control the question under consideration. It was held by the supreme court in U. S. v. Reid, 12 How. [53 U. S.] 363, that the language of this section cannot, upon any fair construction, be extended beyond civil cases at common law as contradistinguished from suits in equity, and in that opinion I entirely concur. Judge Story held in Boyle v. Zacharie, 6 Pet. [31 U. S.] 658, that the chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and that the rules of decision are the same in all. That principle was not a new one when it was thus announced, for it had previously been held by the same court in U. S. v. Howland, 4 Wheat. [17 U. S.] 115, that as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in the other states; and that principle was subsequently reaffirmed in Neves v. Scott, 13 How. [54 U. S.] 272, and appears to be the settled law of the supreme court. For these reasons I am of the opinion that the parties to a suit in equity under the existing legislation of congress, are not competent witnesses, and the depositions both of the complainant and respondent are accordingly suppressed.

Having disposed of this preliminary question, I will now proceed to consider the case upon its merits. Under the admissions of the respondent, as contained in the answer, a prima facie case is made out for the complainant, so that the decision of the controversy must turn upon the matters set up in defence. As alleged in the answer, and not controverted by the complainant, the case shows that, for several years prior to the 1st of December, 1851, the respondent had been using, by the permission of the complainant, one of the patented machines, at North Bridgewater, in the state of Massachusetts. That machine was constructed under his own superintendence, and at his own expense, and he had used it under an agreement, or understanding, with the complainant, that he should pay therefor a tariff of one and one half cents for each and every shoe-last or boot-tree turned by him with the same. Under that arrangement, the tariff of one and one half cents for each last and boot-tree manufactured was to be paid quarter-yearly, at the end of each quarter; and it is not controverted that those payments were regularly and constantly made, pursuant to the terms and conditions of the agreement. Similar arrangements had also been made by the complainant with six other persons, each of whom had constructed a machine, and had respectively been using it for several years prior to the period before mentioned, paying therefor the same tariff to the complainant. Those agreements were made in the first instance to continue for one year, with the stipulation for a renewal of the same by the complainant from year to year for the period of seven years, provided the licensee had not, in the mean time, committed any breach of the terms and conditions, but with the right, on the part of the complainant, upon giving six months' notice of his intention, to increase the tariff to a rate not exceeding two cents for each last and boot-tree, if, in his opinion, the interest of the patent should require it. Some of those licenses were granted as early as the fall of 1847, and others bear date as late as the 20th of January, 1848. They are all substantially alike, and in most instances the stipulation for renewal was enlarged either by an indorsement on the agreement, or by a separate instrument, and extended to the term of fourteen years from the time the agreement commenced to operate. On the 5th of June, 1851, the complainant, under a certain contract in writing, sold to James M. Quimby the exclusive right and privilege of making, using, and vending his machines for certain purposes therein specified, in all the states and territories of the United States, excepting the right to make lasts and boot-trees in the New England states. Shoe-lasts and boot-trees manufactured by machines, paten-

ed in this country, were at that time, it seems, imported here from the British provinces, so that it became desirable, in the vew of the complainant and others interested in his patent, to procure, if possible, the passage of a law by congress prohibiting such importation. Accordingly, he solicited contributions from his licensees in this state to defray the expenses in making the application to congress for the passage of such a law. Upon that ground, and with that view, he applied to the respondent, and the other licensees similarly situated, for such contributions, and in consideration thereof agreed with him and them, if they would pay over to James M. Quimby the sum of eight hundred dollars, towards defraying the expenses of such an application; that whenever such a law was passed and approved, he would not, during the continuance of his patent, increase the number of licenses to manufacture lasts within the territory of New England, east of the Connecticut river. That agreement, however, was made upon the further condition that those then having such licenses should supply all the lasts wanted in the territory therein described. Pursuant to that agreement, the respondent subscribed one hundred dollars, and the remaining six persons or firms, subscribed seven hundred dollars; but no such law was ever passed by congress, and of course the promisors did not become liable, under their subscriptions, to pay the respective sums by them subscribed. Afterwards, towards the close of the following year, the terms of this agreement were modified, or rather a new one was made in its stead, which was not reduced to writing. During the interval that elapsed, the licensees, before named, continued to use their respective machines in the manufacture of lasts and boot-trees in the territory embraced in their district, paying therefor, as they had done before, a tariff of three cents a pair, or one and one half cents for each and every piece of last or boot-tree by them manufactured. Efforts were made, in the mean time, to procure the passage of a law by congress, such as is described in the original agreement, but without success. Towards the close of the year 1852, a second application for money to prosecute the undertaking was made by one of the agents who had that subject in charge. He applied, in the first place, to the complainant, and was by him referred to the licensees for the manufacture of lasts and boot-trees, affirming that it was for their interests to contribute, for the reason that he was going to allow them to run their respective machines during the continuance of the patent, without charging them more than three cents a pair for the articles by them manufactured. They declined to contribute until the proposed law should be enacted, without satisfactory assurance, from the complainant, that they should receive something of value for their money. At the request of the agent, several of the licensees accompanied him to the dwelling-house of the complainant, and there had an interview with the latter in the presence of that agent. That interview resulted in a new agreement, or a modification of the one previously made, in writing, and is to the effect, as proved by the witnesses, that the licensees should pay the eight hundred dollars towards defraying the expenses of procuring the passage of the proposed law; and that the complainant, in consideration thereof, should not charge them but three cents a pair for the lasts and boot-trees by them manufactured, whether the bill passed or not. Such of the licensees as were not present on the occasion were duly notified of the arrangement by their associates, and they approved and ratified it, and the whole amount of the subscription was subsequently paid, pursuant to the agreement. All of these facts are substantially and satisfactorily proved by two or three witnesses, and they accord in substance and effect with the allegations of the answer. Half or more of the amount specified was paid about the time the last agreement was made, and the remainder of the eight hundred dollars was paid as it was wanted for the purpose for which it had originally been subscribed. Attempts were made to discredit the statements of the witnesses called to substantiate these facts, but so clearly without success that any further analysis of the testimony is deemed unnecessary. After that interview, the licensees went on using their respective machines without interruption or complaint, paying therefor the tariff of one and one half cents for each and every last and boot-tree by them turned, as they had done from the commencement, and continued so to do until the 15th of July, 1857. On that day, the complainant notified the respondent of his intention to restrain him from using the machine, unless he should obtain a new license from the complainant, on or before the 20th of January, 1858, in which the rate of the tariff to be paid should be two cents, instead of one and one half cents, for each and every last and boot-tree by him manufactured. Similar notices were also given by the complainant about the same time to the other licensees. But they have all continued to use their respective machines up to the present time, and the complainant has voluntarily received from each of them the tariff of one and one half cents for each and every last and boot-tree by them manufactured, at the end of each quarter, up to the 1st of April, 1858, and in some instances to a later period. Evidence was also introduced by the respondent, showing that the complainant has, in repeated instances, acknowledged since those notices were given that these licensees had the right to run their respective machines, by paying that rate of tariff within the territory of their district, claiming only, that if they did not do so, and did not supply the market, he had a right to license

others to manufacture the same articles. Tender of the amount of the tariff, due for the quarter ending the 1st of April, 1858, was duly made by the respondent to the complainant on the day it became payable. At that time, it was refused by the complainant; but on the 19th of the same month, he wrote to the respondent, informing him that his tender would be received and receipted for, at one and one half cents for each last, not however waiving the right, if any he otherwise had, to an additional half-cent for all lasts turned after the 20th of January, 1858, if the court should sustain the validity of that claim. Payment was accordingly made of the amount previously tendered on the 24th of April, 1858, as alleged in the answer, and the complainant gave a receipt to the respondent for the same, acknowledging in the receipt that the sum so paid, amounting in the whole to one hundred and sixteen dollars and thirty-five cents, was one and one half cents for every last turned by the respondent with the machine in question for the quarter ending the 1st of April, 1858, but repeating substantially the reservation made in his letter, signifying his willingness to accept the tender. Another fact of considerable importance in this investigation ought not to be overlooked in this statement. All of these licensees got up their own machines, and severally constructed them at their own expense, by the permission of the respondent. To that extent the agreement is executed, and the answer, testimony, and exhibits clearly show that it was fully executed for every purpose when the bill was filed, at least up to the 20th of January, 1858, which is nearly five years after the last agreement was made, under which the eight hundred dollars were finally paid. For every hour the machine was used by the respondent, within the period laid in the bill of complaint, and for fifteen days since the bill was filed, the complainant has received from the respondent the tariff of one and one half cents for each article manufactured by him with the machine, and all he now claims is that he is entitled to an additional half-cent for such of those articles as were turned by him subsequently to the 20th of January, 1858. Notwithstanding the allegations of the bill of complaint are so framed that they charge the respondent, as an infringer of the complainant's patent, it is apparent, from the whole case, that the real controversy between the parties arises solely out of the claim to recover the additional half-cent for each article manufactured, in the nature of rent, which the complainant insists is due to him for the use of the machine since the 20th of January, 1858. On this state of facts, I am of the opinion that the relief prayed for in the bill of complaint ought not to be granted in this suit, for the several reasons which will now be stated and briefly explained.

In the first place, the facts and circumstances clearly show that, for the whole period laid in the bill of complaint, the machine in question was used by the respondent under the license or permission of the complainant, which of itself is a complete answer to the prayer for relief. Suppose it be admitted, as is assumed by the complainant, that he had the right to revoke the license whenever the interests of the patent required it, and that his determination to do so was properly and seasonably made known at the time he gave the notice, it still appears, from his own acts, conduct, and declarations, that he acquiesced in the subsequent use of the machine by the respondent to the present time. Four witnesses testify in effect that the complainant admitted, after the notices were given, that these licensees had the right to run their respective machines during the continuance of his patent by paying the tariff of one and one half cents for the articles by them manufactured, declaring at the same time, however, that if they did not supply the market or turn all that were wanted, he should sell more rights. He also stated to those witnesses that he did not intend to make these licensees pay the additional rate, admitting, as before, that they had the right to run their respective machines, but said that they must make all the lasts that were wanted, or he should license others. As before remarked, he has received from this class of licensees the tariff of one and one half cents for every article turned to the time of filing the bill, and for fifteen days afterward, and all the reservation he made in his letter to the respondent, dated the 19th of April, 1858, was the right to claim an additional half-cent on such articles as were turned subsequently to the 26th of January in the same year. When a patentee knowingly, and for a considerable length of time, acquiesces in the use of his patented machine by another, who had previously constructed and used the same by his permission, and actually and voluntarily accepts a compensation for such use, from the person in posssession of the machine as part payment for such use those acts of the patentee are evidence from which a license may be inferred, unless controlled by other facts and circumstances; and where, as in this case, the only reservation made, when the payment was received, was the right, on the part of the patentee, to claim an additional sum for such use of the machine, it cannot be held that the acts of the respondent, in using the machine under such circumstances prior to the time when such payment was made, were unlawful, and consequently an injunction under those circumstances will not be granted. Applying this principle to the case under consideration, it is obvious that the relief prayed for in the bill of complaint cannot be decreed on the facts disclosed in the testimony of the witnesses and the exhibits in this case, for the reason that the allegation in the bill,

that the acts of the respondent were unlawful, is not sustained.

Another reason may be given why relief cannot be granted in this case, which is equally decisive of the question, so far as respects the real matter in controversy between these parties. It is a suit, in point of fact, to recover an additional half-cent for the articles manufactured by the respondent within the reservation contained in the letter and receipt of the complainant before mentioned. No dispute arises in the case under any act of congress, nor does the decision depend in any respect upon the construction of any law of congress in relation to patents. On the contrary, it arises entirely out of the agreement, express or implied, for a license, and the rights of the parties depend altogether upon the ordinary rules of law, and the general principles which regulate and control the decision of the court in equity suits. What the complainant really claims is that he terminated or revoked the license under the agreement which previously existed between the parties by giving the notice, and that the respondent subsequently continued to use the machine without any stipulation as to the rate of tariff. In accordance with this theory, he assumes that, in accepting the one and one half cents from that date to the filing of the bill, he reserved the right to claim and recover an additional half-cent for all such articles as were manufactured by the respondent within that period, and that by virtue of that reservation he is entitled to recover that amount in addition to what he has received as a reasonable compensation for the use of the machine. Looking at the claim from that point of view, and it is the one in which it is presented by the evidence, it furnishes no ground whatever for an injunction, for the reason that it presupposes that the use of the machine was not unlawful, and presents a case, on the facts disclosed, for which the complainant has a plain and adequate remedy at law. But suppose it were otherwise, and that his remedy in equity would be more effectual, and that it was a fit case for equity cognizance, it would not benefit the complainant in this suit, for the reason that it does not depend in any degree whatever upon any act of congress respecting patent rights. Whenever a contract is made in relation to patent rights which is not provided for and regulated by an act of congress, the parties, if any dispute arises, stand upon the same ground as other litigants in respect to the jurisdiction of the court. Wilson v. Sandford, 10 How. [51 U. S.] 100. Both these parties are citizens of the same State; and if the pleadings corresponded with the real nature of the controversy, it is clear beyond dispute that this court could have no jurisdiction of the case. Goodyear v. Day [Case No. 5,568]. Jurisdiction is not controlled, however, solely by the pleadings. But the case itself must be one within the cognizance of the court where the suit is brought. Where it appears at the trial that there is no question involved in the case which it is competent for the court to decide under the pleadings, the cause must be dismissed, notwithstanding the allegations of the bill may be sufficient to authorize the court to take cognizance of the suit. In this case it appears by the bill of complaint that both complainant and respondent were citizens of the state of Massachusetts at the time the bill was filed; and as there is no question involved in the controversy giving the court jurisdiction on account of the subject-matter of the suit, I am of the opinion that the relief prayed for in the bill of complaint cannot be granted. On both grounds, therefore, the bill must be dismissed.

[NOTE. For prior cases between the same parties involving this patent, see Blanchard v. Sprague, Cases Nos. 1,517 and 1,518; and, for other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515.]

Case No. 1,517.

BLANCHARD v. SPRAGUE.

[3 Sumn. 279;[1] 1 Law Rep. 223; 1 Fish. Pat. Rep. 14.]

Circuit Court, D. Massachusetts. May Term, 1838.

STATUTES—CONSTRUCTION—CORRECTION OF ERROR—MISNOMER—DATE—MATERIAL DESCRIPTION.

1. In construing an act of congress, if there be a mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal.

2. No mere misnomer in the name of a person, or a corporation, named in the act is fatal, if the person or corporation really intended can be collected from the terms of the act; but where the descriptive words constitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular subject intended, and to be incapable of being applied to any other, the mistake is fatal.

3. There is no case, where a court, in the construction of a statute, has substituted other words and other dates in order to maintain an act, making erroneous references to things aliunde.

4. By act of congress of 30th June, 1834 [6 Stat. 589, c. 213], it was enacted, "That there be granted, &c., unto Thomas Blanchard, &c., for the term of fourteen years from the twelfth day of January, 1837, the exclusive privilege of making, constructing, using, and vending to others to be used, his invention of a 'machine for turning or cutting irregular forms,' a description of which is given in schedule or specification annexed to letters patent, granted to the said T. B. for the said invention, on the twelfth of January, 1820." Now there were no such letters patent of the twelfth of January, 1820, as are referred to in this act; but letters patent of the twentieth January, 1820; and the words of description therein were, "an engine for turning or cutting irregular forms," instead of "a machine for turning or cutting irregular forms." *Held*, that the court could not correct

[1] [Reported by Hon. Charles Sumner.]

this variance, so as to give validity to the letters patent, under the act of 1834.[2]

At law. Case [by Thomas Blanchard against Chandler Sprague] for the infringement of the patent right of the plaintiff, secured to him by act of congress of the 30th of June, 1834 [6 Stat. 589, c. 213]. Plea, the general issue. The case was referred, by the consent of parties, to Simon Greenleaf, Esq., as a master, to report on the material facts; and, upon the bringing in of his report, certain points were, by direction of the court, ordered to be argued as preliminaries to a hearing upon the general merits. The points were, accordingly, argued by Rand for the plaintiff, and by Parsons and Phillips for the defendant.

STORY, Circuit Justice. On the 30th of June, 1834 [6 Stat. 589, c. 213], congress passed an act, entitled "An act to renew the patent of Thomas Blanchard," by which it was enacted, "That there be and is hereby granted unto Thomas Blanchard, a citizen of the United States, his heirs, assignees, and legal representatives, for the term of fourteen years from the twelfth day of January, in the year eighteen hundred and thirty-seven, the full and exclusive right and privilege of making, constructing, using, and vending to others to be used, his invention of 'a machine for turning or cutting irregular forms,' a description of which is given in a schedule or specification annexed to letters patent, granted to the said Thomas Blanchard, for the said invention, on the twelfth of January, in the year eighteen hundred and twenty." Then follows a proviso and some other enactments, not necessary to be mentioned. In pursuance of this act, the letters patent, on which the present suit is founded, were granted to the plaintiff.

In point of fact, no letters patent were ever granted to the plaintiff, (Thomas Blanchard,) dated the twelfth day of January, A. D. 1820; but certain letters patent were granted to him, which will be immediately mentioned, on the twentieth day of January in the same year. By these last letters patent, after reciting "that Blanchard had invented a certain new and useful improvement, being an engine for turning or cutting irregular forms, out of wood, iron, brass, or other material or substance, which can be cut by ordinary tools, called Blanchard's self-directing machine," they proceeded to grant to him, for the term of fourteen years from the sixth day of January, A. D. 1819, the full and exclusive right, &c. of such invention, a description whereof was given in the schedule annexed to the letters patent. These letters patent were granted upon the surrender of certain other letters patent, which had been granted to Blanchard on the sixth day of September, A. D. 1819, for a new and useful improvement, "being a machine for turning gunstocks, tackle and shipping-blocks, and may be applied to turning or forming wood, metal or other material into any regular or irregular form, provided it be such that the whole surface, as it revolves, may come in contact with the friction wheel;" and the last letters patent granted the exclusive right for the term of fourteen years from the sixth day of September, 1819.

It is apparent from this statement, in the first place, that there are no such letters patent of the date of the 12th day of January, A. D. 1820, as are referred to in the act of 1834; and, in the next place, that the other descriptive words of the act are not exactly those of the letters patent of the twentieth day of January, A. D. 1820. In the act of 1834, the words are, "a machine for turning or cutting irregular forms;" in the letters patent of the twentieth day of January, 1820, the words are, "an engine for turning or cutting irregular forms;" and the remaining descriptive words, "out of wood, iron, brass, or other material or substance, which can be cut by ordinary tools, called Blanchard's self-directing machine," are left out. The question is, whether these variances are fatal, or are mere formal errors, which the court may, upon construing the act, correct and rectify, so as to give validity to the present letters patent under the act.

Now, I agree, that, in construing an act of congress, if there be a plain mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal. I agree, also, that a mere misnomer in the name of a person or corporation named in the act, if the person really intended can be collected from the terms of the act, is also not a fatal mistake. The latter was the case of Chancellor of Oxford, 10 Coke, 54, 57, cited also in Com. Dig. "Parliament," R. 10, in which it was held, that where, by a statute, in case of Popish recusancy, the right of presentation was given to the chancellor and scholars of the University of Oxford, the description was sufficient to express the meaning of the makers of the act, that the corporation of the University of Oxford (whose technical name is the Chancellor, Master, and Scholars of the University of Oxford), which has a chancellor and scholars, shall take it, and no other corporation shall take it. On that occasion the court is reported by Lord Coke to have declared, that, in "an act of parliament, misnomer of a corporation, when the express intention appears, shall not avoid the act, no more than in a will; for parliamentum testamentum et arbitramentum are to be taken according to the mind and intentions of those, who are parties to them. And, therefore, when the description of a corporation in an act of parliament, or in a will, is such,

[2] [An act was passed February 6, 1839 (6 Stat. 748), to amend and carry into effect the act of June 30, 1834.]

that the true corporation intended is apparent, and it is impossible to be intended of any other corporation, although the right name of the corporation, (which is requisite to be expressed in grants and deeds,) is not precisely followed, yet the act of parliament will and shall take effect." But in the case put, the real person or corporation intended to take is supposed to be perfectly clear upon the face of the act, and not to be made out by intendment from circumstances aliunde.

The difficulty in the present case lies somewhat deeper. The descriptive words constitute the very essence of the patent, which is to be renewed for fourteen years. Unless, then, the description is so clear and accurate as to refer to a particular patent, and to be incapable of being applied to any other, the mistake is fatal. If there were here a mistake merely in the date, that might be cured by the other accompanying descriptive words of the subject matter of the patent. On the other hand, if the date were correct, that might cure any inaccuracy in the other descriptive words. Here neither the one nor the other is accurately given. The patent referred to in the act, is a patent of the date of the twelfth day of January, 1820. None such exists. The other descriptive words are not accurate. They purport, in the act, to be between inverted commas and a verbatim transcript. "A machine for turning or cutting irregular forms." The correspondent words of the patent of the 20th of January, 1820, are "An engine for turning or cutting irregular forms." Assuming that the words "engine" and "machine" are in all cases words of an equivalent meaning (which may well be doubted), it is certain that they are not the same words, and cannot be treated as such, when they constitute a matter of description substantial to the case. If forgery were alleged in an indictment of an instrument, purporting to contain a description of a contract respecting a machine, it would be a fatal variance to allege that it purported to be of an engine. But this is by no means the chief difficulty. The descriptive words, in the act of 1834, fall far short of those in the patent of 1820. In the first, they are absolute and unlimited; in the last, they are qualified and restrained, by the very important descriptive words, "out of wood, &c., &c., which can be cut by ordinary tools, called Blanchard's self-directing machine." The purport is, therefore, not necessarily the same; and in truth the machines described may not be identical in all respects, though they may be so for many purposes. So that, to say the least of the matter, there is not such perfect certainty, as to the identity of the patent referred to in the act of 1834, looking merely to its terms, as to preclude all doubt. And, indeed, many of the descriptive words used in the patent of the sixth day of September, 1819, manifestly apply to a machine of the same nature, that is, to a machine for turning or cutting irregular forms. It seems conceded, that the patent of 1819 was in substance designed to cover the same invention as that included in the patent of the 20th of January, 1820, as the former was surrendered for the very purpose of obtaining the latter.

In the present case, then, the mistake in the act of 1834 is not cured by any other words apparent in the act. The reference is to a patent, as the subject of the act, which, according to the terms used, does not exist. And the only means of correcting the mistake is by an argument and inference, that the patent of the 20th of January, 1820, might have been intended, as approaching nearest to the terms; and that, otherwise, the act would be a mere nullity. I have not been able to find a single case, where it has been held, that the court may substitute other words and other dates, in order to maintain an act making erroneous references to things aliunde. In the case of Keene v. U. S., 5 Cranch [9 U. S.] 304, the supreme court of the United States declined to enforce the provisions of the 35th section of the act of 18th of February, 1793, c. 8 [1 Stat. 317], upon the ground, that that section referred to an act of congress by its title, giving it, and that no act could be found with a correspondent title, although there were two acts of congress, whose titles nearly resembled it, and one of them was identical with it with a slight transposition of the words.

In construing the act of 1834, it is not unimportant also to remark, that the act secures Blanchard's patent for the term of fourteen years, from the twelfth day of January, 1834, the very day referred to as the date of the original patent; so that it is apparent, that the supposed date of the latter was a governing point in congress, as to the extent of time of the renewal. Now, it is not pretended, that the court can treat this date also as a mistake, and carry forward the renewal for fourteen years, from the twentieth day of January, 1834. And yet, how can the court say, that if the real date had been known by congress to be the twentieth day of January, 1820, the renewed patent would not have been for fourteen years, from the twentieth day of January, 1834? I confess myself a good deal distressed by this consideration; for, under the circumstances, the correction of the mistake, as to the date of the patent, will require the court either to correct the date as to the renewed term, or to intend, that congress in the one date had no regard whatever to the other date, which would be, not only to presume a fact without evidence, but I may say to presume it against the obvious purport of the words of the act. It seems clear, that congress did intend, that the renewed patent should take effect, immediately from and after the expiration of fourteen years, from the grant of the former patent; probably

under a supposition, that the patent was originally granted for fourteen years.

On the whole, although I cannot doubt, as a private man, what patent was intended to be renewed by congress; yet I do feel great doubt, whether, judicially, I am at liberty to depart from the very words of the act of congress, to correct a mistake, not apparent on the face of the act, where the mistake, when corrected, will still leave another doubt behind it, and that is, whether I do not by such a correction depart from the intention of congress, manifested in the other parts of the act. I say, that I feel great doubt; and I cannot put the case more strongly, because I have not a resolute confidence in my own opinion on the point. But my doubt, such as it is, is decisive for the defendant, since the plaintiff must prevail by his own strength; and unless this doubt is removed, he cannot press for a judgment.

If the learned counsel for the plaintiff should, after this determination, incline to take the case to the supreme court for a final decision, I am sure that my learned brother, the district judge, will unite with me in certifying the same to the supreme court, as upon a division of opinion.

[NOTE. For other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515, and note at end of Blanchard's Gun-Stock Turning Factory v. Warner, Id. 1,521. For other cases between the same parties, see Cases Nos. 1,518 and 1,516.]

Case No. 1,518.

BLANCHARD v. SPRAGUE.

[3 Sumn. 535; 1 Robb, Pat. Cas. 734, 742; 2 Story, 164.][1]

Circuit Court, D. Massachusetts. May Term, 1839.

PATENTS—MONOPOLIES—VALIDITY—CONSTRUCTION—PATENT GRANTED BY CONGRESS—RETROACTIVE EFFECT—PRIOR PUBLIC USE.

1. Patents for inventions are not granted as monopolies or restrictions upon the rights of the community, but "to promote science and the useful arts," and are to be liberally construed.

[Cited in Davoll v. Brown, Case No. 3,662; Wilson v. Rousseau, 4 How. (45 U. S.) 708; Hogg v. Emerson, 6 How. (47 U. S.) 486; Smith v. Downing, Case No. 13,036; Brooks v. Fiske, 15 How. (56 U. S.) 224; Winans v. Denmead, Id. 341; Hamilton v. Ives, Case No. 5,982; Milligan & Higgins Glue Co. v. Upton, Id. 9,607; Thomas v. Shoe Machinery Manuf'g Co., Id. 13,911.]

2. The power of congress to grant to inventors is general; and it is in their discretion to say, when, and for what length of time, and under what circumstances, the patent for an invention shall be granted.

[Cited in O'Reilly v. Morse, 15 How. (56 U. S.) 118; Jordan v. Dobson, Case No. 7,519; Fire-Extinguisher Case, 21 Fed. 42.]

3. Congress has power to pass an act, which operates retrospectively to give a patent for an invention already in public use; but no act will be construed to operate retrospectively, unless such a construction is unavoidable.

[Cited in Union Mill & Min. Co. v. Ferris, Case No. 14,371; Twenty Per Cent. Cases, 20 Wall. (87 U. S.) 187.]

4. In the present case, it was *held*, that the patent was for a machine, and not for a principle or function; and, therefore, was valid.

[Cited in Singer v. Walmsley, Case No. 12,900; Dederick v. Cassell, 9 Fed. 311.]

At law. Case [by Thomas Blanchard against Chandler Sprague] for violation of a patent right. An action between the same parties for an alleged violation of a patent under the act of congress of 1834, c. 213 [6 Stat. 589], was dismissed at a former term. See 3 Sumn. 279 [Blanchard v. Sprague, Case No. 1,517]. Since then a new grant of letters patent was made by act of congress of 1839, c. 14 [6 Stat. 748], under which the present action was brought. [Judgment for plaintiff.]

The plaintiff's declaration set forth the grant of letters patent to him for his invention, on the 6th of September, 1819; that these letters were cancelled, being deemed inoperative by reason of a defective specification, happening through inadvertency and mistake, without any fraudulent or deceptive intention; that new letters patent for the same invention were granted to him on the 20th of January, 1820, for the term of fourteen years; that afterwards, by an act of congress passed the 30th of June, 1834, there was granted to the plaintiff the right of making, using, and vending his invention, for the term of fourteen years from January 12, 1834, which in the said act was described as "An invention of a machine for turning or cutting irregular forms," a description of which is given in a schedule or specification, annexed to the letters patent granted to the plaintiff for the said invention, which said letters patent are in the said act by mistake stated to have been granted on the 12th of January, 1820, when in fact the letters patent last above mentioned were meant and intended to be referred to; that by an act of congress, passed 6th of February, 1839 [6 Stat. 748, c. 14], entitled "An act to amend and carry into effect an act entitled 'An act to renew the patent of Thomas Blanchard,' approved June 30th, 1834," it was enacted, that the rights secured to the plaintiff by letters patent granted on the 6th of September, 1819, and afterwards on a corrected specification on the 20th of January, 1820, be granted to the plaintiff for the further term of fourteen years from January 20th, 1834; and the declaration alleged an infringement by the defendant by using the machine within the term mentioned in the last act. These are the material parts of the declaration, which recited at length both the acts last referred to, and set forth the above facts. The facts, so far as they related to the granting of the letters patent, and the acts passed

[1] [Reported by Hon. Charles Sumner and by William W. Story, Esq., and here compiled and reprinted by taking statement from 3 Sumn. 535, and syllabus from 2 Story, 164.]

with a view to the renewal of them, were not contested. The second letters patent were granted before the act of July 3, 1832 [4 Stat. 559, c. 162].

The plaintiff, in his specification, declared that, "as to the mechanical powers by which the movements are obtained, he claims none of them as his invention. These movements may be effected by application of various powers indifferently. Neither does he claim as his invention the cutter wheel or cutters, or friction wheel as such, nor the use of a model to guide the cutting instrument, as his invention. All these are common property, and have been so for years, but he claims as his invention the method or mode of operation in the abstract explained in the second article, whereby the infinite variety of forms, described in general terms in this article, may be turned or wrought." In another part of his specification he said: "In explaining and describing the different modes, in which he contemplates the application of the principle or character of his said machine, or invention, he does this in compliance with the requirements of the law, and not by way of extending his claim for discovery or invention. His invention is described and explained in the second article of this specification, to which reference is hereby made for information of that, which constitutes the principle or character of his machine or invention, and distinguishes it, as he verily believes, from all other machines, discoveries or inventions, known or used before." In the second article, to which he refers, the plaintiff explained the principle and character of his machine, and the mode of constructing it to effect the different objects to be accomplished, and the mode of operation This was done at considerable length.

The parties agreed to submit the matters of fact in dispute to a master instead of a jury, who was to report the facts and his opinion thereupon to the court, in order that his report might be accepted or rejected, as might be deemed right upon a revision of the evidence to be reported, and that the court might decide upon the whole case for the plaintiff or the defendant; and if the decision should be for the plaintiff, damages were to be assessed according to an agreement between the parties. After the examination of a great number of witnesses, most of whom were practical engineers or machinists, occupying the greater part of eighteen days, and hearing the counsel on both sides, upon the various questions raised, the master reported the facts, and the testimony and proofs, from which he drew his conclusions. And upon the first question, whether the plaintiff's specification was couched in terms so full, clear, and exact as to distinguish it from all other inventions, and to enable any machinist, reasonably and competently skilled in the business, to construct the machine, in all its forms, from the directions there given and other drawings annexed, the master reported his opinion in the affirmative. Upon the second question, whether there was a mode, clearly described in the specification, of constructing a machine capable of producing, from one model or pattern, different sizes, preserving the proportions as stated in the specification, he reported that a mode was described of effecting it sufficiently near for all practical purposes. Upon the third question, whether the machine patented and claimed, or any material part thereof, was known or used before the invention thereof by the plaintiff, and particularly, whether it was so known to one Woolworth, he reported in the negative. Upon the fourth question, whether the rights secured as alleged in the declaration had been infringed by the defendant, he reported in the affirmative, and assessed damages at $521.27.

Upon the hearing before the court upon the whole case, it was contended by the counsel for the defendant, that the plaintiff's specification was defective, that he claimed the functions of the machine, and not the machine itself, and that the description of the machine, so far as it related to the making of things of different sizes from the same model, as well as to the designation of what was intended to be claimed, was unintelligible and wholly insufficient. It was also contended, that the last act for renewing the letters patent was inoperative, inasmuch as it granted only the rights secured by the patents of September 6, 1819, and January 20th, 1820, both of which were supposed to be void; and that the act was also retrospective, so far as it regarded those who had used the machine between the time of the expiration of the letters patent, and the renewal of them by the last-mentioned act.

B. Rand and Mr. Fiske, for plaintiff.

Willard Phillips and Mr. Parsons, for defendant.

STORY, Circuit Justice. My opinion is, that the master has drawn the true conclusions from the facts, which are stated in his report; and I have not the slightest hesitation in adopting them as the basis of my own opinion. The objections, which have been taken at the argument to the present patent granted to the plaintiff by the act of congress of 6th day of February, 1839, c. 14 [6 Stat. 748], I shall now proceed to dispose of, in as few words as may be practicable. In the first place, as to the point, whether the plaintiff has sufficiently expressed in his specification the true nature, character and extent of the invention, which he claims. I am of opinion that he has.

Formerly, in England, courts of law were disposed to indulge in a very close and strict construction of the specifications, accompanying patents, and expressing the nature and extent of the invention. This construction seems to have been adopted upon the notion, that patent rights were in the nature

of monopolies, and, therefore, were to be narrowly watched, and construed with a rigid adherence to their terms, as being in derogation of the general rights of the community. At present a far more liberal and expanded view of the subject is taken. Patents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise; but as ultimately securing to the whole community great advantages from the free communication of secrets, and processes, and machinery, which may be most important to all the great interests of society, to agriculture, to commerce and to manufactures, as well as to the cause of science and art.

In America this liberal view of the subject has always been taken; and, indeed, it is a natural, if not a necessary result, from the very language and intent of the power given to congress by the constitution [1 Stat. 14] on this subject. "Congress (says the constitution) shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right of their respective writings and discoveries." Patents, then, are clearly entitled to a liberal construction, since they are not granted as restrictions upon the rights of the community, but are granted "to promote science and useful arts."

Looking at the present specification, and construing all its terms together, I am clearly of opinion, that it is not a patent claimed for a function, but it is claimed for the machine specially described in the specification; that is, not for a mere function, but for a function as embodied in a particular machine, whose mode of operation and general structure are pointed out. In the close of his specification the patentee explicitly states, that his "invention is described and explained in the second article of his specification, to which reference is made for information of that which constitutes the principle or character of his machine or invention, and distinguishes it, as he verily believes, from all other machines, discoveries, or inventions, known or used before." Now, when we turn to the second article, we find there described, not a mere function, but a machine of a particular structure, whose modes of operation are pointed out, to accomplish a particular purpose, function. or end. This seems to me sufficiently expressive to define and ascertain what his invention is. It is a particular machine, constituted in the way pointed out, for the accomplishment of a particular end or object. The patent is for a machine, and not for a principle or function detached from machinery.

Then it is objected, that the description of the mode of constructing the machine is so defective, that it is not practicable for persons skilled in the art or science to which it belongs or relates, to construct the machine. This objection is put an end to by the master's report, and the facts there stated by intelligent witnesses.

Then, it is suggested, that the grant of the patent by the act of congress of 1839, c. 14 [6 Stat. 748], is not constitutional; for it operates retrospectively to give a patent for an invention, which, though made by the patentee, was in public use and enjoyed by the community at the time of the passage of the act. But this objection is fairly put at rest by the decision of the supreme court in the case of the patent of Oliver Evans. Evans v. Eaton, 3 Wheat. [16 U. S.] 454.[2] For myself, I never have entertained any doubt of the constitutional authority of congress to make such a grant. The power is general, to grant to inventors; and it rests in the sound discretion of congress to say, when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction, which limits the power of congress to enact, where the invention has not been known or used by the public. All that is required is, that the patentee should be the inventor.[2]

The only remaining objection is, that the act is unconstitutional, because it makes the use of a machine constructed and used between the time of the passage of the act of 1834, c. 213 [6 Stat. 589], and the grant of the patent under the act of 1839, c. 14, unlawful, although it has been formerly decided, that under act of 1834 the plaintiff had no valid patent; and so the defendant, if he constructed and used the machine during that period, did lawful acts, and cannot now be retrospectively made a wrong-doer. If this were the true result of the language of the act it might require a good deal of consideration. But I do not understand, that the act gives the patentee any damages for the construction or use of the machine, except after the grant of the patent under the act of 1839, c. 14. If the language of the act were ambiguous, the court would give it this construction, so that it might not be deemed to create torts retrospectively, or to make men liable for damages for acts, lawful at the time when they were done. The act of congress passed in general terms ought to be so construed, if it may, as to be deemed a just exercise of constitutional authority. And not only so; but it ought to be construed not to operate retrospectively, or ex post facto, unless that construction is unavoidable; for even if a retrospective act is, or may be constitutional, I think I may say, that according to the theory of our jurisprudence, that interpretation is never adopted without absolute necessity; and courts of justice always lean to a more benign construction. But, in the present case, there is no claim for any damages, but such as have accrued to the patentee from a use of his

[2] See, also, Evans v. Eaton, 7 Wheat. [20 U. S.] 356; Evans v. Hettich, 7 Wheat. [20 U. S.] 453.

machine since the grant of the patent under the act of 1839, c. 14.

I am, therefore, of opinion that there ought to be judgment for the plaintiff for the damages, agreed by the parties. Judgment accordingly.

[NOTE. For other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515, and note at end of Blanchard's Gun-Stock Turning Factory v. Warner, Id. 1,521.]

Case No. 1,519.

BLANCHARD v. WHITNEY.

[3 Blatchf. 307.][1]

Circuit Court, D. Connecticut. Sept. Term, 1855.

PATENTS—DURATION OF RIGHT—EXTENSION—CONTINUED USE BY PURCHASER FROM PATENTEE.

1. Under the extension of Blanchard's patent for "a machine for turning or cutting irregular forms," by the act of February 15, 1847 (9 Stat. "Private Acts," 35), *held*, that where Blanchard, prior to the commencement of the extended term, had sold a machine made by himself under the patent, the vendee had a right to continue to use the machine, during the extended term.

2. Blanchard, having built the machine, had the right to use it forever, irrespective of his patent; and as, by his voluntary act, that right became vested in his vendee, the act of 1847 could not take away that right, even if it purported to do so, which it does not.

[See Woodworth v. Curtis, Case No. 18,013; Bloomer v. McQuewan, 14 How. (55 U. S.) 539; Bloomer v. Stolley, Case No. 1,559; Day v. Union Rubber Co., Id. 3,691; Chaffee v. Boston Belting Co., 22 How. (63 U. S.) 217; Bloomer v. Millinger, 1 Wall. (68 U. S.) 340; Wooster v. Seidenberg, Case No. 18,039; Union Paper-Bag Mach. Co. v. Nixon, Id. 14,391; Paper-Bag Cases, 105 U. S. 766.]

3. There is a distinction between such a case, and one where the title to a machine is derived from a person who has only a right, under a patent, to manufacture for a specified limited time.

In equity. This was a motion for a provisional injunction, to restrain [Eli Whitney from] the infringement of letters patent granted to Thomas Blanchard, September 6th, 1819, for "a machine for turning and cutting irregular forms." [Denied.]

By an act of congress, passed February 6th, 1839 (6 Stat. 748), the patent was extended for fourteen years from the 20th of January, 1834. Afterwards, by another act, passed February 15th, 1847 (9 Stat. "Private Acts," 35), the patent was further extended for fourteen years from January 20th, 1848. The facts are sufficiently stated in the opinion of the court.

Before NELSON, Circuit Justice, and INGERSOLL, District Judge.

NELSON, Circuit Justice. The plaintiff, being the patentee of an invention for turning gun stocks by machinery, was applied to by the defendant, in the fall of 1842, to sell him a machine, to be used in his armory. After some negotiation respecting the price, it was agreed by the patentee to construct and deliver one for the sum of $600. It was made accordingly, and put up in the defendant's armory in the spring of 1843, and was in use there down to the time of the filing of the bill in this case.

The plaintiff's patent expired in 1848, some five years after the machine was purchased and put in operation, but was extended by act of congress for another term of fourteen years, without any saving clause in favor of assignees, or of persons who had acquired rights under the previous term of the patent. The bill in the present case is filed to enjoin the defendant from further using his machine without a license under the extended term, upon the ground that his right to use it expired with the term of the patent then running, which, as we have seen, was in 1848, and that no new right has been acquired for such extended term.

However this might be in a case where the patentee had simply sold a right to construct and use a machine under the previous term, we are inclined to think that the reasoning is not applicable to a case where the patentee has manufactured and sold the machine himself to the party sought to be enjoined. Such a transaction, it seems to us, reasonably, if not necessarily, implies and carries with the purchase of the article the right to use it, at least till it is worn out. Such is the right of the vendee as against the vendor or manufacturer in ordinary cases; and that relation existed between these parties.

It is true that the plaintiff's exclusive right to manufacture and sell the patented article, existing at the time of the purchase of the machine in question, expired in 1848. But it would be a forced construction of the meaning and understanding of the parties, to hold that the use of the machine was intended to be limited to that period. No such limitation necessarily attached, as the patentee and manufacturer could vest in the vendee, by force of the sale, the right to an unqualified use; and such, we think, must have been the understanding of the parties.

As respects the rights of the patentee as against those using the patented article, there is a manifest distinction between a case where the title to a machine is derived from a person who has purchased simply a right or license to manufacture it under the patent, and a case where the purchase of the article is made directly from the patentee. In the one case, the patentee has parted only with his interest in the term of the patent, which is limited; in the other, he has sold the machine itself, with all the rights appertaining to his title as vendor, and, of course, without any necessary limitation of its use or enjoyment. As I have

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already said, it would be a very forced and unreasonable construction of the transaction, to limit the duration of the use to the then existing term of the patent, in the absence of any express provision to that effect, inasmuch as the limitation of that term in no way operated necessarily as a restriction upon the title of the patentee and manufacturer. He could convey the right to an unlimited use. When the plaintiff built the machine now sought to be enjoined by him, he had a right to use it as long as it should last, for all coming time. This right he had irrespective of the patent. As the inventor and builder of the machine, he had this right to such use, without a patent. The patent secured to him the exclusive right to all machines made like it, and deprived all others of the right to make or use the same, without his consent, for a certain period of time. But the right to use the machine in question for all coming time was in the plaintiff, without the patent. The right which the plaintiff had to the machine in question, he conveyed to the defendant. He conveyed his whole right to it—his whole right to the use of it. And, as his whole right was a right to use it for all coming time, he conveyed to the defendant his right to that extent. By his voluntary act, his whole right to use the machine in question became vested in the defendant; and the act of congress of 1847, which authorizes the renewal and continuance of the plaintiff's patent to his use, does not purport to take away, neither could it take away, any right vested in the defendant, or any one else, by the voluntary act of the plaintiff.

I have thus briefly explained the ground upon which we think that the plaintiff has failed to establish a right to enjoin the defendant's machine, and that the motion for an injunction must be denied.

[NOTE. For other cases involving this patent, see note to Blanchard's Gun-Stock Turning Factory v. Warner, Case No. 1,521, and note at end of Blanchard v. Reeves, Id. 1,515.]

Case No. 1,520.

BLANCHARD'S GUN-STOCK TURNING FACTORY v. JACOBS.

[2 Blatchf. 69;[1] 1 Fish. Pat. Rep. 158.]

Circuit Court, S. D. New York. Nov. 16, 1847.

PATENTS—INFRINGEMENT—TRIAL—INSTRUCTIONS—NEW TRIAL—WEIGHT OF EVIDENCE.

1. The rule that the verdict of a jury will not be set aside where evidence was given on both sides, and there was no misdirection as to the law, is applicable to an action on the case for the infringement of a patent.

[See Stanley v. Whipple, Case No. 13,286.]

2. Where, in such an action, it was submitted to the jury, as a question of fact, whether the defendant was concerned in using the infringing machine, or was merely a purchaser of the articles manufactured by it, and the jury, having been instructed that the defendant was not liable if he was only the purchaser of the articles after they were manufactured, found for the plaintiff: *Held* that, as there was evidence on both sides of the question, and the verdict was not clearly against the weight of evidence, it must stand.

[Cited in Bust v. Cornell Steamboat Co., 24 Fed. 189.]

[See Blagg v. Phoenix Ins. Co., Case No. 1,478.]

[3. The purchaser of patented articles from an infringer is not liable as an infringer.]

[See Goodyear v. Central R. Co., Case No. 5,563.]

At law. This was an action on the case [by Blanchard's Gun-Stock Turning Factory against Laban Jacobs] for the infringement of letters patent, granted to Thomas Blanchard for "a machine for turning and cutting irregular forms." See Blanchard's Gun-Stock Turning Factory v. Warner [Case No. 1,521]. The alleged infringement consisted in the use of the patented improvements in the manufacture of handles for hatchets. At the trial the plaintiffs had a verdict, and the defendant now moved for a new trial, on a case. [Denied.]

The points raised sufficiently appear from the opinion of the court.

Seth P. Staples, for plaintiffs.

W. R. Allen, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The defendant moves to set aside the verdict rendered against him, as being without evidence to support it. It appears that one Pike, a subtenant of the defendant, had used a machine for turning hatchet handles, which was a violation of the Blanchard patent. The handles were manufactured for the defendant. Pike had come to the place at the instance of the defendant, and there was evidence of a relationship by marriage between them. The defendant gave evidence for the purpose of showing that he purchased the hatchet handles from Pike at fixed prices, and that he had no other connection with the manufacture than as a contract purchaser. The plaintiffs gave other evidence, conducing to show a concert between the defendant and Pike in the manufacture, and that it was under their mutual charge. The court instructed the jury that the action could not be maintained against the defendant, if he was no more than the purchaser of the articles after they had been manufactured by Pike, but that it was a question of fact for them to find from the evidence, whether or not the defendant was concerned with Pike in using the machine. There was testimony tending to show a common co-operation in working the machine and infringing the patent, and it belonged to the jury to determine the credibility and weight of that evidence. The rule

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laid down in Ward v. Center, 3 Johns, 271, that the verdict of a jury will not be set aside where there has been evidence on both sides of a question of fraud, and no misdirection as to the law, is applied with like strictness to all cases of tort. Jarvis v. Hathaway, Id. 180.

A new trial will not be granted in any case unless the verdict is clearly without evidence or against the weight of evidence. Brown v. Wilde, 12 Johns. 455; Trowbridge v. Baker, 1 Cow. 251; Lewis v. Payn, 4 Wend. 423; Smith v. Hicks, 5 Wend. 48; Alsop v. Commercial Ins. Co. [Case No. 262]. Nor for the purpose of introducing new evidence to points before in controversy. Williams v. Baldwin, 18 Johns. 489; Douglass v. Tousey, 2 Wend. 352; Chatfield v. Lathrop, 6 Pick. 417. The evidence to support the action in this case was not very full or direct, and the circumstances were not in their character decisive against the defendant, but they all had a legal bearing upon the issue. The testimony offered by the defendant in his exoneration was met by counteracting facts, and we think the jury were well warranted in drawing, from the whole evidence considered together, the conclusion which they adopted.

New trial denied.

[NOTE. For other cases involving this patent, see note at end of Blanchard v. Reeves, Case No. 1,515, and note at end of Blanchard's Gun-Stock Turning Factory v. Warner, Id. 1,521.]

Case No. 1,521.

BLANCHARD'S GUN-STOCK TURNING FACTORY v. WARNER.

[1 Blatchf. 258;[1] 1 Fish. Pat. Rep. 184.]

Circuit Court, D. Connecticut. April Term, 1846.

PATENTS — EXTENSION BY SPECIAL ACT OF CONGRESS—RIGHTS OF CORPORATE ASSIGNEE—SPECIFICATIONS—DEFECTS — INFRINGEMENT—SUBSTITUTION—QUESTIONS FOR JURY—DAMAGES—COSTS.

1. By the proviso in section 1 of the act of congress of February 6th, 1839 (6 Stat. 748), extending Blanchard's patent for turning irregular forms, congress intended to give to assignees of the old patent an equally exclusive privilege in the extended term.

2. The power of congress to reserve rights and privileges to assignees, on extending the term of a patent, is incidental to the general power conferred on them by the constitution to secure to inventors, for limited times, the exclusive right to their discoveries.

[Cited in Jordan v. Dobson, Case No. 7,519.]

[See Evans v. Robinson, Case No. 4,571; Blanchard v. Haynes, Id. 1,512; Bloomer v. Stolley, Id. 1,559.]

3. Where a corporation was chartered in Massachusetts, "by the name of 'Blanchard's Gun-Stock Turning Factory' with all the powers and rights vested by law in manufacturing corporations" in that state: *Held*, that the corporation had on the face of its charter, independently of any act referred to therein, power to purchase Blanchard's patent for turning irregular forms, and, among other things, gun-stocks, issued before the incorporation.

[Cited in Dorsey Harvester Rake Co. v. Marsh, Case No. 4,014.]

4. By the common law, corporations have a right to purchase and hold property, so far as may be necessary to carry into execution the objects of their creation.

[See New York Dry Dock v. Hicks, Case No. 10,204.]

5. The substitution of one mechanical power for another in a machine, such as a wheel and axle for a screw, does not constitute an invention.

6. In Blanchard's machine, whether the cutter and friction wheels, or the pattern and rough material, have the lateral motion, is immaterial, the relative effect of the parts in acting on each other being the same. The change of motion from the one to the other is not a substantial change.

[Cited in Johnson v. Forty-Second St., M. & St. N. Ave. R. Co., 33 Fed. 502.]

7. So, also, the mode of throwing the machine out of gear, was no part of Blanchard's invention.

8. It is a proper question for a jury whether a departure from the parallelism of the axes of motion of the cutter-wheel and of the rough material, as described in Blanchard's specification, is a material variation from his arrangement.

9. The act of 1839 extending Blanchard's patent did not extend the mere legal right of the patentee, but extended his exclusive right to his invention; and the specification was referred to in the act only to identify the invention.

[Cited in Jordan v. Dobson, Case No. 7,519.]

10. The objection, that the specification of Blanchard's patent claims that any article can be turned from a model by his machine and made larger or smaller than the model, but preserving throughout the same proportions, and that the machine will not do what is thus claimed, is not tenable.

11. Although it is claimed in the specification that the machine will turn any irregular surface or form like the model, and yet it will not turn a square shoulder, that is too remote and extreme a defect to destroy the patent.

[Cited in Dederick v. Cassell, 9 Fed. 312.]

12. In an action for the infringement of a patent, the plaintiff's expenses and counsel fees in prosecuting the action will not be allowed to him as part of his damages.

[See Whittemore v. Cutter, Case No. 17,601; Stimpson v. Railroads, Id. 13,456; Teese v. Huntingdon, 23 How. (64 U. S.) 2. Contra, see Allen v. Blunt, Case No. 217; Boston Manuf'g Co. v. Fisk, Id. 1,681.]

[13. Cited in Perry v. Corning, Case No. 11,004, to the points that the omission to record the assignment of a patent within three months does not render it invalid, as between the parties thereto, and that an unrecorded assignment is of no validity after the expiration of three months, as against a subsequent purchaser from the patentee, for a valuable consideration, acting in good faith, without notice.]

At law. This was an action on the case [Blanchard's Gun-Stock Turning Factory against Norman Warner] for the infringement of letters patent granted to Thomas Blanchard for "a machine for turning and cutting irregular forms." The original patent was granted September 6th, 1819; but, it being deemed inoperative by reason of a

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defective specification, a new patent was granted for the invention, on the 20th of January, 1820, for 14 years from the latter day. Afterwards, by an act of congress passed June 30th, 1834 (6 Stat. 589), the sole right was granted to the patentee to make, use and vend the said invention for the term of 14 years from the 12th of January, 1834. This act not being thought to describe the patent with sufficient accuracy, an additional act was passed on the 6th of February, 1839 (6 Stat. 748), as follows: "An act to amend, and carry into effect, the intention of an act entitled 'An act to renew the patent of Thomas Blanchard,' approved June thirtieth, eighteen hundred and thirty-four. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the rights secured to Thomas Blanchard, a citizen of the United States, by letters patent granted on the sixth of September, eighteen hundred and nineteen, and afterwards on a corrected specification on the twentieth day of January, Anno Domini eighteen hundred and twenty, be granted to the said Blanchard, his heirs and assigns, for the further term of fourteen years from the twentieth of January, eighteen hundred and thirty-four, said invention so secured being described in said last-mentioned letters as an engine for turning or cutting irregular forms out of wood, iron, brass, or other material which can be cut by ordinary tools: provided, that all rights and privileges heretofore sold or granted by said patentee, to make, construct, use or vend the said invention, and not forfeited by the purchasers or grantees, shall enure to and be enjoyed by such purchasers or grantees respectively, as fully and upon the same conditions during the period hereby granted, as for the term that did exist when such sale or grant was made. Sec. 2. And be it further enacted, that any person who had, bona fide, erected or constructed any manufacture or machine for the purpose of putting said invention into use, in any of its modifications, or was so erecting or constructing any manufacture or machine for the purpose aforesaid, between the period of the expiration of the patent heretofore granted and the thirtieth day of June, one thousand eight hundred and thirty-four, shall have and enjoy the right of using said invention in any such manufacture or machine erected or erecting as aforesaid, in all respects as though this act had not passed: provided, that no person shall be entitled to the right and privilege by this section granted, who has infringed the patent right and privilege heretofore granted, by actually using or vending said machine, before the expiration of said patent, without grant or license from said patentee, or his assigns, to use and vend the same."

At the trial, at New Haven, in April, 1845, before Mr. Justice Nelson, the plaintiffs gave in evidence the patent of January 20th, 1820, and the specification annexed to it; also an act of the legislature of Massachusetts, passed February 21st, 1820, incorporating the plaintiffs by the name of "Blanchard's Gun-Stock Turning Factory;" also an assignment from Blanchard to the plaintiffs, dated June 29th, 1820, under seal, of all his right to the invention covered by the patent, under the said patent, and any other patent issued or to be issued for the same invention, with all the rights he might have enjoyed, if the assignment had not been made, which assignment was recorded in the patent office October 29th, 1840; and the said act of the 6th of February, 1839. The plaintiffs offered no other proof of their power as a corporation, or of any assignment to them from Blanchard.

The defendant gave in evidence a copy of the original patent granted to Blanchard, September 6th, 1819, and it was admitted that when the patent of January 20th, 1820, was issued, the prior patent was not given up or cancelled, nor was any entry made in any public office or elsewhere purporting to cancel it, and that it had always remained uncancelled. The defendant also offered evidence for the purpose of showing that Blanchard's machine would not perform sundry important functions claimed for it in the specification [2]—as that it would not turn bodies of a different size from the model but preserving the same proportions, and that it would not cut square shoulders in the material operated on. The defendant also offered evidence to show, that allowing Blanchard's patent to be for a combination, there were sundry parts of the combination important in themselves, and others made essential by the specification, which were not used by the defendant; that the lateral motion in Blanchard's machine was produced by a screw, and in the defendant's machine by a wheel and axle; that in the defendant's machine, three motions, namely, the rotary, the vibratory and the lateral or longitudinal were given to the pattern and the rough material, all which three motions were applied to the frame, while in Blanchard's the cutter-wheel and the friction-wheel, and not the pattern and rough material in the frame, had the lateral motion; that the two machines were thrown out of gear in a manner and by a process essentially different; that in the defendant's machine the axes of motion of the cutter-wheel and of the raw material were not parallel, and his machine would not work if they were, whereas by Blanchard's specification it was essential they should be parallel, and they were in fact so in his machine as made; and that in the defendant's machine the form of the periphery of the friction-wheel was essentially different from the form of the periphery of the cutter-wheel as described by the revolution of the cutters, whereas by Blanch-

[2] [For specification, see note at end of case.]

ard's specification it was made essential that the form of the two wheels should be the same. The defendant requested the court to decide as matter of law and to instruct the jury, that the plaintiffs had shown no right, as a corporation, to purchase, receive and hold the patent; that under the act of congress and the assignment from Blanchard to the plaintiffs, they took no such legal right as would enable them to prosecute the action in their own name; that if congress had a right, after the expiration of the patent, to grant an exclusive right for a further term to the original patentee, they could not constitutionally make any such grant to his assignees; that the act of the 6th of February, 1839 [6 Stat. 748], conferred, by its terms, no such right on the assignees, but was designed to confer a favor on the inventor alone, on his application, and that the proviso therein had no other effect than to protect assignees in their enjoyment of the use of the invention during the extended term; that nothing purported to be conveyed by the act except the rights existing under the patent of 1820; that that patent was void because it was for the term of fourteen years from its date, instead of being for fourteen years from the date of the patent of 1819, because the patent of 1819 had not been given up or cancelled, because Blanchard's machine would not perform the several important functions claimed for it in the specification as before mentioned, because the patent was for a function or principle or mode of operation and not for a machine, and because the patent of 1820 contained other and greater claims than the patent of 1819 as to the powers of the machine; that if the jury should find that the differences before specified or any of them existed between Blanchard's machine as patented and the defendant's, the latter would be no violation of the patent; that if Blanchard's patent was for a machine, it was merely for a combination of parts, each of which, long before the date of the patent of 1819, was known and used separately and also in combination with one or more of the other parts, and the defendant had not used the whole combination set out in the patent, but only a part of it, and had not used any of the parts before mentioned as being different from his own; and that in case the jury should find for the plaintiffs the rule of damages by which they were to be governed was to give such damages only as the plaintiffs proved they had sustained, which did not exceed the profits on thirty setts of wagon-wheel spokes.

The plaintiffs set up claims on each and all of the aforesaid questions, the opposite of those made by the defendant, and the court charged the jury in conformity with the claims of the plaintiffs and refused to charge as requested by the defendant. On the point of the title of the plaintiffs to sue, the court charged, that the plaintiffs were a corporation and claimed a right to hold an interest in the invention by virtue of their charter, which conferred on them all the powers of manufacturing corporations under the laws of Massachusetts; that, although the defendant claimed that the charter did not confer the power to purchase the patent, yet the court were of opinion that the general power under the charter was sufficient, and that the plaintiffs took a good title to and interest in the patent, as completely as a natural person could have done; that, by their act of incorporation, no express power was conferred on them directly and specifically, except by a reference to the general laws of Massachusetts, prescribing the powers of manufacturing corporations; that the rule of law was, that when an association of individuals was incorporated for a particular purpose, the law conferred, by implication and of necessity, all the powers necessary and reasonable to carry into effect the object of the incorporation, else the act would be nugatory; that the plaintiffs had power enough to purchase an invention which would tend to facilitate the purposes of their incorporation as indicated by their corporate name; and that the machine in question appeared to be useful for them in their contemplated business. As to the effect of the assignment to the plaintiffs, in connection with the act of 1839, in conveying the second term of the patent, the court charged, that although the defendant claimed that the act was unconstitutional and void, because congress were only authorized to secure to inventors the exclusive right to their discoveries, and had no power to grant exclusive privileges to mere assignees of inventors, yet the act in question, on its face, extended the exclusive right to the inventor, and only operated in favor of the plaintiffs by virtue of the reservation which made it enure to the benefit of purchasers; that it was, therefore, an act extending a benefit to the patentee, with conditions, which it was competent for congress to impose on the inventor. As to the point made that the assignment was inoperative and void, because it was not recorded within the three months prescribed by the act of congress, nor until after the passage of the act of 1839 extending the patent, the court charged that the act prescribing the time for the recording of assignments was directory; and that the recording was not necessary to make the transfer operative, but was only essential to enable the assignee to sue in his own name. On the question of damages, the court charged that the jury were at liberty to consider, besides the actual damages proved, the probable expenses to which the plaintiffs had been subjected in vindicating their rights, but were not at liberty to give vindictive damages by way of punishment.[3] The

[3] Subsequently to the trial of this case, Mr. Justice Nelson was informed that Mr. Justice Thompson had confined juries in patent cases to the actual damages sustained, and had refused to allow to plaintiffs their expenses or counsel fees in suits, and, concurring himself in this view, he has since disallowed those items as a part of the damages.

jury found a verdict for the plaintiffs, and the defendant now moved for a new trial.

Roger S. Baldwin, (with whom was Thomas C. Perkins,) for defendant.

Under the acts of June, 1834, and February, 1839, both of which were passed after the expiration of Blanchard's patent, granting an extension of the exclusive right to Blanchard and his assigns, the plaintiffs acquired no such right, as assignees of the invention, as can enable them to maintain this action.

I. The constitution confers on congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This clause in the constitution is the sole foundation of the power of congress to limit or control the public use of any invention. The power conferred cannot be extended beyond the terms of the grant, or what is necessary to give it effect. It authorizes a grant to inventors to secure to them for limited times the exclusive right to their inventions. It consequently was designed to enable congress to confer on them a property in their inventions, of which they might avail themselves by assignment or otherwise, during the term. In the exercise of the power conferred by the constitution, congress may, without doubt, extend, or make provision by law for the extension of the exclusive privilege to inventors, beyond the term originally limited, if that is deemed too short to afford them an adequate reward or encouragement. As congress is vested with full power to reward inventors, by granting or extending to them for limited times, at its own discretion, the exclusive right to their inventions, it follows that it has the power, in extending such privileges, to make such exceptions out of the grant to the inventor as justice may require. In making a new grant to the inventor, congress may, therefore, unquestionably provide as between him and his assignees, that they shall not be interrupted in the future enjoyment of that which they had purchased of the inventor. The assignees who purchased of the patentee with knowledge of the period when the exclusive privilege conferred by his patent would cease, may well be deemed to have purchased and made their expenditures on their machines, in the full expectation that they would have a right to use them in common with the public at large at the expiration of the term. It would have been unjust to them for congress to grant an exclusive right to the inventor for a new term, without making any exception in favor of his assignees, whose expensive erections would be rendered useless thereby. But justice to them does not require that they shall be secured in the enjoyment of any exclusive privilege beyond the term which they purchased. They could have no claim or well founded expectation of having anything more than the free and common right to use the invention after the expiration of the patent. The extension or renewal of the right to the inventor, with liberty to exclude every body else, does no injury to the assignees, so long as they are left at liberty to use the invention. It incidentally benefits them; and it is believed that, in this sense, and for this purpose only, is it provided in the 18th section of the patent act of 1836 [5 Stat. 125, c. 358, § 18] that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein." But congress have no power, under the constitution, to grant exclusive privileges to any but the inventor. However meritorious may have been the public services of an individual, unless he is an inventor, congress cannot appropriate to him, as a reward, the exclusive right to carry on any particular trade, employment or manufacture. All it can do for assignees, in extending a patent to the inventor, is to save to them the right of using that which they have purchased of the inventor, and from which it would be unjust to allow him to exclude them. The act of 1834, granting the exclusive privilege to Thomas Blanchard and his heirs and assigns for a new term, was not passed until after his patent had expired, and the right to use the invention had become common—as much so as to use any other unpatented machinery in public and common use. If congress could again appropriate this common right to the exclusive use of the inventor, as a further reward for his ingenuity, what warrant is there in the constitution for its appropriation, after his interest had expired and wholly ceased, to the exclusive use of an assignee, to whom he had sold the invention during the existence of the patent, but who had no more property in the invention, at the time of the passage of the act, than the public generally?

II. Congress not only had no power to grant an exclusive right to the plaintiffs, as assignees of Thomas Blanchard, but they did not intend to grant any. They meant to protect them against what would otherwise be as to them, as well as to the rest of the public, an exclusive right in the inventor to the use of the invention they had purchased, in conformity with the principle of the proviso to the 18th section of the patent act of 1836. The language used is susceptible of this construction. The grant was made upon the petition of Thomas Blanchard, and, as appears by the report of the committee to whom it was referred, on the ground that he had been inadequately remunerated for his invention. In other words, he had sold his entire interest to "Blanchard's Gun-Stock Turning Factory," for a song, in consequence of which congress granted to him and his assigns a further term. Could it have been the intention of congress, by the proviso in behalf of assignees, to nullify their grant to Thomas Blanchard, by conferring the exclusive right for the extended term on the plain-

tiffs, who had paid him inadequately for what they had before received? If not, then the plaintiffs cannot maintain this action.

Seth P. Staples, for plaintiffs.

NELSON, Circuit Justice. The motion for a new trial in this case was held over for advisement to enable the court to give further consideration to one of the questions presented—that in relation to the right of the assignees under their assignment from Thomas Blanchard, made prior to the extension of the patent by the acts of congress passed in 1834 [6 Stat. 589] and 1839 [6 Stat. 748]. It was insisted by the counsel for the defendant, that they took no interest thereby in the extended term; and the chief ground relied on was, that an act passed for the benefit of the assignees would be unconstitutional, inasmuch as the constitution only authorizes congress to secure, for limited times, to inventors, the exclusive right to their discoveries. The construction claimed by the plaintiffs, it was said, instead of rendering the act of congress extending the patent, beneficial to the inventor, who had been inadequately rewarded by the price which he had received from the assignees for his invention, would be directly injurious to him by depriving him of the right to use his invention during the extended term for which the exclusive privilege was conferred on the original assignee. But the proviso for the benefit of the assignees in the act of 1839, is too explicit in its language to leave any doubt as to its true meaning and intent. After extending the patent for a further term of fourteen years, it is provided "that all rights and privileges heretofore sold or granted by said patentee, to make, construct, use or vend the said invention, and not forfeited by the purchasers or grantees, shall enure to and be enjoyed by such purchasers or grantees respectively, as fully and upon the same conditions during the period hereby granted, as for the term that did exist when such sale or grant was made." It is clear that congress intended to give to assignees of the old patent an equally exclusive privilege in the extended term. We do not think the clause can be construed in any other way consistently with the fair import of the language. And undoubtedly, inasmuch as the constitution confers on congress the power to grant the exclusive privilege only to the inventor, there would seem to be force in the objection, that the grant to assignees does not come within the scope of their authority.

The direct question was not involved in the four cases that were so elaborately argued at the last term of the supreme court. See [Wilson v. Rousseau; Simpson v. Wilson; Wilson v. Turner; Woodworth v. Wilson] 4 How. [45 U. S.] 646–716. But it was very much discussed, and became the subject of consideration, not as necessarily involved, but as connected with the matters in controversy in those cases. The power of congress to reserve these rights and privileges to assignees seemed to be conceded, according to my recollection, as incidental to the general power conferred by the constitution on congress to promote the progress of the useful arts by securing to inventors, for limited times, the exclusive right to their discoveries. The assignees of the original patentee are frequently most instrumental in putting the invention into general use, and bringing it successfully before the public, by the expenditure of their time and money. More than half, probably, of the useful patented inventions have been thus brought into general public use, the successful results operating, directly or indirectly, for the benefit and interest of patentees. Considerations of this kind may well be taken into account by congress, and weight be given to them in granting extensions. Congress save the respective interests of the patentee and his assignees, by qualifying the new grant, believing that in truth the assignees have expended time and money to a much greater extent than they have received remuneration; and, although this would not authorize them to renew the grant to assignees, as no such power exists in the constitution, still, in exercising the power in favor of the inventor, it would perhaps be going too far to say that they have no right to regard incidentally the interests of the meritorious assignee. Without the power of thus qualifying their grant, congress would be under the necessity, oftentimes, of denying altogether any extension. A just view of the rights of all parties may require that assignees should be protected in their interests, if the patent be renewed.

A question was presented by the counsel for the defendant, as to the charter of incorporation of the plaintiffs. The power of the company under their charter, to purchase any interest in patent rights, is founded on the language of the act of incorporation, namely, "that Isaac Scott and others be and they are hereby incorporated by the name of 'Blanchard's Gun-Stock Turning Factory,' with all the powers and rights vested by law in manufacturing corporations in this commonwealth." So far as regards the right of this corporation to hold personal estate, including the interest in this patent, it is urged that the power is conferred by a general reference to the law regarding manufacturing corporations. We have endeavored to find the law of Massachusetts, that existed at the time of the incorporation of the plaintiffs, and to which the charter has reference for the extent of its powers, but have not been successful. There is some embarrassment in this part of the case, on account of the omission to give this act in evi-

dence. But, on the whole, as the corporation is made a body politic by the name of "Blanchard's Gun-Stock Turning Factory," perhaps it is not going too far to say, independently of the production of the act referred to, that inasmuch as the company seems to have been incorporated for the very purpose of carrying on manufactures by means of this invention of turning irregular forms, as its very name imports, it had, at least, power enough to purchase this particular patent. Indeed, by the common law, corporations have a right to purchase and hold property so far as may be necessary to carry into execution the purposes and objects for which they are created. It would seem to be necessary, in order to carry out the purposes of "Blanchard's Gun-Stock Turning Factory," that it should have power to purchase and hold an interest in the patent.

The other objections were mainly questions of fact, which were submitted to the jury under what the court regard as proper instructions.

One was, that the lateral motion in the plaintiff's machine is produced by a screw, and in the defendant's by a wheel and axle. This we consider no part of the invention. It was a mechanical contrivance to operate the machine. The inventor, having struck out his idea, goes to a mechanic to get the mechanical power to put in operation his combination. The mechanic has at his command various modes of producing power. These mere contrivances, such as any mechanic can supply, are no part of the invention.

It was further said that in the defendant's machine, there are three motions given to the pattern and rough material, namely, the rotary, the vibratory, and the lateral or longitudinal, all of which three compound motions are applied to the frame; whereas, in the plaintiffs' machine, the cutter and friction wheels have the lateral motion, and not the pattern and rough material in the frame. The question was put to the jury whether this varied materially or substantially from the plaintiffs' arrangement; whether so materially as to distinguish the defendant's machine from the plaintiffs'; whether, on the contrary, it was not a merely formal alteration; and the jury have passed upon it. The court were bound to submit that question to the jury. Our impression is, that even this is rather a mechanical contrivance, making no substantial change in the machine, whether the lateral motion is given to the one or to the other of these parts. The relative effect of the parts in acting on each other is the same.

It was said also, that the machines are thrown out of gear in a different manner and by a process materially different. But that may be done in various ways. We think that forms no part of the invention.

In the defendant's machine the axes of motion of the cutter-wheel and of the rough material are not parallel, and it was said that the machine would not work if they were so; whereas by Blanchard's specification and in his machine, it is made essential that they should be parallel, and they were in fact so made. This was set up as a radical difference between the plaintiffs' and defendants' machines. We think it was a question of fact for the jury whether this was a substantial variation or not; and it was properly put to them to say, whether the departure in the defendant's machine from a precisely parallel relation of the two axes constituted a material variation from the plaintiffs' arrangement.

There were some other objections founded on the alleged invalidity of the first and second patents which were extended by the act of congress of 1839. It was alleged on the part of the plaintiffs that the first patent was defective and was surrendered, and that a new patent was taken out for the same invention. But it was objected on the part of the defendant that the new patent was issued for the term of fourteen years from its date and not from the date of the former patent, and that the former patent was never in fact surrendered or cancelled; and that, for both of these reasons, the second patent was void, and consequently there were no existing rights to be extended by the act of congress. Assuming this to be so, we do not think that the mere legal right of the patentee under his patent, new or old, is the right which was extended to the patentee and his assigns by the act of congress. On the contrary, we hold it to have been the exclusive right to the invention, and that the specification was referred to in the act, only to identify what constituted the invention which congress meant to extend.

It was said that the specification claims that any article can be turned from a model by the machine, and made larger or smaller than the model, but preserving throughout the same proportions; and the counsel for the defendant insisted that this claim was unsupported by the evidence. The answer to this objection is that the claim of that power in the specification is a very qualified one, and that the patentee advises a change of the model itself in such cases. It is not put forth as a leading and useful quality of the machine. It was in point of fact proved on the trial that articles could be turned larger or smaller from the same model, but that the capacity of the machine to perform such work was limited.

It was further said that the claim in the specification is, that by this invention any irregular surface or form may be turned like the model, whatever it may be; but that in fact it is incapable of turning a square shoulder. That probably is true; but we think it rather too remote and extreme a defect to seize hold of for the purpose of destroying a patent for an invention so exceedingly in-

genious and useful to the public as this of Mr. Blanchard's. It would be pushing the principle to an unreasonable limit.

New trial denied.

NOTE [from original report]. The specification was as follows:

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said Thomas Blanchard himself, of his improvement, being an engine for turning or cutting irregular forms out of wood, iron, brass, or other material or substance, which can be cut by ordinary tools, called 'Blanchard's Self-Directing Machine.'

"First. The said machine consists of a wooden frame, and of divers parts constructed in brass and iron, with bands to propagate the motion from the power which puts the machine in operation to its several parts.

"The wooden frame consists of the different parts connected together, as in the drawing annexed to, and making part of, this specification, marked fig. 1 and fig. 2.

"The parts marked in both, figure 1 and figure 2, A A, compose the frame, which is about four feet and a half long, and about three feet wide. This is supported on four legs, marked a a, which are about three feet high. The standards, marked I I, support the cap-piece, marked J, in fig. 1. To these are attached two arms, K, fig. 1. The standards are about three feet high, and the cap-piece about four feet and a half long. The legs, frame, standards, cap-piece and arms, should be of sufficient thickness and substance to give solidity to the machine when in operation; the parts composing these are, in the original machine, of which the drawings are an exact copy, from six to eight inches square. The arms are about eight inches long, and about six inches thick or square.

"The hanging lathe, H H H, in figure 1, is constructed of iron in the original; it is cast in one piece. It hangs on the arms, and swings freely on the iron pivots which pass through holes in the upper ends of the said lathe, and are firmly attached to the arms K K, as represented in figure 1, so that the hanging and swinging lathe may swing freely; and as the cutter, marked E, and the friction wheel, F, are placed under the cap-piece to which the lathe is attached, the pattern, T, which is adjusted in the swinging lathe, bears constantly against the friction wheel, F. This swinging lathe is divided into two equal parts by the cross-piece, O. In this cross-piece is formed a box to receive the round part of the spindle or arbor, which sustains the pattern, T. This spindle is supported at the heel end of the pattern in another box formed in the lathe, so that the pattern, when the spindle or arbor passes through it, may turn freely upon the ends of the arbor, which are adjusted like gudgeons to said boxes. This spindle, consisting of one piece, passes through the pattern; but it is quite obvious that two gudgeons, having two sharp points at their inner ends, which may penetrate or be driven into the substance of the pattern, may answer in some cases as well as a spindle. On the end of the arbor of the pattern, where it passes through the box in the cross-piece, O, and comes into the division occupied by the rough material, U, is attached a dog, a piece of iron having a hole through which the end of the arbor passes, and two sharp points, which penetrate the substance of the material to be wrought at one end thereof, while the other end of the rough material is supported by a centre screw, marked b, and used in the common mode of adjusting a rough material in a common lathe, which screw has a square head to adjust the rough material, so that it may be firm in its place; while by its strong connection with the pattern through or by the dog, driven in as aforesaid, it is made to turn with, and upon the same axis as the pattern.

"The sliding carriage C C C, supports the friction wheel and the cutter, and by its horizontal motion, brings these successively in contact with every part of the superficies of the pattern and rough material respectively; j j j, are bars secured to the frame, with smooth upper surfaces, upon which the sliding carriage moves. The sliding carriage consists of five bars joined firmly in a frame, which, as represented in the drawing, fig. 2, is about two feet and a half long, and two feet wide.

"Upon the three cross-bars are fixed three poppets, which are of sufficient height to sustain the friction wheel and cutters, so that they may turn free of the sliding carriage, and of sufficient strength to preserve them steady in operation. In the centre poppet is a hole to receive a double centre, which is kept in place by a regulating or contrary screw entering the top, the centre poppet at D, fig. 2. In the boxes of the outside poppets, are centre screws. Between this centre poppet and the outside poppets, and upon the centres aforesaid, are adjusted the friction wheel and the cutter—the former against the division of the hanging lathe containing the pattern; the latter against the division containing the rough material. The friction wheel turns freely on the centre screws, and takes its motion from the pattern as the pattern turns. The cutter wheel is adjusted in like manner, and it is obvious their centre of motion is exactly the same. To the side of the cutter wheel are firmly attached by screws several cutters of a peculiar shape, each being bent into a semi-circular form. These cutters are so attached, that the curve they or any one of them describes in motion, is precisely the same as the periphery of the friction wheel.

"In fig. 2, is represented the feeding screw, p p, which is a male screw, sustained at one end by the centre screw, marked h, passing through the wooden frame at the other end, by a box, in which it revolves freely; on the one end is a pulley or band wheel, seen at Q. A female screw is formed in the inside of holdfast, g, and which opens like pincers, to be applied to the feeding screw, and its handles being secured by a slipping ring, it lays against the inner side of one of the cross bars of the sliding carriage, and thus gives motion to this sliding carriage as the male screw is turned round. The holdfast, in form of pincers, may be removed at pleasure. In both figures the drum, B, is represented. About this a leather band, R, is passed, which passes over the pulley, G, on the cutter wheel arbor. This drum is turned by a . . . . crank, W, as represented in both figures, but may be turned by any power applied in common modes. The drum is two feet long, and two feet in diameter; and the band R, which passes round it, puts in motion the pulley, C, which is six inches in diameter, and thus drives the cutter wheel with great velocity. On the arbor of the drum near the crank, is a driving pulley, of one and a half inch in diameter, about which passes a band, that passes over and puts in motion the pulley, of ten inches in diameter, which is attached to the feeding screw, as to an axis, and puts this in motion, whereby, as above is mentioned, the holdfast female screw, by pressing against the side of the cross-bar of the sliding carriage, draws or moves the sliding carriage from left to right.

"On the arbor of the drum, at the end furthest from the crank, is another driving pulley, about which passes a band, which goes round a pulley attached to the back leg of the frame, and then over a pulley eight inches in diameter, which is attached to the standard, L, whose axis is a small pulley, c, of three inches diameter: from this a band passes to a pulley eight inches in diameter, attached to the arbor or spindle of the pattern and rough material.

"Thus, when the drum is put in motion, the band which passes about it, puts in rapid motion the cutter wheel, while the band which

passes from one of its little pulleys to the feeding screw pulley, puts this in motion, and gives motion to the sliding carriage from left to right, and the other pulley on the drum axis puts in slow movement the pattern wheel and rough material in a direction opposite to that of the cutter. The friction of the pattern against the friction wheel, by the bearing of the hanging lathe against it, puts this in rotation at the same time that this prevents the swinging lathe from bringing the axis of the rough material in the smallest degree nearer to the cutters than is the axis of the pattern from time to time to the periphery of the friction wheel.

"The consequence of which movement is, that the cutter chips away all the substance of the rough material, which is further from its axis than the surface of the pattern is further from the axis of the pattern, and of course forms from the rough material an exact resemblance of the model.

"Secondly. The said Thomas Blanchard explains the principle or character of his machine or engine, which, in the language of the patent law, distinguishes it from all others known or used before.

"It is this. Out of the rough material placed in the engine, there may be turned or formed at one continued operation, by the mode of operation in this second article explained, an exact resemblance in all respects of a model to be imitated; also a resemblance in reverse, as for example, a right foot shoe last, after a left foot shoe last, as the model, or vice versa; and this, however concave, plain, convex, angular or irregular may be the surface of the model, if the said surface be nevertheless such that every the minutest portion thereof that is to be imitated by cutting, can be brought into close contact with the extreme edge of a circular plate, having its semi-diameter equal to the distance between the cutting edge of the cutters used in operation, and the centre of motion of said cutters, and its periphery of the same form and dimensions as the outer side of the cutting edge of the cutters, the said plate being held vertically at right angles to the axis of motion in the model when placed in the engine, and the model being turned round against it.

"Also, a resemblance in form preserving the correspondent proportions with, but differing in dimensions from, the model, either larger or smaller than the model, and this too, however concave, plain, convex, angular or irregular the surface of the model may be, if the surface of the model be, nevertheless, such that every the minutest portion of the said surface can be brought in close contact with the extreme edge of a circular plate, having the form of the edge thereof correspondent to the form of the outer side of the cutting edge of the cutters, but the size or width of said edge smaller than the width of the outer side of the cutting edges of the largest cutter which can be used, in order to cut the excavations in the form, and having a diameter less than the distance between the cutting edges and the centre of motion of the cutters, if the model be smaller than the form to be turned. But if the model be larger than the form to be turned, then the size or width of the edge of the circular plate must be larger than the outer side of the cutting edges of the largest cutter to be used, in order to cut the excavations in the form, and the semi-diameter of the plate greater than the distance between the centre of motion of the said cutters, and the said outer side of the cutting edges of the said cutters. The said circular plate, in all cases, bearing always the same proportion to the cutter, in respect to its diameter, that the diameter of the model bears to the diameter of the form to be turned; and in respect to the breadth of its edges, the same proportion to the breadth of the cutters, that the narrowest transverse excavation in the model bears to the same excavation in the form to be turned.

"Having thus far explained the principle of the machine, in relation to its products, the said Blanchard explains the mode of operation peculiar to his machine, whereby these products are obtained.

"The rough material must be so placed in the machine, with respect to the cutter wheel, that the axis of motion of the rough material and the axis of the cutter wheel shall always, throughout the operation, be exactly parallel. Hence the movement of the rough material, and the movement of the cutter wheel, must be in opposite or the same direction, the movement of the cutter wheel being greatly the faster. Either the cutter wheel or the rough material must have a slow, gradual movement at right angles to the movement of the cutter wheel and rough material. By these co-operating movements, it is plain, the cutters are made to pass over the whole surface of the rough material, cutting away from it every the smallest portion that comes within reach of the cutters, provided the rotary motion of the rough material and the motion at right angles aforesaid be so timed, that the rough material makes one complete revolution at least while the cutter or the rough material by the motion at right angles aforesaid is carried in the direction parallel with the axis of the rough material only the breadth, or a little less than the breadth, of that part of the cutting edges of the cutters, which cuts the last chip from the rough material in the process of cutting.

"Having thus described the mode of operation by which the cutters are made to pass over the whole surface of the rough material, the said Blanchard explains the mode of operation whereby the cutters are made to cut away, from the rough material, all that part thereof which must be removed, in order to leave the form of the different resemblances of the model, mentioned in the former part of this article as the product of his said engine.

"And first, with respect to the resemblance, which is in exact imitation of the model in all respects. In this case, the axis of motion in the rough material must be kept up from time to time, throughout the operation, at the same distance from the cutting edge of the cutters as the axis of the model is from the edge of the friction wheel, or friction point. To this end, the axis of each must be so connected with each other directly, as in the drawing annexed; or indirectly, by placing one above another, or otherwise, in such a manner that as the prominent parts of the model revolve against the friction wheel, or friction point, and the axis of the model is thereby made to recede from the said friction point or wheel, the axis of the rough material is also thereby made to recede precisely as much from the cutting edges of the cutters, and so as the less prominent parts revolve against the friction point or wheel, the axis of the rough material is thereby precisely as much approximated to the cutting edges of the cutters; and thereby all that portion of the rough material which lies more distant from the axis of its own motion than the surface of the model in correspondent parts is distant from the axis of motion in the model, is wholly removed, and thus is left, out of the rough material, an exact resemblance of the model in all respects.

"And in the second place, with respect to the resemblance in reverse, the position of the model and of the rough material of the cutter wheel, and the friction point or friction wheel, with respect to each other, and their several and co-operating movements, are the same as last above described, except that the movement of the rough material, or of the cutter wheel at right angles to their movement on their own axis, as above described, is different. In the case where the resemblance produced is the same in all respects, the rough material may have the same lateral or right angle movement, in respect to the cutters, as the model has in respect to the friction point or wheel. But where the resemblance is in reverse, as in the instance

of making a right shoe last after a left shoe last as the model, it is necessary that the cutters should pass over the rough material by a lateral or right angle movement contrary to that by which the model passes over the friction wheel or friction point.

"And in the third place when the resemblance in form, but longer than the model, as above mentioned, is to be turned or wrought, the movement of the rough material, or of the cutters at right angles with their own motion on their own axis, must be faster than the same movement of the model, or of the friction wheel or friction point. But if the imitation is to be shorter, then the movement of the rough material, or of the cutters at right angles with their own motion on their own axis, must be slower than the same movement of the model, or the friction wheel or friction point. The velocity of this lateral or right angle movement aforesaid, of the rough material, in respect to the cutters, or of the cutter in respect to the rough material, must bear the same proportion to the lateral or right angle movement aforesaid of the model, in respect to the friction wheel or friction point, that the form intended to be produced or wrought will bear to the model to be imitated. As for example, if the imitation is to be twice as long as the length of the model in the direction of the axis, the lateral or right angle movement aforesaid of the rough material, or of the cutters, must be precisely twice as fast as the same movement of the friction wheel or point, or of the model.

"Having thus shown how the form to be produced may be increased or diminished in the direction parallel with its axis, the said Blanchard explains how the form may be increased or diminished in respect to its diameter or dimensions transverse to the axis.

"If the form is to be of greater transverse dimensions than the model, the axis of the rough material must be placed, and kept throughout the operation, at a greater distance from the cutting edges of the cutters than the axis of the model is distant from the friction wheel or friction point.

"But if the form is to be of less transverse dimension than the model, then the axis of the rough material must be placed, and kept throughout the operation, at less distance from the cutting edges of the cutters than is the distance of the axis of the model from the friction wheel or friction point throughout the operation.

"Moreover, the distance between the axis of the rough material from the cutting edge of the cutters, must bear the same proportion to the distance of the axis of the model from the friction wheel or friction point, that the form to be produced bears to the model—greater if the form to be produced is greater, and less if the form to be produced is less.

"Thus, if it be proposed to produce a form of twice the diameter, or transverse dimensions of the model, the axis of the rough material must be placed at twice the distance from the cutting edges of the cutters that the axis of the model is throughout the operation from the friction wheel or friction point; and this proportionate distance must be preserved throughout the whole operation: whence it is plain that a form of twice the diameter will be produced, and so vice versa. It must, however, be carefully remembered and observed, that, in turning larger or smaller forms, the friction wheel or friction point must, in all cases where there are small excavations, concavities, or channels in the model, bear the same relation to the largest cutter that can be used to cut the excavations, concavities and channels in the form, in respect to its semi-diameter, and the form and size of the edge of the periphery, that the model does to the form intended to be produced.

"It is thus by accelerating the lateral movement of the cutters or rough material, and by increasing the distance of the axis of the rough material from the cutters, and by apportioning the friction wheel or point to the largest cutter that can be used in manner aforesaid, that the machine produces a form larger than the model; and by retarding the lateral movement aforesaid, and diminishing the distance of the axis of the rough material from the cutters, and adjusting the proportion of the friction wheel and cutters as aforesaid, that a form smaller than the model will be produced.

"In conclusion of this article, the said Blanchard declares, that as to the mechanical powers by which the movements aforesaid are obtained, he claims none of them as his invention; these movements may be effected by application of various powers indifferently; neither does he claim as his invention the cutter wheel, or cutters, or friction wheel as such, nor the use of a model to guide the cutting instrument, as his invention: all these are common property, and have been so for years; but he claims as his invention the method or mode of operation in the abstract explained in this second article, whereby the infinite variety of forms described in general terms in this article may be turned or wrought.

"Thirdly. The said Blanchard explains and describes the several modes in which he has contemplated the application of the principle of his discovery, invention, or machine.

"This is susceptible of many different modes of application, by placing some or all of its different parts in different positions, and by augmenting the number of them; also, by making some or all of its parts of different forms or dimensions.

"First. In order to turn a right last from a left last, or vice versa, there may be two sliding carriages, each having two poppets, the poppets of the one supporting the friction wheel, and the poppets of the other supporting the cutter wheel. These sliding carriages will be made to move from the ends of the wooden frame towards each other, by means of the male screw and two holdfasts. The thread of one-half the screw, say the half in front of the cutter wheel, running in the usual direction, that of the other, in a contrary direction, about the screw axis. The holdfast of the cutter wheel sliding carriage being placed and operating as above described, the holdfast of the friction wheel sliding carriage is placed against the inner side of the bar of this carriage nearest to the cutter wheel carriage, and operates in reverse, thus making the sliding carriages approach towards each other, and thereby the whole machine being put in operation, the rough material is formed into a right last, if the model be a left last, and into a left last if the model be a right last. A new last being thus formed, this may stand in the swinging lathe as a model, and by shifting the cutter wheel and the friction wheel, and placing the rough material in the place of the former model, another last will be formed exactly like the former model; and by this alteration the operation may successively form a right from a left last, and then a left from a right and right from a left last indefinitely. Instead of a reverse screw and two holdfasts, two racks and two pinions may be adjusted, and so instead of a screw in the machine as above described, a rack and pinion or any other mechanical power may be used. So also, instead of pulleys in different parts of the machine, wheels meshing with each other may be used.

"Second. The cutter wheel may be placed above or below the friction wheel, and the rough material may be placed in the lathe above or below the model, in which case there will be only two poppets on the sliding carriage, but these must be high enough to receive both the friction wheel and the cutter wheel; and the divisions in the swinging lathe, instead of being placed beside each other horizontally, must be one above the other, and the rough material be placed opposite the cutter wheel, and the model opposite the friction wheel.

"Third. The number of the lathes may be

augmented thus: on the opposite of the friction wheel and the cutter wheel may be suspended a swinging lathe of like form as above described, and bearing in like manner against the said opposite side of the friction wheel and cutter wheel respectively. Also, a lathe of similar construction may be made to lay upon the upper side of the friction wheel and the cutter wheel, and another may be made to bear up by a weight and cord passing over a pulley against the under side, and thus four lasts or other articles be turned at the same time; so the number of cutter wheels may be increased, and the lathe indefinitely extended.

"Fourth. The friction wheel may be fixed in the lathe, and be stationary, and the model and rough material placed upon the sliding carriage. Also, the rough material and model may be alternately shifted in the manner in which the friction wheel and cutter wheel may be shifted alternately, as above described.

"Fifth. To turn an article which is long, as a gun-stock for example, the frame may be lengthened, or the rough material placed above or below the model, and the cutter wheel placed above or below the friction wheel, or the lathes may be augmented in number as above described. Here the said Blanchard would state, that in making a gun-stock, the stock is turned in full size, and the hollow place where the gun-barrel lays in the stock, is cut out by another machine not described in this specification.

"Sixth. An article may be formed of larger dimensions than the model, by placing the axis of the rough material at a greater distance from the cutter wheel than the model is from the friction wheel, which will make the article bigger round, and by giving to the cutter wheel sliding carriage a more rapid horizontal movement than the friction wheel, which will make the article longer. But the said Blanchard thinks this mode of application not so perfect as the one above described; because it may be always easier to use a model of full size than to make the alterations in the lathe or in the cutter wheel carriage or poppets, which in this case would be necessary.

"Seventh. It is obvious that, by this discovery, and the machinery aforesaid, any form, however irregular, may be exactly imitated, provided every part and portion of the model can be brought in contact with the periphery of the friction and cutter wheels; whence it results, that in cutting an article which is concave, as a tray, or other like hollow wooden ware, the diameter of the friction wheel and of the cutter wheel, as per second article, must be diminished so that both can operate freely within the cavity proposed to be formed.

"Eighth. Instead of the friction wheel as described above, a fixed circular plate of the same or proportionate diameter as the cutter wheel may be used, or a segment of a like circle so fixed that its periphery or extremity will be in contact with the model, or a square piece of iron or steel or other material may be so placed that the edge of it may come in contact with the model in like manner as the friction wheel. But the said Blanchard prefers the friction wheel because it opposes less resistance to the movement of the model.

"Ninth. The cutters may be formed and attached to the cutter wheel in various modes besides that above described; they may be formed and set in the cutter wheel like plane irons, as is used in the English machine for scoring blocks, described in the Edinburgh Encyclopedia; they may be formed like circular saws, and two, three, or more adjusted to the cutter wheel, so that one of them on one side or the other of the cutter wheel, or in the midst of them all, shall project the most, and the others receding towards the center of the cutter wheel, operate only on the part of the rough material which is more prominent than that on which the most projecting cutter operates. But the said Blanchard prefers the form of cutter above described, and makes no claim to any form of cutter as his invention.

"Moreover, the cutters above described may be made sharp on both edges, and the cutter wheel be made to turn a quarter of a circle, or less, backward and forward, and so the cutters be made to cut by both edges. But the continued circular movement is believed to be preferable to any other.

"The said Blanchard, in explaining and describing the different modes in which he contemplates the application of the principle or character of his said machine or invention, does this in compliance with the requirements of the law, and not by way of extending his claim for discovery or invention. This invention is described and explained in the second article of this specification, to which reference is hereby made for information of that which constitutes the principle or character of his machine or invention, and distinguishes it, as he verily believes, from all other machines, discoveries, or inventions known or used before.

"From which it is apparent that the principle of his machine or invention is different from the last making machine made and used in Waterbury, in Connecticut, and the card handle machine used for a long time past in Boston; and also from the machinery described in the Edinburgh Encyclopedia for making ships' blocks and dead-eyes, and from the modes of turning irregular surfaces described in the French Encyclopedia."

[NOTE. This patent was originally granted to T. Blanchard, September 6, 1819. For other cases involving this patent, see Blanchard v. Beers, Case No. 1,506; Blanchard v. Sprague, Id. 1,517, Id. 1,518; Blanchard v. Whitney, Id. 1,519; Blanchard v. Eldridge, Id. 1,510; Blanchard's Gun-Stock Turning Factory v. Jacobs, Id. 1,520, and note at end of Blanchard v. Reeves, Case No. 1,515].

Case No. 1,522.

The BLANCHE PAGE.

[Cited in The City of Troy and The Atlas, Case No. 2,769. Nowhere reported; opinion not now accessible.]

Case No. 1,523.

The BLANCHE PAGE.

[4 Ben. 186.] [1]

District Court, S. D. New York. May Term, 1870.

TUG AND TOW—PERIL OF THE SEA—BURDEN OF PROOF.

1. A steamboat agreed to tow certain canal boats from New Brunswick to New York, by way of the Raritan river and the Kills. On reaching the mouth of the river, inside of which there was good anchorage and a safe harbor, there was found outside a high wind and a heavy sea. The steamer, however, went out, and, not being able to cross the flats, the tide being ebb, took a circuitous route by the channel, going by South Amboy and down around the buoy at tail of the flats, and so around to Perth Amboy. While making this passage, two of the canal boats were sunk by the violence of the sea and the dashing of the boats against each other. *Held*, that it showed a want of ordinary care for the steamboat to venture out with such a tow when she did.

[Cited in The Merrimac, Case No. 9,478; The Elmira, Id. 4,417.]

[See The M. A. Lennox, Id. 8,987.]

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

2. That, the violence of the sea furnishing an adequate cause for the disaster, and the steamboat being in fault for placing the boats in such circumstances, she must be held to strict proof of any negligent act on the part of the boats, which she claimed to have been contributory.

[See The Chancellor, Case No. 2,589; The Comet, Id. 3,051; The George Farrell, Id. 5,332.]

[In admiralty. Libels by Francis Markee and Lewis W. Phillips against the steamboat Blanche Page (Edward Moran, claimant) for negligently causing the loss of the canal boat Hays and the canal boat Cornelius Haggerty. Decree for libellants.]

Scudder & Carter, for libellants.

E. H. Owen and James Taylor, for claimant.

BLATCHFORD, District Judge. The libels in these cases are filed to recover for damages sustained through the alleged negligence of the steamboat Blanche Page, while engaged in towing two canal boats, called Schuylkill boats, loaded with anthracite coal, one, the Cornelius Haggerty, owned by the libellant in the first case, and the other, the John Hays, owned by the libellant in the second case. The Haggerty was sunk with her cargo. She was never raised. For her loss, and that of her pending freight and other property on board belonging to her owner, he claims $2,000 damages. The Hays was also sunk with her cargo, but she was raised and repaired. For the damage, and that sustained by the coal of which he was the carrier, some of which was lost, her owner claims damages to the amount of $1,900. The contract for towage was from New Brunswick to New York, by the way of the Raritan river and the passage between Staten Island and New Jersey. The boats had come through the Delaware and Raritan canal. The steamboat left New Brunswick with them on the morning of the 5th of July, 1867. She passed down the river with two boats on each side of her, and four boats in a hawser tier, at a considerable distance astern. The Haggerty was in the hawser tier, having two boats on her right and one on her left. The boat on her right was a lake boat, considerably larger, higher and heavier than herself and the Hays. The Hays was on the right of the lake boat. The boat on the left of the Haggerty was a Schuylkill boat, about the size of the Haggerty. The steamboat, with her tow, passed out of the mouth of the river, and went by South Amboy, and down around the buoy at the tail of the flats or oyster beds, and so around to Perth Amboy. She drew too much water to go across the flats at the time, the tide being ebb. Hence she took the circuitous route by the channel. Other steamboats, with tows, which went down the river, and reached its mouth before she did that day, went to Perth Amboy across the flats, the tide being higher, and they not drawing so much water as the Blanche Page. The Haggerty sank a short distance after she had passed by South Amboy. The Hayes sank just as she was rounding the buoy, from a half to three quarters of an hour after the Haggerty sank. They came out of the mouth of the river not far from three o'clock in the afternoon.

These boats sank in the midst of a violent storm and a heavy sea. The wind was about east, and the sea, as the tow turned the buoy, where the Hays sank, was directly on the starboard side of the Hays, putting her in its trough. The principal disputed question in the case is, as to whether it was negligence in the steamboat, and want of ordinary care, for her to have come out of the mouth of the river, and undertaken the comparatively long and exposed trip she did, at the time she so came out. The weather had been growing bad all through the day, and the wind had been increasing in violence. There was good anchorage and a safe harbor inside of the mouth of the river. Without going in detail through the evidence, which is very voluminous, I think the clear weight of the testimony is, that it showed a want of ordinary care for the steamboat to venture out with such a tow when she did. It was easy to see, from a sufficient distance up the river, the condition of the waters of the bay; the wind was high, and the steamboat knew she could not cross the flats. She was in fault in exposing the boats to the risk, and must abide the consequences. The evidence shows, that those in charge of her did not take care to exercise their own independent judgment on the occasion, but went out because they saw, when they reached the mouth of the river, that the boats which had preceded them had gone out. Those boats went across the flats. The Blanche Page was the only one that came out of the river and went around the buoy.

The answers allege negligence on the part of those in charge of the canal boats. The charge is general and not of any specific negligence. On the trial, it was attempted to be shown that the boats sank because their hatch covers were not fastened down, and that such covers came off either through the rolling of the boats or by being washed off by the waves, and allowed the boats to fill and thus sink. The burden of proof is on the claimant to make out such negligence, as a contributory cause of the disasters. He has not done so. In regard to the Hays, there can be no doubt, on the proofs, that she filled because she had a hole broken in her by being dashed against the larger and heavier boat on her left, by the violence of the waves; and, although it appears that some of the hatch covers on the Haggerty came off before she sank, yet it is not established by the claimant that that circumstance contributed to the disaster. The evidence shows an adequate cause, in the violence of the sea, and the dashing of the boats

against the adjacent boats, particularly the lake boat, for the disasters, and this being so, and the steamboat being in fault in placing the boats in the predicament they were in, must be held to strict proof that they would not have sunk if their hatch covers had not come off before they sank. Such proof has not been made. Indeed, it can scarcely be said that there is any satisfactory evidence that any hatch covers on the Hays came off before she sank.

There must be a decree for the libellant in each case, with costs, with a reference to ascertain the damages.

[NOTE. The final decree was affirmed by the circuit court, and the circuit court decree was subsequently affirmed by the supreme court, neither of which cases appear to have been reported. For subsequent proceedings on the summary judgment against the sureties, James C. Hartt and Edward Godfrey, see Cases Nos. 1,524 and 1,525, and Ex parte Phillips, 25 U. S. (Lawy. Ed.) 781.]

Case No. 1,524.

The BLANCHE PAGE.

[16 Blatchf. 1;[1] 7 Reporter, 326.]

Circuit Court, S. D. New York. Feb. 12, 1879.

ADMIRALTY —ENFORCING FINAL DECREE — EXAMINATION OF SURETIES ON APPEAL BOND — SEQUESTRATION — CONTEMPT — IMPRISONMENT FOR DEBT.

1. There is no statute of the United States which authorizes or requires sureties in stipulations or appeal bonds, in a suit in rem, in admiralty, to appear before the admiralty court, after a final decree in the suit, for examination concerning their property, according to the laws and practice of the courts of the state.

[Cited in Quantity of Manufactured Tobacco, Case No. 11,499; The Sydney, 47 Fed. 262.]

2. The mode of enforcing a final decree for the payment of money, in a suit in rem, in admiralty, is that prescribed by rule 21 in admiralty, by execution.

3. A court of admiralty of the United States has no power to enforce such a decree against such sureties by the sequestration of their property, according to the practice of courts of equity.

[Cited in Winter v. Swinburne, 8 Fed. 53.]

4. Nor can it punish such sureties for contempt for not performing their stipulations, or for failing to comply with the provisions of the decree.

[Cited in Mallory Manuf'g Co. v. Fox, 20 Fed. 410.]

5. The abolition of imprisonment for debt, in New York, makes it impossible for the circuit court of the United States, in New York, to use imprisonment as a remedy in execution of a judgment requiring the payment of money due on such stipulations or appeal bonds.

[Cited in Mallory Manuf'g Co. v. Fox, 20 Fed. 410.]

[In admiralty. The executions issued on the summary judgment in the cause of The Blanche Page,' Case No. 1,523, having been returned by the marshal wholly unsatisfied, libellants move for an examination of James C. Hartt and Edward Godfrey concerning their property with a view to its sequestration, and for punishment for contempt. Denied.

[For opinion granting motion for judgment against the sureties' bond on appeal to the circuit court, see The Blanche Page, Case No. 1,525.]

George A. Black, for the motion.

Abiathar B. Millard and Jacob Vanatta, opposed.

BLATCHFORD, Circuit Judge. These are two suits in rem, in admiralty, originally instituted, one by Lewis W. Phillips and the other by Francis Markee, in the district court, and brought, by appeals taken by the claimant, Edward Moran, into this court. On the 22d of August, 1867, the vessel being in the custody of the marshal, under the processes issued by the district court in the two suits, the claimant, with J. C. Hartt and Thomas Cassidy, as sureties, gave a stipulation for value, in each suit, in the sum of $2,500, consenting and agreeing thereby, that, in case of default or contumacy on the part of the claimant or his sureties, execution for $2,500 might issue against their goods, chattels and lands, the condition of each stipulation being, that the stipulators should, upon the interlocutory or final order or decree of the district court, or of any appellate court to which the suit might proceed, and upon notice of such order or decree to the proctor for the claimant, abide by, and pay the money awarded by, the final decree rendered by the district court, or the appellate court, if any appeal should intervene. On the giving of such stipulations, the vessel was discharged from custody. At the same time, the same parties gave a stipulation for costs, in each suit, in the sum of $250, consenting, that, in case of default or contumacy on the part of the claimant or his sureties, execution for the sum of $250 might issue against their goods, chattels and lands, each stipulation being to the effect, that the stipulators should be, and each of them was, thereby bound, in the sum of $250, conditioned that the claimant should pay all costs and expenses which should be awarded against him by the final decree of the district court, or, upon an appeal, by the appellate court. A final decree in favor of the libellant was rendered by the district court in each suit. The decree in the Phillips suit was made May 3d, 1872, and provided, that the libellant recover against the vessel $2,740.62 damages and $274.77 costs. The decree in the Markee suit was made August 13th, 1871, and provided, that the libellant recover against the vessel $2,027.56 damages and $320.22 costs. Each decree provided, that, out of the proceeds of the stipulations of the claimant for costs and value, when paid into the registry, the clerk should pay

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

to the libellant the amounts so decreed; and that, unless an appeal should be taken within the prescribed time, the stipulators for costs and value should forthwith pay into court the amount of their said stipulations, and that the clerk, after deducting the taxed costs of the officers of the court in the action, distribute the proceeds in satisfaction of the decree. In each case the claimant took an appeal to this court from such final decree. In each case the claimant, with Edward K. Godfrey and Asa D. Dickinson, as sureties, executed a joint and several bond to the libellant, on appeal, conditioned that the libellant should prosecute said appeal with effect, and pay all damages and costs which should be awarded against him as appellant, if he should fail to make such appeal good. The bond in the Phillips case was dated May 22d, 1872, and was in the penalty of $4,000. The bond in the Markee case was dated September 19th, 1871, and was in the penalty of $3,000. This court made a final decree in each suit on the 2d of January, 1875, affirming the decree of the district court. In the Phillips suit the decree further provided, that the libellant recover against the vessel $3,015.39, the amount of the decree of the district court, and $562.27 interest thereon, and $195.05 as costs of this court, amounting in all to $3,772.71; that the vessel be condemned therefor; and that, in pursuance of the act of March 3d, 1847, a summary judgment be and was entered against the vessel and the claimant and the said sureties, on the bond given on the appeal, for the sum of $4,000, the amount of said bond. In the Markee suit the decree further provided, that the libellant recover against the vessel $2,347.78, the amount of the decree of the district court, and $548.69, interest thereon, and $197.05, as costs of this court, amounting in all to $3,093.52; that the vessel be condemned therefor; and that, in pursuance of the act of March 3d, 1847, a summary judgment be and was entered against the vessel and the claimant and the said sureties, on the bond given on the appeal, for the sum of $3,000, the amount of said bond. The claimant took an appeal, in each suit, to the supreme court of the United States, from such final decree of this court. In each case the claimant, with Edward K. Godfrey and James C. Hartt, as sureties, executed a joint and several bond to the libellant, on appeal, conditioned that the appellant should prosecute said appeal to effect and answer all damages and costs, if he should fail to make his appeal good. The bond in each case was dated January 15th, 1875. That in the Phillips case was in the penalty of $7,500. That in the Markee case was in the penalty of $6,200. The supreme court made a decree in each suit, affirming the decree of this court, with costs, and interest until paid, at the same rate per annum that decrees bear in the courts of the state of New York. It further decreed, in each case, that the libellant recover against the claimant $144.75, costs of the supreme court. On the 25th of July, 1878, on the presentation to this court of the mandate of the supreme court in each case, a decree was made by this court, in the Phillips case, that the libellant recover the said sum of $3,772.71, and interest thereon from January 2d, 1875, amounting to $957.26, together with $144.75, costs, amounting in all, to $4,874.72, and that a summary judgment be and was entered against the claimant (the principal), and Edward K. Godfrey and James C. Hartt (the sureties), on the bond on appeal to said supreme court, for the sum of $7,500, the amount of their bond, and that execution issue thereon; and a decree was made by this court in the Markee case, that the libellant recover the said sum of $3,093.52, and interest thereon from January 2d, 1875, amounting to $756.09, together with $144.75, costs, amounting, in all, to $3,994.36, and that a summary judgment be and was entered against the claimant (the principal), and Edward K. Godfrey and James C. Hartt (the sureties), on the bond on appeal to said supreme court, for the sum of $6,200, the amount of their bond, and that execution issue thereon.

It is now shown to this court, on behalf of the libellants, that the said Cassidy has died during the pendency of said appeals; that the said Dickinson has removed to Michigan; that, on the 19th of August, 1878, executions were duly issued to the marshal of the United States for this district, and have been returned wholly unsatisfied; that the said Hartt resides in the state of New Jersey, and owns real property there, but carries on business in the city of New York; that the said Godfrey resides in the city of New York; that the said Moran resides in the state of New Jersey; and that the said Dickinson resides at Detroit, in the state of Michigan. On the foregoing facts, and on notice to said Godfrey and said Hartt, and the proctors for the claimant, the libellants now move this court, "that James C. Hartt and Edward K. Godfrey, sureties upon the stipulations entered into herein, and sureties upon the appeal to the supreme court of the United States, be ordered to appear before this court for examination concerning their property, according to the laws and practice of the state of New York," and "that they be ordered to disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all of their property to a sequestrator to be appointed by this court, and that the said James C. Hartt and Edward K Godfrey be punished for their contempt in not performing their said stipulations, and failing to comply with the provisions of said decrees, and for such other order or relief as may be just."

(1.) As to so much of the motion as asks that the sureties be ordered to appear before

this court for examination concerning their property, according to the laws and practice of the state of New York. There is no statute of the United States which authorizes or requires such an examination in a suit in admiralty. Sections 914, 915 and 916 of the Revised Statutes apply solely to common law suits. Section 941 provides for such stipulations for value as were given in these cases, and enacts that judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. Rule 21 in admiralty provides, that, "in all cases of a final decree, for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal, or his deputy, to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators." There is no other rule as to the enforcing a decree in a suit in rem. That rule is one of a series of rules made by the supreme court under section 6 of the act of August 23d, 1842, 5 Stat. 518, now section 917 of the Revised Statutes, which provides that the supreme court shall have the power to prescribe the forms of process, the modes of proceeding to obtain relief, and generally to regulate the whole practice in suits in admiralty, by the circuit and district courts. Nothing is found which authorizes what is asked for under the first branch of the motion.

(2.) As to so much of the motion as asks that the sureties be ordered to disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all of their property to a sequestrator, to be appointed by this court. There is no statute which confers on a court of admiralty of the United States those powers of sequestering property which appertain to a court of equity, nor is there any rule which does so. The libellants have judgments, and, after executions have been issued and returned unsatisfied, they can resort to the proper court to reach any property which the debtors may have. But this court, sitting in admiralty, is not such court. The fact that the libellants could not recover judgments on the stipulations or bonds in any other court than the admiralty court, does not prevent their resorting to other courts, where they have obtained judgments in the admiralty court to enforce such judgments. The judgments have then become like any other judgments in personam in any court. In a suit in rem, where the court has acquired jurisdiction of the res, and has not voluntarily yielded possession of it, and has a right to recall it to its custody, it may proceed to do so, as against those who have it or have taken it; but that is not the present case. Rule 38. The libellants are general creditors, by judgment in personam, of the sureties. The stipulations and bonds are merely to pay money, and the judgments are money judgments. The stipulators for value could not now perform the condition of their stipulation, by bringing the vessel into court.

(3.) As to so much of the motion as asks that the sureties may be punished for contempt in not performing their said stipulations and failing to comply with the provisions of said decrees. At most, the stipulations, bonds and decrees create a debt from the sureties to the libellants. The decrees are decrees for the payment of money, and only for that. Prior to the December term, 1861, of the supreme court, rule 21 in admiralty read thus: "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a capias and of a fieri facias, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant; and, for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and, upon such attachment, the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court." At the December term, 1861, the supreme court abolished that rule and substituted the following in its place, as rule 21: "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a fieri facias, commanding the marshal, or his deputy, to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulator." It is quite clear that the supreme court intended to abolish attachments to compel the performance of general money decrees.

Although this court has, under section 725 of the Revised Statutes, power to punish, as a contempt of its authority, the disobedience of any party, or other person, to any lawful writ, process, order, rule, decree or command made by it, yet it cannot properly punish, as such a contempt, the failure of these sureties to pay these money judgments. By rule 48 in admiralty, made at the December term, 1850, of the supreme court, it is provided as follows: "Imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a state court." By section 990 of the Revised Statutes of the United States it is provided as follows: "No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprison-

ment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state." The stipulations and bonds in this case are contracts, and contracts to pay money. The decrees are judgments requiring the payment of money due upon contracts. By the statutes of New York, imprisonment for debt is abolished as a remedy in execution of a judgment requiring the payment of money due on a contract, such as the contracts in this case. Laws N. Y. 1831, c. 300, § 1; Code Proc. §§ 12, 548–550, 1240, 1487.

The motion is denied, in all its branches.

[NOTE. For decision denying petition for mandamus to compel the circuit court to require the examination of the sureties, see Ex parte Phillips, 25 U. S. (Lawy. Ed.) 781.]

Case No. 1,525.

The BLANCHE PAGE.

[17 Blatchf. 221.] [1]

Circuit Court, S. D. New York. Oct. 11, 1879.

ADMIRALTY — APPEAL — BOND — SUMMARY JUDGMENT AGAINST SURETIES.

Where, in a suit in rem, in admiralty, in the district court, the claimant, after a decree for the libellant, appeals to this court, and this court decrees for the libellant for a sum not sufficient to allow of an appeal by the claimant to the supreme court, a summary judgment can be rendered at once by this court against the sureties in the appeal bond executed on the appeal to this court.

[Cited in The Sydney, 47 Fed. 262.]

[In admiralty. Motion by libellants in the cause of The Blanche Page, Case No. 1,523, for judgment against sureties on claimant's bond on appeal to the circuit court after affirmance by such court. Granted.]

Scudder & Carter, for libellants.

Benedict, Taft & Benedict, for sureties.

BLATCHFORD, Circuit Judge. As this is not a case in which the claimants can appeal to the supreme court, there can be no supersedeas or stay of execution on the decree made by this court against the vessel libelled. Hence, the claimants, as appellants to this court, are obliged to pay at once the amount of such decree, and the obligation of the sureties in the appeal bond to this court came into force without waiting for ten days to expire after the rendering of such decree. The motion for judgment against such sureties must, therefore, be granted.

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

[NOTE. For subsequent proceedings on the summary judgment against the sureties, see Ex parte Phillips, 25 U. S. (Lawy. Ed.) 781.]

BLANCHE PAGE, The. See Cases Nos. 7,296 and 7,297.

Case No. 1,526.

BLAND v. SOUTHERN EXP. CO.

[1 Hughes, 343.] [1]

Circuit Court, E. D. Virginia. April 18, 1877.

EXPRESS COMPANIES — COLLECTION OF DRAFT — LIABILITY FOR ACT OF AGENT ACTING IN ANOTHER CAPACITY.

Bulky produce, not such as an ordinary express company usually transports, was shipped by the freight cars of a railroad company, to a distant railroad wayside depot, to the name of the person who shipped it; this person wrote on the railroad receipt the words, "Deliver to S. H. Brown & Co.," who were living at the place of destination, and drew a sight draft upon S. H. B. & Co. for the value of the produce, and took the railroad receipt and draft to the office of an express company, delivered them to a clerk of the company, and obtained the express company's receipt for the draft "for collection." The depot agent at the destination of the goods, who was also the agent of the express company, delivered the produce to S. H. B. & Co. as agent of the railroad company, upon ascertaining from the writing on the face of the receipt of the railroad company, sent him by the express company, that the goods were intended for S. H. B. & Co. In an action brought by the shipper of the produce, against the express company for the amount of the draft, *held*, that the railroad company had a right to deliver such bulky produce to the consignees as soon as they were identified; that the express company did not by construction or actually have custody of the produce, and was not bound to take custody of it, and did not become liable for its value in consequence of its own agent (acting as agent of the railroad company) having delivered the produce, instead of holding it until the payment of the drafts.

At law. This was an action of assumpsit [J. B. Bland against the Southern Express Company] for the value of certain shipments, chiefly of bulky produce, made under the circumstances detailed by the court in its written decision. There was a trial by jury, and a verdict for plaintiffs. A motion for a new trial was introduced. [Motion granted.]

Robert Howard and John S. Wise, for plaintiffs.

Robert Ould, for defendants.

The following was the decision of the judge:

HUGHES, District Judge. The plaintiffs, J. B. Bland & Co., living and doing business in Richmond, made three several shipments on freight cars of the Chesapeake and Ohio Railroad Company, chiefly of heavy produce, including a carload of hay, 110 barrels of flour, 150 bushels of meal, 75 bushels of corn, to Cotton Hill depot, in the mountains of West Virginia, consigned to themselves (J.

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

B. Bland & Co.). These shipments were, nearly all of them, not of such articles as were in the line of business of the Southern Express Company. The plaintiffs took receipts of the railroad company for each shipment. They wrote on the face of these receipts the words, "Deliver to S. H. Brown & Co.: J. B. Bland & Co." They took these drafts and receipts to the office of the express company in Richmond, delivered them to one of the clerks in the office, and obtained the company's receipt for the drafts, "for collection." The depot agent of the railroad company at Cotton Hill and the agent of the express company there were one and the same person. As soon as this agent learned from the writing on the face of the railroad company's receipt, that the shipments were intended for S. H. Brown & Co., he delivered them to that concern, stating in evidence that he delivered them as agent of the railroad company. He also presented the drafts to the concern for payment, which they were unable to make. He duly returned the drafts and receipts to the express company at Richmond with a memorandum on them, "not paid for want of funds," and the plaintiffs were duly notified of their action. This action is brought for the face value of these three drafts, and is founded on the supposition that the express company became liable by having delivered the produce shipped before the drafts were paid. The course of making shipments by freight cars on the railroads of this country, is for the shipper to pay or not pay the freight charges on delivering the goods for shipment, to take the railroad company's receipt, and to mark the consignee's name on the goods, or indicate it to the company on making the shipment. The goods or produce are delivered to the consignee by the depot agent at the place of destination, on arrival, on demand. It is not the custom of railroad companies to receive drafts or bills of exchange for collection at all, not even drafts for the value of the particular shipments on which they are drawn, or to hold the goods or produce until these drafts are paid. Such a proceeding would be foreign to the business of railroad companies; is never allowed by them; is generally impracticable in itself; and is wholly unknown in practice. There are many reasons why this proceeding could not obtain; one of which is, that necessity requires that produce should be delivered promptly on arrival, especially at wayside depots, being in general too bulky to admit of being stored, and being such as would clog and glut wayside depots beyond their capacity. The depot in this case was in a narrow pass in the mountain, on the banks of a turbulent river; and, of the produce shipped by the plaintiffs, there was, among other things, a carload of hay which could not be stored at all, a carload of flour which would unduly incumber the small depot building there, and other things equally bulky and inconvenient to store. It would have been vain, idle, and preposterous for the plaintiffs in this cause to have endeavored to induce the railroad company to agree to hold their produce until the drafts for its value were paid. That would have been foreign to the usage of the railroad company, probably impracticable in itself, and a sort of engagement which the company could not, consistently with its modes of transportation, its interests, and its principles of business, make with any customer.

The plaintiffs here have sought to accomplish by indirection what it was not practicable for them to do by direction, of course without improper motive. They sought to bring the express company under obligation to do what the railroad company would not do. They sought so to contrive as to secure the holding at Cotton Hill depot, until their drafts were paid, of the bulky produce which they had shipped there, in spite of the usage of the railroad company not to hold produce until drafts drawn against it were collected The Southern Express Company, like other express companies, does two kinds of business. 1st. It carries in express cars, light freights, called express freights; often collecting the value of the parcels carried on C. O. D. drafts. 2d. It receives for collection and collects drafts drawn upon places where there are no banks, not accompanied by goods shipped by express to the persons on which such drafts are drawn. It was the latter kind of transaction which the express company in this case undertook for the plaintiffs. It received nothing besides the drafts but railroad receipts, having on their face a designation of the firm to whom the shippers intended that the produce should be delivered. The writing on the face of these receipts did not say that the receipts were not to be delivered to S. H. Brown & Co. until the drafts were paid, and even if it implied as much, there was no breach of such an order by the express company; for it had custody of nothing but the drafts and receipts, and has never parted with the custody of either. The writing on the face of the railroad receipts did not in terms give any direction in regard to the produce, which was in custody of the railroad company; but, even if it had done so, it could not thereby have imposed upon the express company an obligation to hold freight which was not in their custody, in violation of the usage and convenience of the railroad company, and in a way probably impracticable in itself. The plaintiffs could not by delivering a draft for collection to an express company, coupled with a railroad receipt, impose upon the express company, by implication, through the inadvertence of a clerk of the express company in receipting for the draft, an obligation to do that with freight, shipped by the railroad, which they could not by any possibility have induced the railroad company itself to do.

The railroad company by its agent had a right, at such a depot as Cotton Hill, to deliver such bulky and cumbrous articles as were shipped in their cars, to the person to whom they were shipped, as soon as it identified that person; and neither the plaintiffs alone, nor the plaintiffs and express company together, could take away or limit that right. It could only be limited by an agreement of the railroad company itself. That right the railroad company through its own agent exercised in this case. If there was any responsibility incurred by so doing, the responsibility is on the railroad company, for it alone had the custody of the produce. The express company did not only not have custody, but was justified in not taking custody of such produce at such a place, for the purpose, even if it had been practicable to hold it, of holding it in violation of the usage of the railroad company. Such an undertaking would have been out of its line of business, and could not be implied from any routine action of one of its clerks. The declaration in this case charges throughout, that the express company had custody of the produce which was shipped by the plaintiffs. The proof is that the produce was never in custody of the express company, but that it was delivered to S. H. Brown & Co. by the railroad company, without ever having been in the custody of the express company. I think the verdict was so clearly contrary to the law and the evidence as to justify the court in setting it aside, which is accordingly done.

Case No. 1,527.

In re BLANDIN.

[1 Lowell, 543;[1] 5 N. B. R. 39.]

District Court, D. Massachusetts. Feb. Term, 1871.

BANKRUPTCY — USE OF WIFE'S SEPARATE ESTATE BY BANKRUPT—PROOF OF DEBT TO WIFE.

1. The bankrupt's wife may prove as a creditor against his estate in bankruptcy for money realized by him out of property which she held as her separate estate under the statutes of Massachusetts, if the evidence clearly shows that the transaction was intended to be a loan and not a gift.

[Cited in Re Jones, Case No. 7,444; Re Jordan, Id. 7,511; Clark v. Hezekiah, 24 Fed. 664; Re Boston & Fairhaven Iron-Works, 29 Fed. 784; Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 497.]

[See In re Bigelow, Case No. 1,398; Sigsby v. Willis, Id. 12,849; Muirhead v. Aldridge, Id. 9,904.]

[2. Cited in Re McLean, Case No. 8,879, to the point that the nineteenth section of the statute covers the indebtedness of a trustee to his cestui que trust, and makes it provable in bankruptcy.]

[3. Cited in Re Jordan, 2 Fed. 319, to the point that equitable debts may be proved in bankruptcy.]

[4. Cited in Wiswell v. Jarvis, 9 Fed. 87, to the point that an understanding between husband and wife that on his death she should have all his estate is not a good consideration for a conveyance to her as against creditors.]

[5. Cited in Re Boston & Fairhaven Iron-Works, 23 Fed. 881, to the point that an account of profits against an infringer of a patent right is provable in bankruptcy, being like an equitable claim for money had and received.]

Bankruptcy. This was a petition by the wife of [E. G. Blandin] the bankrupt for the allowance of a claim against his estate for property lent by her to him, with a promise made by him at the time of the loan that he would repay her. The property consisted of stock and money in savings banks to the amount of two thousand dollars, which the wife received as a distributive share from her mother's estate. With this the husband bought out a grocery store in Taunton, and after carrying on business for about a year, he failed. The question was whether such a claim could be proved against the estate of the husband in bankruptcy.

C. A. Reed and G. M. Reed, for petitioner.
J. H. Dean, for assignee.

LOWELL, District Judge. The statute of Massachusetts gives married women power to contract concerning their separate property, and to sue and be sued in all matters relating to the same, as if they were sole. Gen. St. c. 108, §§ 1–6. In this respect, the act may be said to be declaratory of the rules before adopted by courts of equity, though going much further in ascertaining what shall be considered separate property. This statute does not give any right to husband and wife to contract with each other, or to sue each other, at law; Lord v. Parker, 3 Allen, 127; Edwards v. Stevens, Id. 315; Knowles v. Hull, 99 Mass. 564. The bankrupt, therefore, having borrowed of his wife the money and personal property from which money was realized, the contract to repay it could not be enforced at law. And it is generally true, that a contract void at law is void in equity. To this general rule there are well-known exceptions, one of which is a contract between husband and wife concerning her separate property, which courts of equity will uphold and enforce. In this way a wife may become the creditor of her husband: Fenner v. Taylor, 1 Sim. 169; Towers v. Hagner, 3 Whart. 48; Riley v. Riley, 25 Conn. 154.

I do not understand that it has ever been decided in this commonwealth that these doctrines do not fully apply in equity to separate property held under the statute. It seems to me that the statute merely enlarges the field for the application of those doctrines; and I apprehend that, if a husband should possess himself of his wife's property, whether by force, by fraud, or by virtue of a contract to repay it, very little difficulty would be found in discovering a remedy in the courts of the state. The cases of Turner v. Nye, 7 Allen, 176, and Phillips v. Frye, 14 Allen, 36, differ

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

essentially from this case, because in neither of them was the property the separate estate of the wife; if it had been, I venture to think that the former case would have been decided in favor of the wife, although the latter might have been embarrassed by the want of full equity powers in the courts of probate. The turning point in both those cases was that the property not being separate, there was no valuable consideration for the promise, an objection equally fatal in equity as at law. In this I may be mistaken; but if so, it is not upon any question of the local law, but of the application of general rules of equity to that law, which is a point I should be obliged to decide for myself in any event. And my opinion is that in equity the petitioner has a right to be repaid out of the husband's estate, whether his obligation be called an equitable debt or a trust.

Whether in any given case the wife has such an equitable claim, is a question of fact. If she has permitted her husband to use her money, and especially her income, for a long course of years, the presumption of a gift is almost irresistible, and if a gift, she cannot recall it: Caton v. Rideout, 1 MacN. & G. 599; Gardner v. Gardner, 1 Giff. 126. If, on the other hand, he obtained the money without her consent, or on a promise to hold it as a trustee or to repay it, he must do so: Rich v. Cockell, 9 Ves. 369; Darkin v. Darkin, 17 Beav. 578; Rowe v. Rowe, 2 De Gex & S. 294; Walker v. Walker, 9 Wall. [76 U. S.] 743. In this case the evidence shows that the money realized from the wife's separate personal property was to be repaid.

Under these circumstances the wife claims the right to prove for the amount against the husband's estate in bankruptcy, or that the court, under its equitable powers, should order such a sum as may be just to be paid out to her by way of settlement. The case does not come within the latter alternative. There is no chose in action or special fund in the hands of the assignee, with which a court of equity can deal; the money has gone into the mass of the husband's assets, and the petitioner must come in as a general creditor, or not at all. That she or her next friend may prove as a creditor was held in Re Bigelow [Case No. 1,398]; Ex parte Wells, 2 Mont. D. & D. 504; Ex parte Thring, Mont. & C. 75. It is very doubtful whether such a debt could have been proved under the insolvent law of Massachusetts, for that law was considered to refer only to legal debts (Robb v. Mudge, 14 Gray, 540); but I have little doubt that equitable debts are within the scope of the bankrupt act. It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy: Ex parte Williamson, 2 Ves. Sr. 252; Ex parte Taylor, 2 Rose, 175. "A commission in bankruptcy," said Lord Eldon, "is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment": Ex parte Dewdney, 15 Ves. 498. The nineteenth section of our statute makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his cestui que trust, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform, for proof of debts will depend on the remedies given in the several states, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity.

The twenty-fourth section provides that a creditor who appeals from the rejection of his claim, shall file a statement in writing, setting forth the same substantially as in a declaration at law, and that like proceedings shall be had as in an action of law. This section, perhaps, is the one on which a doubt is raised, as it is precisely like the one referred to in the observations of the court in Robb v. Mudge, above cited. But the provision here seems to be made for the ordinary case. It is seldom that a debt is offered for proof, that could not be sued at law; and in this section, if it is to be taken literally, this very rare case is overlooked. But there is no sort of doubt that the circuit court has full appellate power, and that it may take such order in relation to appeals not fully provided for by section twenty-four as may be necessary to conform the proceedings to the nature of the case. It was not at all the purpose of that section to prescribe what debts might be proved, but merely the mode of conducting appeals; and it is, therefore, but slightly and incidentally that it supplies an argument for any construction of section nineteen.

The real difficulty in these cases is found in the evidence. There is great danger of fraud and mistake, and all demands of this sort must be examined with the utmost care. If on such examination the case is fairly made out, I have no right to disregard well-settled rules of equity, which declare and uphold the wife's right to recover.

Mrs. Blandin is to be admitted as a creditor for two thousand dollars, the sum advanced, without interest, the evidence showing no contract for interest.

Order accordingly.

Case No. 1,527a.

Ex parte BLANDY.

[Nowhere reported; opinion not now accessible.]

Case No. 1,528.

In re BLANDY.

[1 MacA. Pat. Cas. 552.]

Circuit Court, District of Columbia. Jan. Term, 1858.

PATENTS—IMPROVEMENT IN PORTABLE STEAM ENGINES—DOUBLE USE — SUFFICIENCY OF INVENTION.

[1. The application of a hollow bed-plate attached to a boiler and portable engine for the purpose of relieving the operative parts of the latter from the contraction and expansion of the boiler, and the boiler from the direct strain of the engine, is a mere colorable variation or double use of similar bed-plates in prior use, and is not patentable.]

[Cited in Smith v. Thomson, 38 Fed. 606.]

[2. The new application of the principle of an alleged invention, which has been discovered and applied before, is a double use.]

[3. Though the new application possess some degree of novelty, unless the new occasion on which the principle is applied leads to some kind of new manufacture or to some new result, it is but a double use.]

[4. If the same purpose has in other instances been accomplished by substantially the same means, the use of those means on a new occasion does not constitute a sufficiency of invention.]

[Appeal from the commissioner of patents.]

[Application by Henry and Frederick I. L. Blandy for a patent for an improvement in portable steam-engines. From a decision of the commissioner refusing the application, June 15, 1857, the applicants appeal. Affirmed.]

P. Hannay, for appellants.

MORSELL, Circuit Judge. The claim as amended is described in the following terms: "Having thus described our improvement, what we claim as new, and desire to secure by letters patent, is the application to portable steam-engines of a hollow bed-plate, in the manner substantially as described, for the support and attachment of the operative parts of the engine, whereby the latter in working is rendered independent of the contraction and expansion of the former, and the boiler relieved from the direct strain of the engine, as set forth." On the 15th of June, 1857, the commissioner says: "Your application for improvement in portable engines has been examined under rule 114, and a patent thereon refused."

Three reasons of appeal are assigned: First. Because the office has failed to give a reference showing the device applied in the same manner and for the same purposes as that claimed by the applicants. Second. Because the reference given to the engine described in Lardner, and shown in plate 12 of the same, cited in the commissioner's decision as an apposite reference, cannot be considered as a reference at all, as it is not used as a support for the working parts of the engine, but merely as a heater to economize the heat of the waste steam. Third. The opinion of the office, to wit, "the necessity for some provision to accommodate contraction and expansion in machines requiring an extended metallic surface, is so perfectly familiar to every good mechanic that no structure of such material that had to encounter great changes of temperature would be attempted without some such accommodating provision," cannot be considered as a just cause for refusing a patent to the applicants; as, first, the law does not recognize a necessity for the invention of a machine, &c., to effect a useful result, as a reason for refusing a patent on the same [when invented][1]; and second, a mere belief or reason on the part of the office, without assigning proper references to substantiate the same, is not a reference, as contemplated by law, and hence is not a lawful reason for refusing the patent.

The commissioner states as the general ground for his decision "that, as in the construction of every character of steam-engine no more metal is used than in the sound judgment of the builder is required to give it strength and durability and adapt it to its particular position, it will readily be seen that the making of one part of the engine solid and another part hollow must be of common consideration, arising out of the various circumstances of locality, use, durability, and economy. Certain references have been given to this position which show, from an early date to the present time, that not only in portable but in all classes of steam-engines the hollow or tubular character of the structure has been made of importance, and such parts of the engine as were thus made have been used for various purposes; to show which, particular references are given to Lardner on the Steam-Engine, plate 12, p. 148, in 1802, where the hollow or tubular quality is fully employed, the tubular part of the structure serving to sustain the smoke-stack of the boiler, the exhaust pipe, and part of the valve gear, while it is made to serve the very useful purpose of a feed-water heater. In Repertory of Patents (2d S. vol. 2, p. 175) is shown an engine, the entire base of which is hollow and used as a water reservoir—invented in 1802. Herbert's Encyclopaedia (volume 2, p. 701) shows the hollow bed-plate used for two purposes, where compactness appears to have been a prominent intention of the inventor, two of the compartments being for the working cylinders and the third designed for the condenser." The commissioner then passes on to more recent dates, and says: "The references in the descriptive catalogue of the London exhibition (page 375) show portable en-

[1] [From 3 App. Com'r Pat. 77.]

gines with hollow supports sustaining different parts. Burrell's (page 368) shows the cylinder and valve gear sustained on a hollow frame or box placed above the furnace of the boiler, with the bearing of the fly-wheel upon another box near the smoke-box of the boiler. The same may be said of Barrett's engine, illustrated on page 377. Though the box supporting the cylinder on the boiler in this engine is shallow, it is evidently not solid, but hollow. The same is evident in Turner's engine, illustrated on page 391, and Hornby's, on page 396." As tending to prove the same position, the commissioner refers to the files of the office, showing a number of cases particularly stated by him, from all which the commissioner says: "Is it not very clearly and fully shown that there is no novelty in constructing engines of any special character with hollow bet-plates or supports? * * * The applicant insists, notwithstanding this mass of strong and pertinent evidence, that he is entitled to a patent on this application, because the references do not show that the hollow bed-plate was designed by others for the same purposes and for fulfilling the same intentions contemplated by him. It is not proposed to show that the position assumed by the appellant is incorrect; that is, that others have not used the hollow bed-plate for the same purpose and with the same intentions, for the great reason that his premises are without any support derived either from the enactments of congress concerning patents, from the practice of the patent office, or from the decisions and rulings of the courts. It is therefore of no moment whether he is the first to use hollow bed-plates for the purposes and with the intention named by him or not. The laws do not in any degree whatever set out purpose or intent as a cause for granting a patent. Only a few rulings and opinions will therefore be quoted. Reference is given to Phil. Pat. 106; Curt. Pat. p. 4, § 4; Bean v. Smallwood [Case No. 1,173]; Winans v. Providence R. Co. [Id. 17,858]; and the opinion of Judge Cranch in the appeal case of John F. Kemper from the decision of the commissioner of patents" [Id. 7,687].

This was the state of the said case brought before me on the day and place appointed by me for the hearing thereof, at which time and place an examiner on the part of the office appeared, with all the papers, &c., in said case, and on the part of the appellant his attorney appeared, and upon his application was allowed to propound certain interrogatories to said examiner in explanation of the principles of the said improved machine, according to the provisions of the act of congress, which said examination will be herewith sent, (reference thereto will fully appear.)

In answer to the first interrogatory, the examiner says: "I have frequently seen engines running with hollow bed-plates."

Fourth interrogatory: "Does the working of portable engines strain the boilers?" Answer: "It depends altogether on the strength of the boiler and the power of the engine; it has no tendency to strain it if the boiler is sufficiently strong."

Sixth interrogatory: "Is the power of the engine usually proportioned to the capacity of the boiler?" Answer: "The boiler is usually adapted to the engine."

Ninth interrogatory: "Will the expansion and contraction of the boiler, as its temperature is varied and lowered, strain the working parts of the engine if attached directly to it?" Answer: "That depends in a great measure upon the construction and arrangement of the engine and the kinds of metal used in its various parts."

Tenth interrogatory: "How? What different kinds of metals effect this?" Answer: "All metals do not expand equally by heat, and hence an engine might be injured more or less by expansion when constructed of different kinds of metals."

Eleventh interrogatory: "Will the expansion and contraction of the boiler as its temperature varies strain the working parts of the engine if attached directly to it, both being constructed entirely of the same metal?" Answer: "I should think not."

Twelfth interrogatory: "Will the appellant's improvement have a tendency to prevent the straining of the engine and boiler, as arranged and combined, the engine and boiler being of the same metal?" Answer: "Not as little as if there was not any cylinder or bed-plate interposed."

Thirteenth interrogatory: "If the boiler and engine be made of different metals, how then?" Answer: "If made of different metals, there would be more injury from expansion and contraction."

Fourteenth interrogatory: "Will the appellant's improvement have a tendency to prevent the straining of the engine and boiler, as arranged and combined, the engine and boiler being both made of different metals?" Answer: "I should think not."

Fifteenth interrogatory: "When two pieces of the same kind of metal are secured to each other, and are unequally heated, will they have a tendency to strain and burst from each other?" Answer: "Yes."

The case was then submitted on the written argument of the appellant's counsel and the proceedings aforesaid in the cause.

For the purpose of considering the subject of controversy before me on this appeal in the fullest manner, those parts of the argument of the appellants' counsel above alluded to, which may be thought necessary, will be noticed. Counsel supposes "that the office have totally misunderstood the nature and scope of the claim (of the appellant), and have given all their references with a view of showing that hollow supports for engines had been used before. This (he says) we have never presumed to deny; but these references are necessarily predicated upon the

supposition that we claim a hollow bed-plate of itself, without reference to the manner in which it is constructed, applied, arranged, and combined with the boiler, which is not the case. This (he says) forms the grounds for his first and second reasons of appeal; * * * appellant's claim consists of a plan for a peculiar arrangement and combination —an interposition of a single hollow, continuous bed-plate between the boiler and engine, upon which and to which the entire working parts of the latter are supported and attached, the bed-plate being mounted upon and secured to the boiler, by which certain new and beneficial results are obtained." Further, it is contended that by the device a single hollow bed-plate is used, instead of two or three, for the support of the entire working parts of the engine; that thereby a new and beneficial result is produced, which cannot be effected by the use of two or more hollow supports arranged in the same manner; that it costs less, and is more economical. Whether the references are pertinent or not, must depend upon a comparison between them and the invention in this case, as it is described and claimed and set forth in the specification hereinbefore recited; that is to say, "the application to portable steam-engines of a hollow bed-plate, in the manner substantially as described, for the support and attachment of the operative parts of the engine, whereby the latter in working is rendered independent of the contraction and expansion of the former, and the boiler relieved from the direct strain of the engine, as set forth." The references are intended to show that the alleged invention is merely a colorable variation or a double use, and not a substantial invention. The purpose and object in view, as very clearly appears, was, by a proper regard to the portableness of the engine, by an isolated, independent condition of the engine and the working parts of the boiler, to secure them from being injuriously affected by the contraction and expansion of the boiler, and to secure the boiler from any consequent strain from them. Assuming that such would be the effect by the contrivance and plan described, will it be new? The references are given to show that it would not.

As a guide in the investigation, it will be proper to state some of the rules of patent law applicable to the subject. It must involve a new principle. Where the principle of the alleged invention has been discovered and applied before, the application will be what is called a double use. In such cases, although there may be in the new application some degree of novelty, something may have been discovered or found out that was not known before, yet, unless the new occasion on which the principle is applied leads to some kind of new manufacture or to some new result, it will be but a double use. Again, if the same purpose has in other instances been accomplished by the same means substantially, the use of those means on a new occasion does not constitute a sufficiency of invention. See Curt. Pat. § 27. Again (Curt. Pat. § 40), there must be some new process or some new machinery used to produce the result.

I will now consider the objections made by the counsel on behalf of the appellants to the references before mentioned. In doing so, however, I shall only notice a few, all the others having been offered as tending to sustain the same thing. The first I notice is the objection to Burrell's Catalogue of London Exhibition, 368. This, as stated in the commissioner's report, shows the cylinder and valve gear sustained on a hollow frame or box placed above the furnace of the boiler, with the bearing of the fly-wheel upon another box near the smoke-box of the boiler. The objection to this, in the language of the counsel, is that "supposing, for the sake of argument, each of these parts are supported upon separate hollow standards or bed-plates secured to the boiler, the same effect will be produced with these as if the various parts of the engine had been secured directly to the boiler, because, as the boiler contracts or expands, the hollow bed-plate will necessarily move with it in those movements, and produce precisely the same effect as if the engine had been secured directly to the boiler, for as they move, the parts of the engine secured to them must also move, thus destroying their proper relative position." If this reasoning be correct, as perhaps it is, is it not applicable as an objection to the scheme of the appellants? Their bed-plate, on which the working parts are supported, is secured to the boiler at one or perhaps two points; that is, at each end. If, therefore, any such disaster should occur, it is difficult to conceive how the peculiar contrivance or fastenings of the continuous hollow bed-plate of appellants' alleged invention should effectually save said parts from like effects of the shock.

The next which I shall notice is to be found in the Repertory of Patents (2d S. vol. 2, pp. 175, 176): an engine the entire base of which is hollow, and used as a water reservoir, invented in 1802. It is objected that the hollow cistern forming the entire base of the engine "is not supported upon and secured to the boiler, but is stationed upon the ground, and therefore cannot be in point." Considering, as I have done, that the principal feature in the alleged invention of the appellants claimed by them as new was the independent, isolated contrivance of their hollow continuous bed-plate, I am utterly at a loss to perceive the weight of this objection in support of that idea, or how it can be consistently reconciled with what appears to be insisted on in the objection just before mentioned. If it is intended to be used to show the want of portableness,

judging from the only evidence before me—that of the description given in the book referred to—I am not satisfied that it warrants me in drawing any such conclusion. It is in these words: "Its combination of parts form a perfect engine without requiring any fixture of wood or any other kind of framing than the ground it stands upon, and is transferable without being taken to pieces." The same objection is urged to the reference given in Herbert's Encyclopaedia (volume 2, p. 701): an engine (as stated by the commissioner) which shows the hollow bed-plate used for two purposes, where compactness appears to have been a prominent intention of the inventor, two of the compartments being for the working cylinders and the third designed for the condenser. The same reply may be made to this objection as to the preceding one.

The next objection I shall notice is the one taken to the case of Barrett, to be found in the Descriptive Catalogue of the London Exhibition, p. 375. The objector says that is is mounted and supported in precisely the same manner as that of Burrell's, before alluded to; that is to say, the various parts of the engine are supported upon several standards or bed-plates, and not upon one, which alone can effect the purpose and remedy the defects designed by the appellant's improvement. The description given of it by the inventor is: "The engine is fitted and fixed to a separate cast frame, relieving the boiler from all vibration or strain." The specific objection to this seems to be that by appellant's invention, his one bed-plate alone affects the whole that the several standards or bed-plates of this machine can do, and dispenses with them. This involves a separate principle from a mere analogous use, and will be hereafter considered.

It will appear, I think, on a review of the case at this stage of it, that in the construction of the invention by the appellants, although there are differences in point of form from those which are shown by the references, substantially they are analogous. The principles of the leading contrivances appear alike; for instance, they are substantially alike in the independent isolated hollow plate—their mode of operation answering the purposes of preventing any injurious effects that might be occasioned by an immediate contact of the working parts of the engine with the boiler. In one of them it is expressly stated as the purpose and effect "to secure and relieve the boiler from all vibration and strain." They are used or applied in the same kind of combination. As to the matter respecting the portableness, I have already said enough to show that this point is not materially affected by it. The case, therefore, falls within the principles of law as stated by me hereinbefore.

The claim of right to the patent is, however, supposed to be sustained upon the ground "that as by using a single hollow bed-plate, instead of two or three as formerly, for the support of the entire working parts of the engine, a new and beneficial result is produced, being more economically or beneficially enjoyed by the public." For this position Curt. Pat. § 401, is referred to as authority. It is there said: "The claim may be for the use of a known thing, in a known manner, to produce effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public, which the law decides is a patentable subject." If the facts be as stated, the rule will be applicable, and the claim sustainable. The claim was three times examined and rejected. Examiner Baldwin, to whom it was last referred for revision, says: "The necessity of some provision to accommodate contraction and expansion in machines requiring an extended metallic surface is so perfectly familiar to every good mechanic that no structure of such material that had to encounter great changes of temperature would be attempted without some such accommodating provision. To build a portable steam-engine with a view to make it encounter the changes of temperature which its use involves, is therefore no new invention." The testimony of Doctor Everett, on oath, examined before me on the hearing of this cause, at the request of and by appellant's counsel, to interrogatories propounded by him, is very strong against this branch of the claim, and his answers being in response to questions put by appellant's counsel must be received and respected according to the legal rule of evidence on the subject. I will repeat a part of what has been before stated. The eleventh interrogatory put to him was: "Will the expansion and contraction of the boiler, as its temperature varies, strain the working parts of the engine if attached directly to it, both being constructed entirely of the same metal?" Answer: "I should think not." Twelfth: "Will the appellant's improvement have a tendency to prevent the straining of the engine and boiler, as arranged and combined, the engine and boiler being of the same metal?" Answer: "Not as little as if there was not any cylinder or bed-plate interposed." Fourteenth: "Will the appellant's improvement have a tendency to prevent the straining of the engine and boiler, as arranged and combined, when both are made of different metals?" Answer: "I should think not." The proof derived from these two gentlemen—experts of great respectability, as they must be considered to be—I think must be considered as preponderating in weight over all that has been produced on the part of the appellant.

From all which my conclusion and opinion is that the claim for a patent as set up by the appellant in this case has not been sustained; that there is no error in the de-

cision of the commissioner, and that the same ought to be affirmed.

[NOTE. For suit for infringement of letters-patent No. 21,059, granted to Henry and Frederick I. L. Blandy for an improvement in "steam-engines," see Blandy v. Griffith, Case No. 1,529. For application to file a supplemental bill in the nature of a bill to review the decision in the foregoing case, see Blandy v. Griffith, Id. 1,530.]

Case No. 1,529.

BLANDY et al. v. GRIFFITH et al.

[3 Fish. Pat. Cas. 609; Merw. Pat. Inv. 97,705.] [1]

Circuit Court, S. D. Ohio. Sept. Term, 1869.

PATENTS FOR INVENTIONS — HOLLOW BED PLATE FOR ENGINES — INFRINGEMENT — PLEADING AND PROOF — ESTOPPEL BY FORMER SUIT — "INVENTION" — APPLICATION — NEGLECT TO MAKE — PUBLIC USE — RENEWAL OF APPLICATION — NOVELTY — PROPERTY RIGHTS IN PATENTS.

1. The improved bed plate patented to H. and F. J. L. Blandy, August 3, 1858, embraces these particulars: 1. A hollow continuous bed plate placed between the boiler and the engine. 2. The bed plate to have flanges on its upper and outer side cast with it. 3. The attachment and securing of the operative parts of the engine upon its upper and outer side by means of the flanges.

2. The rule is well settled in equity, that every material fact upon either side must be set up in the pleadings, and that the court can no more consider what is proved, but not alleged, than what is alleged but not proved.

3. Where the complainants insist upon an estoppel by a former suit between the same parties, the bill should have averred the judgment, in anticipation of the defense.

4. Invention is the work of the brain, and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he wrought.

[Cited in Yoder v. Mills, 25 Fed. 821; Johnson v. Forty-Second St., etc., R. Co., 33 Fed. 502.]

[See King v. Gedney, Case No. 7,795; Wellman v. Blood, Id. 17,385; Pitts v. Edmonds, Id. 11,191; Dental Vulcanite Co. v. Wetherbee, Id. 3,810.]

5. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists.

[See Spaulding v. Tucker, Case No. 13,220; Barry v. Gugenheim, Id. 1,061; Decker v. Grote, Id. 3,726; Marsh v. Seymour, 97 U. S. 349.]

6. As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated.

7. The statute (section 7, Act [March 3] 1839 [5 Stat. 354]) is inflexible as to the time when the patent is to be applied for, with reference to the prior use and sale of the invention. The neglect to apply within two years after such sale or use, is inevitably fatal.

8. Where a patent was applied for May 3, 1856, and rejected August 30, 1856; amended specifications filed September 22, 1856, and finally rejected upon appeal to the commissioner, June 15, 1857, but not withdrawn. A new application made May 26, 1858, and patent granted August 3, 1858. *Held*: That the last application was in the nature of a petition for a review of the previous rulings, and related back to the prior application, and that the action of the commissioner was not original and independent, but a renewal and elongation of the former proceedings and a reversal of the former rejections.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603; Weston v. White, Id. 17,458; Graham v. McCormick, 11 Fed. 862.]

9. Under such circumstances, the public use to avoid the patent must be for two years before the first application.

10. The delay from June 15, 1857, to May 26, 1858, was not, under the circumstances, unreasonable.

11. Whether two years would be a proper limit to establish for the renewal of an application after the rejection of a prior one, quaere.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 501; Colgate v. Western Union Tel. Co., Case No. 2,995. Distinguished in Lindsay v. Stein, 10 Fed. 913.]

12. The bed plate covered by Blandy's patent is not a frame composed of hollow tubes, but a single continuous shell or tube, attached laterally to the boiler and having the engine attached laterally to it.

13. The question, upon the issue of novelty, is not whether the invention is better or worse than its predecessors, but whether it is new and useful, and different from anything before used or known.

14. The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections capable of a reasonable and just solution in favor of their validity.

15. The patent granted to H. & F. J. L. Blandy, examined and sustained.

In equity. This was a bill in equity [by Henry and Frederick J. L. Blandy] filed to restrain the defendants [Thomas Griffith and Francis Wedge] from infringing letters patent [No. 21,059] for "an improvement in steam engines," granted to complainants August 3, 1858. The invention consisted of a hollow bed plate, substantially in the form of an eight inch pipe, about eight feet in length, which was attached by feet or saddles to the side of the boiler of a portable engine. To the outside of this pipe the working parts of the engine were attached; being thus removed from contact with the boiler, and from the injurious effects of the unequal contraction and expansion of the boiler plates. The cylindrical form of the bed plate imparted great strength, while, as it was hollow, it was exceedingly light. The claim of the patent was as follows: "The application to portable steam engines of a hollow continuous bed plate, in the manner substantially as described, for the support and at-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 97,705, contains only a partial report.]

tachment of the operative parts of the engine, whereby the latter, in working, is rendered independent of the contraction and expansion of the former, and the boiler relieved from the direct strain of the engine, as set forth." The defendants were using similar bed plates, except that a long, longitudinal strip was cut from the pipe on the side furthest from the machinery and next to the boiler, thus exposing the interior of the cylinder. The complainants used their bed plate as a heater also, by introducing water into the interior. The defendants used an auxiliary heater, which was located in the slot or opening of their bed plate. They insisted, by way of defense, that the invention was not new, but that it had been used prior to the invention of the patentees, in sundry places, in the form of an open frame, composed of four sides, each of which was a hollow tube, arranged in the form of a parallelogram and located on the top of the boiler. Upon this frame the machinery was placed. They also denied infringement.

The plaintiffs claimed that the defendants were estopped from denying the validity of the patent, by reason of a former judgment at law between the same parties, upon a suit for the infringement of the same patent. This point was not, however, made in the pleadings, but was founded upon the proofs and was urged in argument at the hearing. [Decree for complainants.]

A. W. Train, S. S. Fisher, Geo. Harding, and A. G. Thurman, for complainants.

F. Seborn, Geo. M. Lee, and C. D. Coffin, for defendants.

SWAYNE, Circuit Justice. I. The first question to be considered in this case is the proper construction of the patent to the complainants. In the specifications they say:

"Our improvement relates mainly to the construction of portable steam engines. The great desideratum in this class of machines is, to construct them so as to render them at once compact, yet simple; light, yet strong; and hence, available for the purposes of transportation.

"The nature of our improvement consists in the arrangement of a hollow continuous bed plate between the boiler and the engine, upon which, and to which, the entire working parts of the latter are supported and attached: the hollow bed plate being for this purpose provided with suitable flanges cast on its upper and outer sides, by which the operative parts of the engine are supported and secured to it; there being others cast on its under side, by means of which the bed plate itself is attached or riveted to the boiler. This hollow continuous casting, or bed plate, may be also used as a heater for the supply water. By this plan the engine will be rendered insulated, as it were, from the boiler, so that the relative position of its working parts to each other can not be affected by the expansion and contraction of the boiler so as to impair their regular and easy working; and on the other hand, the boiler will not be subject to the injurious effects of the vibration and direct straining of the operative parts when at work. * * *

"The bed plate, if desired, may be used as a heater for the supply of water, by passing the exhaust steam, as it escapes from the cylinder, through a pipe suitably arranged within the bed plate; it (the bed plate) having been previously supplied with water, whence the steam is carried to the smoke-stack, so as to increase the draft of the furnace, and the heated water conducted to the force pump so as to be conducted into the boiler through the supply pipe.

"Having thus described our improvement, what we claim as new and desire to secure by letters patent, is the application to portable engines of a hollow continuous bed plate, in the manner substantially as described, for the support and attachment of the operative parts of the engine, whereby the latter, in working, is rendered independent of the contraction and expansion of the former, and the boiler relieved from the direct strain of the engine as set forth."

Fairly construed, we think the context claims for the patentees as their invention: 1. A hollow continuous bed plate placed between the boiler and the engine. 2. The bed plate to have flanges on its upper and outer side cast with it. 3. The attachment and securing of the operative parts of the engine upon its upper and outer side, by means of the flanges.

According to these views, the essence of the invention lies in two things: The construction of the bed plate and its lateral attachment to the engine, as set forth in the specifications.

The specifications and drawings show that the plummer block is fastened to the end of the bed plate on one side of the boiler, while the fly-wheel is on the other. This, it was said at the argument, balances the engine and gives harmony to its workings. It was insisted that this is the only arrangement which renders possible the lateral attachment of the engine to the bed plate, and that this attachment is not only the invention of the complainants, but is of the highest value in the construction of such machinery.

It is said in the specifications that the bed plate "may, if desired, be used as a heater for the supply water," and full directions are given as to the manner in which this object may be accomplished. But this is not an ingredient of the claim. It may be dispensed with at the option of the builder of the engine. The summary of the claims is silent in regard to it.

What is set forth as vital is the construction of the bed plate, and its attachment to the engine in the manner described. The leading objects of the invention are lightness, strength and the insulation of the engine

from the disturbing effects of the heat of the boiler.

II. Before the filing of this bill, the complainants sued these defendants and Washington Ebert, then constituting a copartnership, for the same infringement of the patent which has given rise to this litigation, and recovered a judgment by default for $168.91 damages, and costs. The bill is silent upon the subject of this judgment. The complainants insist that the defendants now before the court are estopped by it from setting up any defense which might have been made in that case. Whether this would be so if the bill contained the proper averments is a question we are not called upon to decide. We will only say, that in that case the question would have been one of grave importance. Aurora v. West, 7 Wall. [74 U. S.] 82; Beloit v. Morgan, Id. 622.

As the bill is framed, it is clear the judgment can not have the effect upon which the complainants insist.

The rule is well settled in equity, that every material fact upon either side must be set up in the pleadings, and that the court can no more consider what is proved but not alleged than what is alleged but not proved. Allegations are as necessary as proofs. Foster v. Goddard, 1 Black [66 U. S.] 518; Simms v. Guthrie, 9 Cranch [13 U. S.] 19; Harrison v. Nixon, 9 Pet. [34 U. S.] 483; Boone v. Chiles, 10 Pet. [35 U. S.] 183; Tripp v. Vincent, 3 Barb. Ch. 613; Bank v. Schultz, 3 Ohio, 61; Sadler v. Glover, 5 Dana, 552; Breckinridge v. Ormsly, 1 J. J. Marsh. 237.

If the complainants desired to bring the subject before the court as matter of estoppel, the bill should have averred the judgment. The defendants would have had the right to answer. The court would then have examined the subject in the light of the law and the evidence, and have come to such conclusions as the facts and the law, in their judgment, required. We overrule this proposition of the complainants as untenable.

III. It is insisted in the answers that the improvement patented was the invention of the defendant Wedge, and not of the complainants; that it was made and put into public use by the complainants, and was by them sold to others to be used, more than two years before they applied for the patent; and that before its supposed invention by the complainants, and two years before their application for the patent, it had been invented and discovered by others, and was in public use and on sale at the several places—and that such use was known to the several persons specifically mentioned.

(1.) It appears by the testimony that Wedge was the draftsman in the complainant's foundry. He devised the Hicks engine, as it is called. He says it was a copy from one he had seen in England. Some of the other witnesses say he found the design in a book he had borrowed. There was difficulty in removing the castings from the molds, and the parts did not fit well together. Frederick Blandy said that another like it should not be made. He suggested the plan of an engine substantially the same with that described in the patent, and marked a diagram to illustrate his ideas in the sand upon the floor. Wedge objected to it strenuously as of no value. Blandy replied that it could not turn out worse than the Hicks engine of Wedge, and directed him to prepare the drawings, and ordered the engine to be made. It was made accordingly, and was sold first to Wedge & Elliott, and afterward, with their consent, to De Graff. These facts touching the invention are proved by Blandy himself, and by Gordon and Fellows. About the time the drawings were made, Wedge showed them to Baldwin and told him that the plan was Blandy's.

Wedge was subsequently examined as a witness. He was wholly silent as to all this testimony. He neither denied nor attempted to explain. The facts are denied by no one. Nevertheless, Wedge testifies that the invention was his, and that in making the first engine he had "not a particle" of assistance from the complainants. There is also testimony that the complainants admitted the invention to be his.

Besides the testimony in support of the complainants' claim as the inventors, already adverted to, there are some additional facts of great weight and significance. The defendants and their copartner, Eberts, negotiated with the complainants for a license to use the invention. They also negotiated for the settlement of the suit commenced against them as infringers. The result was that they agreed to pay the amount for which the judgment was entered with costs, and to discontinue the use of the invention. During all this time no claim was set up by Wedge that he was the inventor. He was wholly silent. This is proved by Henry Blandy, and by Wedge's copartner, Eberts. The testimony also is uncontradicted and unexplained by Wedge, or by any other witness in his behalf.

There is no testimony in the record impeaching the character of any of the witnesses upon either side. The conflict is not irreconcilable. The error of Wedge arose probably from a misapprehension of the law. Having made all the drawings for the first engine, and superintended exclusively its construction, he finally came to the conclusion that he, and not Blandy, was the inventor.

The declarations of Blandy, if made as proved, it may fairly be presumed had reference to this agency of Wedge, and nothing more. It is also to be observed that all the facts tending to prove Wedge to be the inventor, are posterior in date, to the time when Blandy described the design to Wedge, and directed him to carry it into execution.

Invention is the work of the brain, and not of the hands. If the conception be practically complete, the artisan who gives it

reflex and embodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated. In the case before us there does not seem to be any pretense for saying that Wedge invented anything. He simply executed the design drawn by Blandy in the sand. All the engines since made have been substantially like the first one.

(2.) It is not alleged that the complainants abandoned their invention to the public, but it is insisted that they sold it and permitted it to be used more than two years before they applied for the patent.

The first engine was sold in the summer of 1855. From this time the complainants continued to make and sell them without intermission. They filed a caveat in the patent office on December 18, 1855. The first application for a patent was filed May 3, 1856. It was returned for amendment August 30, 1856—the commissioner holding that it claimed too much. On September 22, 1856, amended specifications were filed. They described clearly and distinctly the invention covered by the patent. On March 5, 1857, the complainants made a second affidavit of the originality of the invention. On May 2, 1857, the application was rejected. On June 15, 1857, it was again rejected upon appeal. The grounds of these rejections do not appear in the record, nor does it appear that the application was at any time withdrawn, or that a part of the sum deposited in the patent office was refunded, pursuant to section 7 of the act of 1836 [5 Stat. 120]. On May 26, 1858, the last application was filed. It was supported by numerous affidavits touching the novelty and value of the invention.

The specifications are the same in all material respects with those upon which the next preceding application was founded.

The statute (act of [March 3] 1839 [5 Stat. 354], § 7) is inflexible as to the time when the patent is to be applied for, with reference to the prior use and sale of the invention. The neglect to apply within two years after such sale or use is inevitably fatal. Whenever this fact appears, the patent falls. Whatever the circumstance, the courts have no dispensing power. But beyond this, the provision of the statute is silent. The application of May 3, 1856, was within the time prescribed. If that be held insufficient by reason of the defect in the specifications—a point which is not necessary to consider—the application of September 22, 1856—to which no objection lies—was also in time. The rejections were shown by the final action of the commissioner—which is sustained by the opinion of this court—to have been palpably wrong. The application of May 26, 1858, was, in itself, too late. But we think it may be properly held to have been in the nature of a petition for the review of the previous rulings, and to have related back to the prior application; and that the final action of the commissioner was not original and independent action, but a renewal and elongation of the former proceedings, and a reversal of the previous rejections. To the action of this revisory character, the statute imposes no limitation. There is nothing in the record tending to show that the complainants acquiesced in the second rejection as terminating their controversy with the patent office—or as conclusive of their rights. They ought not to be held responsible for the errors of others, which they could not prevent. We do not think their delay, between the rejection upon repeal, and the final application, was, under the circumstances, an unreasonable one; and we do not feel warranted, upon the facts before us, to adjudge the forfeiture of the valuable rights which their patent otherwise secures to them. It was suggested in the argument by one of the counsel for the complainants, that as the statute allows two years within which to make the application for a patent, after the sale and use of the invention, the same period, by analogy, should be given for the renewal of the application, after the rejection of a prior one. Whether this would be a proper rule to establish, we do not deem it necessary to determine.

We simply decide this part of the case before us, upon its own facts and circumstances as we find them disclosed in the record.

Adams v. Edwards [Case No. 53]; Bell v. Daniels [Id. 1,247]; Adams v. Jones [Id. 57]; Sayles v. Chicago & N. W. R. Co. [Id. 12,414].

(3.) Of the several bed plates older than the invention of the complainants, and alleged to be substantially the same with it—to which the testimony relates—the stress of the argument was confined chiefly to the one described in the depositions of Charles Talbott and John Souther.

This bed plate is more favorable to the defendants than any other to which our attention was called, and our remarks in this connection will be confined to it. They were cast at Richmond, Virginia. At first they were made solid. After the year 1845 or 1846, they were altered and cast hollow. The plate consisted of a frame cast in one or four pieces. The sides were hollow boxes

from four to eight inches square. They extended the whole length of the boiler. The frame was placed upon it. The parts were secured to the boiler by feet or flanges cast with them, and secured by bolts. Upon the bed plate so attached, the engine was placed, and firmly fixed there by bolts or rivets. Both the bed plate and engine were directly over the boiler. About the year 1853, feed pipes for the supply of water were introduced into the bed plate. The exhaust steam from the cylinder was passed along its entire length, and by that means heated the water before its entrance into the boiler. The object of the feet or flanges on the plate was to render the engine, as far as practicable, independent of the contraction and expansion of the boiler, and to relieve the boiler from the direct strain of the engine. In other words, the purpose was to effect, as far as was possible by the means employed, the insulation of the engine.

Here are certainly some striking points of analogy to the engine of the complainants. But able scientific experts have testified that the dominant conceptions in the two cases are totally distinct from each other, and that the differences are not merely mechanical or equivalent, but that they strike deeper, and are radical in their character. Whether they are so, is the test to be applied to the solution of the question before us. We have already held that the use of the plate as a heater is not a part of the invention patented. This subject may, therefore, be laid out of view. The essential diversities are to be found, it is said, in two particulars:

The bed plate covered by the patent is a single continuous shell or tube. It is proved that this gives a combination of lightness and strength beyond any other configuration or structure which has yet been devised.

The engine is attached to the outer side of the bed plate, and is not placed upon it or over the boiler. The attachment is lateral.

In both these points the proof is that it is essentially different from the Talbott engine, and from any other which preceded it.

In these views, after much reflection, we have found ourselves able to concur. It is not our business to form any opinion of the comparative value of the complainants' engine. The question is not whether the invention is better or worse than its predecessors, but whether it is new, useful, and different from anything before used or known. Those who hold the negative are at liberty to use anything older to which the proofs in this case relate. All required of them is that they shall not use, either in form or substance, what is patented to the complainants.

The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections capable of a reasonable and just solution in favor of their validity. This principle should be steadily borne in mind by those to whom is intrusted the adminstration of civil justice.

IV. Conceding the patent to be valid, it is insisted that the defendants have not infringed it.

In regard to this subject, we have had no difficulty and entertain no doubt. The slightest examination of the two models is sufficient to bring the mind to a satisfactory conclusion. The models are not present, and without them it is not possible to convey so clear an impression to the minds of others as was made upon our own. Upon such subjects the eye is a much more effective channel for the communication of knowledge than the ear. In the engine of the defendants which is complained of, we find the bed plate one single continuous hollow casting, extending the entire length of the boiler, and the engine attached to it laterally, exactly as in the complainants' engine. The only difference is that there is a slot or opening, extending longitudinally the entire length of the plate, on the side next to the boiler and just above the flanges by which the plate and boiler are connected together.

The defendants' bed plate and its attachments are in all respects those of the complainants', less the longitudinal opening mentioned.

A clear case of infringement is thus presented. It is vain for the defendants to deny this proposition. As well might an author who had taken a page from the book of another claim it as his own, because he had slightly modified the language in which the ideas were originally clothed. The defendants' engine is copied from the complainants'.

It is the same face, with a single feature a little mutilated. The defendants' bed plate by reason of the slot can not be used as a heater. This defect is obviated by putting a pipe within the slot or opening for that purpose. As the use of the complainants' bed plate as a heater is not covered by the patent, we need not remark upon this substitute of the defendants. It is of no consequence in the case.

We think the complainants are entitled to an injunction and an account of profits as prayed for in the bill. A decree will be entered accordingly.

[NOTE. Patent No. 21,059 was granted to H. & F. L. J. Blandy, August 3, 1858. For former application for a patent for a similar invention, see In re Blandy, Case No. 1,528, and, for proceedings on petition for leave to file a supplemental bill in the nature of a bill to review the foregoing decision, see Blandy v. Griffith, Id. 1,530.]

Case No. 1,530.

BLANDY et al. v. GRIFFITH et al.

[6 Fish. Pat. Cas. 434.] [1]

Circuit Court, S. D. Ohio. May Term, 1873.

EQUITY—BILL OF REVIEW—APPLICATION ON NEW EVIDENCE—CUMULATIVE EVIDENCE—LACHES.

1. In an application for leave to file a new bill, upon the discovery of new facts, in a case once adjudicated, the counter-affidavits must be examined and considered by the court.

2. The application for leave must be made as soon after the new evidence is discovered as can reasonably be done.

3. Cumulative evidence upon a point already adjudicated is an insufficient warrant for giving leave to file a new bill.

4. Where a year and a half elapsed between the discovery of the alleged evidence and the filing of the petition for leave to file the bill: *Held*, that such laches must be fatal to the application.

5. Where the question of priority of invention was put in issue in the original suit, evidence of other alleged anticipations than those set up in that suit is merely cumulative evidence upon the former issue, and the discovery of such evidence after judgment is not a ground for granting leave to file a supplemental bill.

In equity. This was a hearing upon a petition, in behalf of the defendants in the original suit, for leave to file a supplemental bill in the nature of a bill of review. The original suit was [by Henry and Frederick J. L. Blandy against Thomas Griffith and Francis Wedge] upon letters patent for an "improvement in steam-engines," granted complainants August 3, 1858. Judgment was rendered in favor of complainants in September, 1869. See 3 Fisher, 699, where same is reported [Blandy v. Griffith, Case No. 1,529]. The petition for leave was filed January 30, 1870, and alleged the discovery of new evidence since the rendering of judgment. The affidavits in support of the petition were filed in February and October of the same year, and alleged the discovery of evidence relating to other anticipations than those set up in the original suit. It was shown in evidence that the petitioners were informed of the alleged new evidence as early as the summer of 1870. [Application denied.]

James Moore and Henry Stanbery, for petition.

Fisher & Duncan, contra.

SWAYNE, Circuit Justice. It is a rule that counter-affidavits must be examined and considered by the court. Another rule, which is applicable in this class of cases, is, that the application for leave must be made to file the bill as soon after the new evidence is discovered as can reasonably be done. Story, Eq. Jur. 422, 423.

Cumulative evidence as to a point already at issue is an insufficient warrant to give leave. 1 Story, 118; 3 Story, 300 [Clark v. Protection Ins. Co., Case No. 2,832; Jenkins v. Eldredge, Id. 7,267].

The defendants have placed on file in this court, in support of their application for leave, certain affidavits. All these affidavits were filed February 6, 1872, except the second, which was filed October 8, 1872. All relate to portable engines, alleged to be like the engines of the Blandys, and to antedate their invention, and were all publicly used, according to these affidavits, at Geneva, at Ogdensburg, and at Norwich.

I have already adverted to the character of the statement made in the affidavit upon which this application is founded. As regards the want of "due diligence," in that connection, it may be well to call attention to what Justice Story says upon this point. This author is decisive against the sufficiency of the petition for leave. See 3 Story, 315 [Jenkins v. Eldredge, Case No. 7,267].

I may add, in the light of these authorities, that we are by no means satisfied from these affidavits. They are not at all of such a character as to convince us that they were placed on file, in the shape of affidavits, and for evidence, direct or rebutting, they would be sufficient to change the views of the court, or warrant a reversal of the decision. But as we do not propose to rest our conclusion upon these propositions, it is not necessary to consider them further.

We refer to the fact that the petition of defendants was filed January 30, 1872. The question presents itself, when did they first learn of the existence of the facts proposed to be established by this newly discovered evidence, upon the basis of which they ask the setting aside of the decree rendered several years ago, the reopening of the whole case, and to compel the parties to litigate over again, as if nothing had ever been done?

Dunning, in his affidavit, says he was sued by the Blandys for infringement of the same (or of some) patent. He says that during the latter half of May or the first half of June, 1870 (it will be borne in mind that the petition for leave to file a bill was filed January 30, 1872), this defendant had an interview with Thomas Griffith, one of the defendants, in relation to satisfying a claim of plaintiffs as to the originality of the invention. In said interview, this affiant informed said Griffith that, in the opinion of defendant, testimony could be procured showing that the Blandys were not entitled to a patent on their bed-plate (patent 2,159), which said testimony had not been used in the trial; and defendant requested said Griffith to bear part of the expense incurred in looking up said testimony, and also that said Griffith and Wedge would contribute to the defense of said company.

The affidavit of this person covers all the grounds alleged in the petition as reasons for the granting of leave to file a supplementary bill. Yet no affidavit in support of

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

the petition was put on file until February 6, 1872, a year and five months from the time the application was made. No affidavit was taken for more than a year afterward. Such a laches, according to all authors, is fatal to the application.

There is another point which seems to us to be equally conclusive against the application. The defendants, in their litigation with Langdon, relied upon two courses of defense: First, they undertook to prove that the Blandys were not the inventors, but that Wedge was the inventor, and considerable testimony was taken relative to this point. They then undertook to prove that the invention was known and used for a long period prior to the alleged invention of the Blandys, and of necessity that their patent must fail on that ground.

Now, the same fact in relation to which it is proposed to take testimony for leave to file a bill—the same question of priority of invention over the invention of the Blandys by others, was distinctly put in issue, as well as the question as to whether the Blandys were or were not the inventors.

The first of these points it is not proposed to reopen, but it is proposed to reopen the second issue, and to produce further, or what may be called cumulative evidence, on that particular question. Let us see what the rule is as to the introduction of evidence of that character, under these circumstances. See language of Judge Story in Jenkins v. Eldredge [Case No. 7,267]; also in Baker v. Whiting [Id. 786].

In the light of the adjudications cited, it seems to us to be too clear to admit of doubt that, in the proper administration of equity cases, this application must, upon these grounds, especially upon the last mentioned, be denied.

In response to some suggestions of counsel for petitioners, THE COURT further said:

I will say, in reply to the remarks of the gentleman, I treated the question with great care. The case was thoroughly heard when on trial, and we have not now examined it as exhaustively as we should otherwise have done. The ground previously gone over leads to a judgment by the court that seemed to be in the light of reason and the authorities and entirely unanswerable. It now seems that these parties making this application slept upon the knowledge of the very facts upon which they now ask leave to file a new bill more than fourteen months after they came to that knowledge, without making use of the knowledge in making the application.

The general showing of the case was that Blandy was not the original and first inventor. The other matters were all matters of proof. The proof that Blandy did not invent the thing at all, was proof bearing upon that issue. The fact that it was known and used in various places, was proof bearing upon that issue. I said that the evidence arranged itself under two issues: First, that Blandy was not the original inventor; and, second, that it had been known and used by others long before his alleged invention of it. Upon that issue the defendants took considerable testimony, proving the use at various places, the prior knowledge and use of various machines alleged to be identical, claiming to have been invented by the Blandys.

All this was bearing upon the issue as to Blandy's invention. Every engine referred to in proof was carefully considered, and the court came to its conclusion. If it has fallen into error, it is the result of deliberation and considerable reflection.

I think there is no chancery practice that will not say the issues are just those I have stated.

I was further influenced by another consideration. It seemed to me that all the mischief sought to be shut out by the practice of not permitting cumulative evidence to be brought in would follow the granting of this application, and that the principle underlying this practice was correct.

To permit parties to range over the country and hunt up witnesses, after a case has been once fairly heard, and then make application for leave to file a new bill, is to render litigation expensive, and to involve the most serious consequences to parties seeking justice.

I then thought, and still think, that the most of that evidence was cumulative, to prove the general issue which the parties had made up before. I can see, after full reflection, no ground for changing my opinion. The only issue is, whether the plaintiffs were the original and first inventors. I may be in error as to the second ground; I am sure I am not on the first.

[NOTE. For trial and decisions in this case, see Blandy v. Griffith, Case No. 1,529; and, for application for a patent for a similar invention, see In re Blandy, Case No. 1,528.]

BLANDY (LEE v.). See Case No. 8,182.

Case No. 1,531.

BLANE v. DRUMMOND.

[1 Brock. 62.] [1]

Circuit Court, D. Virginia. Nov. Term, 1803.

CONFLICT OF LAWS — ACTION BY FOREIGN ASSIGNEE IN BANKRUPTCY — LEX FORI — ASSIGNMENT OF LEGAL TITLE.

The assignees of a bankrupt in England, cannot maintain an action at law in their own name against a debtor of the bankrupt in Virginia, and the action is only maintainable in the

[1] [Reported by John W. Brockenbrough, Esq.]

name of the bankrupt himself. Though the right to personal property may be regulated by the laws of the domicil, as in the case of the bankrupt laws of England, and though the equitable rights of the assignees acquired under those laws will be respected in our courts, yet the right of action must be regulated by the law of the forum in which the suit is brought: and the transfer of a bankrupt's effects in England being an assignment merely by operation of law, and not by the act of the party, is not such an assignment of the legal title to the assignees as will enable them to maintain an action in their own name in the courts of Virginia.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Cuykendall v. Miles, 10 Fed. 344.]

[See Perry v. Barry, Case No. 11,000; Harrison v. Sterry, 5 Cranch (9 U. S.) 289; Ogden v. Saunders, 12 Wheat. (25 U. S.) 213; Booth v. Clark, 17 How. (58 U. S.) 322; Hunt v. Jackson, Case No. 6,893.]

At law. This was an action of debt, on a bond with collateral condition, brought by Thomas Blane, the obligee, in his own name, against William Drummond, one of the obligors. The defendant pleaded specially, that the action ought not to be maintained against him, "because he saith that the said plaintiff is a British subject, and that after the date of the said writing obligatory in the declaration mentioned, and before the institution of this suit," "at the city of London, &c., where the said plaintiff then resided, he, the said plaintiff, became a bankrupt within the meaning and purview of the several statutes of the parliament of Great Britain made against bankrupts; by which said statutes it is in substance declared, that all the estate and effects, rights and credits, of any person becoming bankrupt, &c. (in whatever country the estate and effects, rights and credits aforesaid, may be situate and exist,) shall be assigned to, vested in, and belong to assignees, to be chosen by the creditors of such bankrupt, for the uses in those statutes mentioned: and the defendant further says, that in consequence of the bankruptcy aforesaid, of the said plaintiff, all the estate and effects of the plaintiff, whatsoever and wheresoever, were assigned, according to the said statutes to Samuel Brandram, Thomas Maltby, and George Glenny, who are also British subjects, and in whom, by reason of the premises, all the estate and effects, rights and credits, whatsoever and wheresoever, which were of the plaintiff at the time of the bankruptcy aforesaid, became vested in the said assignees, for the benefit of the creditors of the said plaintiff; which said assignees, by the statutes aforesaid, have the exclusive right to sue for and recover, all the debts, rights, credits, and effects, which were of the said plaintiff, at the time of the bankruptcy aforesaid; and, consequently, that they the said assignees have the exclusive right to sue for and recover the debt in the declaration mentioned: and this the defendant is ready to verify, &c."

In his replication to this plea, the plaintiff insisted that, "by any thing in the said plea alleged he ought not to be barred from having his said action, because he saith that Samuel Brandram, Thomas Maltby, and George Glenny, the said assignees, &c.," did, "by their letter of attorney duly sealed and executed, constitute and appoint John Hamilton, now of Norfolk, a British subject, and consul to his Britannic majesty, their lawful attorney, to ask, sue for, and demand in their name, or in the name of the said Thomas Blane, all debts, dues, and demands, originally owing and payable to the said Blane, from any person or persons resident within the United States of America; and the plaintiff saith that his said action was begun and is prosecuted with the consent and approbation of his said assignees, and their said attorney, and is carried on for the benefit of his creditors, under the direction of his said assignees and their attorney; and this he is ready to verify, &c."

The defendant demurred generally to the plaintiff's replication; and the plaintiff joined in demurrer, and upon this demurrer the chief justice delivered the following opinion:

MARSHALL, Circuit Justice. The only question in this case is, whether an action at law can be maintained in this court in the name of a person who has become a bankrupt in a foreign country? In support of the action it is contended, that bankrupt laws have no positive extra-territorial force, and that although other nations will notice the rights which are vested by them, yet they cannot give a form of action in a foreign country, nor entitle a person to maintain an action, who by the laws of that country could not maintain it. From this position it is inferred, that although a foreign court will respect the right of the assignees to money due a bankrupt, yet that money must be sued for according to the forms of the place where the action is brought. For the defendant, it is contended, that the right to personal things is regulated by the law of the domicil, and not by the law of the place where they happen to be found, and, consequently, that the right to the effects of a bankrupt, wherever they may be, unless the law of the place shall otherwise direct, is vested in those to whom the law of his residence gives it. It is also contended, that an action can only be maintained by him who has the right, and that, consequently, no action can be maintained in the name of the bankrupt. The law of foreign nations, it is said, constitutes a part of the law of every nation, so far as to govern foreign contracts and foreign rights.

In examining this proposition, that only the person having the right can maintain an action, it is necessary to be more definite in the terms employed. If it is intended to say, that only the person having the legal right can maintain an action at law, the position is perhaps correct; but if it is intended to say, that the person not having the equita-

ble right to retain the money sued for, cannot maintain an action at law, the truth of the proposition cannot be admitted. The common case of a bond not legally assignable, sued for in the name of the obligee for the use of his assignee, disproves it.[2] The proposition, too, that the laws of foreign nations become a part of the law of every civilized nation, is true to a certain extent. It is true, also, that, generally speaking, the rights to personalties are determined by the law of residence, and not by the law of the place where the property is found.[3] The right to claim the effects of a deceased person in foreign countries is generally secured by treaties, but the principle would probably be adopted independent of compact. Whether the same principle extends to rights under bankrupt laws, seems not to have been so well settled. But the person having this right, according to the laws of a foreign country, sues in conformity with the principles of jurisprudence established in the country where the suit is brought. If according to those principles any person having the right may maintain an action, then it is sufficient to show that the person suing is entitled to the thing claimed, by the laws of the domicil. But if those principles oppose any obstacle to the person suing on his original right, he must give himself a character which will authorise him to maintain his action. Thus the hoeres factus or natus of a Frenchman, claiming personal property in England, has a complete title, and most probably in France, where proceedings are according to the forms of the civil law, might maintain an action for the property of his testator or intestate. But the forms of jurisprudence established in England require, if he would proceed at common law, that he should qualify himself according to the requisites of the common law to maintain his action. He must therefore take out letters of administration in England. His right to the personal estate gives him a right

[2] By the law of Virginia, as it exists at the present day, assignments of all bonds, bills, and promissory notes, and other writings obligatory, are valid; and an assignee of any such may maintain an action upon it in his own name, which the original obligee or payee might have brought; but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant. 1 Rev. Code 1819, p. 484, § 5. In construing this section, the court of appeals of Virginia have decided that the statute does not transfer the legal title to the debt to the assignee, but simply adds the capacity to sue in his own name to the equitable right which he had independently of the statute: Hence, notwithstanding the assignment, an action may still be maintained in the name of the original obligee for the benefit of the assignee, upon the strength of the legal title remaining in the obligee; the statute upon this construction giving a new remedy without abolishing the old. Garland v. Richeson, 4 Rand. [Va.] 266.

[3] But in Harrison v. Sterry, 5 Cranch [9 U. S.] 289, 2 Pet. Cond. R. 260, Chief Justice Marshall said, that in the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt as regulated by the law of the country where the representative of the deceased acts, and from which he derives his power; not by the law of the country where the contract was made. The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. The principle here laid down is cited and approved by the supreme court in Smith v. Union Bank of Georgetown, 5 Pet. [30 U. S.] 518. The question, what law shall govern the distribution of an intestate's effects among his next of kin, when there shall be a conflict between the law of the domicil and that of the situs, did not arise in either of the above cases; and in the last of them, Johnson, J., who delivered the opinion of the court, said it would be time enough to decide that question when it arose. This question did arise in Harvey v. Richards [Case No. 6,184]; and Story, J., after a laborious examination of authorities, held it to be very clear that the lex domicilii must prevail. See, also, Shultz v. Pulver, 3 Paige, 182, and 2 Rob. Pr 126, 127. See, also, opinion of the court delivered by Mr. Justice Story, in Harrison v. Nixon, 9 Pet. [34 U. S.] 503, 504. In that case the testator was born in Pennsylvania, and was a merchant in Philadelphia at the breaking out of the Revolutionary War, when he went to England, and resided in Old Street, London. After the war, he came several times to the United States, and made his will in Philadelphia, in 1791, which he deposited in the old Bank of North America. By this will he gave the bulk of his property, real and personal, to his "heir at law." He died in London, in 1824. Without determining the place of testator's domicil,—the court remanding the cause to have amendments made to the bill, averring not only the citizenship, but the domicil of the testator, at the date of the will, at the time of his death, and during the intermediate periods, so that the elements of a full decision might be brought before the court,—Mr. Justice Story said that the court were called upon to construe this will, "and in an especial manner to ascertain who is meant by the words 'heir at law,' in the leading bequest in the will. The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference; unless there is something in the language which repels or controls such a conclusion. In regard to personalty in an especial manner, the law of the place of the testator's domicil governs in the distribution thereof, unless it is manifest that the testator had the laws of some other country in his own view."

With respect to real property, it is an acknowledged principle of law that the title to, and disposition of it, are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. Kerr v. Moon, 9 Wheat. [22 U. S.] 565; McCormick v. Sullivant, 10 Wheat. [23 U. S.] 192. See, also [Robinson v. Campbell] 3 Wheat. [16 U. S.] 212; [Clark v. Graham] 6 Wheat. [19 U. S.] 577; 2 Gall. 105; [Society, etc., v. Wheeler, Case No. 13,156; Darby v. Mayer] 10 Wheat. [23 U. S.] 469; [Jackson v. Chew] 12 Wheat. [25 U. S.] 153.

to administer, but does not give him a right of action before administration granted. The right to personal property then may be regulated by the laws of the domicil; but the right of action must be regulated by the law of the court where that action is brought.[4] The question then is, whether the operation of a bankrupt law can be such as to transfer to the assignees the legal title or the right of action in debts due in a foreign country, or to extinguish the legal title or right of action of the bankrupt? If it affects the one or the other of these objects, the present action cannot be maintained.

The general proposition, that the laws of one nation may give a form of action in the courts of another, or authorise a person to maintain an action who could not maintain it by the priciples of that forum to which he has applied, has been already denied. The plainest principles of national law refute such an idea, and it would be time utterly misspent further to demonstrate its error. A debt, therefore, which, by the laws of Virginia is not assignable, cannot be assigned by the laws of any other country, so as to enable the assignee to sue in this. The right of property may be changed by those laws, but the right of action cannot be given. Debts due by open account, therefore, cannot be sued for in the name of the assignees. Yet in the country of the bankrupt, the assignees sue in their own names for debts, in themselves unassignable by an act of the party. This follows from the principle, that suits must be prosecuted by virtue of the law of the country where they are instituted, and not of that where the claimant resides. This being true, the assignment, as well as the nature of the debt sued for, must conform to that law. Not only must the debt be assignable, but it must be assigned according to law. Bonds by the laws of Virginia are assignable, but they can only be assigned by the act of the party himself. The declaration must state a legal assignment in order to give the assignee an action. A declaration, stating an assignment by virtue of the law of a foreign country, would not be good, for that would be equally effectual in the case of an unassignable debt. It then only remains to inquire whether, if the assignees in this case had declared on an assignment by the bankrupt, they could have given in evidence the assignment made in conformity with the bankrupt law. This would be, by legal inference, totally to change the nature of the fact itself; an operation which would require very plain legal principles for its support. The counsel for the defendant has cited a principle of which I supposed at the time he designed to make this use. It is, that every subject is intended to give his assent to an act of parliament. He did not, however, so apply it, nor could it be properly so applied, for this plain reason, that the assent follows the nature of the act, and is only an admission that it shall be an act of parliament, not that it is in truth his personal act; nor can such an assent give the act an extra-territorial force, or change the requisites of a law of a foreign country respecting assignments. The admission, then, of one of the counsel, that an action at law is not maintainable in the name of the assignees, was correctly made; and it remains to inquire whether such an assignment, without transferring a right of action to the assignees, has extinguished that of the bankrupt. Upon principle, I cannot perceive any solid ground on which the distinction taken can be maintained, or on which such extinguishment is to be supported. To deprive a man, having a right to sue in a foreign country, of that right, is giving to the law which would effect this object an extra-territorial operation, which, I believe, has never been admitted. In this case it is the less allowable, because it would not be to conform to the intention of the law itself. That intention is one entire thing. The law takes the right out of the bankrupt, for the purpose of transferring it to his assignees; and unless this transfer can be made, the intention of the law cannot be effected. To give a foreign legislative act an extra-territorial operation which would defeat the intention of the act, would be peculiarly improper. The whole argument in favour of this proposition, so far as it is merely an argument on principle, is, that only he who has the right to the thing, can have the right of action; but this is answered by saying, that the rule is not universally true, because nothing is more frequent than suits at law in the name of a person, whom equity will compel to deliver over the property to another. The common case of a suit in the name of the assignor of an unassignable paper, is sufficient evidence of this position. The right of action,' distinct in different courts in the same country, is of course distinct in different countries. The defendant attempts to get over this common case, by saying that the common law takes no notice of such assignments, but the counsel does not recollect that assignments under the bankrupt law must be equally unnoticed by the common law courts of a foreign country, or the assignees would be permitted to sue in that foreign country. These laws are said to be noticed, and the rights they give protected, in pursuance of that courtesy which one nation pays to the institutions of another. But this courtesy extends only to the substantial rights of the parties, and not to the forms

[4] The law of a place where a contract is made, governs as to the validity of it, its nature and construction, but the remedy on such contract must be pursued according to the law of the place where the suit is brought. Van Reimsdyk v. Kane [Case No. 16,871]. See, also, Kerr v. Moon, 9 Wheat. [22 U. S.] above cited.

of action, and would display itself very ungraciously indeed, in denying the foreigner an action in any form. The defendant states the bankrupt law to operate by way of contract between the bankrupt and his assignees. This is very probably correct; but a contract, not being an actual assignment, cannot divest the contracting party of the legal right of action which was vested in him. The situation of a right without a remedy, is so unusual, that the counsel for the defendant has thought it necessary to state several cases, showing that it may exist. The cases put are those of a release of all actions, of an alien, of an outlaw, and of a person excommunicated. That it is within the compass of the legislative power of any country to deprive a person having a right, of a particular remedy, or of any remedy whatever within its own territory, is not questioned. But the cases put are understood to apply to that before the court, very differently from the manner in which they have been applied. In the cases put, the law operates according to its intention. In the case at bar, the law would not so operate. But what is of more importance, is, that in the cases put, so far as they could occur in a foreign country, the party might sue in his own name. It is a settled principle, that disabilities to sue affect the party only in the courts of the country imposing them. They do not, like natural defects, adhere to the person, and pass with it to distant regions, but fall off when he travels out of the jurisdiction which has imposed them. I believe no man doubts that a person excommunicated, or outlawed in a foreign country, might maintain a personal action in this. The argument, that the act operates by way of estoppel, cannot be admitted, without agreeing that a foreign law has a positive operation, and at the same time giving it an operation contrary to its intention. Upon principle, then, I should feel not much difficulty in saying that the suit is maintainable in the name of the bankrupt. The cases cited do not change this opinion. They only support principles which have already been considered, and which do not defeat the action. The only circumstance which excited doubt in my mind, was the practice of suing in chancery in the name of the assignees, in cases of foreign bankruptcy. I thought it strange, that no case should have occurred, where a suit was instituted in the name of the bankrupt himself, if such a suit was thought to be maintainable. I still think so. But this is accounted for, perhaps, by a general disinclination to use the name of the bankrupt, by the authority of the chancellor over bankrupt cases, and by the point never having been doubted.

Demurrer to the plaintiff's replication overruled, and judgment for the plaintiff.

BLANFORD (CROSS v.). See Case No. 3,429.

Case No. 1,532.

BLANK v. MANUFACTURING CO.

[3 Wall. Jr. 196;[1] 20 Leg. Int. 37.]

Circuit Court, D. Delaware. Sept. Term, 1856.

PATENTS—INFRINGEMENT—EQUITY PRACTICE—INJUNCTION AFTER EXPIRATION OF PATENT — ACCOUNTING.

1. The equity for an account in patent and copyright cases is not, in the courts of the United States, a mere incident to a right to injunction; however this be by the rules of English chancery.

[See Sanders v. Logan, Case No. 12,295.]

2. In the courts of the United States the right to an account may exist, and an account be directed where there can be no injunction; as e. g., where the term of the patent has expired before the final hearing of the case.

[See Jordan v. Dobson, Case No. 7,519; Atwood v. Portland Co., 10 Fed. 283; Gottfried v. Moerlein, 14 Fed. 170; Adams v. Howard, 19 Fed. 317.]

In equity. The complainant in this case—an equity bill, praying an injunction and account of profits—was the assignee of one [William B.] Sickles, to whom a patent [No. 2,631] had been granted. The bill charged that the validity of the patent had been put in issue in a suit at common law, between Sickles and one Rodman, of which it gave an account, and its validity established by a verdict for the patentee. It charged also that the defendants were infringing the patent. The case was heard in September, 1856; a few months prior to which date, to wit, on the 20th of the May preceding, the term of the patent had expired. Against the injunction it was now contended, that courts of equity entertain jurisdiction of patent and copyright cases only for the purpose of injunction; that the equity for the account is strictly incident to the injunction; and that, therefore, if an injunction is refused, or for any reason cannot be decreed (which it was said it could not here be, because the patent had expired), an account cannot be given, but the plaintiff must resort to a court of law. [Point overruled.]

GRIER, Circuit Justice. The proposition contended for may be considered as a correct statement of the general rule as settled in England. Baily v. Taylor, 1 Russ. & M. 73. This doctrine had its origin in the case of Jesus College v. Bloom, 3 Atk. 264, Amb. 54, as applied to bills to restrain waste; but, since that time, the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing. The bill needs only to pray a discovery for the purpose of account, and it will be sustained for the account only.

The proposition, it is said in the books, cannot be maintained, that a court of equity will not interfere to direct an account when indebitatus assumpsit will lie at law. Nor

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

is the converse of the proposition true, that equity will decree an account in all cases where an action for money had and received, or indebitatus assumpsit, may be brought. But, whenever the subject matter cannot be as well investigated in those actions, a court of equity exercises a sound discretion in decreeing an account. Carlisle v. Wilson, 13 Ves. 276, etc.

As it appears in this case that, in order to ascertain the extent of the plaintiffs' damages, it might become necessary to have a discovery and account of profits, I see no good reason why the court might not retain jurisdiction of the case for that purpose, even on the principle of the English cases. The jurisdiction of the court ought not to depend on the accident of the date of its decree. If, in this case, the decree were dated on the 19th of May, 1856, the jurisdiction of the court could not be doubted, while it is challenged as impotent to give any decree on the 21st of the same month. If the complainants are able to sustain their case on the other points, and it was absolutely necessary, to sustain our decree, that an injunction form a part of it, I would order the decree to be entered nunc pro tunc as of the date of the 19th of May last. The delays of a court of chancery should not be suffered to operate as a bar to the complainants' suit.

But the courts of the United States have their jurisdiction over controversies of this nature by statute, and do not exercise it merely as ancillary to a court of law. The 17th section of the patent law of 1836 [5 Stat. 124] ordains that "all actions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States."

Besides this general and original cognizance or jurisdiction over the whole subject matter, a special power is conferred on the circuit courts to grant injunctions. Having such original cognizance of these controversies, the courts of the United States do not, in all cases, require a verdict at law on the title, before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury.

Exercising our jurisdiction in these controversies not by assumption for a special purpose only, or as ancillary to other tribunals, but under plenary authority conferred by statute, the technical reasons which compelled the English chancellor to refuse a decree for an account where he could not decree an injunction, can have no application.

Point overruled.

[For other cases involving this patent, see note to Sickels v. Youngs, Case No. 12,838.]

BLAUVELT (JAMES v.). See Case No. 7,180.

Case No. 1,533.

In re BLEDSOE.

[12 N. B. R. 402;[1] 1 N. Y. Wkly. Dig. 101.]

District Court, W. D. Texas. 1875.[2]

BANKRUPTCY—GROWING CROPS—RENT.

A sale of land free from incumbrances, does not pass to the purchaser the bankrupt's right to any portion of the growing crops thereon, stipulated to be paid him by way of rent.

DUVAL, District Judge. In this case a controversy has arisen between Isaac Bernstein & Co. and L. & H. Blum, of the city of Galveston, creditors of said bankrupt, and the assignee of the estate, Wall. Brown. The most material facts to be considered are the following, viz.: Bledsoe became a voluntary bankrupt on the 7th of April, 1874. To secure the above-named creditors in a debt he owed them, he had executed a deed of trust in their favor on two hundred and sixty-five acres of land. The date of this deed does not appear, but it was made some time prior to the filing of the petition in bankruptcy. After the adjudication was had, and an assignee appointed, this court was asked for an order requiring the trustee to sell said land, to satisfy the lien created by the trust deed. The order was made, and the land sold on the 11th day of August, 1874. The creditors above named became the purchasers, and received a deed in fee from the trustee. It seems that some time prior to his bankruptcy, Bledsoe had rented certain portions of the land, for which the rentors had agreed to pay him a certain proportion of the crops raised thereon. It is now contended by the purchasers, under the sale aforesaid, that they were entitled, by virtue of such purchase, to so much of the crops then growing upon the land, as the rentors had promised to pay Bledsoe, or the value thereof, less the costs incurred by the assignee in collecting and disposing of the same, etc. And this they now seek to recover by this proceeding.

The sole question involved is this: After a party has been adjudicated a bankrupt, the assignee appointed, the proper deed of assignment made, etc., does a sale of the bankrupt's land, made under order of the bankrupt court, to secure a lien thereon, pass to the purchasers the bankrupt's right and title to any portion of the growing crops thereon, stipulated to be paid him by way of rent; or does it go to the assignee as part of the assets of the estate, for the benefit of the general creditors?

My opinion is that the contracts for rents in kind are properly choses in action, and did not pass by a sale of the land to the

[1] [Reprinted from 12 N. B. R. 402, by permission.]

[2] [Affirmed by the circuit court, January, 1875; unreported.]

purchasers. I think this is so, under the provisions of the bankrupt act, though the rule may be different in ordinary cases of sale of land, between vendor and vendee, where there is no reservation expressed as to growing crops. The contracts of rent made by Bledsoe enured and passed to his assignee in bankruptcy. It is therefore ordered and adjudged that the suit of petitioners be dismissed at their costs.

NOTE [from original report]. The above decision was reviewed, on appeal, by Hon. W. B. Woods, United States circuit court judge, at Austin, January term, 1875, and by him affirmed.

Case No. 1,534.

BLEECKER v. BOND.

[3 Wash. C. C. 529.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

NEGOTIABLE INSTRUMENTS — MATURITY—ESTOPPEL —WITNESS—DEPOSITION — EVIDENCE —CERTIFICATE OF TREASURY OFFICIALS.

1. Action of covenant, upon an agreement under seal, entered into in 1804, in which the defendant bound himself to pay to the plaintiff two notes of 1,250 dollars each, and an unliquidated demand, when it should be liquidated, forthwith; after the defendant should obtain, or be in a legal capacity to obtain the lawful possession of the Georgia lands conveyed by him to E. G. The declaration averred, that on, and ever since the 1st of May, 1806, the defendant was in the legal capacity to obtain, &c.; and, on this, issue was joined. Until the defendant was in the legal capacity to obtain possession of the lands, the plaintiff's claim was suspended; and, as soon as the capacity existed, the plaintiff's right accrued; although the defendant did not choose to obtain, or endeavour to obtain the possession.

2. The mortgagee of the defendant, as the agent of the defendant, having received from the United States, compensation for the lands conveyed to the defendant, by E. G.; and he having conveyed the land to the United States, they being part of the Yazoo lands, the defendant is estopped thereby, from denying his legal capacity to obtain possession of the lands.

3. The deposition of a witness, living out of the state, and more than one hundred miles from the place where the court is held, cannot be read, unless taken under a commission.

[Approved in Allen v. Blunt, Case No. 217.]

4. The certificate of the register of the treasury department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the secretary of the treasury, under the seal of that department, that he is the register, is not evidence. It must appear, not only that the officer who gives the certificate, has the custody of the papers, but that he is authorized by law to certify them; and the register is not so authorized—a sworn copy should have been produced.

[Cited in Woodworth v. Hall, Case No. 18,016.]

[5. Cited in Patapsco Ins. Co. v. Southgate, 5 Pet. (30 U. S.) 606, to the point that a deposition cannot be read at the trial unless due diligence be first used to obtain the attendance of the witness at the trial or his evidence under commission.]

At law. This was an action of covenant upon articles of agreement, bearing date the 15th of November, 1804, entered into between these parties, whereby the defendant covenanted, amongst other things, to repay to Bleecker the amount of two notes, for 1250 dollars each, and the amount of an unliquidated account, when the same should be liquidated, forthwith, after Bond should obtain, or be in a legal capacity to obtain the lawful possession of about 700,000 acres of land in Georgia, which had been conveyed to Bond by Edward Gould. The declaration avers, that the defendant, on the 1st of May, 1806, before, and ever since, was in a legal capacity to obtain the lawful possession of the above lands; on which this issue was joined. The defendant also plead generally covenants performed.

The plaintiff gave in evidence the act of the Georgia legislature of the 7th January, 1795, the grant by the governor to the Georgia Company; the rescinding law of 1796; and a succession of conveyances, from the Georgia Company, of the land mentioned in the articles of agreement, to the defendant; the conveyance to Edward Gould in April, 1798; and of Gould to Bond in 1802:—also a conveyance from Bond to Walter Simms, in 1803. It was also proved, that, on the 8th of November, 1814, Simms released all right and title in these lands to the United States; and in other respects conformed to the requisitions of the act of congress, passed the 31st of March, 1814 [3 Stat. 116, c. 39], and received the compensation allowed by that law, in certificates of stock.

By an award, made in a suit brought by the defendant against Simms, it appeared, that the deed from the former to the latter, though absolute in form, was intended as a mortgage, to secure the payment of a certain unliquidated claim, the balance of which the arbitrators ascertained, and awarded, that, upon the payment of the same, the certificates of stock, received by Simms from the United States, should be transferred to the defendant. This award was returned to the court on the 20th of January, 1817, and judgment thereon became absolute on the fourth day thereafter. This suit was brought on the 28th of the same month; and in March following, the balance awarded to Simms having been paid, the certificates were transferred to the defendant. It was further proved, by a witness, that some time previous to the 28th January, 1817, the attorney of the plaintiff demanded of the defendant a performance of the agreement on which this action is brought, when he acknowledged that he had received the certificates of stock allowed for the land; that a paper annexed to this agreement, being an order for 500 dollars, drawn by the defendant on Edward Gould, in favour of the plaintiff, dated in 1802,

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

was the amount of the unliquidated demand referred to; and that his only objection to paying that sum, and the amount of the two notes for 2500 dollars, was a set-off which he had to make against the claim.

The following points of evidence were ruled in this cause: 1. That the deposition of a witness, living out of the district of Pennsylvania, and more than one hundred miles from Philadelphia, cannot be read in evidence, unless it be taken under a commission. Evans v. Hettick [Case No. 4,562]. 2. The certificate of Joseph Nourse, the register of the treasury department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the secretary of the treasury, under the seal of the department, that Joseph Nourse is register, was offered in evidence, and objected to. The court overruled the evidence, upon the ground, that it is not sufficient, that the officer who gives this certificate, has the custody of the papers, unless it also appeared, that he is authorized by law to certify such papers; which this officer is not. A sworn copy ought to have been produced.

It was contended by the counsel for the defendant, that the plaintiff was not entitled to recover in this action; because he had not proved, that the defendant had, at any time, obtained the possession of the lands conveyed to him by Edward Gould, or that he had been in a legal capacity to obtain the lawful possession of the same. The possession spoken of in the agreement, is a legal possession of the land itself; and consequently, excludes the idea of an equitable equivalent, which, against the will of the defendant, might be forced upon him. That at the time this agreement was made, there existed two impediments to the defendant's obtaining legal possession of these lands. The first, was the title of the United States, derived under the cession of the state of Georgia, subject to the Indian title; and the legal title of Simms, under the deed made to him by the defendant prior to this agreement. Both these impediments were to be removed, before the payment of the stipulated sums to the plaintiff could be demanded. The former never was removed. The act of cession by the state of Georgia stipulates, that the territory so ceded, should be for the use of the United States; and that not more than five millions of acres, should be applied to the satisfaction of claims not acknowledged by that state. To this the United States assented. In 1807, an act of congress was passed [2 Stat. 445], to prevent any person from taking possession of the public lands, whether under the sanction of a title thereto or not, and authorizing the president to use the civil authority, or the military force, to remove all persons who should take such possession. The act of March, 1814 [3 Stat. 116, c. 39], requires all persons having claims to lands under the state of Georgia, and not acknowledged by her, to release the same to the United States, before some day in January, 1815, under the penalty of losing the compensation offered by that law, as well as being rendered incapable of maintaining any action to recover the possession of the lands themselves. The release, therefore, was not voluntary, but was given in compliance with a law, which, by disabling the defendant from obtaining possession of the land, discharged him from all the obligations imposed upon him by this contract, which were dependent upon the happening of that event. The same objection is applicable to the legal title vested in Simms; and even if the jury could, under this issue, consider the receipt of the certificate of stock, as equivalent to the possession of the thing for which it was granted, this equivalent was not received by the defendant, until after the institution of this suit. But, if the plaintiff is entitled to recover any thing in this action, it was contended that he cannot exceed the amount of the two notes for 2500 dollars; since it is obvious, that the defendant's draft on the plaintiff, for 500 dollars, made prior to the date of this agreement, could not be the unliquidated demand, which, "when it should be liquidated," the defendant promised to pay.

It was answered by the counsel for the plaintiff, that as to the unliquidated demand, the evidence was uncontradicted, that the defendant acknowledged it to be 500 dollars, and this ought to be conclusive with the jury. As to the contingency, upon which, the sum agreed by the articles to be paid to the plaintiff, should become due, it could refer only to the impediments created by the law of Georgia, because that was public and notorious; with which both the parties were acquainted. The private conveyance from Bond to Simms, was known only to themselves; and consequently, could not be within the contemplation of the parties, nor could it be their intention to place the payment of the sums to the plaintiff, upon the mere volition of the defendant to pay off the incumbrance, and regain the possession, or to postpone it as it might suit his own convenience. Besides, this deed not having been communicated to the plaintiff, was a fraud upon the agreement, and is on that account to be disregarded. The impediment created by the law of Georgia, was removed by the decision of the supreme court, in the case of Fletcher v. Peck [6 Cranch (10 U. S.) 87]; and from that time, the defendant had a legal capacity to obtain possession of these lands, of which, if he did not choose to avail himself, it was his own neglect, which should not be turned to the prejudice of the plaintiff. The Indian title was not in the contemplation of the parties; and even if it had been, their title was nothing more than a privilege of hunting, which did not interfere with the legal seisin, which the defendant might have acquired. The acts of congress of 1803 [2 Stat. 229, c. 27], 1807,

and 1814, which are principally relied upon by the defendant's counsel, are unconstitutional, so far as they operated to affect the title of the defendant to these lands, being contrary to the 5th article of the amendment to the constitution of the United States, which declares, that "private property shall not be taken for public use, without just compensation;" and this public use, even where a just compensation is made, can never mean the filling of the public coffers by the sales of private property, seized expressly for that purpose. But, at all events, the right of the plaintiff to bring this suit, commenced at the moment that Simms released to the United States, and thereby deprived the defendant of any legal capacity to obtain possession of the land. That release was voluntary, and it was the act of the defendant's trustee. The rule of law, therefore, which is admitted by the defendant's counsel, applies strictly to this case. The counsel claimed interest from the time when a legal capacity existed in the defendant to obtain the possession of these lands.

[Verdict for plaintiff.]

Ewing, and Condy, for plaintiff.

Binney, and Joseph R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice, charged the jury. This is an action of covenant brought upon certain articles of agreement, entered into between these parties, in the year 1804; whereby the defendant agreed to pay to the plaintiff, two notes for 1,250 dollars each, and an unliquidated demand of the plaintiff, when the same should be liquidated, forthwith, after he, (the defendant,) should obtain, or be in legal capacity to obtain the lawful possession of the Georgia lands, conveyed to him by Edward Gould. The question which arises out of the issue, is, whether the defendant was, at any time previous to the institution of this suit, and when, in a legal capacity to obtain the lawful possession of these lands?

It is to be observed, that the subject of inquiry is, legal capacity to obtain possession, and not the actual obtaining of it. It was not the intention of the plaintiff to leave it in the option of the defendant, to defeat, or to postpone his right to the stipulated sums, by forbearing to exercise the legal capacity he might at any time acquire, to gain the possession. So long as this capacity should be opposed by legal impediments, so long the rights of the plaintiff were suspended. When they should cease to exist, those rights were in full force, notwithstanding other impediments created by the defendant himself, which it was within his own power to remove A contrary doctrine would have authorized the defendant to take advantage of his own wrong, in fraud of his contract, and to the detriment of the plaintiff. The impediments known to the parties, and which, no doubt, were within their contemplation, were, 1st, the Indian title; and, 2d, the law of Georgia; the title acquired by the United States, under the cession of that state; and the laws of the United States in relation to these lands. No other impediment has been stated by the defendant's counsel, except that produced by the conveyance to Simms, which will hereafter be noticed.

As to the Indian title, that was removed by the treaty of August, 1814. The other impediments were in full operation, in November, 1814; and have never, to this moment, been removed. These were:

1st. The rescinding law, as it is styled, of the legislature of Georgia, passed in the year 1796, professing to annul the act, under which the grant to the Georgia Company was made; and forbidding the courts of justice, in any action which might be depending before them, to admit the said law or grant to be given in evidence.

2d. The cession made by the state of Georgia, to the United States, in the year 1802 [Bior. & D. Laws], of a large territory of country, including the lands which form the basis of the present controversy. This instrument, after ceding to the United States all the right of Georgia to the jurisdiction and soil of the above territory, stipulates, amongst other things, as a condition, that, after satisfying certain claims previously mentioned, the ceded lands should form a common fund for the United States, and be disposed of for that purpose, and none other; provided that congress may, within twelve months after the assent of Georgia to the boundary established by that agreement shall have been declared, dispose of, or appropriate, not more than five millions of acres of the ceded lands, to satisfy and compensate any claims, other than those before recognized by that agreement, which may be made to any part of the said lands; but that no such cession or compensation should be made, unless in virtue of a law which should be passed within the above period.

3d. The act of congress, passed on the 3d of March, 1803,—3 [Bior. & D. Laws] 546; [2 Stat. 229, c. 27],—"regulating the grants of lands, and providing for the disposal of the lands of the United States, south of the state of Tennessee." The 8th section declares, that the residue of the five millions of acres reserved by the articles of cession, to satisfy the claims not confirmed by that agreement, after satisfying certain enumerated claims, or so much of the proceeds thereof as may be necessary, shall be appropriated for compensating such other claims to the lands of the United States, south of the Tennessee, not recognized in said cession; which are derived from any act of Georgia, which congress may hereafter think fit to provide for. Provided, that

no claim shall be embraced, but such of which the evidence shall be exhibited to the secretary of state, to be recorded, before the 1st day of January following; and that no claim, grant, deed, or other written evidence of claim to such lands, derived under the state of Georgia, and not recognized by the agreement of cession, should ever be admitted as evidence in any court of the United States; unless the same has been exhibited to be recorded, within the time, and in the manner before directed. It is further provided, that nothing contained in this act shall be construed to recognize or affect the claims of any persons to any of the said lands. The 9th section provides for the appointment of commissioners, to receive propositions of compromise and settlement from the companies and persons claiming the said lands; and to report their opinion to congress.

4th. The act of congress, passed on the 3d March, 1807,—4 [Bior. & D. Laws] 118; [2 Stat. 445],—"to prevent settlements being made on lands ceded to the United States, until authorized by law;" which declares, that if any person shall, after the passage of the law, take possession of, or settle upon, any lands ceded to the United States by a foreign nation, or by any state, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim thereto by such person shall not have been previously recognized and confirmed by the United States; said offender shall forfeit all his right to the said land, whatever it may be; and the president is authorized to direct the marshal, and to employ, if necessary, the military force, to dispossess and remove him.

5th. The act of congress, passed the 31st March, 1814,—4 [Bior. & D. Laws] 671; [3 Stat. 116, ch. 39],—"providing for the indemnification of certain claimants of public lands in the Mississippi territory." This act allows, to persons claiming lands in the Mississippi territory, under the act of Georgia, of the 7th of January, 1795, whose claims have been exhibited to be recorded, according to the act of 3d March, 1803, until the first Monday in January, 1815, to deposit in the office of the secretary of state, a legal release of all such claim, to the United States, and a transfer to the United States of their right to any money which had been paid by them, &c., into the treasury of Georgia, as the consideration of the purchase of the said land, &c.; such release and transfer to take effect, on the indemnification of such claimants being made, conformably to the provisions of this act. The 2d section creates a board of commissioners, whose duty it was to decide on the validity of the releases, &c.; and also to decide all controversies arising on adverse claims. The 3d section provides, that, on the report of the commissioners to the president, as to the sufficiency of the releases, &c., the names of the claimants, whose claims they have allowed, and the relative proportions on which they are entitled to indemnity under this act; the president is required to cause to be issued, at the treasury department, certificates of stock to such claimants, not bearing an interest; to be paid out of the first moneys in the treasury, arising from the sales of public lands in the Mississippi territory, after payment of the debt to Georgia, expenses, &c. To the different companies are allotted certain sums; and amongst others, to the Georgia Company the sum of 225,000 dollars. The 9th section declares, that, if any person claiming land under the aforesaid act of Georgia, of the 7th of January, 1795, shall neglect or refuse to compromise such claim, in conformity with the provisions of this act, the United States shall be, and are hereby declared to be, exonerated from all such claim; and the same shall be for ever barred; and no evidence of any such claim shall be admitted to be pleaded, or allowed to be given in evidence, in any court, against any grant derived from the United States. Acceding to the terms held out by this law, Simms, on the 8th November, 1814, released to the United States all his title to the lands claimed under the above act of Georgia, of the 7th of January, 1795, and the grant made in pursuance thereof; and received the compensation allowed by the above act of congress, in certificates of stock.

Upon this statement of the acts of Georgia, and of the United States, it must be admitted, that, unless the defendant is prevented by the release executed by Simms, as just stated, and the acceptance of the compensation allowed by the above act of congress [Act March 31, 1814], from asserting that he has never been in a legal capacity to obtain possession of these lands; the impediments to his obtaining such possession, which existed at the time when this contract was entered into, have never been removed, and that a legal incapacity to obtain such possession still continues.

What, then, is the legal effect of this release? Let it in the outset be observed, that the act of Simms is to be considered as that of the defendant. The deed to him, though absolute in form, was substantially a mortgage for securing the payment of money, and was so decided by the award of arbitrators, and the judgment of a court thereon, rendered in January, 1817. Simms was therefore a trustee for the defendant, who was bound by his acts; more especially as he afterwards affirmed them, by bringing an action to recover the certificates of stock which he received from the United States, as the consideration of his release. This being the case, it must be admitted, that the effect of the release was to pass to the United States all the right and title of the defendant to these lands, and that it created a perpetual bar to any claim which he might thereafter

assert to the possession of them. It was a solemn transfer of his right to these lands, for a certain consideration paid by the United States; and from the moment that this contract was complete, he deprived himself of the legal capacity to obtain possession of them. The rule of law is admitted by the defendant's counsel, that, if one person is bound to pay a sum of money, upon the happening of a particular event, which is prevented by the obligor, it is the same thing as if the event had actually taken place; and the right of the obligee to claim the stipulated sum immediately arises.

But it is contended by the defendant's counsel, that if the law discharges, or incapacitates the obligor from performing the act, or renders the performance unlawful, his obligation is discharged. This rule must also be admitted; and then the questions are —1. Whether, in this case, the defendant was prevented by the acts of congress before noticed, from obtaining possession of the lands mentioned in the agreement?—and if so, then —2. Whether he has not also barred himself by his release, so as to subject him to the operation of the first rule?

By the defendant's counsel, it is insisted, that the act of 1807 rendered it unlawful for the defendant to take possession of these lands; and that the acts of 1803 and 1814, barred the right of the defendant, not only to the lands themselves, but also to the compensation, unless he executed the release by a certain period. The alternative then presented to the defendant was, to receive the compensation offered by congress, upon the condition of executing the release of his right, or to lose both that and the land.

In answer to this argument, it is contended, that those acts are unconstitutional; and consequently, would not have prevented the defendant from obtaining possession of these lands, if he had not shut himself out of the tribunals of justice by his own act.

The court feels the difficulty, as well as the delicacy of this question. It is one which has never been decided in any court of the United States, to our knowledge. It is not whether the subject upon which congress has legislated, was without the sphere of those powers which are conferred upon that body by the constitution; because it is not to be denied, that the power of congress to dispose of the public property, and to enact laws in reference thereto, is unlimited. But, can congress legislate upon the rights of individuals, to property acquired or claimed by the United States, and enact laws of forfeiture, or otherwise to defeat those rights, either absolutely or conditionally, at the mere will and pleasure of that body?—does the power to pass laws, though unrestrained by the constitution, include a power to decide upon private rights, and to dispose of private property, because the title asserted by the individual affects property claimed by the United States? There are certain expressions of the supreme court, in the case of Fletcher v. Peck, 6 Cranch [(10 U. S.) 87], which seem to be not inapplicable to this subject; they are the following—"The question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of reflection." Id. 136. "How far the power of giving the law, may involve every other power, in cases where the constitution is silent, never has been, and perhaps never will be definitely stated. The validity of this rescinding act might well be doubted, were Georgia a single sovereign power." Id. "It may well be doubted, whether the nature of society, and of government, does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation." Id. 135.

It is true, that private interests must be subservient to the public necessities. This results from the nature of the social compact. Under every government, be the form what it may, private property may be taken for public use, provided a fair compensation be paid for it; and the 5th article of the amendments to the constitution of the United States has provided, that private property shall not be taken for public use, without just compensation. But who is to decide, as to the quantum of the compensation? If the power is exercised exclusively by the legislature, it is easy to perceive that it may be abused; and that the condition may be only nominally performed. Ought not the compensation, in all cases, to be judged of by indifferent persons, so selected as to afford a fair expectation of their acting impartially? The practice, we believe, is universal, in this country at least, to submit the question of compensation to persons summoned for that purpose, by process in nature of a writ of ad quod damnum. But are there not some limits to the exercise of the power itself, even where a compensation, fairly ascertained, is offered to be made? Can private property be seized, for the sole purpose of filling the public coffers with the product of its sale? These are questions of vast magnitude, which this court would deem it its duty to submit to the decision of the supreme court, if they were necessarily involved in the determination of this cause. We think that they are not; and that this case may be decided upon general principles of law, which may be predicated upon an admission of the validity of the acts of congress which have been referred to. The inquiry, however, into this subject, which has been but partially made, will be found to bear upon another view which is yet to be taken of this case.

But it will first be necessary, to inquire into the nature of the title of the purchasers under the Georgia Company, to the lands granted to it by the state of Georgia. In the case of Fletcher v. Peck [supra], the following

points were resolved—1. That the lands lay within the state of Georgia, and that that state had power to grant them. 2. That the Indian title, until extinguished, was to be respected by courts; but that it was not such as was absolutely repugnant to seisin; in fee, on the part of the state. 3. That the estate granted by Georgia, having passed into the hands of purchasers, for a valuable consideration, without notice; the state was restrained, either by general principles which are common to our free institutions, or by the constitution of the United States, from passing any law to impair the estate vested in the said purchasers.'

If this then was the title of those persons, who purchased from the grantees, under the state of Georgia, as against that state, it could not, we conceive, be impaired by the subsequent cession of Georgia to the United States. The derivative title of the latter, could not, upon general principles of law, be other, or better, than that of the former. If this be so, then the purchasers under the Georgia Company, acquired a good and valid title against the United States. Admitting, then, the validity of the acts of congress, for the purpose of getting at the question, how far the release of Simms to the United States, can legally affect this case; all that can be said of them is, that they prevented the defendant from obtaining possession of the land; and barred his claim to the same, either against the United States, or against any grantee under them. Still the claim was admitted, or else it would have been unnecessary to require a release of it, as the consideration of the compensation to be paid by the United States. It cannot be contended, that the defendant was compelled to give the release. He was at perfect liberty to do it or not, as he pleased. He preferred the former; and then, by a voluntary act, he extinguished forever all his right to the land, and incapacitated himself to obtain the possession of it; and, for this renunciation, he received the stipulated consideration. So far as his own interest was concerned, the defendant had unquestionably a right to enter into this contract with the United States. It was perhaps prudent in him to do so. But he had no right, by any act of his, and without the consent of the plaintiff, to compromit his interest, and for ever to close the door against his appeal to the justice of the nation, even if he had no stronger ground to stand upon. As to the defendant, it may be admitted, that he bettered his situation, by acceding to the terms held out by the law. Not so as to the plaintiff, if the argument of the defendant's counsel be correct, that, although he has received an equivalent for the possession of the land, he is discharged from his obligation to pay the plaintiff; because he could not, at the time he received it, and never can obtain, the possession of the land. Independent of the release, the defendant might have appealed to the justice of congress to repeal the laws, so far as they had deprived him of his rights; and, if the arguments which have been urged in the preceding part of this opinion, are not strong enough to impeach the validity of the laws in question, they could scarcely have failed to avail the defendant, in his appeal to the legislature of the United States. However this may be, the plaintiff had a contingent interest, dependent upon the acknowledged right of the defendant to these lands, which the defendant could not defeat by any act of his, without the consent of the plaintiff, and upon such terms as he might be willing to agree to. The manifest injustice of a contrary doctrine will appear, by supposing, (as was very probably the present case,) that the sums agreed to be paid by the defendant, upon his being in a legal capacity to obtain the possession of these lands, were, in reality, the consideration agreed to be paid for the purchase of them from the plaintiff. Could it be endured for a moment, that the defendant should, by a contract with the United States, extinguish his right to the land, and receive from the United States the consideration for such relinquishment; and then say to the plaintiff, that, having lost forever the capacity to obtain possession of the lands, he was not bound to pay to the plaintiff the purchase money, which was made to depend upon his having that capacity? Whatever, then, may have been the operation of the acts of congress, the voluntary release of the defendant by his trustee, in November, 1814, was, as it concerned the plaintiff, the same thing as if, at that moment, he possessed the legal capacity to obtain the possession of these lands.

As to Simms's title, it was clearly not embraced by this agreement; because the conveyance to him was secret; and was not, so far as the evidence informs us, communicated to the plaintiff. To introduce this, therefore, as an impediment in the way of the defendant to the obtaining the possession of the land, would be a manifest fraud upon the contract between these parties. But, even if it had been known to the plaintiff, still, it created no legal incapacity in the defendant, to obtain the possession of the land from Simms, provided the release had not been made to the United States; because, by paying off the incumbrances upon the property, the defendant might, at any time, have recovered the possession; and it could never have been competent to the defendant to urge an incapacity, produced by his own act, and which it was in his power to remove, as a reason against paying the sums stipulated in this agreement. If he could, then the alternative, so cautiously provided in the agreement, would have been altogether without meaning: the legal capacity to obtain possession, and the obtaining of it, would in effect mean the same thing.

The next question is, to what amount is the plaintiff entitled to a verdict? As to the two notes for 2500 dollars, no question has been

made, provided the plaintiff can recover anything. There is more difficulty in respect to the 500 dollars. On the one hand, it is contended, that this is an ascertained sum, and can by no means be brought within the meaning of the expressions in the agreement, an unliquidated demand. On the other, it is insisted, that as no evidence has been given of any unliquidated demand to which the expressions in the agreement could refer, and the testimony of the witness is positive, that the defendant acknowledged this sum to be the amount due; this must be considered to be the unliquidated claim referred to in the agreement. This point is submitted to the jury.

As to interest, it clearly ought not to be calculated beyond the 8th of November, 1814, when the release was executed. And the jury may give interest from that period, or from the period when the defendant recognized, or otherwise approved of the release made by his trustee, which was some time in the year 1816 or 1817.

Verdict for the plaintiff.

[For subsequent proceedings on fieri facias and venditioni exponas, see Cases Nos. 1,535 and 1,536.]

Case No. 1,535.

BLEECKER v. BOND.

[4 Wash. C. C. 6.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1820.

EXECUTION — DEATH OF PARTY AFTER FIERI FACIAS—VENDITIONI EXPONAS—SECURITY TO SAVE ISSUE OF—BREACH OF CONDITION — RETURN OF SECURITY.

1. In Pennsylvania, the death of either of the parties after a fieri facias issued, does not prevent the venditioni exponas from issuing immediately upon the return of the fieri facias, levied on land, and the same condemned. A scire facias is not necessary.

[See Taylor v. Miller, 13 How. (54 U. S.) 287; Wilson v. Hurst, Case No. 17,808.]

2. The agreement of the plaintiff to receive certain securities for the debt, and to give time on their being certified in a particular way, being conditional, and the condition not being performed, the plaintiff might proceed with his execution, though he had not returned the securities.

At law. Rule to show cause why the venditioni exponas issued in this case should not be set aside. [Rule discharged.]

Joseph R. Ingersoll, in support of rule.
Mr. Ewing, contra.

WASHINGTON, Circuit Justice. The material facts in this case are the following. At the sessions of this court in October, 1819, the plaintiff obtained a judgment against the defendant for about $3898. Some time in March of the present year, a parol agreement was made between the attorney of the plaintiff and the defendant, by which the sum for which the judgment was rendered, was reduced to $3100, to be paid in four, nine, twelve, eighteen and twenty-four months; the payments to be satisfactorily secured, and the arrangement to be finally completed before the 11th of April following, unless the plaintiff's attorney should choose to grant a longer indulgence. It appears from the evidence, that Bond was frequently, after the 11th of April, pressed by the plaintiff's counsel to complete the agreement, when, at length, he delivered to him a bond and mortgage for $1450, given by a Mr. Van Metre, the latter being upon a tract of land in the state of New Jersey; which the attorney, with the approbation of his client, consented to take in part payment of the $3100, upon this condition however, that the certificate of the clerk of the court where the land lay should be obtained, that no incumbrance on the land appeared, from the records of his office, prior to the recording of this deed; for the balance of the debt, Bond was to furnish the plaintiff with another good mortgage on land in New Jersey, for $1000 and to pay the balance of the debt in cash. In consequence of this agreement, Bond took the bond and mortgage, (which had been left with the plaintiff's attorney for the inspection of his client) in order to have an assignment of them drawn and executed, and instead of returning them with the assignments indorsed, and the promised certificate against prior incumbrances, he sent them to the office where they were recorded, five days after a subsequent deed from Van Metre to another person had been recorded. About the latter end of July, the plaintiff's attorney not having received the clerk's certificate, and having failed in every attempt to get Bond to complete the above agreement, gave him notice that he considered the agreement as at an end, and that he should proceed to issue an execution upon the judgment. The fieri facias issued about the —— of August, and was executed upon land which was regularly condemned. On the day of the test of the writ, or the day after, Bond died, and the venditioni exponas issued on the 11th of September. The plaintiff's attorney, soon after Van Metre's bond and mortgage were recorded, received from Bond the clerk's certificate of that fact, accompanied by a promise to furnish him also with a certificate from the same source, that there was no incumbrance on record prior to his. This latter certificate was never furnished, and it was not till some time after Bond's death, that the fact of a prior recorded mortgage on the same land was communicated to the plaintiff's attorney.

Two reasons in support of this rule have been assigned. The first is, that the vendi-

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

tioni exponas issued after the death of the defendant, without the judgment having been revived by scire facias. 2d. That the mortgage and bond for $1450, having been received by the plaintiff in part payment of the debt, which greatly exceeded all the instalments due when the fieri facias or the venditioni exponas issued, and the same not having been returned by the plaintiff to the administrator of Bond, after he knew of the prior incumbrance, it ought now to be considered as a payment pro tanto.

1. Were I called upon to decide this question upon principle and authority, I could not but feel perplexed, in consequence of the difference in the execution of the writ, between the fieri facias of England and of this state. But I feel myself relieved from all difficulty upon this subject, by the concurrent testimony of gentlemen high in the profession, and well acquainted with the practice of this state; that the death of either of the parties after the fieri facias issued, does not prevent the venditioni exponas from issuing immediately, upon the return of the fieri facias levied on land, and the same condemned; and that a scire facias is not necessary.

2. The pretence that the bond and mortgage for $1450 were received by the plaintiff in part payment of his debt, is entirely without foundation. It is true that the plaintiff agreed to reduce his claims, under the judgment, to $3100, and further to receive the above bond and mortgage in part payment of that sum; but these promises were upon conditions to be first performed by Mr. Bond, and which never were performed. In the first place, the whole debt was to be well secured; and in the next, the bond and mortgage were to be accompanied by a certificate of searches made to the time of its being recorded, and that there were no prior incumbrances. No such certificate was, or could have been procured at the time this mortgage was recorded; and no other security for the $3100 had at any time been offered prior to the death of Mr. Bond. The agreement, therefore, was not in any manner obligatory upon the plaintiff.

As to the objection that the plaintiff did not offer to return the bond and mortgage, as soon as he heard of the prior recorded mortgage; there is nothing in it. His attorney immediately informed the administrator of the circumstance, and stated to him that the security was worthless to the plaintiff. The formal offer to return the papers was, no doubt, prevented by the answer of the administrator; that he would have nothing to do with them, as he considered them as part payment of the debt. In addition to this, the plaintiff has offered upon this motion, to return the papers.

The rule must be discharged.

[For trial and verdict in this case, see Case No. 1,534. For subsequent proceedings after sale on venditioni exponas, see Id. 1,536.]

Case No. 1,536.

BLEEKER v. BOND.

[4 Wash. C. C. 322.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

UNITED STATES MARSHALS—SALE OF REALTY—APPLICATION OF PROCEEDS.

The marshal who sells certain property under a venditioni exponas, has no power to pay to the tax collector the arrears of taxes due on the property sold, out of the proceeds of other property sold under the same writ.

At law. Rule upon the marshal, at the instance of the administrator of Bond, to bring the residue of the money in his hands into court. The case is as follows. Under a venditioni exponas, which issued in this cause, all the real estate of which Bond died seised, and which had been levied upon by virtue of the writ of fieri facias, was sold by the marshal, to satisfy the judgment under which the process issued. Amongst the property so sold, was a house which had been devised to the said Bond by his wife, subject, however, to the payment of $2000 to a Mrs. Moor. Upon this house there were certain taxes due to the state. The house was purchased by Mrs. Moor at the marshal's sale at the price of $2, which being insufficient to pay the taxes due upon the property, the marshal paid them to the tax collector out of the money for which he had sold the rest of the property of Mr. Bond. The question was, whether the marshal was justifiable in making such payment? [Rule made absolute.]

Joseph R. Ingersoll, in support of rule.
Mr. Ewing, contra.

WASHINGTON, Circuit Justice. Whether taxes are by the laws of this state a lien on the property upon which they are assessed, is a question which I do not mean to decide in this case, nor is it necessary. For if they be a lien, the property chargeable with the taxes having been sold for comparatively nothing, the marshal had nothing, or in more correct language, he had but $2 out of which to discharge the lien. But whether a lien or not, he had no authority to pay the taxes due upon that property, out of funds in his hands raised by the sale of other property of the intestate under the venditioni exponas. The duty of the marshal was to pay over the money remaining in his hands, and leave the collector to resort to the administrator for the taxes due from his intestate's estate. The marshal having improvidently paid the taxes to the collector, must look to him to refund it. Rule made absolute.

[NOTE. For trial and verdict in this case, see Case No. 1,534. For proceedings to set aside venditioni exponas, see Id. 1,535.]

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

Case No. 1,537.

BLEEKER v. HYDE.

[3 McLean, 279.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

GUARANTY—LETTER OF CREDIT TO A PARTICULAR FIRM — PURCHASES FROM ANOTHER FIRM — APPROVAL BY GUARANTOR—TAKING POSSESSION TO PREVENT LOSS—ACCEPTANCE OF GUARANTY.

1. A letter of credit, to a particular firm, and which guaranties the payment, will not bind the guarantor, if the purchase be made of other persons.

[Cited in First Nat. Bank v. Hall, 101 U. S. 51.]

2. Such a contract is not to be extended beyond the manifest intention of the parties.

3. But where the goods were purchased in the name of the guarantor, and he examines the invoices and approves of the same, he is clearly bound.

4. And especially is he bound, if he take possession of the goods, with the view of preventing a loss.

5. Under such circumstances no notice of the acceptance of the guaranty was necessary.

[At law. Action by Bleeker against O. M. Hyde for goods sold on faith of a letter of credit. Verdict and judgment for plaintiff.]

Joy & Lockwood, for plaintiff.

Buell & Wetherall, for defendants.

OPINION OF THE COURT. The defendant gave the following letter of credit: "Messrs. Erastus Corney & Co. New York. Gentlemen, I hereby authorise Messrs. A. & D. Wallingsford to purchase goods, such as they may wish to, in my name and on my account, to the amount of twenty-five hundred dollars. (Signed,) O. M. Hyde, 20th Sept. 1841." Under this letter Wallingsfords purchased goods of Corney & Co. to the amount of $1453, and of the plaintiff to the amount of $1046.04.

It is objected that the letter of credit did not authorize a purchase from the plaintiff, and that consequently the defendant is not bound. In Grant v. Naylor, 4 Cranch, [8 U. S.] 224, it was held that a letter of credit addressed by mistake to John and Joseph Naylor, and delivered to John and Jeremiah Naylor, will not support an action by John and Jeremiah, for goods furnished by them to the bearer, upon the faith of the letter of credit. A surety is not answerable beyond the scope of his engagement. Walsh v. Bailie, 10 Johns. 179; Penoyer v. Watson, 16 Johns. 99; Robbins v. Bingham, 4 Johns. 476. Although the letter of defendant is directed to Corney & Co., yet it does not appear from its language to have been alone intended for them. The language is general—"that he had authorized A. & D. Wallingsford, to purchase goods on his account to the amount of twenty-five hundred dollars." He does not say he had authorized the purchase of goods from them. Had such been the language of the letter, it would be clear from the cases above cited, that, by virtue of the letter, the defendant would not have been bound by a purchase from any other person or firm. But the case does not necessarily turn upon the construction of the letter of credit, as it has been proved that after the purchases were made, the defendant saw and approved of the invoices. And it further appears that the defendant took the remaining goods into possession, on the ground that he was bound to pay for them. The goods were charged to the defendant in the invoices. This is sufficient to show that the defendant approved of the purchases, and he is consequently bound to pay for them. No notice of the acceptance of the letter of credit, by the plaintiff, was necessary, as the purchases were made in the name of the defendant. Verdict for the plaintiff and judgment.

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

Case No. 1,538.

The BLENHEIM.

[Blatchf. Pr. Cas. 626.] [1]

District Court, S. D. New York. Feb. 23, 1865.

PRIZE—VESSEL AND CARGO CONDEMNED FOR A VIOLATION OF THE BLOCKADE.

[A vessel with a British registry, flying the British flag, but having a Confederate flag on board, owned by her master, who, with a majority of the crew, were British subjects, and laden with a general cargo from Nassau, where the cargo was owned, cleared for St. Johns, but proceeded to Wilmington, N. C., and, on attempting to enter that port, was captured. The master and crew had previously run the blockade, and knew of its existence. *Held*, that the circumstances justified the condemnation and forfeiture of the vessel and cargo.]

[Proceedings to condemn and forfeit the steamer Blenheim and cargo as prize. Decree of condemnation and forfeiture.]

BETTS, District Judge. This is another vessel captured by a squadron of the United States blockading fleet of ships-of-war on the Atlantic coast. On the 25th of January, 1865, the steamer Blenheim was seized, as prize of war, off the mouth of Cape Fear river, by the squadron under the command of Rear-Admiral Porter, of the United States navy, and was sent into this port for adjudication. She was here arrested, February 4, 1865, under the process of the court, and due return thereof having been made in open court, with public proclamation, and no person intervening in the case, or claiming to appear or defend the said prize, the United States attorney moved and had accorded to him interlocutory judgment of default in the cause, according to law and the practice of the court, and submitted to the court the allegations and proofs brought into the cause, and prayed a final decree of condemnation and forfeiture of the prize aforesaid, pursuant to law and right.

Beatty Peshine Smith, a lieutenant in the United States navy, on the 7th of February,

[1] [Reported by Samuel Blatchford, Esq.]

1865, delivered, under oath, the papers taken from the Blenheim, when captured, to one of the prize commissioners at this point, consisting of a clearance from Nassau to St. John's, a list of port charges, a crew list, two bills of sale, a log-book and a British register. By the first bill of sale, dated at Belfast, February 12, 1863, John J. McKee, of that place, purports to have conveyed, as agent of the Belfast Steamship Company, to William Fod and his assigns, sixty-four shares in the said ship Blenheim; and by the second bill of sale, dated September 20, 1864, William Fod purports to have conveyed to Richard Eustace, of Penryn, sixty-four shares in the same ship. By a certificate of British registry, dated in Glasgow, September 23, 1864, the registrar of that port certifies that Richard Eustace is the master of the said ship, and holds sixty-four shares of the said ship. The crew list connected with the papers states only the names of the crew, their wages, and their places of birth, but does not give the voyage contracted for, nor the capacities in which they served on board the ship.

Examinations were taken in preparatorio before the prize commissioners, and certified to the court February 8, 1865. Richard Eustace, the master of the ship, Archibald Lang, the chief engineer, and James Henry Thomas, the chief steward, gave testimony upon the stated interrogatories propounded to them. The testimony supports clearly, and without contradiction, the allegations of the libel as to the time, place and manner of the capture made of the vessel and cargo. The prize was under the British flag alone. She had also a Confederate flag on board. She was owned by her master. The cargo was owned at Nassau. The crew were chiefly English subjects, and a majority sailed with the steamer from England. She was laden with a general cargo, provisions and wearing apparel. The cargo was taken on board at Nassau, cleared for St. John's, but was destined for Wilmington, North Carolina, notwithstanding the clearance. This voyage was the second attempt of the vessel to run into Wilmington. On her first voyage there she carried a general cargo, and returned with a cargo of cotton. The master and crew knew, on the first voyage to Wilmington, that the port was under blockade by the United States government. They did not know, until they got into Cape Fear river on the second voyage, that Fort Caswell was taken, and that the United States fleet were in the river. The vessel was captured on her second attempt to run the blockade. She sailed directly from Nassau for and to Wilmington. Her ship's company, at the time of the capture, knew of the existence of the war, and of the blockade of the port of Wilmington.

All the evidence is direct and conclusively efficient, in demonstration of the culpable conduct of the vessel and cargo on the voyage, and of their liability to conviction on the prosecution against them.

It is, accordingly, ordered, that a decree of condemnation and forfeiture be pronounced against the vessel and cargo.

Case No. 1,539.

The BLENHEIM et al.

[5 Sawy. 192;[1] 6 N. Y. Wkly. Dig. 545; 10 Chi. Leg. News, 353.]

District Court, D. Oregon. July 2, 1878.

FREIGHT—DELIVERY OF—LIMITATION IN ADMIRALTY.

1. A vessel while taking on a cargo of flour by the charterer, by mistake of the mate and wharfinger took on eighty-three sacks more than was entered upon the bill of lading, or shipped on account of the charter: *Held*, that it was the duty of the master upon discharging the cargo at the port of delivery, if the owner of the eighty-three sacks of flour was not present to receive the same, to store it safely, subject to freight and charges, and notify the owner thereof, and that having failed to do so, but delivered the same to the charterer or his assigns, whereby the flour was lost to the owner, the vessel is liable for the value of the same, with interest.

2. A demand in admiralty is not necessarily barred by lapse of time, but the matter rests in the discretion of the court to be governed by the circumstances of the case considered with reference to the wants and convenience of commerce and the analogies of the local law of limitation.

[See Stillman v. The Buckeye State, Case No. 13,445.]

[In admiralty. Libel by John S. Barnard against the British bark Blenheim for a quantity of flour taken on board by mistake, and not accounted for to the libellant (Peter Iredale and others claimants). Decree for libellant.]

David Goodsell and H. H. Northrup, for libellant.

Benton Killen, for claimants.

DEADY, District Judge. This suit is brought by the libellant, John S. Bernard, to recover the sum of four hundred and fifty dollars, the alleged value of a quantity of flour shipped on the British barque Blenheim, and not delivered or accounted for. The testimony in the case is meager, and leaves some points made by counsel in doubt. But the following facts are satisfactorily established. In January, 1874, and thereafter, the libellant was engaged in the business of a wharfinger and warehouseman at Portland, Or., when and where the Blenheim received a cargo of flour from the libellant for and on account of the charterer of the vessel, to be shipped to Great Britain or the continent of Europe; that by mistake of the parties, including the mate who kept the tally, eighty-three sacks of flour, weighing ninety-eight pounds each, were shipped on said vessel in excess of the cargo furnished

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

to said charterer, and entered upon the bill of lading, which sacks of flour were delivered by the master to the charterer or his assigns at Havre, France, and thereby lost to the libellant; and that the Blenheim did not return to this port until shortly before the commencement of this suit, March 30, 1878. The fact that this excess of flour was taken on board, and discharged at Havre is distinctly admitted by the managing owner, Mr. S. Martin, in a letter to the libellant, dated December 31, 1874.

Upon this state of facts, I think, the vessel is liable as for a non-delivery of the flour. When goods are taken on board by mistake, as in this case, the law will imply a contract between the master and owner to deliver them on account of the latter at the port of destination for the remainder of the cargo, particularly where the goods so shipped are of the same kind and character as the rest of the cargo. This being so, the general rule applies. If the owner is not present at the port of delivery to receive the goods, it is the duty of the master to store them in a place of safety, subject to the lien of the vessel for freight and charges, and notify the owner. The Eddy, 5 Wall. [72 U. S.] 495.

In this case, the master of the Blenheim should have stored the flour safely at Havre on account of the libellant, and notified him of the fact, unless perhaps he chose to dispose of it on his account, and remit the proceeds, less the freight and charges, or to return the flour to him at Portland. The flour having been lost to the libellant by this neglect of a plain duty on the part of the master, the vessel is liable to the libellant for the loss.

Objection is made that this is a stale demand, and that the proof tends to show that since the date of the transaction out of which it arises the vessel has changed owners in whole or in part. But a sufficient answer to this objection is found in the fact that the Blenheim has not been in this jurisdiction since the taking away of this flour until the commencement of this suit. There is no fixed rule of limitation in the admiralty, but the matter is left to the discretion of the court, to be governed by the facts and circumstances of the case, considered with due reference to the wants and convenience of commerce, and the analogies of the local laws of limitation. Ben. Adm. §§ 574, 575. This suit would not be barred by the statute of this state, even if the vessel had remained within its jurisdiction since the cause arose, but it might be brought within six years after the right accrued. Civ. Code Or. § 6. Neither has there been any unnecessary delay on the part of the libellant in asserting his rights, from which it may be inferred that the demand was neglected or abandoned. The suit was brought as soon as it could be where the cause arose. The libellant was not bound to incur the expense or risk of following this vessel around the world to bring suit against her. It was sufficient to do so as soon as her return to this jurisdiction permitted it to be done.

It appears from the proof that at the time of the discharge of the cargo of the Blenheim at Havre, flour was worth there not less than eight dollars per barrel. These eighty-three sacks were equivalent to forty-one and one-half barrels, and at this rate were worth three hundred and thirty-two dollars. Add to this amount legal interest on the same for three years and six months, which allows one year from the time of shipment for a sale and returns, and it makes four hundred and forty-nine dollars and forty cents, for which sum the libellant is entitled to a decree.

Case No. 1,540.

In re BLIGHT'S ESTATE.

[1 Pa. Law J. (1842) 225.]

District Court, E. D. Pennsylvania.

BANKRUPTCY—UNCLAIMED DIVIDENDS.

Where a man had been declared bankrupt, many years ago, and dividends on his estate were long unclaimed by the persons entitled to them, the court declined to assist the bankrupt's administrator to get possession of these unclaimed dividends, it appearing that other creditors not yet paid in full, opposed the application.

In bankruptcy. On the 22d June, 1842, the administrator of Peter Blight, deceased, who had been decreed a bankrupt, under the act of congress, of [April 4] 1800 [2 Stat. 21], presented a petition praying the court to supersede the commission of bankruptcy, and for such other relief, &c. in the premises, as the court might deem fit. The commission referred to, had issued in the year 1801, and Blight had been duly declared a bankrupt, and surrendered himself; and in 1805 obtained his certificate of discharge. The whole amount of debts proved under the commission was,

$1,028,296 28

And the following dividends had been made:

1802	1st	Div.	20	p. c.	$204,541 55	
1805	2d	"	2½	"	26,674 21	
1815	3d	"	1	"	10,282 87	
1820	4th	"	23/32	of 1 p. c.	7,390 84	
1825	5th	"	35/100	" "	3,599 02	
1839	6th	"	4/100	" "	411 31	
						$252,899 80

Leaving, of unpaid debts a balance, $775,396 48*

The first two dividends, amounting as above stated to 22½ p. c. were claimed by all the creditors, and paid accordingly; and some of the creditors constantly claimed their shares whenever a dividend was made; and the last dividend had been paid to eighty-one different creditors, representing debts to the amount of about three hundred thousand dollars. But as the creditors were

* This calculation, though, apparently, not exact in all particulars, is printed as it was presented to the court by the assignee.

very numerous, the later dividends minute, the lapse of time quite considerable, and a number of the creditors resident in foreign countries, portions of the later dividends had not been called for, and still remained unclaimed, notwithstanding they had been "diligently advertised and public notice given in the papers to the creditors of their being declared." The dividends unclaimed, it was said, amounted to about $2000.

The object of this application was, to enable the representatives of the bankrupt, to get possession of these dividends. [Application denied.]

The assignee with two creditors appeared personally in court, to oppose the application.

Mr. Saunders Lewis, for the administrator, contended, that under the circumstances already stated, the representatives of the bankrupt were entitled to the presumption in law, that the claimants who omitted to receive their dividends, had been paid their debts. In such a lapse of time many creditors were dead; the claims forgotten or abandoned; and, the dividends being so minute, there was, in point of fact, no probability that they would ever be demanded. In regard to the last dividend, though three years had elapsed since it was declared, not one-third, in amount, of the claimants had asked for it. Though it did not appear precisely, from what date the dividends unclaimed, had come over, a portion of them, it was obvious were of old standing. At any rate, it laid on the assignee, to show that the unclaimed dividends were modern, if they were so. He ought to satisfy the court by producing books. The administrator could know the fact only in a general way. In a general way the thing was evident. In Sailor v. Hertzog, 4 Whart. 259, the supreme court of Pennsylvania held, that in the case of an insolvent debtor, the presumption that all his debts were paid, arose after a lapse of fourteen years. See Judge Rogers' charge to the jury, page 267, confirmed by the court on page 278. In many of the cases here, no doubt, a right to the dividend had been lost by the statute of limitations. It has been held that the statute applies to such a demand. 2 Deac. p. 599, Index citing Ex parte Clarkson, 3 Mont. & A. 154.[2] The prayer for relief, was of a general nature. The court, in the exercise of its discretion, would so modify the supersedeas, or otherwise dispose of the matter, as to produce no injustice.

Mr. T. I. Wharton, for the assignee, remarked, that such an order as was prayed for, would, if granted, be entirely without precedent, and would be unjust. In the case cited from 4 Wharton, p. 259, nothing whatever had been done by the insolvent's assignee or by the creditor's. That was a fair case for presumption. Here, however, on the facts appearing, no court could presume payment. Evidence overcame presumption. Creditors were here, before the court. Besides, the prayer was, to supersede, and for such, &c. Now a supersedeas would not be proper, even if the case were one for relief. The effect of a supersedeas, was to set aside everything that had been done. The cases in which a supersedeas will be granted, are enumerated by Judge Cooper, "Bankrupt Law of America," p. 167. It is always for some inherent defect, or by consent, or by all the debts having been paid off. The court could exercise no discretion but one guided by sound legal principles. The nature and the effects of a supersedeas were settled. The court would not change them. The petitioners could proceed at law, or file a bill in equity. That sort of proceeding would be more regular.

Mr. Ellis Lewis replied, that by the prayer to supersede, it was not meant to ask for a technical "supersedeas" in bankruptcy. The court would readily understand that the term was used in its common acceptation; that the petition meant to ask for an order to render the assignee's possession of the unclaimed dividends, inoperative as respected the administrator. The prayer was, moreover, general in its terms. Besides this, one ground of a supersedeas is a settlement or a payment of all the debts. Cooper, 167. We contend that in this case the law will presume the debts to be paid. It would then be a case for a supersedeas.

(Mem. [from original report]. A good deal was said on both sides, in the argument, about the case of Mr. Robert Morris' estate, in which, under circumstances (as Mr. Saunders Lewis said) not very dissimilar to those of this case, a supersedeas had been granted by Judge Hopkinson. Mr. Wharton thought that that case went to the verge of law; but at any rate that it was not a precedent for a supersedeas in this. The case is too long to report here, but it may be proper to state that a pamphlet report of it, had been given to RANDALL, District Judge, before his decision in this case.)

Cur. vult advisari.

RANDALL, District Judge. If the case were one where there could arise a presumption of law that the debts of the bankrupt had been all satisfied, the court might perhaps entertain an application for an order upon Blight's assignee to pay to the administrator the dividends so long unclaimed. But the case does not afford room for the presumption spoken of. No less than eighty-one creditors, representing nearly a third in value, of all the claimants, received a dividend within three years; and creditors appear now before me, to resist the prayer of the petition. The bankrupt's estate is greatly insolvent, and if any dividends remain unclaimed, they will, after a certain time, fall into the general fund, and make it proper that a new dividend be made. As long as any creditors remain unpaid, and choose to insist upon payment, Blight's representa-

[2] Anti, Ex parte Healey (In re Norris), 1 Deac. & C. 361.

tives, cannot claim any part of the estate. The petition must, therefore, I think, be dismissed.

Case No. 1,541.

BLIGHT v. ASHLEY et al.

[Pet. C. C. 15.][1]

Circuit Court, D. New Jersey. April Term, 1808.

CONTRACTS—TENDER—EXCUSE FOR PERFORMANCE—AGENCY—DUTY OF AGENT—CONTRACT BY TWO OF THEM ASSIGNEES IN BANKRUPTCY—RECOVERY AGAINST ONE—EVIDENCE—DECLARATIONS—NOTICE TO PRODUCE—WAIVER—CONDUCT OF TRIAL.

1. The parties to a parol agreement, which by the understanding between them is to be reduced to writing, cannot escape from its obligations, by refusing to execute the written instrument, or to proceed further therewith.

[See Tilghman v. Tilghman, Case No. 14,045.]

2. Any one bound to do a particular thing, must either do it, or offer to do it, and if no objections are made, he must show he made the tender in a regular manner; but this is not necessary if the other party by his conduct dispenses with a regular tender, as by a previous refusal to accept it, &c. After an offer of performance, and a refusal of acceptance, it is not in the power of the opposite party to say, that he who made the offer would not, or could not have done what he declared himself ready to do.

[See Barker v. Parkenhorn, Case No. 993; Hepburn v. Auld, Id. 6,389; U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240.]

3. Where the defendants agreed to pay a sum of money, out of funds expected to come into their hands, they are not excused from the payment of damages, if the money did not come into their hands by their own fault.

[See Williams v. Bank of U. S., 2 Pet. (27 U. S.) 96.]

4. It is pressing too hard on agents, to say they ought to have done what those who were intrusted as principals, in the same pursuit, did not do.

5. After an agreement to pay a debt, as valid and subsisting, its legality and justice cannot be denied, without strong and substantial evidence to support such denial.

6. Where two of three assignees of a bankrupt enter into an agreement, in the absence of the third, the contract is not binding upon the absent assignee, unless he had previously given authority to make it, or subsequently recognized and acknowledged it. Aliter among partners.

7. The agreement of the assignees of a bankrupt, to give a preference to a particular creditor, is not valid, without the assent of the commissioners, and a certain portion of the creditors. In a joint action against them, the plaintiff cannot recover from any one, unless the claim against all is supported by evidence.

8. The declarations of a party on one day, as explanatory of what was said by him on another day and which was given in evidence, cannot be shown by testimony—what a party has said on one day, against his interest, cannot be explained by declarations on a subsequent day.

9. When the declarations and letters of an agent are evidence, if a party who gives a notice to produce papers, afterwards waive reading them in evidence, he may do so, and the papers are not made evidence, by the notice calling on the opposite party for them.

[See Hylton v. Brown, Case No. 6,982; Willings v. Consequa, Id. 17,767; Smith v. Coleman, Id. 13,029; Rhoades v. Selin, Id. 11,740. Contra, Wallar v. Stewart, Id. 17,109. See Wilkes v. Elliot, Id. 17,660.]

[10. When the relation of principal and agent has ended, declarations of the agent made thereafter are not binding upon the principal.]

[Cited in Griffin v. Jeffers, Case No. 5,817.]

[See U. S. v. A Lot of Jewelry, Case No. 15,626.]

[11. An agent is the proper person to prove a fact, but his letters or declarations admitting facts are evidence of the motives or inducements of a contract with him, where the object is to prove such motives or inducements.]

[See Munns v. Dupont, Case No. 9,926; U. S. v. Barker, Id. 14,520; Vasse v. Mifflin, Id. 16,895.]

12. Manner of conducting a cause, by the counsel for plaintiff and defendant.

[See note at end of case.]

This was a special action on the case [by Deborah Blight, executrix of George Blight, deceased, against Ashley, Fisher, and Bayard, assignees of Peter Blight, a bankrupt]. The declaration contained four special counts, and two general counts, for money lent, and for money had and received. The case was as follows:

George Blight, Mr. Cole and Mr. Frazier, being disposed to assist Peter Blight, after his embarrassments had commenced, and after he had made an assignment of his estate to trustees for the benefit of his creditors, lent a considerable sum of money to him to enable him to go on in business; and for securing themselves, and in order to conceal the name of Peter Blight in the business, the money was ostensibly loaned to Jacob Haylander, who it was said, gave his note for the amount, with an agreement, that the vessels and cargoes, in which the money should be invested, should be charged with the payment of these debts. The note was not produced, it being stated, that in consequence of the agreement of the 20th September, 1801, hereafter mentioned, it was given up; but of this no evidence was offered, nor indeed was any positive proof given of the loan. It appeared by letters from Peter Blight, (who after his assignment to trustees, became and was declared a bankrupt) to the defendants, his assignees, under the commission of bankruptcy, that the funds received from George Blight and the other persons before named, together with some of the trust property, had been invested in three vessels and their cargoes, to wit the Equator, the Mary, and the Manchester, in partnership with Murgatroyd and Sons, the name of Haylander being used instead of that of Peter Blight. The defendants wishing, as was proved by Moyland's deposition, to convert the contingent interest of Peter Blight into an absolute interest

[1] [Reported by Richard Peters, Jr., Esq.]

in themselves, a meeting took place between Ashley and Fisher, Haylander, and Peter Blight, representing George Blight, on 20th September, 1801; when, after considerable discussion, an agreement was entered into, of which a memorandum in writing was made, with an intention that Mr. Rawle, the attorney of Ashley and Fisher, might put it into form, and which was read to all the parties, and approved by them. The memorandum was as follows:

"George Blight, ...Dolls.	14,000
"Haylander, ...	2,500
"Cole, ...	5,500
"Frazier, ...	2,000
"Goods, (quere)	10,000
Dolls.	34,000

"The half of the Equator and cargo, to be delivered over to the assignees; the 10,800 dollars to be paid by Haylander, in the first instance out of the Equator and cargo. The proceeds of the Equator and cargo, say Haylander's half, after paying the above, to be divided by the assignees between the four creditors above mentioned, pro rata; with the exception, that Cole's share shall be held by the assignees till his right to the 6,000 dollars shall be determined, and they to pay over to him or to retain, according to the event of said determination. Should the proceeds of the Equator and cargo, say of the half, be insufficient, the deficiency to be paid out of the first receipts from the funds in Africa, whither the assignees propose sending a vessel for the same. But Cole's share, arising from these last mentioned funds, to be retained as above. If Cole will pay the 6,000 dollars, the 5,500 dollars shall be paid in the same manner as to the other three."

The memorandum was not signed by the parties. Mr. Moyland further adds, that the consideration with the defendants for entering into the agreement, was their wish to vest the contingent interest of Peter Blight in those vessels, absolutely in them; from which they expected considerable profits; and also the agreement of Haylander, to pay them a debt of 10,800 dollars, due to Peter Blight, without insisting to offset against it, a debt due from Peter Blight to him of 5,500 dollars; and as to that sum, to come in for his dividend under the commission. That after much discussion, as to this point, it was at last acquiesced in by Haylander, and that in fact, he afterwards received only a dividend on 5,500 dollars. No authority from George Blight to Peter Blight, to act for him at this meeting was proved, but it was evident that Peter Blight professed to act for him, and that George Blight always, afterwards, approved of the agreement, and insisted upon its execution. The agreement was accordingly prepared more formally, by Mr. Rawle, and another meeting was called to execute it, to wit on the 30th of September; but Ashley and Fisher then positively refused to go on with the agreement, and in this determination they persevered, without assigning any reason for their refusal. At the time the agreement was made, and for some time afterwards, Bayard, the other defendant, was in Rhode Island, and no evidence of his having authorised his colleagues to act for him in this business was offered. At that time too, the Equator was under arrest in the district court for seamen's wages, which not being paid, she was, in October, sold by the marshal for 21,000 dollars, leaving, after paying the wages, about 17,000 dollars, one half of which was paid to Savage and Dugan, the assignees of Murgatroyd and Sons, and the other half was retained by Haylander, who purchased the vessel. From the sales of the cargo of the Equator, Haylander received a note for 10,800 dollars, which Moyland, his counsel, handed over to the defendants in December, 1801, which, he says, he understood to be in affirmance or under the contract of September 20th, 1801. The property in Africa consisted of parts of the cargoes of the Equator and Mary, which had been left in the hands of one Shute; who left Africa in 1801, with the property he had, came to the United States, was arrested here by the assignees of Murgatroyd and Sons, was found to be worth nothing, and finally he took the oath of an insolvent debtor. From the Manchester, nothing could be collected by the assignees of Murgatroyd and Sons, after her expenses, &c. were paid.

Mr. Moyland stated in his deposition, that after the return of the marshal of the sale of the Equator, the defendants, by their counsel Mr. Rawle, moved to take out the balance of the proceeds, on the ground of the contract of the 20th September. Mr. Rawle, in his deposition says, that the application was made on the ground of their general authority as assignees. It is further stated by Mr. Moyland, that on his propounding to the defendants certain interrogatories, embracing the affair of the agreement of the 20th September, they declined answering, saying that they might thereby injure the estate of the bankrupt. Some letters from Peter Blight to the defendants, written in 1802, were read, in which he speaks of that agreement; and says, that by that agreement, the defendants had procured the payment of the debts therein mentioned, to which no answer as to that point was given. It was proved, that on the 30th September, Haylander offered to return possession of the Equator and cargo to the defendants, and to do and perform all that he was by that agreement to do, but that Ashley and Fisher refused to go on with it. The declaration was founded on this agreement, which throughout is stated to have been made at Trenton, in the district of New Jersey, and in every count it is stated that Haylander agreed to transfer, assign and deliver over one half of the Equator and cargo to the defendants. The objections made to the recovery were: that no money was really

lent by George Blight, but that it was a mere cover. That nothing was finally agreed upon, on the 20th September, but mere heads, which before they could be binding, were to be put into form, and to be approved of. That there was no valid consideration for the agreement. That, if it was made as contended for, still it was altered by a subsequent agreement. That, even upon the construction of the agreement declared upon, Haylander was to retain the Equator and cargo, and to sell and pay over the proceeds thereof to the defendants; which not having done, the defendants are liable for nothing, being only obliged to pay out of proceeds and receipts. That it was not in Haylander's power to perform his part of the agreement, because, as to the Equator, she was in the custody of the law, and was finally ordered to be sold, so that he could not deliver possession of her; and as to the other funds, they stood in the sole names of Murgatroyd and Sons, who had a right to retain them, unless it had appeared that they were not creditors of Peter Blight, which they contended they were. That Bayard was not bound by the agreement, not having been present when it was made, and no evidence that he had given the other assignees power to bind him, or that he had afterwards ratified these acts: and finally, that the contract not being signed was void, by the statute of frauds and perjuries of this state, where (though contrary to the fact) the declaration states the agreement to have been made.

All these points were controverted by the plaintiff's counsel; and on the last point, they insisted that there was a direct agreement to pay these debts, upon a new consideration passing to them, and not a collateral agreement to pay the debt of another. They read 3 Burrows, 1886, 2 Burrows, 1077.

The following points of evidence were decided in the course of the cause.

In their opening the defendants' counsel offered to give evidence of what one of the defendants had said at one day, as explanatory of what he had said at another day, of which the plaintiff had given evidence.

WASHINGTON, Circuit Justice. This is improper. The whole of an entire conversation may be given in evidence to explain the meaning of the parties; the testimony cannot be garbled. But what a party has said at one time, which makes against him, cannot be explained by declarations made at another time, which, possibly, were made to get rid of the effect of former declarations.

The plaintiff read many letters from Peter Blight to the defendants, giving them information respecting his affairs, and in relation to the contract of the 20th September, 1801. The defendant offered other letters from the same to the same, with a view to shew, that the contract of the 20th September was afterwards altered, or in some manner to affect that contract. This was objected to on two grounds: First, that no letters from Peter Blight could be given in evidence, to bind the plaintiff, but on the ground of his being the agent of George Blight; but that to admit the evidence, it should appear that Peter Blight had a power to act for George Blight after the 20th September, 1801. Secondly, that upon no principle can the letters of an agent be read, if he be alive. 2 Ves. Sr. 193; 1 Esp. 375; 7 Term R. 663, 665, 668. For the defendants it was insisted, that the evidence was proper; because, if the motives which led a man to deal with an agent, and which their correspondence would prove, could only be proved by the agent himself, it would render very insecure, the situation of those who should deal with agents. A case from 3 Term R. 454, was read, to prove that the receipt of an agent is good evidence.

Second, as the plaintiff read some of the correspondence, the defendant has a right to read the whole.

Third, notice was given to the defendant to produce these letters, and this makes their evidence. 1 N. Y. Term R. 276.

BY THE COURT. There are certainly some cases, where the declarations or letters of an agent, are proper evidence; and others, where he must be examined, and his letters are not evidence, if he be alive. The distinction rests upon the principle, that the best evidence must be produced. If the object is to prove a fact, the agent is the proper person to prove it; and his evidence is better than his declarations. If his letter contains an acknowledgment of a fact, it is not as good evidence of the fact, as proof given by himself. But if the object is to prove, what were the motives or inducements for a man to contract with the agent, what were the statements made by him, his letters or conversation are proper evidence; not of the facts stated in them, but that such inducements and statements were made. They are the best evidence, because they speak for themselves, and the only point is what did they state? Upon this principle, many letters from Peter Blight to the defendants were read, not as evidence of a single fact mentioned in them, but that they communicated certain information to the defendants, which, however, if important to be established, it would have been incumbent on the plaintiff to establish by other evidence. In this case however, there is no evidence, that Peter Blight was the agent of George Blight after the 20th September, 1801, after which period the letters offered in evidence were written, and they offered to be read to prove facts. There is in truth no evidence, that Peter Blight was an agent for George Blight, except that he appeared at the meeting of the 20th September, as such, and George Blight afterwards ratified what he did. As to the notice to produce these letters, there is certainly no principle of law, on which that circumstance would make them evidence. If the party giving the notice,

choose afterwards to waive the reading of them in evidence, he is at liberty to do so.

WASHINGTON, Circuit Justice (MORRIS, District Judge, absent), delivered the following charge to the jury.

In order to gain a full view of the merits of this case, I shall for a moment consider it as stripped of all the objections, which, in a degree, partake of form; as if the contract stated, and the contract proved, were precisely the same; as if Bayard had been present, and was bound by the articles of Ashley and Fisher; and as if the statute of frauds was out of the question. We must then enquire whether the contract was finally made on the 20th of September? Was it a valid contract? Did any thing afterwards occur on the part of Haylander or the plaintiff's testator, or otherwise, to alter or avoid it? What is the real import of that contract? Has it been performed by the defendants; and if not, what principles ought to govern, in fixing the damages to which the plaintiff is entitled?

No doubt can exist, that the contract was finally concluded on the 20th September, after a full and satisfactory disclosure by Peter Blight to his assignees, as Ashley and Fisher acknowledge, of all which it was necessary for them to know in relation to the contract. It was fairly made, it being proved that the memorandum, after it was written, was read over two or three times to the parties, and approved of by all. The intention of the parties, to turn this parol agreement into a written one, did not weaken the obligation of the parol agreement; and it was not competent to Ashley and Fisher, to escape from such obligations, by afterwards refusing to execute the written agreement when it was prepared, and to proceed further with it. As to the consideration, it was not only sufficient in law, but it was a substantial one. Haylander was to deliver possession of the Equator and her cargo to the assignees of Peter Blight, which certainly was beneficial to them as assignees, and the right of offset, desired by Haylander, to which he seems to have been entitled, was in a pecuniary point of view valuable and important. The pretence, that the contract was afterwards altered, so as to leave the possession of the property with Haylander, stands upon assertion only, no proof of the fact having been given. The conduct of Haylander, in superintending and directing the sale of the Equator by the marshal, and the terms of the sale, furnish no evidence of the fact. The previous refusal of the defendants to go on with the contract or to be bound by it, is sufficient to account for the conduct of Haylander in this respect. What then is the true construction of the agreement of 20th September? That Haylander should deliver possession of one half of the Equator and cargo to the defendants; that the debt due from Haylander should be paid, out of the proceeds of the cargo in the first instance, and the balance be divided by the assignees, among the four specified creditors pro rata. If they should be insufficient to pay them fully, then, the balance unpaid was to be made up out of such sums as the defendants should raise out of the funds in Africa. There is no ground for the argument that Haylander was to retain possession of the property, and merely to pay over the proceeds to the defendants, in consequence of the stipulation that Haylander was to pay the 10,800 dollars: because the words are, that he is to deliver to the defendants possession of half the Equator and cargo; and therefore the plain meaning of the parties must have been, that the defendants were to retain that sum, which would have been, substantially, a payment by Haylander. What then has happened to avoid this agreement? It is said that Haylander did not and would not perform his part of it. The answer is complete; he offered to do it, and was prevented by the previous and persevering refusal of the defendants to be bound by the contract. If a man be bound to do a thing, he must either do it, or offer to do it; if no objections are made, he must show that he made the tender in a regular manner; but this is not necessary, if the other party, by his conduct, dispenses with a regular tender, by a previous refusal to accept it. It is said that he could not have performed it, when he made the offer; but who can say this? There was no physical or legal impossibility. Even admitting it was incumbent on Haylander to deliver possession of the Equator, freed from the restraints of the arrest, under process from the district court; still by paying off the seamen's wages, he might have released the vessel from that restraint, and have gained the possession of her. As to the other property, who can say, that he could not, and would not, have obtained all the necessary documents to establish the legal right of the defendants to half of that property? He offered to do it, and after the refusal of the defendants to accept the tender, it does not lie with them to say, that he would not have done what he offered to do.

What damages then ought you to find? It is to be recollected that the defendants were to pay so much money, not absolutely, but out of the proceeds of this property. It is true that nothing was received, but still, if their failure to receive funds, proceeded from their own fault, it is the same thing as if they had received them. How then does this point stand? As to the Equator and her cargo, they would certainly be liable for the amount received by Haylander, from the sales of the vessel, which would have gone into their hands, had they complied with and executed the contract. This is between eight and nine thousand dollars. About 5,000 dollars is also claimed on account of gold dust, part of the cargo of the Equator. But

it appears, that this was taken out of the vessel by Haylander, before she arrived at Philadelphia, and before the 20th September, 1801. The only ground on which this claim can be supported is, that, as it was part of the cargo which had gone into the hands of Haylander, he was bound by his agreement, to account for it to the defendants in the same manner as for any part of the cargo. As to the ivory and wood, it would be a proper subject of enquiry for the jury, what was the value of them, and whether the same came into the hands of Haylander. From the amount of the cargo, is to be deducted the 10,800 dollars paid by Haylander to the defendants, and which by the agreement he was bound to pay.

As to the funds on the coast of Africa, the defendants stood in the situation of agents, who were bound to use due and reasonable diligence to possess themselves of those funds. We find that Savage and Dugan, who were personally interested in half of that property, sent a vessel to the coast of Africa as early as January 1802, yet they could collect nothing. It would seem to be pressing too hard upon an agent, to say the defendants were guilty of negligence in not sending earlier, or that if they had done so, they would have been more successful than Savage and Dugan: of this the jury will judge. As to the Manchester, you have heard from Mr. Ingraham, who claimed the whole of her under the Murgatroyds, that nothing could be got.

But an objection is made, going to the root of this action; that nothing was ever, in fact, lent by George Blight to Peter Blight, and that the whole was a cover. It is true that the note given by Haylander has not been produced, nor has any evidence been given of it; nor has any evidence been given, that if the money was lent, a lien on this property was given, when such loan was made. But I think, after the agreement of the defendants to pay the debt as a valid and subsisting one, it is going too far to permit them to deny the fact, without supporting that denial, by strong and satisfactory evidence. Nothing of this kind has been offered.

Thus then the case would stand upon its merits; but a legal objection has been made to the plaintiff's right to recover, which remains to be considered. It is admitted that Mr. Bayard was not present on the 20th September, when the agreement was made, nor for some time afterwards. There is no proof that he ever authorised Ashley and Fisher to bind him or the estate, without his concurrence; and I think the principle of law is clear, that without such authority, previously given, or afterwards acknowledged or recognised, they could not bind him individually, or in his representative character. It is true that a co-partner may bind his associates, in relation to the partnership concerns, because each partner is interested in his share of the partnership effects and concerns, and also in the whole. But this principle does not apply to persons acting under a delegated authority, and more especially when the act is not within the scope of their authority. It is the duty of the assignees to make a legal distribution, among all the creditors. Here was an agreement to give a preference to certain creditors. If it was a case, where the law would have given the preference, it was nugatory. If the law does not sanction it, then the assignees could not give it, so as to affect the estate, without the assent of the commissioners, and a certain proportion of the creditors. Without this authority, they can neither arbitrate, nor compromise. The agreement could not therefore be binding on the defendants or either of them, in their representative characters; and certainly if they are individually bound, Ashley and Fisher could not make an agreement to bind Bayard. Should judgment be given for the plaintiff, it must be against the defendants in their individual capacities. Unless then, Ashley and Fisher were authorised by Bayard to bind him, or unless he afterwards ratified what they had done, he is not answerable to the plaintiff; and as the action is joint, the plaintiff cannot recover at all, unless she can support her action against all. But it is insisted that Bayard has subsequently ratified the agreement of the 20th September, and certain acts of his, are relied upon to prove it. Let this be considered.

The first circumstance relied on is, the claim of the defendants, (as stated by Mr. Moyland) to the balance of the proceeds of the Equator, under the contract of the 20th September. From his testimony, it would appear, as if the application was made by all the defendants; but no evidence is given that Bayard was present, and no reliance is to be placed on the expression used by the witness, because in the same deposition he uses the same language, though he admits that at the time Mr. Bayard was not present. He says, that the application to the court was made under the contract of the 20th September. This is expressly contradicted by Mr. Rawle, who made the application; who states that he made it, in virtue of the defendants' general rights, as assignees of Peter Blight. It is more likely that the person who made the motion, should know what he meant, and what he said, than any other person. Besides, is it probable, that after a positive refusal, on the 30th September, to be bound by the agreement, Ashley and Fisher, and particularly Bayard, should indirectly mean to do any thing in affirmance of that agreement?

The second circumstance is, the refusal of the defendants to answer interrogatories touching that agreement. It is impossible to say what they refused; but it is very likely that they may have entertained the incorrect opinion, which has been attempted to be supported by the plaintiff's counsel, that the agreement of Ashley and Fisher

was binding on Bayard and on the estate.

Under this idea they might well refuse to answer the interrogatories, without thereby implying that Bayard had ratified or intended to ratify the acts of his associates. Here too the observation made before applies; they could not mean, impliedly, to affirm, what two of the parties had, expressly, disaffirmed.

The third circumstance is, the payment of the 10,800 dollars by Mr. Moyland, in behalf of Haylander, to the defendants, which he says he understood to be in affirmance of the contract. If the witness had stated that it had been so declared, the evidence would have been very material; not being so declared, it amounted to nothing, although at the time he, secretly, so intended it. The payment and receipt of this money, if made without any such declaration, was entirely equivocal. The defendants, on the 20th September, claimed a right to this money, and denied the right of offset asserted by Haylander. Having declared, positively, that they would not complete or be bound by that contract, the presumption is, that they did not receive the payment under the contract. At the same time, they might have received it under the contract, but then it would be necessary, in order to justify this presumption, to prove, either that they had withdrawn their objections to go on with the agreement, or that the payment was distinctly made under the agreement. The different letters which have been relied on, from the defendants to Peter Blight, and his to them, in which he speaks of this agreement, might be material, if a peremptory refusal to be bound by the agreement had not been previously made and no evidence of a change of sentiment proved. But after this refusal, there is no room left for presumption.

Upon the whole, as there is some contrariety in the testimony, and much must depend upon a proper weighing of the evidence as to this fact, you will decide whether any thing was done by Bayard to affirm or ratify the agreement of the 20th September. If nothing was done, your verdict must be for the defendants; if otherwise, for the plaintiff.

Verdict for defendants.

NOTE [from original report]. In this case the court adopted the practice of the circuit court of Pennsylvania, as to the manner of conducting the cause; by requiring a strict opening on the part of the plaintiff and defendant,—a summing up by one of the plaintiff's counsel—then by all the defendants' counsel, and then closing by the remaining counsel for the plaintiff.

[For subsequent proceedings to punish the plaintiff for contempt, see Blight v. Fisher, Case No. 1,542.]

BLIGHT (EWING v.). See Cases Nos. 4,589 and 4,590.

Case No. 1,542.

BLIGHT v. FISHER et al.

[Pet. C. C. 41.][1]

Circuit Court, D. New Jersey. Oct. Term, 1809.

CONTEMPT — SERVICE OF SUMMONS ON PARTY IN ATTENDANCE ON COURT — SERVICE IN ACTUAL OR CONSTRUCTIVE PRESENCE OF COURT.

1. It is not a contempt of court, to serve a person while attending at the court as a party in a cause, or as a witness, with a summons. This privilege extends to exemption from arrest, and no further.

[Cited in Atchison v. Morris, 11 Fed. 583; Larned v. Griffin, 12 Fed. 592.]

[See, contra, Parker v. Hotchkiss, Case No. 10,739.]

2. It is a contempt of court to serve process, either of summons or capias, in the actual or constructive presence of the court.

[Cited in Bridges v. Sheldon, 7 Fed. 44.]

This was a motion made on the part of the defendants [by Ashley, Fisher, and Bayard, assignees of Peter Blight, a bankrupt] to dismiss this suit and for an attachment against the plaintiff [Deborah Blight, executrix of George Blight, deceased] for a contempt, in having had a summons served upon them in April, 1808, whilst they were attending at the court, in a suit in which they were plaintiffs against the present plaintiff. It appeared by the affidavits, that, immediately after the verdict was rendered in the case of the present plaintiff against the defendants, in April, 1808 (see 1 Pet. C. C. 15 [Blight v. Ashley, Case No. 1,541]), the defendants went with the jury, as is customary, to the tavern, at some distance from where the court was sitting, and, whilst they were there, the summons to answer in this case was served. At that time a suit, in which the defendants were plaintiffs against the present plaintiff, was for trial. [Motion overruled.]

In favour of the motion, Messrs. Griffiths and Rawle contended, that the service of the writ was a contempt of the court; but, if it was not, it was a breach of the privilege, to which the defendants as suitors were entitled. 3 Inst. 140; 6 Com. Dig. 90; 2 Strange, 1094; 2 Lil. Abr. 455; Lofft, 435; [Bolton v. Martin] 1 Dall. [1 U. S.] 296; [Gyer v. Irwin] 4 Dall. [4 U. S.] 107; 2 Strange, 985; Miles v. M'Cullough, 1 Bin. 77.

Mr. Stockton, for the plaintiff, replied, that the privilege of a suitor or witness extends only to an exemption from arrest; and that to serve a summons, is no contempt of the court, unless done in its presence. He read the report of Cole v. Hawkins, Andrews, 275; also, 5 Bac. Abr. 619; 3 Bl. Comm. 288; 5 Bac. Abr. 616.

WASHINGTON, Circuit Justice (MORRIS, District Judge, absent). Mr. Stockton has taken the true distinction. The service of process, whether a capias or summons, in the actual or con-

[1] [Reported by Richard Peters, Jr., Esq.]

structive presence of the court, is a contempt, for which the officer may be punished. But the privilege of a suitor or witness extends only to an exemption from arrest. The privilege claimed being in derogation of the right of the other party to sue, the defendant's counsel were fairly called upon to produce some case to support his claim to the privilege. 3 Inst., 6 Com. Dig., and 2 Strange, are obviously cases of contempt, from the circumstance of the process having been served in presence of the court. The doubt as to this fact in Cole v. Hawkins, Andrews, 275, is perfectly cleared up by referring to Andrews, where the case is more fully and correctly reported. It appears, that the motion was not to discharge the party from the service, but for an attachment; and the court go expressly on the ground, that the writ was served on the steps leading to the court, which was constructively in the presence of the court. What Chief Justice Lee says in that case, in respect to the extent of the privilege, is clearly in answer to what had dropped from the counsel. If it be a case of privilege merely, it extends to the party manendo as well as eundo et redeundo. But, upon the main point, the opinion of the court is confined to the question of contempt. 2 Lil. Abr. is the case of an arrest. The case of Miles v. M'Cullough, 1 Bin. 77, which alone induced the court to suspend the decision until this morning, has been examined, and it is as clearly the case of service in the presence of the court. The expressions of the reporter are "the defendant, while attending in this court, upon an appeal, &c. was served, &c." The argument at the bar is not reported, but I can understand the case in but one way—that the party, at the time of the service, was in the presence of the court. The cases from Dallas' Reports relate to the claim of privilege by a member of the convention, and by a member of assembly. It is not for me to approve or to condemn those decisions. It is sufficient that the state courts of Pennsylvania have attributed to persons standing in public situations, such as those persons held, a degree of sanctity sufficient to protect them against the service even of a summons; and perhaps it was right to afford it upon considerations connected with the public good. But the defendants were not attending as members of the legislature, and would not, I apprehend, have been entitled, even in Pennsylvania, to as extended a privilege. In one of those cases the right to a continuance of his cause, was considered as a part of his privilege; which, I apprehend, cannot be claimed by a suitor as such, though it may be granted him as an indulgence, in the discretion of the court. On the other hand, the writers, who speak upon this subject, confine the privilege of suitor and witnesses to exemption from arrest, and not a dictum to the contrary is to be found.

Motion overruled.

BLIGHT (PALMER v.). See Case No. 10,684.

BLIGHT (WICKHAM v.). See Case No. 17,611.

BLIGHT (WILLINGS v.). See Case No. 17,765.

BLIGHT'S ASSIGNEES (HUMPHREYS v.). See Case No. 6,870.

BLISS, The A. M. See Case No. 274.

Case No. 1,543.

In re BLISS.

[1 Ben. 407;[1] 1 N. B. R. 78; Bankr. Reg. Supp. 17; 6 Int. Rev. Rec. 116.]

District Court, S. D. New York. Sept. 19, 1867.

BANKRUPTCY—APPROVAL OF APPOINTMENT OF ASSIGNEE—DUTY OF REGISTER.

1. A register should state to the judge any reasons which he may know to exist, why an assignee elected or appointed should not be approved.

[See In re Clairmont, Case No. 2,781.]

[2. The court should decline to approve an assignee selected by the influence of, or in the interest of, the bankrupt.]

[Cited in Re Wetmore, Case No. 17,466.]

In bankruptcy. In this case, the register certified to the court the question whether, if he was satisfied that the bankrupt [Augustus A. Bliss] had, through his friends, chosen an assignee in his own interest, he should certify his opinion and the grounds of it to the court.

[Decision certified to the register in the affirmative.]

BLATCHFORD, District Judge. [2][At the first creditors' meeting the solicitor for the bankrupt appeared before him, and after waiting a while for the creditors to come in, applied to the register to adjourn the meeting, alleging that one or two creditors had promised to come in and prove their debts, and choose an assignee, and that they had probably forgotten it; but that in case an adjournment was had, he would on the adjourned day have them or one of them present to choose an assignee. He urged that the petitioner had an interest in having a good assignee and that he might properly procure one to be elected, rather than permit him to be appointed by the register. The register entertained no doubt that the granting of an adjournment was a matter resting in the sound discretion of the register, with which this court will not interfere unless it be abusively exercised, nor had he any doubt that the bankrupt had no locus standi from which he could make such a motion, as he is not interested for the creditors and cannot assume or be allowed to act for them without authority. The motion to adjourn was therefore denied. Soon after the bankrupt came in, and with him the two creditors who were

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

[2] [From 1 N. B. R. 78.]

expected, and they proceeded to prove their claim and elect an assignee.

[In this case it is clear that it was, in effect, the bankrupt who elected the assignee. It is certainly against the policy of the act that a bankrupt should select his assignee, as by electing a fraudulent person or a person disposed to favor him, the rights of the creditors might suffer. It is true that if the creditors do not care sufficiently for the matter to attend to the meeting, they ought not to complain. But still the law is no less brought into contempt. A fraudulent discharge of a debtor, or the discharge of a debtor who does not surrender all his assets, is precisely what those charged with the execution of the law are bound to guard against. If the court could be advised that in any particular case the bankrupt had brought in one or more of his friends, although bona fide creditors, and had by them chosen an assignee, who was also his friend and in his interest, it is clear that the court would withhold its approval. The question upon which the register asks instruction is this: When the register is satisfied that this is the case, shall he certify such his opinion and the grounds of it to the court? and that unless there be a standing rule, requiring him to do so, he would probably feel that his certificate might be deemed supererogative if not impertinent.

[When the register is satisfied that any reasons exist why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons fully in submitting to the judge the questions of approval [and this decision will be regarded as a standing rule to that effect. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.].[3]

Case No. 1,544.

BLISS v. BROOKLYN.

[8 Blatchf. 533; 4 Fish. Pat. Cas. 596.][1]

Circuit Court, E. D. New York. July 12, 1871.

PATENTS — MUNICIPAL CORPORATION — LIABILITY FOR USE OF PATENTED IMPROVEMENT — REISSUE — INJUNCTION — ENJOINING USE OF HOSE COUPLINGS BY CITY.

1. The act of the legislature of New York, passed March 27, 1862 (Laws 1862, c. 63), has no effect to relieve the corporation of the city of Brooklyn from liability to pay the patentee of a patent for an improvement in hose-couplings used by it without his license.

[Cited in Allen v. Brooklyn, Case No. 218; Bliss v. Brooklyn, Id. 1,546; May v. Board Com'rs Logan Co., 30 Fed. 260; Asbestine Tiling & Manuf'g Co. v. Hepp, 39 Fed. 327.]

2. The fact that the patent is a reissued one, and that the hose-couplings were bought by the city before the reissue was granted, does not confer the right to use them.

[Cited in Brown v. Deere, 6 Fed. 490.]

[See Ballard v. Pittsburgh, 12 Fed. 783.]

3. On final hearing, an accounting was decreed, but, as the hose-couplings were necessary for the daily use of the city in the prevention of fires, an injunction was withheld.

[Cited in Hoe v. Boston Daily Advertiser Corp., 14 Fed. 916; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804; Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896; Campbell Printing Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 935.]

[In equity. This was a bill in equity, brought [by William H. Bliss] to restrain the defendant from infringing letters patent for an "improvement in hose-couplings," granted to Robert Lawson and William H. Bliss, February 22, 1859, and reissued to plaintiff December 21, 1869, and referred to more particularly in the report of the case of Bliss v. Haight [Case No. 1,548]. It was insisted, on behalf of the defendant, that the city of Brooklyn was not liable for the acts of her officers, by virtue of the provisions of section 39 of the act of the legislature of New York, passed March 27, 1862. The section, in full, was as follows: "The city of Brooklyn shall not be liable in damages for any nonfeasance or misfeasance of the common council, or any officer of the city or appointee of the common council, of any duty imposed upon them, or any or either of them, by the provisions of titles four and five of this act, or of any other duty enjoined upon them, or any or either of them, as officers of government; by any other provision of this act; but the remedy of the party or parties aggrieved for any such nonfeasance or misfeasance shall be by mandamus, or other proceeding or action, to compel the performance of the duty, or by other action against the members of the common council, officer, or appointee, as the rights of such party or parties may by law admit, if at all."][2]

Wm. C. Witter & Geo. Gifford, for complainant.

Wm. C. DeWitt, for defendant.

BENEDICT, District Judge. This is a suit in equity brought to compel the city of Brooklyn to account for the use of a patent hose-coupling and for an injunction. The complainant's rights are based upon a reissued patent for an improvement in hose-coupling, dated December 1st, 1869. The use of the coupling by the city is undisputed, and the utility of the invention is thus proved. Neither the novelty of the invention nor the complainant's right to the patent are placed in issue, but the defence is mainly rested upon the act of the legislature of this state, passed March 27, 1862 (Laws 1862, c. 63). My opinion is, that the act in question is without effect to relieve the corporation of the city of Brooklyn from liability to pay

[2] [From 1 N. B. R. 78.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus is from 8 Blatchf. 533, and the statement is from 4 Fish. Pat. Cas. 596.]

[2] [From 4 Fish. Pat. Cas. 596.]

the complainant for the use of his patent. On the contrary, I hold the city liable, notwithstanding that act, for such use, from the date of the reissue to the filing of the bill. The use of the coupling in question does not come within the description of the acts for which, when committed by its officers, the city is relieved from liability by the act of 1862.

The point taken, that the city bought the coupling before the reissue of the patent, and when the only patent in existence was invalid, is not new, and cannot be maintained. Carr v. Rice [Case No. 2,440].

There must, accordingly, be a decree for the complainant, with an order for an accounting before a master. I do not grant an injunction at the present time, because of the fact that the couplings in question are necessary for the daily use of the city in the prevention of fires. The complainant's rights can, doubtless, be fully protected without a resort to an injunction.

[NOTE. For other cases involving this patent, see note to Bliss v. Haight, Case No. 1,548.]

Case No. 1,545.

BLISS v. BROOKLYN.

[10 Blatchf. 217.] [1]

Circuit Court, E. D. New York. Nov. 5, 1872.

COSTS—SECURITY FOR—DILATORY MOTION.

When a suit in equity has been once heard, on issue joined, and is opened for a further hearing, on an amended answer only as a matter of favor, it is too late to move for security for costs on the ground of the non-residence of the plaintiff, that having appeared on the face of the original bill.

[Cited in Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896.]

[In equity. Suit by William H. Bliss against the city of Brooklyn to enjoin infringement of letters patent granted to plaintiff February 25, 1862, and reissued, and for an accounting. There was a decree for plaintiff for an accounting (Bliss v. Brooklyn, Case No. 1,544), and defendant moves to compel plaintiff to file security for costs. Motion denied.]

William C. Witter, for plaintiff.

Benjamin E. Valentine, for defendant.

BENEDICT, District Judge. It is too late to move for security for costs in this case, which has been once heard, on issue joined, and which is now open for a further hearing, upon an amended answer, only as a matter of favor, and when the non-residence of plaintiff appeared on the face of the original bill. The motion for security is, therefore, denied.

[NOTE. For other cases involving the patent in this suit, see note to Bliss v. Haight, Case No. 1,548.]

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

Case No. 1,546.

BLISS v. BROOKLYN.

[10 Blatchf. 521; 6 Fish. Pat. Cas. 289; 3 O. G. 269.] [1]

Circuit Court, E. D. New York. March 13, 1873.

PATENTS—IMPROVEMENT IN HOSE COUPLINGS—VALIDITY—COMBINATION.

1. The reissued letters patent, granted to William H. Bliss, December 21st, 1869, for an "improvement in hose couplings," the original patent having been granted to William H. Bliss and Robert B. Lawton, February 22d, 1859, are void, because the invention claimed therein is worthless.

[See, contra, Bliss v. Gaylord, Case No. 1,547.]

2. It is of no utility without the addition of a lug, in combination.

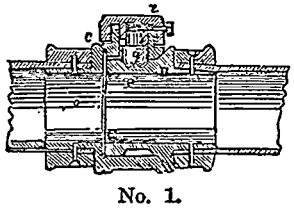
3. The addition of the lug is not merely an improvement.

[In equity.] Final hearing on pleadings and proofs.

Suit [by William H. Bliss against the city of Brooklyn] brought on reissued letters patent for "improvement in hose-couplings" [No. 3,768], granted William H. Bliss, December 21, 1869, as a reissue of the patent originally granted to Robert B. Lawton and William H. Bliss, February 22, 1859 [No. 23,033]. The decision of a question raised in the early part of the same case, will be found reported in 4 Fisher, 596 [Bliss v. Brooklyn, Case No. 1,544].

Figs. 1 and 2 represent respectively the device patented by the complainant, and the device substantially as used by the defendant.

In Fig. 1, C is the outer thimble, and D the inner one. They are held together by the pin g, held in the head i, and operating through the outer thimble against the inclined groove, about the inner thimble.



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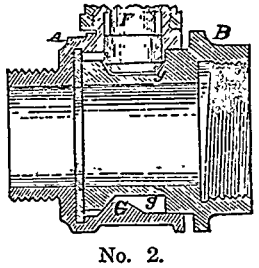

No. 2.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus and opinion are from 10 Blatchf. 521, and the statement is from 6 Fish. Pat. Cas. 289.]

The defendant used, in addition to the above-described combination, the lug G (see Fig. 2), on the inside of the outer thimble, and beveled to correspond with the inclined side of the groove of the inner thimble, so that when pressure is applied to the inner thimble by means of the pin F, a close joint will be formed.

The drawings will be readily understood from the full description of the devices found in the opinion of the court.] [2]

[Judgment for defendant.]

George Gifford, for plaintiff.

Benjamin E. Valentine, for defendant.

BENEDICT, District Judge. This action, which has been before me on a former occasion (8 Blatchf. 533 [Bliss v. City of Brooklyn, Case No. 1,544]), upon other pleadings and proofs, having been reopened, now comes up for determination upon new pleadings and different proofs. It is an action to recover damages from the city of Brooklyn for using certain hose couplings, which are claimed to be an infringement upon a certain patent for hose couplings, originally issued to Robert B. Lawton and William H. Bliss, on the 22d of February, 1859, and reissued to the plaintiff, December 21st, 1869.

The object of the invention is stated in the original patent as follows: "The object of this invention is, to connect hose together in such a manner that a swivel joint will be attained, and, at the same time, certain provision made for compensating for the wear attending such connection, so that the coupling may always be kept water-tight by the mere act of adjusting or connecting the parts together." The claim of the original patent is as follows: "The two thimbles, C, D, attached to the ends of the hose, A, B, the thimble C being provided with the shoulder b, and ground seat or packing c, and the thimble D provided with the groove e, with inclined sides, and fitted within thimble C, the above parts being used in connection with the conical roller or rollers g, fitted in the screw caps i, and the whole arranged to operate as and for the purpose set forth."

In the reissue, upon which this suit is based, the object of the invention is stated as follows: "The object of this invention is, to connect hose together in such a manner as to secure a tight joint, and admit of their being connected and disconnected with greater facility than was previously done." The claim in this reissue, which is the subject of this controversy, is as follows: "The combination of the two thimbles, C and D, by means of a pin, operating longitudinally, through the outer thimble C, and against the inclined side of the groove in the thimble D, so that the two thimbles will be forced together by the inward movement of the pin, and be liberated by its outward movement, substantially as described."

[2] [From 6 Fish. Pat. Cas. 289.]

It will be observed, that the idea which is put forth in the original patent, as the new idea embodied, as there described, namely, the formation of a hose joint, which, by means of a revolving pin, could swivel, and, at same time, remain tight, is omitted from the reissued patent. In the reissue, the only object of the invention, as there stated, is the formation of a tight hose joint, by means of the combination of certain old and well-known devices, in the manner described.

In opposition to the patent, as thus reissued, several grounds of defence have been here taken. One of them is, that the invention which the reissued patent describes is worthless, and the patent, for this reason, invalid; and this defence appears to me to be supported by the proofs. The law upon the subject of utility is not in doubt. No particular amount of utility is required to render an invention patentable, but there must be some. When the invention is shown to be worthless, the patent must fail. Such appears to be the case in the present instance. The evidence fails to disclose any instance where the combination described in the reissued patent of 1869 has been successfully used. The plaintiff himself testifies, that he does not know of any such coupling having been found to be of practical use. Although he sells couplings, he never sold any such, and only recollects three instances where their use has been attempted. His testimony satisfies me that the combination described in the patent here relied on proved inoperative and worthless.

It is true, that couplings containing all the elements, in combination, which are described in the plaintiff's reissue of 1869, are in use, and such are those used by the defendant; but, in these couplings, another essential element is present in the combination, which additional element is not to be found in the plaintiff's reissue of 1869. This additional feature is a lug, which is placed upon the inside of the outer thimble, opposite to the pin, in such a manner, that, when the pin is forced inward upon the inner thimble, the inclined side of the groove of that thimble is pressed upon the lug, and that part of the inner thimble is thus forced up to the shoulder of the outer thimble, at the same time that the pin itself, by pressing the inclined groove, where it is touched by the pin, forces that side of the inner thimble up to the shoulder of the outer thimble, thus making a tight joint, which cannot tilt, although the inner thimble be smaller than the inside of the outer thimble, and which can swivel or turn, and be tight. The introduction of this element makes the combination a different combination from that described in the plaintiff's patent of 1869. This combination, into which the lug enters as an element, is the subject of another patent, obtained by the plaintiff on the 25th of February, 1862, which he has not proved here, and in which he states that

the lug is "very essential." This latter patent of 1862 has been put in evidence by the defence, and if affords strong support to the position, that the combination described in the reissue of 1869 proved worthless.

But, it is said, that the introduction of the lug is simply an improvement. I cannot so consider it. The two combinations are distinct, because they have different elements and attain a different result. In the one combination, no lug appears, and no practical result is attained. The introduction of the lug, for the first time, produced a combination which accomplished any useful result. An added element, which increases the efficiency of a combination, of itself effective, is of the nature of an improvement; but, when the added element is essential to the production of any useful result, such an addition is not an improvement, but its use gives birth to the only patentable, because the first useful, combination. Notwithstanding, then, the conceded fact, that the combination which includes the lug with other elements which are described in the reissue of 1869, is useful, it is, nevertheless, necessary, in order to sustain the reissue, that it should appear that the device there described, which does not contain the lug, is of some utility. As before stated, the contrary here appears, and, for this reason, the patent must be declared invalid.

[NOTE. For other cases involving this patent, see note to Bliss v. Haight, Case No. 1,548.]

Case No. 1,547.

BLISS v. GAYLORD PATENT COUPLING & MANUF'G CO. et al.

[7 Blatchf. 279.][1]

Circuit Court, S. D. New York. June 7, 1870.

PATENTS—IMPROVEMENT IN HOSE COUPLINGS—VALIDITY—INFRINGEMENT.

1. The reissued letters patent granted to William H. Bliss, December 21st, 1869, for an "improvement in hose-couplings," on the surrender of the original patent granted to William H. Bliss and Robert B. Lawton, as inventors, February 22d, 1859, are valid.

[See, contra, Bliss v. City of Brooklyn, Case No. 1,546.]

2. The first claim of such reissued patent claims the arrangement of two thimbles, the inner one grooved circumferentially, and with an incline on the side of the groove, against which a pin passing through the outer thimble is forced, so that the inward movement of the pin crowds the end of the inner thimble against the seat on the shoulder in the outer thimble.

3. The second claim claims the construction with an incline, of the side of the groove in the inner thimble.

4. Those claims are infringed by a hose-coupling which has every feature described in the specification of such reissued patent except the feature of the rotation of the pin when not disconnected from the thimble.

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

[In equity. Suit by William H. Bliss against the Gaylord Patent Coupling & Manufacturing Company and others to restrain the infringement of letters patent No. 23,033, granted to complainant and Robert B. Lawton, February 22, 1859, and reissued to complainant December 21, 1869, for an improvement in hose couplings. Motion for provisional injunction granted.]

George Gifford, for plaintiff.
Peter Van Antwerp, for defendants.

BLATCHFORD, District Judge. The original patent in this case was issued to the plaintiff and Robert B. Lawton, as inventors, February 22d, 1859, for an "improvement in hose couplings." It came before me—Bliss v. Haight [Case No. 1,548]—on the final hearing of a suit in equity brought on it by the plaintiff against the defendant Haight and others. In the construction I then gave to the patent, there had been no infringement of it by the defendants in that suit. In my decision then given, I said: "It may be that the patentees have a patentable invention in the action between the conical face of a pin and the bevelled side of a groove in two thimbles, in a hose-coupling, to make a water-tight joint between the end of one thimble and a seat in the other, irrespective of any capacity in the pin to rotate, after the thimbles are set, to allow a swivelling action; but, if they have, they have failed to secure it by their claim, as at present worded. The defendants have been called upon to meet and defend against the claim as it is; and the most liberal interpretation will not warrant the court in striking out from the claim the feature of rotation, which makes the pin a roller, and which the claim states is a part of the whole, and must operate to effect the purpose which the body of the specification sets forth as the purpose to be effected by such rotation. The defendants' coupling has no substitute or equivalent for such feature of rotation in the pin, and it does not infringe the patent." Since that decision was rendered the patent has been reissued to the plaintiff, the reissue bearing date December 21st, 1869. There can be no doubt that the case was a proper one for a reissue, and that the reissue is valid. The reissued specification says: "The object of this invention is to connect hose together in such a manner as to secure a tight joint, and admit of their being connected and disconnected with greater facility than was previously done. The nature of the invention consists in having a part of one of the thimbles which are to connect the end of the hose, fitted into the other, with a circumferential groove around the inner one, having an inclined side nearest the tight joint to be formed by the coupling, and a pin, operated longitudinally through the outer thimble and against the side of the groove, so that, when the pin is moved in, it acts against the inclined side of the groove,

and forces the thimbles together, and secures a tight joint where the joint is to be made between the two thimbles, and, when the pin is moved out, it allows the thimbles to be separated." The specification then describes fully and intelligibly the mode of constructing and adjusting the apparatus. A thimble, D, fits within another thimble, C, the end of D abutting against a packing or ground seat on a shoulder formed within C. D is grooved circumferentially, one side at least of the groove being bevelled or inclined, so that the outer part is wider than the inner part, and on C a tubular flanch is made, with an opening through it and through C. A pin, which, by preference, has its inner end tapering, or rounded, or bevelled, or chamfered, passes through such opening into the circular groove on D. But the end of the pin may be made, without being so formed, to act on the inclined side of the groove, and tend to force the parts together, but not so advantageously. The pin is to be operated through the opening by means of a screw connection, or in any other convenient or known way, but preferably by a screw; and, when the pin is moved inwardly, its end comes in contact with the inclined side of the groove on D, and forces the end of D against the shoulder on the inside of C, thereby making a tight joint. A mode is described of constructing the pin so as to allow it to rotate freely when not disconnected from the thimble, and thereby prevent one and the same part of it from wearing at all times against the inclined side of the groove on D. The first two claims in the reissue are as follows: "1. The combination of the two thimbles, C and D, by means of a pin, operating longitudinally through the outer thimble C, and against the inclined side of the groove in the thimble D, so that the two thimbles will be forced together by the inward movement of the pin, and be liberated by its outward movement, substantially as described. 2. The side of the groove in D, nearest to the joint to be formed, or to the flanch, constructed with an incline, substantially as described."

Nothing is found in the description in the specification in the reissue which is not contained in the specification and drawings of the original patent, and the two claims above recited are within the scope of the invention described. The feature of the rotation of the pin is described as a preferential mode of construction, but it is not made a necessary part of either of the two claims. It is quite obvious that the object of the invention, in attaining a tight joint between the thimbles, and in enabling them to be rapidly connected and disconnected, can be accomplished by a pin which does not rotate, as well as by one which does. On this subject I said, in my decision in the former case: "It is apparent, from the description in the specification, that the conical roller is endowed with two functions. The conical face of the roller will, by bearing against the bevelled or inclined side of the groove, when the roller is screwed into the groove or recess, force the end of one thimble against the ground seat or packing in the other thimble, and thus form a water-tight joint. This function of making pressure, by the wedge-like action between the conical face of the roller and the bevelled side of the groove, has relation solely to the production of a water-tight joint between the two thimbles. In this particular, the fact that the roller is a roller capable of rotation, and not a pin, incapable of rotation, is of no importance. A pin with a conical face, incapable of rotation, and such face bearing against the bevelled side of the groove, would be, in all respects, the same as a roller with a conical face, so far as the wedge-like action between such conical face and the bevelled side of the groove, to press together the parts where the water-tight joint is to be formed, is concerned. But the roller, in addition to having a conical face, is a roller; and this introduces the second function of the conical roller. That is, that, after the roller is screwed into the groove, and the connection is formed between the two pieces of hose, they can be turned or rotated easily, and without much friction, by means of the rotation of the roller in one thimble, as its face bears against the side of the groove in the other thimble. As the two pieces of hose are turned, the movement of the end of one thimble against the packing or ground seat in the other thimble is favored and assisted by the rotation of the roller. This is what the specification calls, obtaining a swivel-joint. It is an incident of this function, that compensation is made for the wear attending the turning of the hose, by the fact that the roller may be screwed down further into the groove, as the conical face of the roller or the bevelled side of the groove becomes worn." There was, therefore, abundant warrant for the two claims thus introduced into the reissue. The essence of the first claim is the two thimbles, the inner one grooved circumferentially, and with an incline on the side of the groove, against which a pin, passing through the outer thimble, is forced, so that the inward movement of the pin crowds the end of the inner thimble against the seat on the shoulder in the outer thimble. The second claim claims merely the construction with an incline, of the side of the groove in the inner thimble.

The defendants in this case are engaged in making and selling hose-couplings the same in construction as those made and sold by the defendants in the former suit, and possessing every feature referred to in the specification of the reissue, except the feature of the rotation of the pin when not disconnected from the thimble. But that feature forms no part of either the first or the second claim of the reissue. The infringement by the defendants is, therefore, clear.

The defendants have put in an answer attacking the reissued patent on various grounds:

(1.) Want of clearness in the specification; (2.) Bad faith in the reissue, in that Lawton and Bliss did not invent what is claimed in the reissue; (3.) Inability of the invention, as described in the reissue, to make a secure connection under hydrostatic or other pressure; (4.) Prior existence of the invention in a patent granted to Jesse Reed, April 16th, 1841, for an "improvement in pumps."

The plaintiff now moves for a provisional injunction. Nothing is shown in opposition which gives any support to any of the grounds on which the patent is attacked in the answer, or which in any manner impeaches the validity of the reissued patent, or throws any doubt on the right of the plaintiff. The Reed patent does not contain anything that is claimed in the first two claims of the reissue.

An injunction must issue.

[NOTE. For other cases involving this patent, see note to Bliss v. Haight, Case No. 1,548.]

Case No. 1,548.

BLISS v. HAIGHT et al.

[7 Blatchf. 7;[1] 3 Fish. Pat. Cas. 621.]

Circuit Court, S. D. New York. Sept. 3, 1869.

PATENTS—IMPROVEMENT IN HOSE COUPLINGS.

1. The specification of the patent granted to Robert B. Lawton and William H. Bliss, February 22d, 1859, for an "improvement in hose coupling," explained.

2. The claim of that patent is: "The two thimbles C D, attached to the ends of the hose A B, the thimble C being provided with the shoulder b, and ground seat or packing c, and the thimble D provided with the groove e, with inclined sides and fitted within thimble C, the above parts being used in connection with the conical roller or rollers g, fitted in the screw caps i, and the whole arranged to operate as and for the purpose set forth." To be within this claim, there must not only be a pin with a conical face at its inner end, but the pin must have the capacity of rotating as a roller.

3. The specification of the patent granted to William H. Bliss, February 25th, 1862, for an "improvement in hose couplings," explained.

4. The second claim of that patent is: "The lug G, within the butt A, when used in connection with the pin F, and the groove g of the butt B, substantially as and for the purpose set forth." To be within this claim, the pin must be a rotating pin, with a bevelled inner end.

[5. Where a patent is granted for a mere combination of old devices to produce a new result, such a patent is not infringed by a production of the same result without using all the devices which are included in the patented combination.]

[Cited historically in Bliss v. Gaylord Patent Coupling & Manuf'g Co., Case No. 1,547. Cited in Waterbury Brass Co. v. Miller, Id. 17,254.]

In equity. The bill in this case was founded on two letters patent. One [No. 23,033] of them was granted on the 22d of February, 1859, to Robert B. Lawton and the plaintiff [William H. Bliss], for an "improvement in hose coupling," and Lawton's interest in it was assigned by him to the plaintiff on the 2d of June, 1866 [and reissued to him December 21, 1869 (No. 3,768)]. The other patent was granted to the plaintiff on the 25th of February, 1862, for an "improvement in hose couplings." In regard to both of the patents the answer [of the defendants William H. Haight and others] set up the defence of non-infringement. In regard to the Bliss patent, it set up the further defence, that, for upwards of two years prior to the application by Bliss for that patent, he made and sold, or caused to be made and sold, large numbers of couplings containing the improvements contained in that patent, or substantial and material parts thereof, and that such couplings were used by others with his knowledge and allowance for more than two years before he made such application. The defence that Bliss abandoned to the public the inventions covered by the Bliss patent, was not set up as a distinct defence. [Bill dismissed.]

George Gifford, for plaintiff.
Charles M. Keller, for defendants.

BLATCHFORD, District Judge. The defence of non-infringement in respect to the Lawton and Bliss patent will be first considered. In order to determine that question, it is indispensable to determine what is the nature and scope of the invention claimed therein. The specification states the object of the invention to be "to connect hose together in such a manner that a swivel joint will be attained, and at the same time certain provision made for compensating for the wear attending such connection; so that the coupling may always be kept water-tight by the mere act of adjusting or connecting the parts together." It then states that the invention consists "in having a metal thimble or tube attached to each end of the hose to be connected, one thimble fitting within the other, and the inner one grooved circumferentially to receive one or more taper or conical rollers, that are adjusted by screw caps, so as to secure the two thimbles together and also keep the end of the innermost one against a packing or ground seat at the inner side of the outermost one, whereby the desired object is attained, as hereinafter described." It then describes the manner of attaching and securing the thimbles to the hose, which is unimportant. It then says: "The thimble D, its outer portion beyond its hose B, is smaller than the corresponding portion of the thimble C; so much so that D may fit within C, and the end of D abut against a packing or ground seat c, placed on a shoulder d, which is formed within C by its enlargement, it being understood that the inner ends of the thimbles within the hose are equal in diameter. The thimble D is grooved circumferentially, as shown at e,

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

the sides of the groove being bevelled or inclined, so that the outer part is wider than the inner part, and on the thimble C tubular flanches f are cast, one or more, the openings or interior of the flanches passing through the thimble C and having conical metal rollers g placed within them, said rollers being provided with stems h, which pass into caps i, and are secured therein by pins or small screws j, which pass laterally into grooves in the stems, as shown at k. The roller stems h are allowed to turn freely within the caps i, and the caps i screw on the flanches f, as plainly shown in the drawing. From the above description it will be seen, that, by fitting the thimble D within C, and screwing down the rollers g into the groove e in thimble D, the ends, A B, of the hose will be connected, and a swivel joint obtained, that is to say, the hose A B may be turned or rotated, and consequently prevented from being twisted in handling. The roller or rollers g rotate in the groove e, and thereby prevent friction, and favor the easy turning or rotation of the hose. It will also be seen, that, as the roller or rollers g are screwed down into the recess e, said roller or rollers will, by their conical form, and in consequence of bearing against the outermost bevelled edge of recess e, provision being made for such result, force the outer end of thimble D against the packing or seat c, and thereby form a water-tight joint, and, as the roller or rollers g may be screwed down more or less, as occasion may require, the wear attending the turning of the coupling may be compensated, and a water-tight joint always obtained." Then comes a disclaimer, as follows: "We do not claim connecting the two parts or thimbles C D together by means of a screw or pin passing through one thimble and fitting in a groove in the other, for such coupling or connection is well known and has been used, if not for the same, for analogous purposes." Then follows the claim, in these words: "The two thimbles C D attached to the ends of the hose A B, the thimble C being provided with the shoulder b and ground seat or packing c, and the thimble D provided with the groove e, with inclined sides and fitted within thimble C, the above parts being used in connection with the conical roller or rollers g, fitted in the screw caps i, and the whole arranged to operate as and for the purpose set forth."

It is apparent, from the description in the specification, that the conical roller is endowed with two functions. The conical face of the roller will, by bearing against the bevelled or inclined side of the groove, when the roller is screwed into the groove or recess, force the end of one thimble against the ground seat or packing in the other thimble and thus form a water-tight joint. This function of making pressure, by the wedge-like action between the conical face of the roller and the bevelled side of the groove, has relation solely to the production of a water-tight joint between the two thimbles. In this particular, the fact that the roller is a roller, capable of rotation, and not a pin, incapable of rotation, is of no importance. A pin with a conical face, incapable of rotation, and such face bearing against the bevelled side of the groove, would be in all respects the same as a roller with a conical face, so far as the wedge-like action between such conical face and the bevelled side of the groove, to press together the parts where the water-tight joint is to be formed, is concerned. But the roller, in addition to having a conical face, is a roller; and this introduces the second function of the conical roller. That is, that, after the roller is screwed into the groove, and the connection is formed between the two pieces of hose, they can be turned or rotated easily and without much friction, by means of the rotation of the roller in one thimble, as its face bears against the side of the groove in the other thimble. As the two pieces of hose are turned, the movement of the end of one thimble against the packing or ground seat in the other thimble is favored and assisted by the rotation of the roller. This is what the specification calls, obtaining a swivel joint. It is an incident of this function, that compensation is made for the wear attending the turning of the hose, by the fact that the roller may be screwed down further into the groove as the conical face of the roller or the bevelled side of the groove becomes worn. With this view of the mechanism we are prepared to consider the disclaimer and the claim. The patentees disclaim connecting the two thimbles together by a screw or pin passing through one thimble and fitting in a groove in the other. By these words "a screw or pin," as used in contradistinction to what the patentees describe as their invention, must be understood a screw or pin without a conical face, and without the capacity of rotating as a roller. They then claim the two thimbles attached to the ends of the hose, the one thimble provided with the shoulder and the ground seat or packing, and the other thimble provided with the groove with inclined sides and fitted within the first thimble, "the above parts being used in connection with the conical roller or rollers g, fitted in the screw caps i, and the whole arranged to operate as and for the purpose set forth." To be within the claim, the thimbles, constructed as specified, must be used in connection with the conical roller, and the whole must be arranged to operate for the purpose set forth. The pin, which screws through one thimble and into the groove in the other, must have a conical face, and must also have the capacity of rotating as a roller, and the whole must be arranged so as to operate to accomplish the purposes which are set forth in the specification as the purposes to be ac complished by the mechanism. Those pur-

poses, as has been shown, are two—pressing the end of one thimble against the ground seat or packing in the other thimble, and procuring the swivel joint. To accomplish these purposes requires the employment of a conical roller, and of both of the functions of such roller—the bearing of the conical face of the roller, as a pin, against the bevelled side of the groove, and the capacity of the roller to rotate. A non-rotating pin is not the conical roller of the patent, even though it has a conical face at its inner end, unless it also has the capacity of rotating as a roller.

Some question was made on the hearing as to whether the patentees intended to convey the idea that the thimbles could be swivelled upon each other after they were coupled or connected by the screwing down of the conical roller into the groove, and while the mechanism was set ready for use. But, the specification, as has been seen, is too clear on this point to admit of a doubt. In addition, the plaintiff, in the specification to his patent of February 25th, 1862, before mentioned, states that the invention described in that patent relates to improvements in the hose coupling patented to Lawton and Bliss by the patent of 1859, and describes the conical roller of both patents as a pin having a bevelled or taper inner end, and as being free to rotate, to prevent friction, when the thimbles are turned, after the connection is made, and as thus making a swivel joint.

Such being the proper construction of the claim of the Lawton and Bliss patent, it is manifest that the defendants have not infringed it. Their couplings have the two thimbles, the one with the seat and the other with the circumferential bevelled groove, but, instead of a conical roller, they have a non-rotating pin with a conical face. It is true they secure the wedge-like action between the conical face of the pin and the bevelled side of the groove, but they have no swivel joint resulting from the rotation of the pin after and while the apparatus is set. Both of these features must be found in an apparatus, before it can be an infringement of the claim of the patent. It may be that the patentees have a patentable invention in the action between the conical face of a pin and the bevelled side of a groove in two thimbles, in a hose coupling, to make a water-tight joint between the end of one thimble and a seat in the other, irrespective of any capacity in the pin to rotate after the thimbles are set, to allow a swivelling action; but, if they have, they have failed to secure it by their claim, as at present worded. The defendants have been called upon to meet and defend against the claim as it is, and the most liberal interpretation will not warrant the court in striking out from the claim the feature of rotation which makes the pin a roller, and which the claim states is a part of the whole, and must operate to effect the purpose which the body of the specification sets forth as the purpose to be effected by such rotation. The defendants' coupling has no substitute or equivalent for such feature of rotation in the pin, and it does not infringe the patent.

We come now to consider the Bliss patent. As before stated, that patent is for improvements in the hose coupling patented to Lawton and Bliss by their patent of February 22d, 1859. There are two claims in the Bliss patent, but only the second of them is alleged to have been infringed—the one relating to the lug. The specification states the object of the invention to be, "to obtain a more secure or a firmer connection of the two butts, with but a single pin." The butts are the thimbles of the Lawton and Bliss patent, and the pin is the conical roller of that patent. It is described as a cylindrical pin, with a bevelled or taper inner end, and as being forced into the groove in the innermost butt by means of the improved mechanism claimed in the first claim of the patent. The front side of that groove is described as inclined outward from its inner to its outer edge. The specification says: "Within the butt A, and at a point opposite to the pin F, there is a lug G, which is simply a projecting piece of metal having inclined surfaces at its outer and inner edges, as shown in figure 1. * * * The butt B is so formed that its outer part a* will fit within the butt A, and an annular packing e* is placed within the butt A, against a shoulder f, for the end of the butt B to bear against, and form a water-tight joint—see figure 1. The part a* of the butt B has a groove g made in it circumferentially. This groove extends entirely around the part a,* and it receives the inner end of the pin F, when the latter is forced inward. * * * The pin F, it will be seen, has a bevelled or taper inner end, and the front side of the groove g is inclined outward, from its inner to its outer edge, as shown in figure 1. Hence, when the pin F is forced within the groove g, the end of the butt B will be brought in close contact with the packing e* and a close or water-tight joint obtained. The lug G, in consequence of having its inner edge inclined, also has the same tendency to press the butt B against the packing e,* the lug fitting in groove g. The outer edge of the lug is inclined, in order to facilitate the insertion of the part a* of the butt B within A. This mode of connection, it will be seen, affords a swivel joint, as the butts are allowed to turn freely after the connection is made, the pin F being free to rotate, thereby preventing friction. The lug G is very essential, as it forms a bearing directly opposite the pin F, and ensures a firm connection of the two butts. Without the lug G, a plurality of pins F would be required, and that would considerably augment the cost of construction and also add materially to the manipulation in connecting and disconnecting the butts." The claim in

regard to the lug is as follows: "The lug G, within the butt A, when used in connection with the pin F, and the groove g of the butt B, substantially as and for the purpose set forth." This is, in substance, a claim to a combination of the lug on one butt with the groove in the other butt and the pin F. Now, the specification states that the pin F not only has its inner end bevelled or tapering, but is free to rotate, so as to allow the butts to turn freely after the connection is made, and thus afford a swivel joint. This rotating pin with a bevelled inner end is, as such, made by the patentee an element in the combination claimed in the second claim. The language of the claim is, "the pin F," that is, such a rotating pin as the specification describes the pin F to be. A non-rotating pin is not within the description or the claim. The purpose, referred to in the claim, for which the combination is made, is, among other things, as stated in the specification, to allow the butts to turn freely after the connection between them is made by means of the lug, the rotating pin and the groove in the inner butt, such freedom of turning being stated to be due to the fact that the pin F is free to rotate. The defendants have, in their coupling, no capacity of rotation in the pin which enters into the groove in the inner butt. The specification of the patent states that the mode of connection by means of the lug opposite to the pin F affords a swivel joint. This mode of connection is the combination claimed in the second claim; and the swivel joint must be regarded as a part of the purpose spoken of in the claim as to be effected by the combination of which the rotating pin F is made an element. The swivel joint means nothing more than such freedom of turning in the butts, after they are connected, as is due to the capacity for rotation of the pin F. This second claim of the Bliss patent is open to the same objection as the claim of the Lawton and Bliss patent, that is, making a pin with the capacity of rotating after the apparatus is set, so as to allow freedom of turning in the butts, after they are connected, an element in the combination claimed. Although the defendants' coupling has a pin with a conical face, and a groove with a bevelled side in the inner butt, and a lug on the outer butt opposite the pin, yet, as the pin is not a rotating pin or a roller, such coupling does not infringe the second claim of the Bliss patent.

This conclusion makes it unnecessary to consider the question, before stated, which is raised in the answer, as to the validity of the Bliss patent.

The bill must be dismissed, with costs.

[NOTE. Patent No. 34,476 was granted to William H. Bliss, February 25, 1862. For other cases involving this patent, see Bliss v. Brooklyn, Cases Nos. 1,544 and 1,545. Patent No. 23,033 was granted to Robert B. Lawton and William H. Bliss, February 22, 1859, and reissued December 21, 1869, to William H. Bliss (No. 3,768). For other cases involving this patent, see Bliss v. Gaylord Patent Coupling & Manuf'g Co., Case No. 1,547, and Same v. Brooklyn, Id. 1,546.]

BLISS (PEYTON v.). See Case No. 11,055.

Case No. 1,549.

BLISS v. REDFIELD. SAME v. SCHELL. CROOK v. BRONSEN. SAME v. REDFIELD.

[17 Leg. Int. 373.][1]

Circuit Court, D. New York. 1860.

CUSTOMS DUTIES—FREIGHT AND TRANSPORTATION CHARGES—SALES FREE ON BOARD—SEA FREIGHT.

[1. Additions to the market value of railroad iron of freight and transportation charges from Wales to London and Liverpool are illegal, where it appears that the Welsh sales were free on board.]

[2. Sea freight is not a dutiable charge.]

These were actions brought [by Ira Bliss against H. J. Redfield, same against Augustus Schell, Septimus Crook against Greene C. Bronsen, and same against H. J. Redfield,] to recover an excess of duty paid on railroad iron imported to the port of New York from Cardiff and Newport in Wales, via Liverpool and London.

It appeared in evidence that the appraisers at the custom house, under instructions from the secretary of the treasury, added to the market value of all railroad iron coming from Wales by way of Liverpool and London, 7s. 6d. sterling per ton, as freights or cost of transporting the iron from Wales to Liverpool or London, to make up the dutiable value at London, at the period of the exportation. It also appeared that railway iron is always bought and sold at a price free on board in Wales, and is always a rule so quoted in the circulars and prices current of Great Britain. It further appeared that the iron in question was shipped at Cardiff or Newport, in Wales, for Liverpool or London, it was, in fact, destined to New York; and only went by way of Liverpool or London as a matter of convenience to the importer, on account of the want of vessels at Cardiff or Newport bound for New York. [Verdict for plaintiffs.]

NELSON, Circuit Justice, held that the addition of 7s. 6d. per ton freight was illegal; that sea freight is not a dutiable charge, and the government cannot now set up as a justification that the addition was to make market value at Liverpool and London, on the ground that these are the principal markets, because the evidence shows that Cardiff and Newport, in Wales, are the principal markets of Great Britain for railroad iron, and the fact that the iron-makers have their offices in Liverpool and London, and nego-

[1] [Reprinted by permission.]

tiate their sales there, does not make those places the principal markets, when it appears that there sales are always made at a price free on board in Wales.

Verdict for plaintiff.

BLISS v. SCHELL. See Case No. 1,549.

Case No. 1,550.

BLIVEN et al. v. NEW ENGLAND SCREW CO.

[3 Blatchf. 111.] [1]

Circuit Court, S. D. New York. Nov., 1853.

REMOVAL OF CAUSES—FOREIGN CORPORATION.

Where, in a case removed into this court, under the 12th section of the judiciary act of September 24th, 1789 (1 Stat. 79), the defendant is a foreign corporation, this court has jurisdiction of the case, although no suit can be commenced in this court by original process against a foreign corporation.

[Cited in Winans v. McKean R. & Nav. Co., Case No. 17,862; Sands v. Smith, Id. 12,305; Rosenbaum v. Bauer, 120 U. S. 458, 7 Sup. Ct. 637.]

[See Barney v. Globe Bank, Case No. 1,031; Sayles v. Northwestern Ins. Co., Id. 12,421; Clarke v. New Jersey Steam Nav. Co., Id. 2,859.]

This was an action [by Charles Bliven and others against the New England Screw Company] commenced in a state court in New York against a Rhode Island corporation, by summons and attachment of their property. The defendant removed the case into this court, under the 12th section of the act of September 24th, 1789 (1 Stat. 79). The defendants now moved to quash the suit, on the ground that the defendants were a foreign corporation. [Motion denied.]

George William Wright, for plaintiff.

Edwin W. Stoughton, for defendants.

NELSON, Circuit Justice. If this were an original suit, the court would have no jurisdiction of it; because, no process known to the laws of the United States could be served upon the defendants, who, being a foreign corporation, cannot be found within the jurisdiction of this court, to be served with process. If, therefore, this suit had been commenced in this court, it would be quashed.

The state court, it is admitted, had jurisdiction of the case, and was entitled to proceed in it. It seems, also, to be conceded, that this corporation is a citizen of another state, within the meaning of the 12th section of the judiciary act of September 24th, 1789 (1 Stat. 79), and was entitled to have the case transferred from the state court to this court. But it is urged, that this court has no jurisdiction of the case, because it would have had none had it been commenced here. But this does not follow either logically or legally. The suit has been regularly brought into this court from a court which had jurisdiction of it. And, in such a case, I know of no exception to the rule that this court has jurisdiction. Unless this be so, all foreign corporations must be deprived of the benefit of that 12th section. Because, if a case be instituted in a state court which has jurisdiction of it, and be transferred to this court, and this court, on looking into it, finds the defendant to be a foreign corporation, and therefore decides against its own jurisdiction, it follows that this court can do nothing but remit the case to the court from which it came, and, which has jurisdiction. On these grounds, the motion must be denied.

[NOTE. For further litigation between the same parties, see Cases Nos. 10,156 and 10,157; 23 How. (64 U. S.) 420.]

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

BLIVEN (NEW ENGLAND SCREW CO. v.). See Cases Nos. 10,156 and 10,157.

Case No. 1,551.

In re BLOCH et al.

[18 N. B. R. 328.] [1]

District Court, S. D. New York. Aug. 15, 1878.

BANKRUPTCY—COMPOSITION—OBJECTIONS TO VOTE—WHEN TO BE TAKEN—CONFIRMATION—REVERSION OF PROPERTY TO BANKRUPT—PRIOR WRONGFUL ACT OF BANKRUPT—EFFECT.

1. Objections to the vote of a creditor upon a resolution of composition, on the ground that his claim is fictitious or invalid, should be made at the first meeting and before the vote is taken; or if the facts impeaching its validity are afterwards discovered, application should be promptly made for relief; such objections cannot be raised for the first time upon a motion for confirmation.

2. The composition was for twenty-five per cent., payable five cents cash in five days after confirmation, and ten cents at the end of three and six months each from the same date. The resolution provided that upon payment of the five cents the property should revert to the debtor. It appeared that the bankrupts had, with a full knowledge of the wrongful nature of their act, used moneys belonging to a creditor, without his consent, which they had deposited in bank in their own name as a special deposit for him. *Held*, that the arrangement was not judicious nor reasonably safe for the creditors. A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee of property for the benefit of his creditors.

[Cited in Re McNab & Harlin Manuf'g Co., Case No. 8,906.]

[In bankruptcy. In the matter of Emily Bloch and Morris Bloch. Motion to confirm a composition. Denied.]

Morris S. Wise, for motion.

J. A. Seixas, contra.

CHOATE, District Judge. This is a motion to confirm a composition. The composi-

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tion is twenty-five cents on the dollar, payable five cents cash in five days after the composition is confirmed, and ten cents at the end of three and six months each from the same date, to be secured by the promissory notes of the debtors. It also provides that the property shall revert to the debtors on payment of the instalment of five cents. The composition was accepted by a vote of fifteen creditors, representing sixteen thousand six hundred and sixty-three dollars and thirty-six cents, against three creditors, representing two thousand eight hundred and forty-two dollars and thirty-nine cents. One of the assenting creditors, Henry Nathan, is a brother of one of the debtors, Emily Bloch, and he proved for six thousand three hundred dollars. Morris Bloch is a son of Emily Bloch, and the business of the firm was that of retail dealers in cigars and tobacco, etc.

1. Objection is taken to the note of Nathan being counted in making the majority necessary for the acceptance of the composition. It is insisted that upon the evidence this is a fictitious claim, or at least that it is of very doubtful validity. This objection comes too late. It has been before held that such objections should be made at the first meeting and before the vote is taken, and if necessary, and the result of the vote will be affected by the determination of disputed debts, the meeting should be kept open till their re-examination. Or if the facts impeaching a debt that has been proved are afterwards discovered, application should be promptly made for relief. It must therefore, at this stage of the case, be assumed, for the purpose of this motion, that the debts proved were valid debts.

2. It does not appear that the amount proposed to be paid is unfair, nor that there is a reasonable expectation, that upon winding up the estate in bankruptcy, it will yield to the creditors more than twenty-five cents on the dollar.

3. It is objected that the composition above five cents on the dollar is not secured; that the character of the debtors is shown to be such that they cannot safely be trusted with their property; and that the creditors have no assurance whatever that they will be paid, nor that the property will be applied for that purpose by the debtors. This objection is sustained. The arrangement is not judicious nor reasonably safe for creditors. The largest claim against the estate, that of Nathan, above referred to, grew out of the use by the firm of moneys belonging to Nathan, deposited in bank by the firm in their name as a special deposit for him. It was used by the firm without his consent, and with a full knowledge of the wrongful nature of the misappropriation. All this is confessed by the debtors. In the case of In re Wilson [Case No. 17,785], the question that arises here has been fully considered, and it was held that the personal and business character of the debtor is the chief element to be considered in passing on the objection that the composition, being without security for the notes to be given, leaves the property in the possession of the debtors. A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee of property for the benefit of his creditors, which is virtually what this composition makes the debtors.

Motion denied, with leave to the debtors, within five days, to file an amended proposition, with security for the notes, in which case the meeting may be re-opened for further action of the creditors, or the motion may be renewed.

BLOCK (UNITED STATES v.). See Cases Nos. 14,609 and 14,610.

Case No. 1,552.

In re BLODGET et al.

[5 N. B. R. 472.][1]

District Court, E. D. Michigan. Nov. 8, 1871.

BANKRUPTCY—REMOVAL OF ASSIGNEE—COLLUSION—ACTING UNDER ERRONEOUS LEGAL ADVICE.

1. A petition for the removal of an assignee was filed, charging collusion with his brother, incompetency, and involving the estate in unnecessary litigation. The court held that there was a failure to prove the first two charges, and that in regard to the third, if he has erred through erroneous legal advice, it may be cause for ordering him to employ other counsel, but not necessarily for his removal.

2. Prayer of petitioner denied. Costs ordered to be paid out of bankrupt's estate.

In bankruptcy. On the petition of Constant C. Pond, a creditor, on whose petition the bankruptcy proceedings were commenced, for the removal of David B. Hibbard, Jr., as assignee. Answer was put in by the assignee substantially denying the allegations of the petition, and proofs have been taken before Register Eugene Pringle, to whom it was referred for that purpose. [Petition denied.]

W. K. Gibson, for petitioner.

J. G. Dickenson, for assignee.

LONGYEAR, District Judge. The grounds for removal as set up in the petition and claimed on the argument are: 1. Collusion with one W. R. Hibbard, a brother of the assignee, in the sale to the former by the latter of the stock of goods constituting the entire property assets of the bankrupts' estate, in consequence of which a less sum was obtained than what might have been realized. 2. Incompetency. 3. Involving the estate in unnecessary and unwarranted litigation.

The bankrupt act (section 18) provides, "that the court, after due notice and hearing, may remove an assignee for any cause,

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which, in the judgment of the court renders such removal necessary and expedient." This provision places matters of this sort in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to remove an assignee when cause is shown, rendering such removal either first, necessary, or second, expedient. An extended analysis and review of the voluminous testimony which has been taken, in the view which the court entertains of the case, is unnecessary, and would extend this opinion to an inconvenient length to no profitable purpose. Suffice it to say that I have carefully examined all the proofs, and given full consideration to the same, as well as to the able arguments of counsel on both sides, and I find that the charge of collusion in the sale of the stock of goods is not made out. There were irregularities attending that sale, which, unexplained, were sufficient to cast suspicion upon the good faith of the transaction, and in my opinion, to justify an enquiry into it. But, as explained by the proofs, I fail to see any intentional wrong, collusion or bad faith.

It is complained that the assignee advertised the goods to be sold at public auction on a day within the time during which he was authorized by an order of court, to sell at private sale, thus inducing persons desiring to purchase to refrain from making offers at private sale, in hopes, of course, of getting the goods at a less price at the public sale. While it was clearly irregular thus to advertise, yet I fail to find any direct proof that it was done collusively or for the purpose of misleading those desiring to purchase. If, however, such would have been the necessary or even probable effect of the notice, then the intention that it should have such effect might be presumed, and probably would be, unless rebutted by the assignee. I find, however, from copies of the notices before me, that it was distinctly advertised that the stock was for sale at private sale in the meantime. I know some criticism was passed upon the effect of the language used in this respect in the notice, but I am clear that the language is such that no man of ordinary intelligence could have been misled for a moment. The notices therefore carry upon their face a rebuttal of any intention to mislead, or that they could have that effect even if intended.

It is claimed that by waiting till the day advertised, and selling at public auction, the goods would have brought a better price. I fail to find support for that claim in the proof. The proof in this respect rests entirely upon the opinions of witnesses, some putting the probabilities above and some below the price sold for, but no large difference either way. If the sale made by the assignee was open and fair in all other respects, and was, according to the best of his judgment, with the information he then possessed, the best that could be done, he cannot be convicted of fraud or collusion on the mere varying opinions of men as to what might have been done by waiting, nor even on proof that some one stood ready to pay more for the goods, unless it is also shown that such fact was known to the assignee when he accepted the offer which he did accept. While the legal right of the assignee to sell to his brother, all other circumstances being equal, in preference to others, is conceded, yet his having done so is very properly alluded to as a ground for suspicion; and it is claimed that he so sold to his brother while there were offers at a better price pending. There was one better offer made, but in hopes of getting still better offers the same was not accepted at the time. When, however, the assignee had concluded to accept it, the offer was withdrawn, and the matter was again left upon his brother's offer as the highest that had been made. That there was no higher offer pending when he accepted his brother's offer clearly appears by the proof.

The brother's offer was made five or six days before it was accepted. During this time it was freely talked about by the assignee, and also by the brother. It was made use of with others who, it was thought, might desire to purchase, to obtain a better offer. Creditors were consulted, even the petitioner, in the matter, and no objection seems to have been made to a sale to the brother if he would pay as much, or more than any one else. To my mind the proof is clear, that the assignee used all reasonable diligence to obtain a higher price before accepting the offer of his brother. During the five or six days that elapsed between the offer for the goods and the acceptance, the assignee was selling at retail, and at the time of the sale had realized about two hundred and fifty-five dollars in cash. This he turned over to his brother, and then the same money was paid back to him on the purchase price. This was certainly a suspicious circumstance, and had a bad look for the assignee. The assignee and his brother, however, explain the matter in this manner: The offer was thirty per cent. of the appraised value for the whole stock before any sales had been made. When the offer was accepted, it was deemed to relate back to the time when the offer was made, and the money was turned over with the stock that remained, in lieu of the goods which had been sold. This explanation removes all suspicion of any fraud on the estate having been intended, and leaves it to stand as an irregularity merely, evidently resulting from a misapprehension by the assignee of his powers and duties as assignee. Such a transaction would, of course, have been perfectly competent for a person dealing in his own right, with plenary powers of disposition over his own property. But not so with the assignee. He must keep within his powers as conferred by the law, and the orders of court under which he acts. Here he was acting under a special order of the court authorizing him to sell goods at private

sale—not the money he might receive for the goods. When he had once sold any portion of the goods and received the money for them, his power under the order, so far as the goods so sold were concerned, was at an end. He could not resell the goods, nor could he sell the money he had received for them. But I will not now decide what effect the mistake will have upon the assignee in the settlement of his final accounts, where the question may very properly arise. All I intend to decide now is, that it was a mere mistake, and not a device to defraud the estate. Although the sale was made in terms for cash, the assignee in fact waited a few days for a part of the purchase money, but the whole amount was eventually paid to him. This, of course, he had no legal right to do, and if any injury had come to the estate on account of it, the assignee and his bail would have been liable. Although this act was an irregularity, and perhaps may savor of favoritism under the circumstances, yet as the estate was perfectly secure, and the whole amount was in fact realized according to the terms of the sale, I fail to see in it, in and of itself, such evidence of fraud or collusion as would warrant the court in resorting to the severe measure of removal for that cause. So much as to the first ground alleged for removal, viz: that of collusion. The second ground, that of incompetency, will be considered last.

The third ground, that of involving the estate in unnecessary and unwarrantable litigation, is based upon the fact that the assignee commenced a suit in the United States circuit court for this district, by bill in equity against the petitioner here, in relation to certain personal property to which it was alleged said Pond claimed title; and which suit, on an intimation from the court that bill in equity was not the proper remedy, was discontinued by the assignee. It is proven that the assignee in conversation with Pond and his counsel, before said suit was commenced, said that he believed, or had no doubt, the property in controversy belonged to Pond. But this did not conclude the assignee. If he were afterward to change his mind upon obtaining advice of counsel, or otherwise, or if the creditors or a respectable number of them should demand that the question be submitted to judicial decision, the assignee would be perfectly justifiable in so submitting it. If adopting a remedy to test the question which the court should decide to be a wrong one is to be made a cause for removal, I fear that very many of the assignees in bankruptcy stand upon very precarious grounds. He may have done so under an erroneous opinion of his own, or under erroneous legal advice, which was probably the case in this instance, but so long as bad faith is not shown it cannot be alleged against him. Erroneous legal advice, where the errors are so gross and frequent as to be evidence of incompetency of the legal advisers he has chosen, may be cause for ordering the assignee to employ other counsel, but not necessarily for removing the assignee.

The whole case narrows itself down to the second ground alleged for removal, viz., that of incompetency. The assignee is a young man of fair education and talent, but as yet with but little experience in the domain of law. The creditors, with but slight opposition, and that on the ground of his locality alone, have seen fit to place him where he is. And those creditors—and they are considerable in numbers and in the amount of their claims—now, after all that has been charged and shown against him, with the single exception of the petitioner, acknowledge themselves—some expressly and others tacitly—content to have him close up the estate. Under these circumstances it would be a severe penalty upon the assignee, and, as it seems to me, doing him an unnecessary injury, to remove him from his position because he has been guilty of unintentional irregularities in his administration of the estate—irregularities, too, which, as we have seen, have not operated, and cannot, to the injury of the creditors. If, however, such a step seemed to be necessary, or even expedient, I should not hesitate to adopt it. But it seems to me that such is not the case. If from the proofs before me, I could see even reasonable cause to believe that the sale of the stock of goods was for any cause invalid, and that it would be for the interest of the creditors that it should be further inquired into, the court would not hesitate to remove the present assignee and appoint a new one to make such investigation. But I fail to see any such cause; on the contrary it is patent to my mind that any attempt to invalidate that sale would result in nothing but a wasteful expenditure to the estate. The sale of the stock then being valid, and there being, as I understand, no other assets to dispose of, so that, virtually, nothing is left to be done by the assignee but to render his final account and close up his trust, I cannot see that it is necessary or expedient even, to change assignees. All that a new assignee could do would be to receive what is in the present incumbent's hands, and then proceed to do just what it is the duty of the present assignee to do, and what, if necessary, he may be compelled to do in the premises. That may just as well be done through the present assignee as to go through the unnecessary performance of a removal and appointment. Any questions which a new assignee might raise as to the legal liability of the present incumbent on account of any errors he may have committed, or as to any charges which he may make for disbursements or otherwise, can be raised just as well by any creditor upon the settlement of the assignee's accounts. I cannot see, therefore, that a removal of the present assignee is either necessary or expe-

dient. The prayer of the petition is therefore denied.

As to the question of costs. While unwarranted or vindictive attacks upon assignees ought to be not only discouraged, but punished, and the estates of bankrupts ought to be scrupulously guarded against unnecessary costs and expenses, yet, inquiry into the conduct and dealings of assignees, when their transactions are such, unexplained, as justly to give rise to suspicions of their honesty and good faith, ought not to be discouraged. The liability to such inquiry and investigation into their conduct will tend to make them vigilant and careful in the discharge of their duties. I have already said in the commencement of this opinion, that I consider this inquiry justifiable under the circumstances. I think, therefore, that the petitioner ought not to be mulct in costs. The assignee had the right and it was his duty to vindicate himself from the charges of collusion and bad faith, (and it is upon these points that most of the evidence was taken) and he has succeeded in doing so. I think, therefore, that he ought not to pay costs. It is therefore one of those cases in which the costs of the proceedings must be paid out of the estate. In re Mallory [Case No. 8,990].

Ordered accordingly.

Case No. 1,553.

BLODGET v. BRENT.

[3 Cranch, C. C. 394.][1]

Circuit Court, District of Columbia. Dec. Term, 1828.

DOWER—BAR BY TAX SALE — ESTATE OF WIDOW BEFORE ASSIGNMENT—RIGHT TO REDEEM—TAXATION—LIABILITY FOR TAXES—TITLE ACQUIRED BY PURCHASER AT TAX SALE.

1. A widow cannot be barred of her dower by a tax sale, either under the act of congress laying a direct tax, or for the county taxes; nor by a sale under a decree in the lifetime of the husband.

2. A purchaser at a sale for taxes acquires only the right of the person in whose name the property was assessed.

3. A widow, before actual assignment of her dower, has no estate in the land. It is an incumbrance upon the land, into whose hands soever it may pass; but she is not seized, and has no right to enter, or to pay the taxes, or to redeem the land when sold for taxes.

4. The tenant, until assignment of dower, is bound to pay the taxes.

At law. Writ of dower in forty-two acres of land. By the case stated, it appears that the marriage, the seizin in fee by Samuel Blodget, the husband [of Rebecca Blodget, plaintiff], during the coverture, and his death in 1814, were admitted. On the 14th of October, 1816, the defendant [Robert Y. Brent] purchased the premises at a sale made under a decree of this court against the husband in his lifetime, (namely, in 1813.) On the 28th of February, 1817, the defendant purchased the same premises again, at a sale by a collector of the United States direct tax due for the year 1815. On the 21st of November, 1818, the defendant received a deed from the trustee under the decree of this court. On the 31st of July, 1822, the defendant purchased the premises again, at a sale by a collector of the county taxes due for the years 1812 to 1819, and received a deed from him on the 25th of September, 1822. On the 23d of May, 1827, the defendant received a deed from the collector of the United States tax. These sales are all admitted to have been correctly made; and the question is, whether they are a bar to the plaintiff's right of dower.

[For verdict on the writ of dower, see Blodget v. Thornton, Case No. 1,554.]

Mr. Hall, for the plaintiff, rested her case upon the admission of the marriage, seizin in fee of the husband during the coverture, and his death in 1814.

Mr. Worthington, for the defendant, contended that the plaintiff's right vested before the tax sale, and by that sale passed to the defendant. The land itself was sold. It was her own neglect in not paying the taxes and obtaining an assignment of dower by the tenant, who was not bound to pay the taxes upon her third part of the land. The taxes were an annual incumbrance; she ought to have paid her part. Mr. W. referred to the Maryland law of 1797, c. 90. § 4, respecting the sale of lands for county taxes, and the proceedings therein.

Mr. Coxe, in reply. The wife has no estate in the land until her dower is assigned. Her right, on the death of her husband, was only a right to have dower assigned. It was not her laches; she cannot assign her own dower; she cannot enter on the land; it is the laches of the heir or assignee. The whole freehold descends upon the heir. Cruise, Dig. c. 4, § 1; Id. p. 120.

CRANCH, Chief Judge, after stating the case, delivered the opinion of the court (nem. con.)

These sales are all admitted to have been correctly made; and the question is whether they are a bar to the plaintiff's right of dower. In both the tax sales the property was advertised as the property of Samuel Blodget's heirs, and sold as such. The sale made to the defendant by the trustee, on the 14th of October, 1816, was not ratified by the court until June 3d, 1818.

The act of congress of the 27th of February, 1815, c. 60 (3 Stat. 216), laying a direct tax on the District of Columbia, requires that the tax should be assessed, laid, and collected in the manner described in the act of the 9th of January, 1815 [3 Stat. 172], c. 21, the 24th section of which declares that

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

the annual amount of the taxes "shall be and remain a lien upon all lands and other real estate, and all slaves of the individuals who may be assessed for the same, during two years after the time it shall annually become due and payable; and the said lien shall extend to each and every part of all tracts or lots of land, or dwelling-houses, notwithstanding the same may have been divided or alienated in part;" and by the 27th and 28th sections, the lands may be sold if the tax be not paid in one year after notification. The sale for the county tax was made under the act of congress of March 3, 1801, § 4 (2 Stat. 115), which gives the levy court the same power and means to collect taxes which, by the laws of Maryland then in force, were given to the levy courts, or county commissioners, in Maryland. By the Maryland law of 1797, c. 90, so much of the lands charged for the payment of county taxes may be sold by the collector as may be sufficient to discharge the taxes due thereon, if he can find no personal property in the county liable for the same. Neither the act of congress nor the act of Maryland says that the purchaser shall hold the property free from all incumbrance. He would acquire, one would think, nothing more than the right of the United States and of their debtor. The act of congress says that the tax shall be a lien on the lands of the individual who may be assessed for the same; and no land is liable to be sold but the land upon which the tax is a lien. The land of A. cannot be sold if assessed to B. If it be sold as B.'s land, nothing but B.'s title passes. So in Maryland, the land cannot be sold if personal property of the person, in whose name the land is assessed, can be found in the county. If no such personal property be found, then the land is sold as the land of the person in whose name it is assessed; and nothing but his title passes by the sale.

But the case of a widow whose dower has never been assigned is still stronger. No act of the husband or of his heirs could deprive her of her right; yet she has no estate in the land until actual assignment of her dower. Jackson v. Vanderheyden, 17 Johns. 167. It is an incumbrance upon the land into whose hands soever it may pass, but she is not seized, and has no right to enter. If land be sold under a decree in chancery in a case in which the widow is not a party, or under a judgment against the husband, the purchaser takes it with its incumbrance. It would, otherwise, be in the power of the husband or his heirs to deprive the widow of her dower by suffering a judgment, or a sale for taxes, to take effect. Caveat emptor is the rule in both cases. Before assignment of dower, the widow has no right to pay the taxes, or to redeem. She looks to the tenant of the freehold, whoever he may be, and he is bound to pay the taxes until he assigns her dower. The defendant, in the present case, purchased the property under the decree of this court, subject to the plaintiff's right of dower. He was bound to pay the tax. He can gain no new or better title, as against the plaintiff, by suffering the land to be sold for taxes, and buying it himself.

Case No. 1,554.

BLODGET v. THORNTON.

[3 Cranch, C. C. 176.] [1]

Circuit Court, District of Columbia. May Term, 1827.

DOWER—MARRIAGE—EVIDENCE—COHABITATION.

Upon a writ of dower, the marriage may be proved by parol evidence of cohabitation as man and wife.

Writ of dower. Verdict for the plaintiff [Rebecca Blodget], subject to the opinion of the court, whether parol evidence of cohabitation as man and wife, is sufficient to prove the marriage.

C. C. Lee, for the defendant [William Thornton], contended that the marriage can only be proved by the certificate of the bishop, or of the clergyman who married them. The following authorities were cited by Mr. Lee: Jackson v. Claw, 18 Johns. 346; William v. Gwyn, 2 Saund. 45; 1 Phil. Ev. 262; Starkie, Ev. 939; Birt v. Barlow, 1 Doug. 172; Morris v. Miller, 1 W. Bl. 632.

R. S. Coxe, contra, cited Birt v. Barlow, 1 Doug. 172; Morris v. Miller, 4 Burrows, 2058; Bayard's Peake, Ev. 88. See, also, Woodf. Landl. & Ten. 402; Henry St. George Tucker's notes to 1 Bl. Comm. 440, note 3.

THE COURT (MORSELL, Circuit Judge, absent), ordered the judgment to be entered for the plaintiff.

[NOTE. For subsequent proceedings by the plaintiff, see Blodget v. Brent, Case No. 1,553.]

BLODGET (WILSON v.). See Case No. 17,792.

Case No. 1,555.

In re BLODGETT et al.

[10 N. B. R. (1874) 145.] [2]

District Court, E. D. Michigan.

BANKRUPTCY—PARTNERSHIP—EXEMPTION.

1. An adjudication of bankruptcy against a copartnership operates in all cases as a dissolution, and thereafter it ceases to exist; hence, there being no firm in existence to receive the exemption allowed by the bankrupt law, nothing could be set apart as exempt property to the bankrupts as a firm.

[Cited in Re Melvin, Case No. 9,406; Re Corbett, Id. 3,220.]

2. Under the statutes of Michigan, the individual members of a firm are not entitled to a

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

[2] [Reprinted by permission.]

separate exemption of two hundred and fifty dollars out of the undivided partnership property.

[Cited in Re Handlin, Case No. 6,018; Re Boothroyd, Id. 1,652; Re Hughes, Id. 6,842.]

In bankruptcy.

This was on petition of Daniel B. Hibbard, Jr., assignee, for a decision and determination of claims of exemption by the bankrupts out of partnership property. The answers of the bankrupts need proofs. The claims of exemption are, first, of a separate exemption to each individual member of the firm, out of the partnership stock, of two hundred and fifty dollars in value; or, if not so entitled, then, second, of an exemption of a like amount to the firm as such.

Under the bankrupt law (section 14), the statute of Michigan governs in this respect. That statute (2 Comp. Laws, p. 1742, § 6101) is as follows: "The following property shall be exempt from levy and sale under execution or upon any other final process of a court; * * * 8th, the tools, implements, materials, stock, apparatus, team, vehicles, horses, harness, or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars."

The bankrupts were partners in trade, doing business as merchants; and before the bankruptcy they had made a voluntary assignment of all their stock in trade for the benefit of creditors, dissolved their copartnership, and ceased doing business. The marshal took possession of the stock in the hands of the voluntary assignee, and delivered the same to the assignee in bankruptcy. After the assignee in bankruptcy had taken possession, each of the bankrupts made a claim of exemption out of the stock to the value of two hundred and fifty dollars, or five hundred dollars in all. These claims were objected to and refused by the assignee; but the assignee, at the same time, selected and tendered to them jointly, as exempt, goods to the value of two hundred and fifty dollars, which they refused. These goods he afterwards sold under an order of court, and kept the proceeds separate from the general assets; and the present petition is by the assignee for leave to treat those proceeds as a part of the general assets, notwithstanding the claims of exemption set up by the bankrupts. An order for the bankrupts to show cause was made and served, and they appeared and answered thereto, reiterating their claims to exemptions as above stated.

LONGYEAR, District Judge. It is a well settled rule that an adjudication of bankruptcy against a copartnership operates in all cases as a dissolution, and that thereafter the firm has no existence for any purpose whatever, except for the purpose of closing up the affairs of the concern in the bankruptcy court. In this case, however, we have the additional fact that the partnership had been dissolved, and had ceased to exist by the act of the partners themselves, before the bankruptcy proceedings were commenced. For both reasons, therefore, the firm had ceased to exist before the exemptions were claimed; and, there being no firm in existence to receive it, no exemptions could be allowed by the assignee to the bankrupts as a firm. The question, therefore, whether in any case where a firm continues in existence, the exemption laws of this state entitle it to an exemption out of partnership property, is not here involved.

The only question involved is, whether, under the Michigan statute, each individual member of a firm is entitled to a separate exemption of two hundred and fifty dollars as stock, out of the undivided partnership property.

I had never entertained any serious doubts upon this question, and had been of the opinion that the right here claimed did not exist; and I should have so disposed of this matter at the close of the argument, but for the fact that my attention had been called to two district court decisions holding the contrary doctrine. In re Young [Case No. 18,148] in the eastern district of Missouri, and In re Rupp [Id. 12,141] in the northern district of Ohio. Respect for the opinions of these learned judges induced me to hold the matter under advisement, for the purposes of reviewing my own opinion and examining the foundations upon which it rests. Upon such review and examination, however, I find my former opinion fully confirmed upon both principle and authority; and, without entering into any extended argument, it must suffice here to say that I find that the two decisions above named stand almost or quite alone upon that side of the question, while, on the contrary, the almost unbroken current of decision in the courts of states having exemption laws similar to those of Michigan is almost uniformly the other way, viz.: That there is no separate exemption to the individual members of a firm out of undivided partnership property. So held in Massachusetts (Pond v. Kimball, 101 Mass. 105), and in North Carolina (Burns v. Harris, 67 N. C. 140), and in Wisconsin (Wright v. Pratt, 31 Wis. 104); and is said to have been also so held in Kansas in a case reported in 9 Kan. 34, but which is not now before me. See, also, as bearing in the same direction, the following: 6 Allen, 427; 43 Ill. 300; 5 Cal. 244; 6 Cal. 165; 27 Cal. 418; 39 Cal. 665; 26 Wis. 579; and Amphlet v. Hibbard, decided by the supreme court of Michigan at April term, 1874, not yet reported [29 Mich. 298]. And in Re Hafer [Case No. 5,896] the learned judge of the district court for the eastern district of Pennsylvania, following the decisions of the state courts, held the same way.

The proposition maintained by these de-

cisions is based mainly upon the idea that the exemption here under consideration is several, personal, and individual, as well in regard to the property to which it applies, as to the right conferred; and also upon the impracticability of giving it the application here sought, growing out of the nature of partnership property, and the relations of partners to each other and to creditors. In Pond v. Kimball, supra, the supreme court of Massachusetts say: Property belonging to a firm cannot be said to be the separate property of either member of it. "He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his separate account with the firm." And in Bonsall v. Comly, supra [44 Pa. St. 442], the supreme court of Pennsylvania shows the impracticability of either separate or joint exemptions in such cases. Thompson, J., delivering the opinion of the court at pages 447, 448, says: "It seems to me quite apparent that the execution or warrant against which the exemption may be claimed must be such as is levied on several property. To hold otherwise when the execution is joint and the levy is on joint property, would be to allow each one of the joint debtors to claim the exemption; and that would be, in a case like the present, where there are two in number, to exempt six hundred dollars" (the exemption there being stock, etc., of the value of three hundred dollars, instead of two hundred and fifty dollars, as here), "which the statute does not allow, or of three hundred dollars, which would be an exemption of one hundred and fifty dollars to each, which is as foreign to the statute as in the case of allowing six hundred dollars." And further on he repeats, "three hundred dollars cannot be set aside for the use of each debtor and his family; for this would exceed the statute, nor three hundred dollars to be divided, for that would be less than it allows." Much more might be said in support of the proposition, but time does not permit, neither do I consider it necessary. With great deference to those learned judges who have held the contrary, it seems to me too plain to require or admit of extended argument.

The attention of the court was called on the argument to two decisions of the courts of New York as being in favor of separate exemptions out of partnership property. One was Radcliff v. Wood, 25 Barb. 52. In that case the levy was upon a horse used in carrying on the firm business. The execution was for the separate debt of the partner claiming the exemption, and the levy was on his interest only, and the exemption was allowed. The question was not much discussed; the case was one of great hardship to the debtor; and the decision can hardly be given weight as against the numerous well-considered judgments to the contrary. It may be said to be an illustration of an old saying, "hard cases sometimes make bad law." The other case was Stewart v. Brown, 37 N. Y. 350. In that case the levy was upon a team of horses and harness, which were partnership property, and used to carry on the partnership business; and it was by virtue of an execution for a firm debt. The firm claimed the exemption, and it was allowed. That case is, therefore, not in point here, as will be readily seen. In that case, however, the court made this remark: "If each of the respondents had owned a pair of horses, both teams would have been exempt." As to that there is no doubt; and so in the present case, there is and can be no question that each of the bankrupts is entitled to the full exemption allowed by law out of his individual property. Whether they have individual property out of which they have had or may claim an exemption, was not made to appear in this case, neither does it become material in the view the court has taken of the question presented. In the opposite view, however, it would have been essential. If persons about to enter into copartnership would protect themselves against any apparent hardship in this regard, they must see to it that they retain sufficient property in their individual right to come within the protection of the exemption laws. By that means complete protection to themselves and their families is within their reach. It results that the claims of the bankrupts for exemption out of the property in question must be denied, and the prayer of the assignee's petition must be granted.

[NOTE. For proceedings to remove the assignee, see In re Blodget, Case No. 1,552.]

BLODGETT (ADAMS v.). See Case No. 46.

BLODGETT (UNITED STATES v.). See Case No. 14,611.

Case No. 1,556.

The BLOHM.

[1 Ben. 228.] [1]

District Court, S. D. New York. June Term, 1867.

SEAMAN'S WAGES—PRIORITIES—LIEN — HAMBURG CODE—EXTRA PAY ON SALE OF VESSEL ABROAD —MORTGAGOR—THE GOLD QUESTION.

1. Seamen shipped in Hamburg for a voyage to New York and back. In New York the vessel was sold by a decree of the court of admiralty for advances, and the purchaser discharged the seamen, who, thereupon, petitioned to have their wages, with two months' extra pay, paid first out of the fund: *Held*, that a sailor who was made second mate was entitled

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

to a second mate's wages from the time of his appointment.

[See Knee v. American S. S. Co., Case No. 7,877.]

2. That a sailor shipped in New York, who rendered services on board in port only, was entitled to a lien for his wages.

[Cited in The Atlantic, 53 Fed. 609.]

[See Levering v. Bank of Columbia, Case No. 8,286; The Artisan, Id. 568.]

3. That the Hamburg law was part of the contract of these seamen, and that, by that code, when a vessel is prevented by higher power from completing the voyage, and the crew are discharged, they are entitled to a free passage home, or two months' extra pay.

[See The Alonzo, Case No. 258.]

4. That the sale of this vessel by decree of court was a "preventing by higher power," and that, as no free passage to Hamburg had been provided, the seamen were entitled to the two months' extra pay, and had a lien on the proceeds for it.

5. That a mate who had loaned money to the master and taken from him an agreement, in place of interest, to divide all profit and loss, as if he were part owner, was only a mortgagee, and was entitled to recover his wages as mate.

6. That an increase of wages by the master in New York did not give the sailors a lien for such increase prior to that of creditors for advances to the vessel.

7. That the act of March 3, 1843 [5 Stat. 607], fixing the value of the "mark," does not apply to its value for commercial purposes, and that such value is a matter of evidence.

8. That the amount decreed to the seamen must be the amount of their wages, in Hamburg money, reduced into coined dollars of the United States, without adding anything by reason of the premium on gold.

[Cited in The Mary J. Vaughan, Case No. 9,217; Baker v. Ward, Id. 785.]

[See The Cabot, Case No. 2,277.]

[9. Cited in Gove v. Judson, 19 Fed. 524, to the point that a seaman discharged in a foreign port may bring suit for the three months' wages allowed by Rev. St. § 4582, if the wages are not paid to the consul as required by that section.]

In admiralty. The brig Blohm, a Hamburg vessel, shipped a crew in Hamburg for a voyage to New York and back, at various rates of wages, payable in marks courant. After the vessel had arrived in New York, the second mate left her, and one of the crew, named Struck, was appointed second mate in his place, and another sailor, named Ternan, was shipped to supply Struck's place. While the vessel lay in New York, the master, as it appeared, agreed to raise the wages of the rest of the crew above the rate specified in the articles. After this agreement was made, the vessel was libelled in the court of admiralty for advances made to her, and was sold under a decree of the court, whereupon the crew applied, by petition, to the court for their wages, and for two months' extra wages, under the Hamburg Code. The proceeds of the vessel not being sufficient to pay the sailors' claim and also the decree for the advances, the amount of the sailors' claim was contested by the libellants, in whose favor that decree was made.

The libellants contested the claim of the sailors on the following grounds: 1. They claimed that, even if the master did advance the men's wages, their own claim should be paid in preference to such advance. 2. They claimed that Ternan having only rendered services in port, had no lien on the vessel or her proceeds. 3. They claimed that the two months' extra pay was not a lien on the vessel. 4. They claimed that the mate, Vogelgesang, was really a part owner of the vessel, and, therefore, could not claim a lien on her for his wages. This claim was based on the fact that in August, 1865, while the bark was in Hamburg, the mate loaned Tiedemann, who was master and owner of her, seven thousand thalers, and, on the 14th August, 1865, they entered into a written agreement, which recited, that Vogelgesang had loaned Tiedemann that amount, for the purchase of the brig Blohm, and provided that, "for increased security of this capital, Tiedemann mortgages to Vogelgesang the vessel, and gives him the first mortgage for this money, and that, instead of paying interest, the parties agree that they shall divide all profit and loss, the same as if he was a part owner. It was also agreed, that in case Vogelgesang should die, his share of the profit or loss should be for the benefit of another party. And, by a subsequent article, dated in September, the parties agreed that, in case of Vogelgesang's death, the money should be paid to this third party with five per cent. interest, and the vessel should be mortgaged to him till it was paid. 5. The libellants also claimed that the amounts to be paid the seamen should be calculated by reducing the marks courant to dollars of the coin of the United States, and giving them a decree for that amount, while the seamen claimed that the amount of the premium on gold in New York at the time should be added, in calculating the amounts decreed to them.

J. K. Hill, for petitioners.

C. M. Da Costa, for libellants.

BLATCHFORD, District Judge. The contract of August 14th, 1865, with the supplemental contract of September 11th, 1865, between Vogelgesang, the mate, and Tiedemann, the master of the vessel, was merely a mortgage of the vessel to Vogelgesang as a creditor of Tiedemann, and did not constitute Vogelgesang a part owner of the vessel. He is, therefore, entitled to his wages, as mate, of 84 marks courant per month.

As to Ternan, the man shipped at New York, he was shipped to supply the place of Struck, who was promoted to be second mate, in place of a second mate whom the master had discharged. No objection is made to the promotion of Struck; and the employment of Ternan, under the circumstances, was proper. He is, therefore, entitled to his wages of 60 marks courant per month.

Struck is entitled to his wages as seaman, at 42 marks courant per month, to February

5th, 1867, and, from that time, to wages, as second mate, at 60 marks courant per month.

The alleged increase of the wages of Adams, Ahrent, and Struve, made February 5th, 1867, cannot be admitted. They shipped for the round voyage back to Hamburg, and it does not sufficiently appear that the agreement made by the master to raise their wages from the 5th of February, 1867, was a voluntary act on his part by which the vessel ought to be bound, especially as against creditors advancing money on the strength of a lien on the vessel. Accordingly, Adams, Ahrent, and Struve are entitled to wages for the whole time since they shipped at the rates named in the shipping articles and no more, namely: Adams, 27 marks courant per month; Ahrent, 21 marks courant per month; and Struve, 12 marks courant per month.

The Hamburg law formed part of the contract with these seamen, and, according to that, I think that each of the crew is entitled to either a free passage to Hamburg from New York or to two months' extra wages. It is urged that this cannot be enforced as wages, and is not a lien, but is merely a penalty enforceable against the master and owners personally. It is true, that in article 24 of the Hamburg Code this two months' wages is called forfeiture money, but in article 25 it is expressly provided that if a vessel is entirely prevented by higher power from the continuation of her voyage, the crew have to look for their passage home or money in lieu, according to article 24, entirely to the vessel or the proceeds of the same, and not to the master or owners. In this case, the vessel is a Hamburg vessel and has been prevented, by the vis major of a sale under a decree of this court, from continuing her voyage, and the crew have been discharged from her by the purchaser under the sale. The choice as to whether the crew shall have a free passage home or this "distance money," as it is called in article 25, is given by that article to the master. As he appears to have been derelict to all his proper duties, and no free passage home has been provided for the seamen, each of them is entitled to two months' extra wages, at the rate of his ordinary wages, to be paid out of the proceeds in court.

The only remaining question is, as to how the computation is to be made of the amounts due to the seamen. It is shown by the evidence that 125 marks courant are equal to 100 marks banco of Hamburg. The act of March 3d, 1843, § 1 (5 Stat. 625), fixes the value of the mark banco of Hamburg at thirty-five cents, in all computations of its value at the custom houses of the United States. This act does not apply to its value for commercial purposes; and, by the act of February 21st, 1837 (11 Stat. 163), all former acts declaring foreign gold or silver coins a tender in payment of debts are repealed. The question, therefore, is one of evidence, to be taken before a commissioner, as to the commercial value of the mark courant of Hamburg in the coined money of the United States. When that value is ascertained, a further question arises. The claimants contend that the amount due the seamen in dollars, computed at that value, must be paid in United States currency, or legal tender notes; while the petitioners claim that they are entitled to be paid the amount in gold, or, if paid in United States currency, or legal tender notes, to be paid so much as will purchase an amount in gold equal to the amount in dollars found to be due to them. The ground of this claim of the petitioners is, that the contract of the seamen was made in Hamburg, for service on board of a Hamburg vessel, and that their wages are made payable in Hamburg currency. It is difficult, perhaps, to reconcile some of the decisions which have been made on this subject. The case of Councer v. The Griffin [Case No. 3,279], decided by Judge Hall in the district court for the northern district of New York, and affirmed by the circuit court on appeal, and the case of The Rochambeau [Id. 11,973], would seem to sustain the views of the petitioners. But the practice of this court has been to the contrary, even in cases of foreign seamen shipped abroad on foreign vessels under a contract in which the rate of wages was expressed in a foreign currency. The Isis [Id. 7,106], before Judge Betts, Nov., 1864; The Tweed [Id. 14,278], before Judge Benedict, Feb., 1866. And I am satisfied that the weight of authority, both on principle and by precedent, is in favor of the view which has prevailed in this court. Metropolitan Bank v. Van Dyck, 27 N. Y. 400; Wilson v. Morgan, 30 How. Pr. 386; Swanson v. Cooke, 45 Barb. 574; Kimpton v. Bronson, Id. 618. When the amounts due to the petitioners in coined money of the United States are ascertained, according to the evidence which shall be given as to the commercial value of the mark courant of Hamburg in the coined money of the United States, they will be entitled to a decree for the payment of those amounts in United States currency, or legal tender notes, dollar for dollar, without any allowance for any premium on such coined money or any depreciation in the value of such currency or notes.

If the parties do not agree on the amounts due to the petitioners on the principles thus declared, there must be a reference to a commissioner.

BLOOD (WELLMAN v.). See Case No. 17,385.

BLOOD v. WOODMAN. See Case No. 17,385.

Case No. 1,557.

In re BLOOM.

[17 N. B. R. 425; 17 Alb. Law J. 434; 24 Int. Rev. Rec. 166; 35 Leg. Int. 165.] [1]

District Court, D. New Jersey. March 5, 1878.

CHATTEL MORTGAGES—VALIDITY—MORTGAGE ON STOCK IN TRADE.

A chattel mortgage on the present and after-acquired property of the mortgagor, which by its terms asserts that its end and purpose is that the lien of the mortgage may attach to all new goods brought into the store and be released from all such as are sold in the due course of a regularly conducted business, so that such mortgage may be a continuing one, is void.

[See Bowen v. Clark, Case No. 1,721.]

An involuntary petition in bankruptcy [against Erastus S. Bloom] was filed in this case on the 10th of April, 1877, the alleged bankrupt having previously, to wit, on the 10th of February, 1877, made a voluntary assignment of all his property for the benefit of his creditors under the state assignment law. All of his available assets consisted of a stock of goods, such as are usually found in a country drug store. These were claimed to be subject to liens, held by the father of the bankrupt, amounting to more than the full value of all the property. The liens consisted of two chattel mortgages; one executed and filed May 4th, 1876, to secure to Daniel Bloom (the father) five thousand dollars, and the other executed and filed February 3d, 1877, to secure indorsements by the mortgagee upon the notes of the mortgagor not exceeding six hundred dollars, and which said indorsements are not secured by the mortgage for five thousand dollars theretofore given. These mortgages were executed to secure antecedent debts and liabilites, and more than two months had elapsed between their execution and the filing of the petition in bankruptcy.

After the appointment of the assignee in bankruptcy the court made an order, directing him to sell all the personal property alleged to be included within the descriptions of said chattel mortgages, clear and discharged of all incumbrances, and transferring the lien of the mortgages, if any, to the fund realized from the sale. An application is made by the assignee to set aside the first mortgage, on the ground that it is fraudulent in law, and all the parties in interest have submitted the question to the court for determination.

[First mortgage adjudged fraudulent and not a lien, and the second mortgage adjudged valid.]

NIXON, District Judge. The mortgage in controversy is given by the bankrupt to his father, and is to be void if the mortgagor shall pay "the sum of five thousand dollars, or such part thereof as the said Erastus S. Bloom shall at any time give to the said Daniel Bloom by note, book account, or for money paid by indorsement or otherwise; and it is the intent that this mortgage shall be a continuing mortgage, and shall secure and is intended to secure to said Daniel Bloom the repayment to him of any money he shall now have loaned, or may at any time hereafter loan, or for money he shall now have paid by reason of indorsing the notes of the said Erastus Bloom, or may hereafter be compelled to pay, to the intent that the said Daniel Bloom shall be fully paid off and settled with for all liabilities incurred for the benefit of said Erastus S. Bloom." The property mortgaged is "all the goods and chattels mentioned in the schedule hereto annexed, and now in, or hereafter to come into the possession of said Erastus S. Bloom, at his store in Odd Fellows' Hall, at Bloomsburg, in the county of Hunterdon." The schedule annexed is in these words: "Schedule of the goods and chattels and personal property referred to in the foregoing mortgage, and upon which it is intended this mortgage shall be a lien, viz.: 1 soda fountain and generator with fixtures, 1 safe, 3 show cases, 3 scales, 1 desk, lot of oil cans, lamps and store fixtures, 2 coal stoves, 1 prescription case, stock of drugs and patent medicines, wine and liquors, paints and oils, cigars and tobacco, lot of fancy articles, stationery and perfumery bottles, 1 table and wardrobe; being all the stock of drugs and medicines now in his store at Bloomsburg, with the tobacco, fancy articles, &c., &c., usually kept, and also whatever of the same class of goods may hereafter be brought into said store, to the end and purpose that the lien of this mortgage may attach to all new goods brought into the same, and be released from all such as are regularly sold in the due course of a regularly conducted business, so that this mortgage may be a continuing mortgage so long as there shall be a continuing indebtedness to be secured."

The difficulty with this mortgage is not, as has been suggested, because it was given in part to secure future advances, nor because it included not only the goods and chattels on hand when executed, but also all after-acquired property of like character. Mortgages with these characteristics are not necessarily bad, and it has been the inclination and tendency of courts in later years to hold such good. If the schedule had embraced the very loose and imperfect description of the property that the mortgagor had in possession, and the sentence "and also whatever of the same class of goods may hereafter be brought into said store," and had stopped there, I should probably have said, under the revealed circumstances of the case, that the mortgagee was entitled to his lien upon all the goods and chattels in the store at the date of the execution of the mortgage, and also upon all subsequent acquired property, if any, that he had taken actual possession

[1] [Reprinted from 17 N. B. R. 425, by permission. 17 Alb. Law J. 434, contains only a partial report.]

of under his mortgage. Such was the doctrine announced in the somewhat similar case of Miller v. Jones [Case No. 9,576], decided by his honor, Mr. Justice Strong, in the circuit court of this district, and which has been reiterated more recently by the supreme court of Rhode Island, in the cases of Williams v. Briggs and Cook v. Corthell, to be reported in the 11 R. I. 476, 482. But the parties did not stop there. They went further and added another clause to the schedule, declaring their end and purpose in executing the mortgage, and its character must be determined by the legal construction to be placed upon this declaration. A mortgage embraces a single idea, to wit, the pledge of property as security for the payment of a debt. If it contain other stipulations and provisions, which, in their necessary effect, accomplish other results, and these other results are unlawful, the whole instrument is void. The parties assert that the end and purpose of the mortgage are to enable the mortgagor to sell for his own benefit the goods and chattels specifically enumerated, and to make it a lien upon all new goods brought into the store. In other words, it is a device, whereby the mortgagor can carry on his ordinary business, with all his property, present or future, fully covered from his other creditors. An instrument operating in this manner necessarily hinders, delays, and defrauds creditors, and is void under the second section of the statute of frauds.

No argument can make it plainer that this mortgage is fraudulent in law, than the mere statement of the intention of the parties in the body of the instrument itself, and if authority is needed, the case of Robinson v. Elliott, 22 Wall. [89 U. S.] 513, is precisely in point. The agreement therein was "that until default shall be made in the payment of some one of said notes, or in some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put in said store, or in any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage. The supreme court in construing such a provision, not distinguishable in terms from the one under consideration, determined that its legal effect was to render the whole mortgage void. Mr. Justice Davis, expressing the opinion of the court, said: "Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage, which in its very terms contemplates such results, besides being no security to the mortgagee, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

The judgment of the court therefore is, that the first mortgage of five thousand dollars is fraudulent in law, and that it is no lien upon the fund in the hands of the assignee. The second mortgage for six hundred dollars is not obnoxious to these objections, and is a lien upon the fund to the extent of the goods and chattels enumerated in the schedule, and which were on hand before the sale by the assignee. If the assignee has doubts about the value of the chattels included in the second mortgage, and which remained to the time of the sale, a reference will be ordered to ascertain their value; but if he is clear, from his knowledge of the property, that they bought at the sale more than sufficient to satisfy the mortgage, the expense of a reference may be saved, and he may pay the amount due upon the mortgage out of the fund.

Case No. 1,558.

BLOOMER v. GILPIN et al.

[4 Fish. Pat. Cas. 50.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1859.

PATENTS — INFRINGEMENT—WHAT CONSTITUTES—JURISDICTION — LICENSE—VALIDITY OF ASSIGNMENT—ESTOPPEL—EXPIRATION OF PATENT PENDING SUIT.

1. It is no ground of jurisdiction, under the patent law, that the contract between the parties relates to a patent right.

2. But if an infringement is proved, jurisdiction is conferred; and, having power to protect the rights of the parties, the court will take cognizance of the matters as incidental to the infringement.

3. Where it was provided by the terms of a license that it should not be transferred without the consent of W., the licensor, but it appeared that after it had been assigned without such consent, B., the assignee of W., made settlement and received royalties from the assignees: *Held*, that B. was estopped from urging the invalidity of the transfer.

4. A provision that work shall not be done for less than seven dollars per thousand feet, is satisfied, although the work at that rate was paid for in lumber instead of cash.

5. The mere making of a patented machine although it is neither used nor sold is an infringement of the right of the patentee, for which an action may be maintained.

[See Whittemore v. Cutter, Case No. 17,600; Haselden v. Ogden, Id. 6,190.]

6. Where the defendants were authorized to use one machine only, but constructed two, they are not relieved from liability by the fact that both were never in operation at the same time.

7. If the patent expires pending the litigation, the bill will be retained for an account.

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

In equity. This was a bill in equity filed [by Elisha Bloomer against Thomas Gilpin and Joseph H. Gilpin] to restrain the defendants from infringing letters patent for "improvements in planing and tonguing and grooving machines," granted to William Woodworth, December 27, 1828, and more particularly referred to in the case of Foss v. Herbert [Case No. 4,957].

E. P. Norton and Coffin & Mitchell, for complainant.

M. H. Tilden, for defendants.

LEAVITT, District Judge. This was a bill for an injunction to restrain the defendants from infringing the plaintiff's exclusive right to the invention known as "Woodworth's Patent Planing Machine," and for an account of profits. It avers, that on December, 27, 1828, a patent issued to William Woodworth, for a machine for "planing, tonguing, and grooving boards, planks, and other materials;" that in December, 1842, the patent was extended to William W. Woodworth, as administrator, pursuant to the provisions of law, for the period of seven years; that on August 9, 1843, said administrator assigned his interest in the patent for the extended term, to James G. Wilson, for the territory named in the assignment; that in January, 1844, the patent, excepting the state of Vermont, was assigned to said Wilson; that the patent was extended in February, 1845, by special act of congress, to December 27, 1856; that by deeds dated respectively March 14, and July 9, 1845, the administrator assigned the patent for the whole of the extended term to the said Wilson; and that on July 2, 1849, Wilson assigned to the complainant, Bloomer, his interest in the patent, for the county of Hamilton, and five miles of the adjacent territory of Kentucky, along the Ohio river, together with "the proceeds arising out of thirteen licenses theretofore granted for using said machine within said territory."

The bill then avers that the defendants, about July 1, 1853, at Cincinnati, "without any legal grant or license therefor, and in violation and defiance of the patent rights aforesaid, did make and construct, or cause to be made and constructed, and set up and put in operation, a machine, or machines, for planing, tonguing, and grooving, etc., in all material parts, substantially like, and upon the plan of the machines invented, made, and put in operation by said Woodworth, and described, in said letters patent; by reason of which infringement, the plaintiff alleges, he has been greatly injured, and the defendants have made profit, to an amount not less than five thousand dollars."

The bill also refers to the claim of the defendants to use a planing machine, under a license from Wilson to Bicknell & Jenkins, and alleges that the conditions on which said license was granted have not been complied with, and that no rights have accrued to the defendants under it. It is alleged as a specific violation of the conditions of said license, that the defendants have planed boards at a less price than seven dollars the thousand, and have received payment therefor in lumber, instead of cash. It is also alleged that the license under which the defendants claim is inoperative and void, for the reason that Wilson has never given his written consent to its transfer to them, as required by the contract between Wilson and Bicknell & Jenkins. And the bill also avers that the defendants have used and kept in operation a machine for the sole purpose of planing the surface of boards, without the machinery for tonguing and grooving, constructed on the precise plan of the Woodworth patent, in addition to that for which the license was granted, and in plain violation of the plaintiff's rights.

In their answer the defendants admit that, since September 2, 1853, they have had in operation, at Cincinnati, a Woodworth planing machine, complete in all its parts, in virtue of a license granted by said Wilson to Bicknell & Jenkins, under a contract executed between the said parties, April 21, 1846; which license has legally vested in them by assignment. The defendants deny that they have made for sale, or sold, any of said patented machines.

They admit that they have, in some cases, received payment for the work done by said machine in lumber, but deny that they have ever charged or received less than seven dollars the thousand feet for such work. But they admit that they have erected and used a machine for planing the surfaces of boards, without the appendages for tonguing and grooving, constructed on the plan and principle of the Woodworth patent, which is entirely distinct from the complete machine, and which they have never used when the other was in operation. This, they aver, has been done merely to avoid the inconvenience and loss of time resulting from the adjustment of the entire machine for the single operation of planing the surface of boards; and they say it is not a violation of the plaintiff's exclusive right, or of any of the conditions of the license under which they claim.

This brief statement of the averments of the bill and answer will suffice to indicate the questions arising in this case. Before passing to their consideration it will be proper to notice some of the provisions of the contract, before referred to, between Wilson and Bicknell & Jenkins. By this contract, Wilson assigned to Bicknell & Jenkins the exclusive right to the patent, within the territory before described, for its whole term, subject to certain conditions and exceptions stated. It is provided, among other things, that the licenses previously granted by Wilson shall continue in force so long as the licensees shall comply with the conditions on

which they were granted; and Wilson also reserves the right of granting other licenses, with the restriction that the whole number shall not exceed thirteen; and that Bicknell & Jenkins shall not make or use any machines within the territory described, until the number licensed shall be reduced to eight, and that when so reduced they shall be kept at that number. It is also agreed that the licensees shall pay Wilson one dollar and twenty-five cents for every thousand feet of lumber passing through any of the licensed machines, and that no licensee shall receive less than seven dollars the thousand feet for boards planed; and that a violation of any of these conditions shall work a forfeiture of the license. It is also stipulated that the licensees shall render monthly accounts of the work done by the machines, and promptly pay the amounts due to Wilson, or his assignee.

In the argument of the defendants' counsel it is insisted that, in this state of the case, the court has no jurisdiction; and this point is to be first considered. It is urged, in support of this position, that the plaintiff's claim to a decree is based on an alleged violation of the conditions of a license to use a patented machine, and is not, therefore, cognizable in this court under the patent laws of the United States conferring exclusive jurisdiction on the circuit courts in certain cases. And this objection must prevail, unless, in connection with his claim for an account of profits, he has proved an infringement of the patent. It is clearly no ground of jurisdiction, under the patent law, that the contract between the parties relates to a patent right. But if an infringement is proved, jurisdiction is conferred; and, having power to protect the rights of a party under a patent, the court will take cognizance of other matters, as incidental to the infringement. This is the doctrine which has been long recognized by the federal courts, and was distinctly held by Judge McLean, in the case of Brooks v. Stolley [Case No. 1,962].

But aside from this consideration, it is not perceived why this court has not jurisdiction on the ground of contract. The plaintiff avers in his bill that he is a citizen of the state of New York; and it sufficiently appears that the sum claimed and in controversy exceeds five hundred dollars. This meets the requirements of the statute conferring jurisdiction on the circuit courts of the United States.

The claim of the plaintiff to a decree for an account of profits, is based, first, on the ground that the defendants, without any legal right, have used the Woodworth planing machine for their profit, and in violation of the rights of the plaintiff. And this presents the question, whether the defendants are protected in the use of the machine by the license under which they justify. The plaintiff's counsel insist that the license was void, as the written consent of Wilson to its transfer to the defendants was not obtained. This was required by the contract between Wilson and Bicknell & Jenkins, and it is averred in the bill that such consent was not given. The answer admits this allegation, and avers that Bloomer, the assignee of Wilson, under the agreement of July 2, 1849, has waived his right to a strict observance of the clause referred to; and by making settlements and receiving payments from the defendants for the use of the machine, has acquiesced in the validity of the transfer of the license. There is no direct proof on the point in question, but as the objection urged is purely technical in its character, the court is justified in the inference, from the facts before it, that there has been a virtual waiver, by the plaintiff, of the provision referred to, and that he is now estopped from urging the invalidity of the transfer of the license, on the ground that Wilson's consent was not obtained. By his assignment to Bloomer, he was dissevered from all interest in the patent within the territory designated; and there was subsequently no reason for procuring his consent to the transfer of licenses granted under his contract with Bicknell & Jenkins. And as there is no ground for the conclusion, that it was ever insisted on by Bloomer, till the present controversy took place, it would be inequitable now to enforce it.

It is also insisted by the counsel for the plaintiff, that if the transfer of the license to the defendants is held to be valid, they have forfeited their rights under it, by failing to comply with the stipulations contained in the contract between Wilson and Bicknell & Jenkins. In the view taken by the court as to this point, it will not be necessary to inquire or decide whether a court of chancery, under the circumstances presented, can enforce a forfeiture. The evidence is clear, that as relates to the one machine for which a license was granted, no forfeiture has been incurred. It may be remarked here, that the plaintiff, in his bill, does not allege, as a ground of forfeiture, the non-payment of the sums stipulated to be paid, as the consideration for the use of the machine. The only ground insisted on, as a violation of the conditions of the license, is that the defendants planed boards at a less price than seven dollars the thousand feet. But the evidence wholly fails to sustain this allegation. The witnesses state that in some instances they paid for the work performed by the machine in lumber, at cash prices, but never at a lower rate than seven dollars the thousand feet. As there is no requisition in the contract that the work done by the machine shall be paid for in cash, it was not a violation of its terms to receive payment at the stipulated price, in other property, at its value in cash.

It results from the conclusions thus indicated, that the license held by the defendants is a justification for the use of one planing machine; and as to this, there is no sufficient ground for a decree for an account of profits. And the only inquiry which remains, is

whether the defendants infringed the plaintiff's rights under the patent, by the construction and use of a second machine for the purpose merely of planing the surfaces of boards, without the machinery for tonguing and grooving.

On this point there is no controversy as to the facts. The allegations of the bill are admitted by the answer, and the making and use of the second machine is justified under the license held by the defendants. It seems to be a clear proposition that such a right was not granted by the license, and that the construction and use of the second machine was an infringement of the plaintiff's rights under the patent. The license grants the right to build and use one machine, and can by no construction be held to extend to two. It is well settled that the mere making of a patented machine, though it is neither used nor sold, is an infringement of the right of the patentee, for which an action may be maintained. The defendants in this case not only constructed, but used, the machine, and they are not relieved from liability by the fact asserted, that both were never in operation at the same time. The second was made and used for their convenience and benefit, and it is not to be doubted that it aided in increasing their profits. And on the theory of the contract between Wilson and Bicknell & Jenkins, it lessened correspondingly the value of the plaintiff's patent.

A reference to a master, to ascertain and report the profit accruing to the defendants from the use of the second machine, will be necessary. A decree embracing such an order of reference may be entered.

As the patent has expired, no injunction can issue, as prayed for by the plaintiff.

[NOTE. For other cases involving this patent, see note to Gibson v. Van Dresar, Case No. 5,402.]

BLOOMER, The (HAY v.). See Case No. 6,255.

Case No. 1,559.

BLOOMER v. STOLLEY.

[5 McLean, 158;[1] 8 West. Law J. 158; 1 Fish. Pat. R. 376.]

Circuit Court, D. Ohio. July, 1850.

PATENTS—POWER OF CONGRESS — CONSTITUTIONAL LAW — EXTENSION OF PATENT UNDER ACT OF 1836—EXTENSION BY CONGRESS—LICENSEE—EXTENSION BY IMPLICATION—SURRENDER AND CORRECTION—INFRINGEMENT.

1. Congress has the constitutional power to grant the extension of a patent which has been renewed under the act of 1836.

[Cited in Bloomer v. McQuewan, 14 How. (55 U. S.) 542.]

2. Any legislative act, which does not assume the form of a contract, may be repealed by a subsequent legislature.

[Cited in Fire Extinguisher Case, 21 Fed. 43.]

3. It was in the constitutional power of congress to make special grants to inventors, or to authorise them to be issued in the modes provided.

4. In granting public lands certain forms and modes of proceeding were required by law.

5. But this does not prevent congress from making legislative grants.

6. The same principle applies in making grants to inventors. They must be limited; but they are issued under established modes, or at the discretion of congress.

7. By the construction of the act of 1836, the licensee of a planing machine may run his machine under an extension of the right, by that act.

8. But that act has no application to an extension of the right by congress.

9. There being no provision in the act extending the right, nor in the contract that the assignee should have an interest in the renewal of the patent, none can be implied.

[See Gibson v. Cook, Case No. 5,393.]

10. A surrender and correction of a patent, give effect to it in all cases of infringement subsequently accruing, though the patent was originally invalid.

[Cited in Hussey v. Bradley, Case No. 6,946.]

[See Grant v. Raymond, 6 Pet. (31 U. S.) 218; Shaw v. Cooper, 7 Pet. (32 U. S.) 292; Stanley v. Whipple, Case No. 13,286; Smith v. Pearce, Id. 13,089; Woodworth v. Hall, Id. 18,016.]

11. And, for this purpose, the correction of the patent is considered as having been made at the time it was originally issued.

[Cited in Hussey v. Bradley, Case No. 6,946.]

[12. While no state can impair the obligations of a contract, this inhibition does not apply to the federal government.]

[Cited in Bucknor v. Street, Case No. 2,098; Re Smith, Cases Nos. 12,986 and 12,996.]

[In equity. Bill by Elisha Bloomer, assignee of letters patent granted to William W. Woodworth, December 27, 1828, extended November 15, 1842, and reissued to William Woodworth, administrator, etc., July 8, 1845 (No. 71), against John H. Stolley, for infringement. Defendant moves to vacate an injunction granted in vacation. Motion denied.]

Coffin, Norton, and Stanbery, for plaintiff.

Mr. Walker, for defendant.

OPINION OF THE COURT. The plaintiff claims, as assignee, the exclusive right of using Woodworth's planing machine, and authorizing others to use it, within the county of Hamilton, in this state, including a certain district opposite thereto, in the state of Kentucky; and this bill was filed, and an injunction obtained, to enjoin the defendant from running the machine, in violation of the plaintiff's right. The injunction was granted in vacation, and a motion is now made to dissolve it on the following grounds:

1. The extension of the patent granted by congress was not within its constitutional power, and is, consequently, void.

2. If valid prospectively, the extension cannot affect, injuriously, previously acquired rights.

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

3. A surrender and renewal of the patent cannot affect previously acquired rights.

Woodworth obtained his patent on the 27th of December, 1828. The patentee died the 9th of February, 1839. On the 16th of November, 1842, the patent was extended seven years, on the application of his administrator, and congress extended the patent another term of seven years, on the 26th of February, 1845. On the 8th of July, 1845, the original patent was surrendered, and certain defects being corrected, it was reissued. Bloomer, the plaintiff, claims the title through several assignments; and, among others, one from Brooks and Morris, who acquired title 29th of August, 1843, and held it until November 4, 1845. On the 11th of September, 1843, they made a license to Stolley. Bloomer's title was acquired July 2, 1849. The original patent would have expired in 1842, but, being extended under the act of 1836, it was continued to 1849. The validity of this extension has been settled by several of the circuit courts; and, finally, by the supreme court; no objection is made to it. But the extension, by congress, is alleged to be invalid; and as the right set up by the complainant was derived under this extension, it is alleged to be of no validity. By the eight section of the first article of the constitution, power is given to congress to "promote the progress of science and useful arts, by renewing, for limited times, to authors and inventors, an exclusive right to their respective writings and discoveries." And it is contended that the time of the grant must be limited by congress in each case as it arises, or by a general provision applicable to all cases, and that the latter would seem to be the most appropriate, if not the only mode of making the grant. Special legislation, it is said, on such a subject, is not only opposed to the spirit of our institutions, but it would be impossible to legislate in each particular case. That the object being to receive an exclusive right, in order to promote the progress of invention, an established mode of procedure is implied. The terms are general to all "authors and inventors," which implies a general regulation on the subject. The time must be limited; and this cannot be done, it is argued, consistently with the constitution and the general policy of our laws, except by a general rule of action. That laws cannot be just which are unequal; and this, it is insisted, was the original understanding of congress, as appears by the first patent act and acts subsequently passed. The grant was limited to fourteen years, with the power to certain officers, designated in the act of 1836, on the proof of certain facts, to extend the patent for seven years. This power of extension was first given in the act of 1832. It was to be done by congress on petition and notice. The object of the renewal is to compensate the inventor, on proof that he has not been compensated for his "ingenuity, labor, and expense," in the matter of his invention; and this was made the ground of extension, whether by congress or by certain officers of the government.

It is insisted that, by the act of 1836, congress exhausted its powers, and, consequently, cannot extend the limitation of the grant; if this could be done, the limitation of the constitution would become a dead letter; and it is urged that the reasoning in McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316, in this respect, is conclusive against the power of congress.

When a rule of action is prescribed for the exercise of the executive or judicial power, it must conform to such rule; and, generally, where no appeal is given, the power, in a particular case, terminates when the act is done; but this is not the character of a legislative power. There would seem to be no doubt that the constitutional power in question might have been fully exercised by congress in making special grants; this might have engrossed much of the time of congress, and it might not be thought the most competent body to investigate the facts and do equal justice to inventors; but this would be a question of expediency, and not of constitutional power. Congress, from the elements of which it is composed, is not considered the most fit tribunal to investigate claims; and yet it continues to exercise this power. Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has a right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract. If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors; whether it would be wise to do so, is a matter for legislative discretion.

Congress adopted a system for the sale and granting of the public lands, but no one doubts that it may make special grants of land by law. This has been done; and the same principle applies to the granting of an exclusive right to an inventor. The machinery through which this right is ordinarily applied for, and obtained, may be dispensed with, and the title may be conferred by a legislative grant; and this may be done in regard to the extension of an exclusive right by congress, the same as in originally granting it. No constitutional restriction appears to exist against the exercise of this power by congress. Whether such a restriction may be found in previously acquired rights, will

be considered under another head. There is no prohibition in the law against a second extension, while provision is made for a first extension, should the inventor bring himself within it. The expressed policy of the law is to compensate the inventor, not only for his expense, but for his labor and ingenuity; and, if this object be not attained by a first extension, there would seem to be justice in a second. This can only be done by act of congress, as the law makes no provision on the subject. Had the act of congress provided for a second extension, on the same principles of the first one, the power could not have been questioned. It is said monopolies are odious; but a patent right, that shall compensate the inventor, is not a monopoly, in the general sense of that term. The inventor takes nothing from society. He confers upon it a benefit by his labor and ingenuity; and it is reasonable that he should be paid for such services, and the law designs to give him nothing more than a compensation; he is entitled to this by the immutable principles of justice, and it is believed to be given to him by the laws of all civilized nations.

It is alleged that there was no inquiry as to the expenses and labor, when this patent was extended by act of congress. It is not the province of the judiciary to inquire into the reasons which induced the passage of the law, with the view of testing its validity. If constitutional, it must be enforced, without regard to the policy or justice which dictated it.

The second ground assumes that if congress had power to extend the right of the patentee, it can only operate prospectively. Stolley obtained his license the 11th of September, 1843, to run one of the Woodworth machines, until the expiration of the judicial extension under the act of 1836. As the law stood, the exclusive right would then expire and become common; and it is argued that it may be fairly presumed this expectation induced the defendant to incur the expense of purchasing the planing machine, and putting it in operation; but, if this law affect his right, he must take out a new license, or abandon his machine and lose his expenditures; and a reference is made to the case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, where the court held the licensee was entitled to run his machine during the extension of the patent under the act of 1836. The decision in that case was made by the construction of the act, and can have no application to the legislative extension under consideration. In that act of extension there was no saving of the right of any license, expressed or implied. In regard to the value of the machine, it may be a matter of doubt whether it was rendered less valuable by the extension of the exclusive right. A right which becomes common can be of no more value to one person than another, except as the capacity and efficiency of one may be superior to another. If the right to use the machine be common, in all probability it could not be sold for a higher price than it would bring under an extension of the exclusive right. In the latter case, a license must be purchased; but more than a compensation for this would be realized in lessening the competition; so that, whether the licensee should elect to run his machine or to sell it, his interests would not be much, if any, affected by an extension of the right. To presume that the patentee would fix the price of a license so high as to discourage a purchaser, is contrary to the ordinary motive of human action.

If an extreme case be supposed of an individual who had expended a large sum in preparing to run several machines, under a license, which, on an extension of the right, the patentee shall refuse to renew, could the law redress such an injury, whether real or supposed? It is true, the licensee may have expected that, at the termination of the patent, the right would become common; but how would his case differ from any other person who had incurred an expenditure equally large to run machines, when the right should become common, but was prevented from doing so by a legislative extension of the patent? In both cases, the same expectation led to the expenditure, and the same act of extension to the disappointment. In principle, the claims would be the same; and if the licensee could be held exempt from the operation of the act, the other would be equally exempt. The true answer to the case put is, the expenditure made by the licensee, or any other person, was made with a presumed knowledge of the law that congress had power to extend the patent; and, with this knowledge, the risk of a renewal of the patent was incurred. Under such circumstances, there can be no ground for complaint. Congress might have imposed conditions favorable to the licensee, on the renewal of the right; but this not having been done, and there being no provision in the contract of license beyond the term of the patent, none can be implied. A retrospective law is not, necessarily, unconstitutional. No state can impair the obligations of a contract; but this inhibition does not apply to the general government. In Satterlee v. Matthewson, 2 Pet. [27 U. S.] 380, this court held that a statute of Pennsylvania was valid, which declared that the relation of landlord and tenant should exist under a certain Connecticut title in that state, although, prior to such statute, the courts had decided that no such relation existed, and effect was given to this statute by the courts of the state, and by the supreme court in the case above cited.

The third ground assumes that the surrender and renewal of the patent cannot affect previously acquired rights. How was the interest of Stolley affected by the legislative extension and subsequent surrender and correction of the patent? In September, 1843, he received a license to run Woodworth's plan-

ing machine. This was under the extension of the patent procured by the administrator, which ran to November, 1849. Now, it is admitted that the surrender and renewal of the patent would not affect, injuriously, the right of Stolley. But his right extended only to the limitation of the renewed patent to 1849, and this he has fully enjoyed. That he had no right beyond this has been shown, under the second ground assumed by defendant's counsel. Stolley must be considered as having taken his license, subject to the power of congress, to extend the patent by a special act, as was subsequently done. It is said that the surrender of the patent is conclusive evidence of its invalidity, and, consequently, that the patentee could have had no rights under the original patent. This inference is not sustained by the facts. The patent had been sustained on all points of objection, by several of the circuit courts, and by the supreme court. The thirteenth section of the act of 1836 provides that "the patent so reissued, together with the corrected description and specifications, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing of the original patent." Now, if the patent were invalid, by reason of a defective specification, as contended, still the right of the plaintiff is sustainable. The ground of complaint is for causes accruing subsequently to the re-issuing of the corrected patent, and in all such cases the corrected patent is made to apply, by the act, as though it had been so issued originally. The argument, therefore, that Stolley acquired rights under the invalid patent, which he could exercise under the legislative extension of the right, is unsustainable. He acquired no right beyond the term for which the patent was renewed, on the application of the administrator. The extension granted by congress, it is said, was of the original patent. This is admitted. It was the original patent that was surrendered and corrected after the legislative extension. Under that extension, the patentee could exercise all the rights, and claim all the privileges, conferred by the original patent.

The motion to dissolve the injunction is overruled.

[NOTE. For other cases involving this patent, see note to Gibson v. Van Dresar, Case No. 5,402.]

Case No. 1,560.

BLOOMER v. VAUGHT.

[Cited in Gibson v. Giffard, Case No. 5,395, note. Nowhere reported; opinion not now accessible.]

BLOOMGART (UNITED STATES v.). See Cases Nos. 14,612 and 14,613.

Case No. 1,561.

In re BLOOMINGTON.

[12 How. Pr. 283.]

Circuit Court, D. Illinois. April 1, 1871.

MUNICIPAL CORPORATIONS—BONDS—INNOCENT PURCHASER—DEFENSES.

[A municipal corporation is liable on its road improvement bonds in the hands of innocent purchasers, although such bonds were put forth, in violation of a condition that they should only be issued upon a certain amount of work being done.]

At law.

DRUMMOND, Circuit Judge. When, under certain circumstances, it is conceded, as in the case here, that a corporation or municipality has the power to issue bonds, then, when these bonds or coupons attached are in the hands of innocent persons, who have paid value for them, the question is, whether it is competent for the municipality to set up that those conditions have not been complied with. In most of these cases it is declared that, in order to enforce the issuing of these bonds, there must be an application made to the municipality by the voters and it is only when this is done that the municipality has a right to issue the bonds. When such application is made, the proper number of voters is a precedent to the issuing of the bonds. The power to determine whether the application has been made in the proper way, and by the proper number of voters, rests with the municipality or its agents; and when they have acted, although it is a condition precedent to the issuing of the bonds, the municipality cannot say that it has acted without authority,—without this particular condition having been complied with. This rule runs through all authorities. Now, as we understand, the objection is made here that one of the conditions upon which these bonds were to issue was, that they should not be issued except upon a certain amount of work being done upon the road. It is conceded by the defense that if the facts are peculiarly within the cognizance of the parties, that other persons—innocent purchasers—are not bound to inquire into the existence of these facts. How is it here? Now, whether or not the application was made by the proper number of voters is a matter of public notoriety, and ought to be a matter of record; yet, as we say, it is not necessary for a bona fide purchaser of a bond or coupon to inquire into that, and go behind the bond to ascertain whether this condition has been complied with or not. Why should there be in such a case as this any greater necessity for inquiring as to how much work has been done? Must the purchaser go upon the road and ascertain whether the ties have been laid down, and the road put in running order, when the law declares that the bonds shall not be issued, except those facts exist when the bonds have been issued by the agents of the municipal-

ity? Why is a party any more obliged in that case than in the other to ascertain the facts? Although their case shows that the business was somewhat loosely done, and that certain facts were not spread upon the record as they should have been, yet that fact would not make it necessary to go and ascertain whether every contingency had occurred precedent to the issuing of the bonds. The law presumes that the agents of a public corporation will act in conformity with the law, and the corporation must indorse the acts of its agents. These agents have done what the law authorized to be done, and issued the bonds. The bonds bear on their face the fact that they were issued in conformity with the law; and when an innocent purchaser looks upon them in the market, and buys them with this evidence of legality upon their face, it is not competent for the municipality to turn round and say that its agents did not act as they ought to have done,—that they did not comply with the certain conditions with which they were required to comply. This is a rule of universal application which has been repeatedly settled by the decisions of the supreme court of the United States, and has been uniformly acted on for a series of years. It would be reversing all the rules that have existed a long time to say that it is competent now for the town of Bloomington to come in and say that "our agents have issued these bonds before they were authorized to issue them." When the bonds were issued the town of Bloomington took the responsibility of the acts of its agents, and outside parties dealing with bonds in the market were not obliged to look into the hidden things which were done or not done by the agents of the municipality.

It is for these reasons, as we understand them, that the plaintiffs are authorized to recover in these cases. Let judgment enter for the coupons, with interest on them since their maturity.

Case No. 1,562.

In re BLOSS.

[4 N. B. R. 147 (Quarto, 37).][1]

Circuit Court, D. Michigan. 1870.

BANKRUPTCY—SECURED DEBT—WAIVER OF SECURITY—PETITION FOR INJUNCTION—SUFFICIENCY OF ALLEGATIONS—RESTRAINING SALE OF REALTY—GROUNDS FOR.

1. Where a petition was filed, and an injunction allowed against C. E. B., a son of the bankrupt, to restrain the sale of certain real estate, etc., and C. E. B. moves to dissolve the injunction on affidavit of himself and the bankrupt, denying the collusion and connivance charged in the petition, *Held*, a secured debt is provable within the meaning of section 39 of the bankrupt act.

[Cited in Re Stansell, Case No. 13,293; Re Parkes, Id. 10,754; Re Hyndman, 5 Fed. 709; Re Baxter, 12 Fed. 75.]

2. That a creditor who has a lien upon the property of his debtors by virtue of a judgment, etc., filing a petition for adjudication of bankruptcy without reference to such lien, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor.

[Cited in Re Hope Mining Co., Case No. 6,681; Re Stansell, Id. 13,293; Re Jaycox, Id. 7,242; Re McConnell, Id. 8,712; Re Broich, Id. 1,921.]

[See Ex parte Alexander, Case No. 161.]

3. Allegations upon information and belief merely, unsupported by other proof, are not sufficient to sustain an injunction.

4. C. E. B. had probable cause to believe that J. B. B., the alleged bankrupt, was insolvent, and that he suffered the said C. E. B. to obtain judgment, execution, and levy, with intent to give him a preference in violation of the bankrupt act, and that therefore the injunction issued in this case ought to be retained and continued till the further order of the court. Motion to dissolve denied.

In bankruptcy. On filing the petition of adjudication of bankruptcy, a petition was filed and an injunction was allowed against one Charles E. Bloss, a son of the alleged bankrupt, to restrain the sale of certain real estate upon an execution in favor of the said Charles E., and against the said alleged bankrupt, issued from the circuit court for Wayne county, for the reason, as alleged in said petition, that the judgment upon which the execution issued was obtained by collusion and connivance with the said alleged bankrupt, and for the purpose of preventing the petitioning creditor from collecting his claim. Charles E. Bloss now moves to dissolve the injunction, which motion is founded on affidavit of himself and the said alleged bankrupt, denying the collusion and connivance, and the fraudulent purpose charged in the petition. On the hearing of the motion, counsel for the petitioning creditors offered counter-affidavits, which were objected to, but the affidavits were received subject to the objection. It appears, from the affidavits, that the claim of the petitioning creditor was also in judgment in the Wayne circuit court, and that he had garnished a claim of the alleged bankrupt against the Detroit and Milwaukee Railway Company, and had also levied an execution upon the same real estate, but subsequent to the levy in favor of the said Charles E. Bloss. It is contended, as an additional ground for dissolving the injunction, that the claim of the petitioning creditor being a second claim, it was not provable under the bankrupt law, and therefore he could not file the petition for adjudication of bankruptcy.

Mr. Dickinson and Mr. Russell, for the motion.

Wilkison & Post, for petitioning creditors.

LONGYEAR, District Judge. First. As to receiving counter-affidavits on a motion to dissolve an injunction, the authorities are by no means uniform. In bankruptcy cases, where there are generally interests of creditors involved other than those immediately

[1] [Reprinted by permission.]

before the court, there are strong reasons for adopting the more liberal rule, and allowing counter-affidavits to be read, so that the court may be possessed of all facts bearing upon the question, and thereby enabled to protect the interests of all parties concerned. The objection to receiving the counter-affidavits is therefore overruled.

Second. By section 39 of the bankrupt act, a petitioning creditor for adjudication of bankruptcy, must be one whose debt is provable under the act. By section 20 it is clearly contemplated that a secured creditor may prove his debt. It is true he cannot be admitted as a creditor only for the balance of his debt after deducting the value of the property upon which he has a lien, unless he releases or conveys his security to the assignee, in which case he may be admitted as a creditor for his whole debt; yet his debt is nevertheless provable within the meaning of the act, before such balance is ascertained or such release or conveyance is made. It does not follow that because he cannot be admitted as a creditor, he therefore cannot prove his debt. On the contrary, the proving of his debt is a necessary preliminary step to his eventually being admitted as a creditor. See Davis v. Carpenter [Case No. 3,618]; In re Ruehle [Id. 12,113]; In re Winn [Id. 17,876]; In re Bigelow [Id. 1,396]. It is said, however, that the conditions upon which a second creditor can be admitted as a creditor, depend upon an assignee being first appointed, through whom those conditions can be complied with (section 20); and therefore he cannot vote for assignee at the first meeting of creditors. This is, no doubt, correct; but it does not follow that the proceedings must therefore fail; because, 1st, there may be other creditors who can vote; and, 2d, if there are none, then a condition of things exists which is provided for by section 13 of the act, in which the judge, or, if there be no opposing interest, the register, is required to appoint an assignee. In re Cogswell [Id. 2,959]; Anon. [Id. 457].

I have thus far considered this question as though the debt was set up in the petition as a secured debt. But such is not the case. The petition for adjudication of bankruptcy, and the proof of claim accompanying it, is without reference to any lien or security whatever; and it has been held, I think correctly, that where a creditor proves his full claim without reference to his lien or security, and without apprising the bankrupt court of its existence, such an act is a waiver of the lien and relinquishment of the security, and such creditor will be ordered to release the same to the assignee. Stewart v. Isidor [5 Abb. Pr. (N. S.) 68,] and the numerous cases, English and American, there cited. The lien or security in this case was by judgment and execution, and it is expressly provided by section 21 of the act that all unsatisfied judgments which may have been previously obtained upon one debt proven in the bankruptcy proceedings shall be deemed to be discharged and surrendered. It is true these decisions and section 21 have reference to debts proven in the course of the proceedings after they have been commenced, but they certainly apply with as great, if not with greater force, to a creditor proving his claim for the purpose of commencing proceedings.

I hold, therefore, upon this point: First. That a secured debt is provable within the meaning of section 39 of the bankrupt act, so as to entitle a creditor holding such debt to file a petition for adjudication of bankruptcy under said section.

Second. That a creditor who has a lien upon the property of his debtors, by virtue of a judgment, execution, and levy, or as secured by garnishment, filing a petition for adjudication of bankruptcy without reference to such lien or security, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor.

Third. The grounds for injunction are alleged in the petition on information and belief merely, and the petition was not accompanied by affidavits sustaining the allegations. Neither, in my opinion, do the affidavits and counter-affidavits read on the hearing of the motion to dissolve, sustain those allegations. If this was all, the court would not hesitate to dissolve the injunction, because allegations upon information and belief merely, unsupported by other proof, are not sufficient to sustain an injunction.

But it is contended that the affidavits read at the hearing of the motion to dissolve do show that at the time said Charles E. Bloss obtained his judgment and procured a levy of execution on the property of the said Joseph B. Bloss, he, the said Joseph B., was insolvent, and that he suffered such levy to be made with intent to give a preference to the said Charles E., and that the said Charles E. had reasonable cause to believe that the said Joseph B. was so insolvent, and that such was his intent, and that therefore the court will continue the injunction, allowing the petition to be amended, if necessary, so as to cover that ground. Such I believe to be the correct practice. Allowing that the facts appearing are such that if properly alleged they would warrant an injunction, there certainly would be nothing gained by dissolving the injunction and then re-issuing the same state of facts. It becomes important, then, to inquire into the facts as bearing upon this phase of the question.

That Joseph B. Bloss was insolvent there can be, and I believe is, no controversy. That Charles E. Bloss knew that he was so insolvent is equally clear. This appears from declarations made by him to the attorneys of the petitioning creditor during the negotiations for compromise; and all the facts

go to show that Charles E. was perfectly familiar with the pecuniary circumstances of Joseph B., whatever they were.

It is sufficient under the 39th section of the act that the alleged bankrupt suffered his property to be taken on the execution. It cannot be said that he had no alternative, because he had the alternative to put himself into bankruptcy, and thus prevent the levy. Did he then suffer the levy to be made with intent to give a preference to Charles E.? It is said that he could not have entertained such intent, for the reason that the petitioning creditor was fully secured by his garnishment of the claim of Joseph B. against the Detroit & Milwaukee Railway Company, and that it does not appear that there were other creditors. But was this petitioning creditor so sued? It is true Joseph B. claims two thousand dollars of the company, but the company disputes his claim, and it was then, and still is, in litigation; and the evidence is clear, to my mind, that neither Charles E. nor Joseph B. expects a recovery of anything like the amount claimed, or sufficient to liquidate more than a small part of the petitioning creditor's claim. But it is said the petitioning creditor slept upon his rights, otherwise he might himself have levied upon the property afterwards levied on by Charles E. This is fully explained by the pending negotiations for compromise conducted by Charles E. on behalf of Joseph B., and the representations made by Charles E. to the attorneys of the petitioning creditor as to the worthlessness of the property over and above the incumbrances which were upon it. The effect, then, of the levy in favor of Charles E. was to give him a preference, and as every person is presumed to intend the necessary consequences of his own acts, Joseph B. must be presumed to have suffered his property to be so taken with intent to give a preference to Charles E.

We have already seen that Charles E. knew that Joseph B. was insolvent. Had Charles E. reasonable cause to believe that Joseph B. suffered him to obtain his levy with intent to give him a preference? The answer is clear and potent. Charles E. knew Joseph B.'s condition as well as he knew it himself. He was also perfectly familiar with the condition and prospects of the claim of Joseph B. against the railway company, and of course knew that the petitioning creditor was very inadequately secured thereby. It is simply preposterous to say that he had not reasonable cause to believe that Joseph B. suffered him to obtain his levy with intent to give him a preference. Why did Charles E. thus suddenly turn round and prosecute his father for monies he had, like a dutiful son, loaned him for his support and otherwise, and push his suit to judgment, execution, and levy with such expedition, if it was not to gain an advantage over the other creditors of Joseph B.? He had no difficulty with his father, but was evidently in perfect accord with him. So far as his father was concerned, it does not appear but he was willing to continue to wait for his pay. But it would not answer to let other creditors in to share the property of Joseph B. Charles E.'s claim may be the more meritorious, and no moral turpitude may be attributable to him for the course he has pursued; but the bankrupt act recognizes no such distinctions and is inexorable in its provisions.

I hold, therefore, that sufficient appears to show that Charles E. Bloss had probable cause to believe that Joseph B. Bloss, the alleged bankrupt, was insolvent, and that he suffered the said Charles E. to obtain judgment, execution, and levy with intent to give him a preference, in violation of the bankrupt act, and that therefore the injunction issued in this case ought to be retained and continued till the further order of the court.

The motion to dissolve is therefore denied.

Case No. 1,563.

BLOSSBURG & C. R. CO. v. TIOGA R. CO.

[5 Blatchf. 387.][1]

Circuit Court, N. D. New York. March Term, 1867.

STATUTES — FOLLOWING CONSTRUCTION OF STATE COURT IN FEDERAL COURT—LIMITATION OF ACTIONS — FOREIGN CORPORATIONS — PLEADING—REPLICATION—DEMURRER.

1. By the decision of the court of appeals of New York in the case of Olcott v. Tioga R. Co., 20 N. Y. 210, it is the law of New York, that, in a suit against a corporation, the fact that the defendants were and are a corporation created by another state, and not under any law of New York, is a legal answer to a plea of the statute of limitations. Such decision, as the latest one on the subject by the court of the last resort in the state, is binding on this court as to the construction of the statute of limitations of the state, in an action at common law in this court.

[See Smith v. Shriver, Case No. 13,108; Dike v. Kuhns, Id. 3,907.]

2. The provisions contained in section 100 of the Code of Procedure of New York (Laws 1851, c. 479), as to the time limited for commencing actions, considered, in reference to their applicability to foreign corporations.

3. Under that section of the Code, the most appropriate form of replication to a plea of the statute of limitations pleaded by a foreign corporation, is to allege, in proper technical language, and with the requisite certainty of time and place, the fact that the defendants were out of the state at the time the cause of action accrued, and continued out of the state down to the time of the commencement of the suit.

[See Andreae v. Redfield, Case No. 368.]

4. An allegation, in the replication, that they were out of the state when the cause of action accrued, is, however, a sufficient legal answer to the plea of actio non accrevit infra sex annos.

5. An allegation, in the replication, that they were and are a corporation existing under the laws of another state, and that they were not

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

and are not a corporation existing under any law of New York, is not a sufficient answer to such plea, because it fails to aver that the defendants were a foreign corporation before and at the time the cause of action accrued, and does not allege that they had never been a corporation under the laws of New York.

6. Objections to the replication for not alleging time and place, and for duplicity, can be taken only by special demurrer.

7. On demurrer by the defendants to the plaintiff's surrejoinder, judgment was given for the plaintiff, because the defendants, in their rejoinder, committed the first fault in pleading.

[See note at end of case.]

[At law. Action by the Blossburg & Corning Railroad Company against the Tioga Railroad Company.] This case came up on a demurrer to a surrejoinder. The declaration contained a special count upon certain agreements in writing, and also the common counts for money had and received by the defendants to and for the use of the plaintiffs, and for money due and owing from the defendants to the plaintiffs, for the use and occupation, by the defendants, of a railroad with its fixtures and appurtenances. The defendants pleaded, (1) the general issue; (2) payment; and, (3) the statute of limitations. The third plea of the defendants alleged, "that the said several causes of action, and each and every of them, in the said declaration set forth, did not, nor did any of them, nor any part thereof, accrue to the said plaintiffs at any time within six years next before the commencement of this suit, in manner and form as the said plaintiffs have in declaring above alleged." This plea concluded with a verification and a prayer for judgment. To this plea the plaintiffs replied, "that the said defendants were and are a body corporate, created and existing under and by virtue of the laws of the state of Pennsylvania, and that they are not, and were not, a corporation created or existing under or by virtue of any law or laws of the state of New York; and that at the time the said several causes of action, in the plaintiffs' declaration mentioned, accrued to the said plaintiffs, the said defendants were out of the state of New York, and have ever since, until the time of the commencement of this action, remained out of the said state of New York." This replication concluded with the usual verification and prayer for judgment. To this replication the defendants rejoined, "that, when the several causes of action in the declaration mentioned accrued to the said plaintiffs, against the said defendants, they, the said defendants were not out of the state of New York; and that, for six years before the commencement of this suit, and after the said causes of action accrued to the said plaintiffs against the said defendants, they, the said defendants, did not depart from, and reside out of, the state of New York." This rejoinder, also, concluded with the usual verification and prayer for judgment. The plaintiffs answered this rejoinder by a surrejoinder, which alleged, "that when the said several causes of action in the declaration mentioned accrued to the said plaintiffs against the said defendants, the said defendants were out of the state of New York, and have ever since, until the time of the commencement of this action, remained out of the state of New York." This surrejoinder concluded to the country, and with the usual similiter. To this surrejoinder the defendants demurred, and specially assigned the following causes of demurrer: "1st. The plaintiffs neither avoid nor deny the material allegations of the defendants' rejoinder, but, instead thereof, reaffirm the allegations of their replication, in the words therein contained, to which these defendants have already answered by their said rejoinder. 2d. The plaintiffs, in the said surrejoinder, conclude to the country, upon an allegation which does not take issue upon the material allegations of the defendants' rejoinder. 3d. The issue upon the said surrejoinder is so framed, that a verdict for the defendants would only determine that they, the defendants, have not, ever since the causes of action accrued, until the commencement of the suit, remained out of the state of New York, and that this would not determine the action in their favor, whereas, the material issue is, whether they, the said defendants, for six years between the accruing of the causes of action and the commencement of this suit have been within the state of New York." [Judgment for plaintiffs upon the demurrer.]

HALL, District Judge. The most important question raised by the demurrer in this case, and the one on which the validity of the supposed defence of the statute of limitations must ultimately depend, is, whether this defence can be successfully interposed by a foreign corporation. This question, in substance, was before the former supreme court of this state, in 1845, in the case of Faulkner v. Delaware & R. Canal Co., 1 Denio, 441; and it was then held, that a replication that the defendants were and are a body corporate created under and by virtue of the laws of New Jersey, and that they are not, and were not, a corporation created under or by virtue of any law or laws of the state of New York, was no legal answer to a plea of the statute of limitations, for the reason, expressly stated, that, in the judgment of that court, the provisions of the statute of New York (2 Rev. St. 297, § 27), (which is the same in substance as section 100 of the Code), manifestly applied to natural persons only, and could not be made to embrace corporations. The same question, in substance, was brought before the court of appeals of this state, in 1859, in the case of Olcott v. Tioga R. Co., 20 N. Y. 210. After an argument evincing unsurpassed ability and extraordinary research, it was held, by the whole court, that the case in 1 Denio had been improperly decided. When the

case in 1 Denio was decided, the supreme court was not, like our present court of appeals, the court of last resort within the state; but, as very few cases were then carried to the court for the correction of errors, the decision of the supreme court would, in this court, have been properly considered conclusive evidence of the proper construction of the statutory provisions on which the defence in this case depends, if it had not been overruled by a court of superior authority, or otherwise shaken by the decisions of the state courts. Leffingwell v. Warren, 2 Black [67 U. S.] 599.

These decisions of the state courts being thus in conflict, it was insisted by the defendants' counsel, on the argument of this case, that the decision of the court of appeals, although subsequent in point of time, and made by the court of the last resort within the state, is not of controlling authority in the courts of the United States; and that it is only a series of decisions which attains that force. It was also insisted, that the construction given to a state statute by a state court ought especially to be open to revision, when it is adverse to persons or corporations of other states. The question involved in these propositions will first be considered.

By the 34th section of the judiciary act of September 24, 1789 (1 Stat. 92), the law of the state is to be regarded as the rule of decision in this case; and, as a general rule, the latest decision of the court of the last resort within the state, directly upon the question in controversy, is to be regarded by the courts of the United States as conclusive evidence of the law of the state. And this is especially true in respect to the construction of a statute of the state. U. S. v. Morrison, 4 Pet. [29 U. S.] 124; Green v. Neal, 6 Pet. [31 U. S.] 291; Leffingwell v. Warren, 2 Black [67 U. S.] 599. In the last mentioned case, it was said, by Mr. Justice Swayne, in delivering the opinion of the court, that "the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statute of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. * * * The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of the state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." The case just referred to is binding upon this court, and, if it be our duty to follow the later of two conflicting decisions of the same court, sitting as the court of last resort within the state, it is certainly our duty to follow a later decision of the court of last resort, rather than an earlier conflicting decision of a subordinate tribunal. It must, nevertheless, be conceded, that there may be extraordinary and extreme cases, in which the supreme court of the United States, or even this court, would be justified in disregarding the latest decision of the state court of the last resort. This might be done in a case in which the latest decision was in direct conflict with a long series of prior decisions in the same court and in the highest courts of other states, and clearly repugnant to well settled principles of law and justice; or in which it was clear and beyond all question, that the law of the state had been innocently mistaken, or willfully and corruptly perverted. But these are exceptional cases, like that of Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175, in which the supreme court of the United States declared that it would "never immolate truth, justice and the law, because a state tribunal had erected the altar and decreed the sacrifice." Under the 34th section of the judiciary act, and the well established doctrines of the supreme court of the United States, as declared in the cases above referred to, the case of Olcott v. Tioga R. Co., must be considered as establishing the true construction of the statutory provisions upon which the question under discussion depends. The decision was made, without dissent, by the whole bench of the court of appeals, after a most able and exhaustive argument, and after ample time for deliberation. A very elaborate opinion was delivered by one of the ablest judges of that court, and it has been before the profession and the public for more than seven years, during which many provisions of the Code have been frequently modified by the legislature, without the adoption or declaration, by the legislature or the court of appeals, of any rules of limitation, in respect to foreign corporations, different from those thus established by the court of appeals in Olcott v. Tioga R. Co. It is not only the settled law of the state, as declared by its highest court, but it commends itself to our judgment, as declaring the correct construction of the statute under consideration.

The Code, after the general provision requiring an action like the present to be brought within six years after the cause of action shall have accrued, makes certain exceptions, by the following provisions: "Sec. 100. If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the times herein respectively limited, after the return of such person into this state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." It is clear that the last clause of this section can furnish no rule of decision in a case like the present, for the reason that a corporation, by the very law

of its being, is necessarily confined to the jurisdiction of the state by which it is created, and can neither depart from, nor return to, another state. As was said by Mr. Justice Thompson, in Runyan v. Coster, 14 Pet. [39 U. S.] 122, 129: "A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law; and, when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another." It is also clear, that the first clause of the section was intended to prolong, as well as to limit, the time within which a suit must be brought against a party not within the state when the cause of action accrued; and that this clause has reference to the time within which the action must be brought, and was not intended to debar the right to bring an action, or to resort to an attachment, while the debtor was out of the state, any more than the section which prolongs the time within which infants, insane persons, and persons imprisoned on a criminal charge may bring their actions, was intended to prevent infants, or parties imprisoned, from bringing an action before their disabilities have been removed. In the case of Olcott v. Tioga R. Co., Judge Denio cites numerous cases which fully justify the conclusions reached in that case, and an extended discussion of the question in this court would be a work of mere supererogation.

It must necessarily follow, from the conclusions already stated, that the fact that, at the times the plaintiffs' causes of action accrued, the defendants were without this state, and have never since been within it, must be, (if properly pleaded,) a conclusive answer to the defence of the statute of limitations, although such original and continued absence results from the fact that such defendants are a corporation created by and existing under the laws of Pennsylvania, and are not, and never were, a corporation existing under the laws of the state of New York.

The principal question in the case being thus disposed of, it becomes necessary to consider several questions depending upon the frame of the replication and subsequent pleadings, which were not discussed upon the argument in this case, or by the judges who delivered opinions in the two cases which we have been considering. In the case of Olcott v. Tioga R. Co., no question was raised upon the pleadings; and, although the case in 1 Denio arose upon demurrer, the conclusion reached by the court, upon the main question, rendered any discussion upon the language of the replication entirely unnecessary.

The first of the questions referred to relates to what may properly be termed the substantial form of the replication. It would seem, from the reporter's statement of the case in 1 Denio, that the replication in that case simply averred, that the defendants were and are a corporation, created under and by virtue of the laws of the state of New Jersey, and that they are not, and were not, a corporation created under, or by virtue of, the laws of the state of New York, (which is, in substance, the same as the first allegation in the replication in this case;) but, as it does not appear that any objection to the form of the replication was discussed by counsel, or considered by the court, it is quite probable that this statement is not in the exact language of the replication. Indeed, it is scarcely possible that a replication in the precise language given by the reporter, would, on demurrer and full argument, have been held good in the supreme court, for it fails to aver that the defendants were a foreign corporation before and at the time the cause of action accrued, nor does it allege that they had never been a corporation under the laws of the state of New York. However this may be, I am strongly inclined to the opinion, that the most appropriate, if not the only proper form of the replication, is, to allege, in proper technical language, and with the requisite certainty of time and place, the fact that the defendants were out of the state at the several times when the causes of action accrued, and had continued out of the state down to the time of the commencement of the suit. Although the fact of such absence from the state is, in law, the necessary consequence of another fact—that of the defendants' being a foreign corporation, having no existence under the laws of this state—it is, nevertheless, a fact, and the particular and precise fact on which the legal rights of the parties depend. It should therefore, be expressly and directly alleged in the pleading, instead of being left to legal inference. But the fact that the defendants were and are a foreign corporation may, perhaps, be properly stated as matter of inducement, introductory to the main and essential averments of the replication. I see no objection to this form of pleading, although I do not deem it absolutely necessary to the technical sufficiency of the replication in this case, to allege the continued absence of the defendants. That they were out of the state when the cause of action accrued, shows that the six years' limitation cannot be computed from the time the cause of action accrued. This allegation is, therefore, a sufficient legal answer to the plea of actio non accrevit infra sex annos, and requires the defendants to take issue on the particular fact alleged, or else to avoid, by rejoinder, its legal effect. Whether a rejoinder that the defendants,

after the cause of action accrued, returned to the state and had, from thence, remained within it, &c., for more than six full years before the commencement of the suit, would not necessarily be a departure from the plea of actio non accrevit infra sex annos, and, therefore, bad, on general demurrer, it is not necessary now to decide; but it would seem that, under such circumstances of absence, return and continued residence, the plea itself should allege the actual facts of the case, in order to show the precise character of the limitation or defence set up, and to enable the plaintiffs to tender a direct issue upon the facts averred. However this may be, it is, I think, proper for the plaintiffs to reply to the plea actio non accrevit, &c., that the defendants were out of the state when the cause of action accrued, and continued absent therefrom down to the time of the commencement of the suit. 3 Chitty, Pl. p. 1162; Plummer v. Woodburne, 4 Barn. & C. 625. The continued absence is not inconsistent with, but rather in affirmance and support of, the matter previously alleged; and, in case the defendants, though absent at the time the cause of action accrued, had in fact returned and remained within the state for more than six years before suit brought, these facts might be alleged by the rejoinder, if that would have been a proper form of rejoinder, (or, in other words, would not have been a departure from the plea,) in case only the absence of the defendants from the state at the time the cause of action accrued had been averred in the replication. But I am inclined to the opinion that such a rejoinder would be a departure in either case.

Considering, then, that the first allegation of the plaintiffs' replication is not, for the reasons above stated, a sufficient answer to the defendants' plea, and may properly be deemed matter of inducement only, or even be rejected as surplusage, the question whether the remaining allegations of the replication are a sufficient answer to the plea, must now be examined. These allegations are, in substance, that, at the time the several causes of action accrued, the defendants were out of the state of New York, and have ever since, until the commencement of the suit, remained out of the state. If these allegations are true, and if I am right in the conclusions before stated, the statute of limitations is no bar to the plaintiffs' action, and the replication is sufficient in substance. Perhaps, time and place should have been given in the allegation of such original absence, but this omission, being matter of mere form, cannot be taken advantage of except by special demurrer.

The only remaining objection which now occurs to me, as one which might, perhaps, have been taken to the replication, is that of duplicity; but this objection, if well founded, cannot now be made available, as such an objection, like the one just noticed, can be successfully urged only when taken by special demurrer. But the replication does not contain two sufficient answers to the plea. It does not allege the absence of the defendants from the state when the cause of action accrued, and, also, a subsequent departure and continuance abroad; for, the continuance abroad is indissolubly connected with, and dependent upon, the original absence alleged. The insufficiency of the first allegation of the replication, considered as a distinct and independent answer to the plea, has already been determined.

My conclusion in regard to the sufficiency of the replication necessarily rests upon the prior conclusion, that the defendants' position in regard to the proper construction of the statute of limitations is untenable, and that I must follow the construction of the court of appeals; but, upon this question of pleading, it may be useful to consider what course or courses the defendants, at this stage of the proceedings, were at liberty to pursue, for the purpose of bringing the case to a proper conclusion. If the position of the defendants' counsel had been tenable, and the statute limitation of six years, as pleaded, was applicable to the case, (notwithstanding the defendants, as a foreign corporation, had never been, and were incapable of being, within the state,) the defendants could have demurred, and would have been entitled to judgment on the demurrer. If, on the other hand, the defendants had, in fact, or in law, been within the state at the times the causes of action accrued, and ever since, the defendants might have taken issue upon the denial of those facts, as contained in the replication, and have concluded to the country. The defendants did not demur, but rejoined, that the defendants were not out of the state when the suit was commenced, thus taking issue upon the most important and essential allegation of the replication. The prior allegation, that the defendants were and are a foreign corporation, and the subsequent allegation of their continued absence from the state, were left undenied, while a new issue was tendered, by the additional allegation, "that, for six years before the commencement of this suit, and after the said causes of action accrued to the said plaintiffs, against the said defendants, the defendants did not depart from and reside out of the state of New York," which allegation was then, for the first time, introduced into the pleadings. This new allegation, thus introduced into the rejoinder, standing alone, can furnish no answer to the replication. Indeed, in the case of a natural person, these allegations of the rejoinder might be true, if the defendant was within the state when the cause of action accrued, although he left the state within six months after, and then resided continually abroad, for seven years next before suit brought; and it would not be contended that, in such a case, the statute of limitations would be a defense.

But, if this new allegation, standing alone, could be considered a sufficient answer to the replication, it would clearly be a departure from the plea, and, therefore, bad on general demurrer; and, if this allegation be rejected as surplusage, the rejoinder is bad, on general demurrer, because, after taking issue upon the main and essential allegation of the replication, it concludes with a verification, instead of concluding to the country.

The plaintiffs, at this stage of the case, might have interposed a general demurrer and had judgment, for, the common counts of the declaration are clearly good, (the special count has not been examined;) and, as the defendants have committed the first substantial fault in pleading, the plaintiffs are now entitled to judgment upon the defendants' demurrer.

This conclusion renders it unnecessary to consider the form or substance of the surrejoinder, which was a mere reiteration of the allegations of the replication; but, as the new allegations of the rejoinder were no answer to the replication, and as the rejoinder concluded with a verification, I see no objection to the course pursued by the plaintiffs. If the rejoinder had concluded to the country, the plaintiffs might at once have gone to trial upon the issue already joined, and they had a right to reiterate the allegations of the replication and conclude to the country, in order to go to trial upon the issues of fact, without the delay to be occasioned by a demurrer. Even if I am wrong in this, no objection to the course taken can be made available on this demurrer, as the first fault in pleading, in matter of substance, is clearly on the part of the defendants.

As these questions of special pleadings involve only the costs upon the demurrer, I have not thought it necessary to enter upon any critical examination of authorities, or to review my early studies of elementary books. If we may judge from the experience of the last forty years, the practice of special pleading will, at no distant day, under the progress of modern innovation, be classed among "the lost arts;" and, under the present pressure of the business in our courts, a judge may be excused, if he prefers to dispose of a mere question of costs almost wholly upon his recollection of the rules of special pleading, without searching for authorities, or undertaking the labor of a critical examination of the cases, especially when none were cited by the counsel upon the argument.

The plaintiffs are entitled to judgment upon the demurrer, with leave to the defendants to amend their plea or rejoinder within twenty days, on payment of costs.

[NOTE. Upon the subsequent trial of this case there was judgment for plaintiffs, and upon writ of error the judgment was affirmed by the supreme court in Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. (87 U. S.) 137.]

Case No. 1,564.

The BLOSSOM.

[Olc. 188;[1] 6 N. Y. Leg. Obs. 374; 1 Am. Law J. (N. S.) 354.]

District Court, S. D. New York. Sept. Term, 1845.

COLLISION—BETWEEN SAILING VESSELS—MODE OF STEERING—VESSEL WITH WIND FREE MEETING VESSEL CLOSE-HAULED — LIGHTS — LOOKOUT—DAMAGES—CONSEQUENTIAL DAMAGES.

1. It is not culpable or improper conduct for the officer or deck to take the helm of a vessel, and to receive and act upon the direction of the look-out as to the mode of steering her.

2. A vessel running with the wind free, must give way to another close-hauled, without regard to their respective tacks.

[Cited in The Maria and Elizabeth, 7 Fed. 255.]

[See The Rebecca, Case No. 11,618; The Argus, Id. 521; The Thomas Martin, Id. 13,926; Allen v. Mackay, Id. 228.]

3. Sailing vessels, coming into port in the night time, are not bound to carry lights.

4. Pilot-boats, equally with other vessels, are guilty of gross negligence by running in the night time without a competent look-out stationed forward on the deck.

[Cited in The Ancon, Case No. 348; Ciancimino Tow & Transp. Co. v. The Ripple, 41 Fed. 64.]

5. The man at the wheel is not a sufficient watch to fulfill the obligations of the boat in that respect.

[See The Tillie, Case No. 14,049.]

6. The damages in case of collision, to be adjudged against the party in fault, must be sufficient to restore the injured vessel to the condition she was in at the time of the collision.

[See The New Jersey, Case No. 10,162; The Granite State, 3 Wall. (70 U. S.) 310.]

7. Actual injuries only are to be compensated for. The courts do not consider hypothetical or consequential damages.

[See The Narragansett, Case No. 10,019.]

In admiralty. This suit was instituted for the recovery of damages occasioned by a collision, on the 19th day of December, 1843, at sea, in the night, a few miles off Sandy Hook, between the schooner Harriet Smith, owned by the libellant, and the pilot-boat Blossom, owned by the claimants. The schooner was coming into this port from sea, and the pilot-boat was on her way out in pursuit of pilotage business. By the pleadings and proofs it appears the wind was about W. S. W., the schooner was heading about N. N. W., and pilot-boat about S. S. E. All these were estimated courses. The schooner was struck about a foot forward of her stern, on the starboard quarter. Three stanchions were broken, part of the taffrail split, the bulwark torn about eight feet, and the whole stern racked and broken by the blow. The repairs cost thirty-one 30-100 dollars, but the ship-carpenter testified that in his judgment, the injury to the schooner, in consequence of the collision, was from two hundred and fifty to three hundred dollars, and that the schooner

[1] [Reported by Edward R. Olcott, Esq.]

could not be replaced in a condition as good as before the injury without taking up her deck, and taking out the knees, &c. She was well manned and found.

The pilot-boat was outward bound on a cruise, with a complement of six persons on board, all of whom, except one, an apprentice at the helm, were below at the time of the collision. The night was dark; and so dark, it was contended for the claimants, that it was impracticable to discover the schooner far enough off to afford the pilot-boat any way to avoid her. The pilot-boat carried a lantern under her bow. She had no look-out forward, and no person on deck other than the man at the helm. The schooner had two men stationed forward on the look-out, one on the lee and the other on the weather bow. They and the mate, who was at the helm, testified that they saw the light of the pilot-boat the distance, they supposed, of a mile or more off, and the two on the watch both saw the boat itself coming upon them several times its length off, before she struck the schooner. The schooner showed no light. There was contradictory evidence respecting the usage or custom on the coast for sailing vessels to carry lights, and also as to the utility and prudence of doing so. The mate of the schooner took the helm, and ordered the men keeping the look-out to give him directions how to steer in respect to objects ahead. Evidence was given by the claimants to show the custom and usage of pilot-boats off this port to run in the night time with no more men on deck than the one at the helm.

W. Q. Morton, for libellants.
F. B. Cutting, for claimants.

BETTS, District Judge. It was argued for the pilot-boat that there was carelessness and want of due care and precaution in not carrying a light on board the schooner, and also in the officer of the deck taking the helm himself, and trusting to a common sailor to keep a look-out, and give orders how to steer. I do not consider those suggestions of any weight, because, if the mate had taken a position on the quarter-deck or midships, he must have shaped his orders to the helmsman from the report of the look-out. Indeed, I apprehend the uniform usage is for the look-out to cry the direction to be given the helm, and for that call to be obeyed instantly, unless countermanded by an officer. The maritime law does not oblige sailing vessels to carry lights at sea in dark weather.

The testimony as to the extreme darkness of the night is in conflict between the witnesses on board the pilot-boat and those on the schooner. The preponderance in numbers is with the latter, and their opportunity for observation was also superior to that of the others; and the opinion given by the schooner's men, that the night was not so dark but that the schooner might, at the time, be seen from another a distance far enough off to avoid her, is corroborated strongly by the occurrences succeeding the collision.

Immediately after striking the schooner, the pilot-boat glanced past her stern, was brought about into the wind, in order to ascertain her own damages, &c. The men below ran on deck, and one of them testifies, that after he got there, the vessels had separated, and he supposes were twenty yards apart, and that the schooner was under way going ahead. It is not to be supposed, in the confusion of such a moment, that the witness could estimate time or distance with any accuracy, and the circumstances tend to prove that the vessels must have separated more than twenty yards, and probably five times that distance, when so seen by him. When they struck, both were under full way, with a united speed of ten or twelve knots, and the headway of either was not apparently checked by the collision. The schooner's stern was canted off to windward, and her bow thrown round more leeward, so that her sails were nearly filled, and this position would more probably increase than retard her speed. The supposed movement of the two in opposite directions being about 1,760 yards (one mile) in five minutes, they would separate twenty yards in four seconds; and if only half a minute is allowed for the witness to be wakened by the shock, get on deck and make his observation, the vessels would, at that rate, be 140 or 150 yards apart. Almost instantly after the collision, another pilot-boat hailed the schooner, and asked if she wanted a pilot. Accordingly, she must have been seen from the pilot-boat, and it was judged by the sound of the hail she was 100 yards distant. In my opinion, the claimants do not succeed in proving the collision was owing to the extreme darkness of the night, and thus an inevitable accident.

The clear weight of evidence is, that it was not so dark but that the schooner could have been seen from the Blosson at the time, at such distance as to have enabled the pilot-boat easily to escape her.

It is strenuously argued for the claimants, that the schooner must be considered running with the wind free, or if she was on the wind, her larboard tacks were on board, and that accordingly it was her duty to give way for the Blossom, which was going close-hauled, with her starboard tacks on board, and was thus privileged to hold her course. That accordingly the fault of navigation, in this respect, was with the schooner. This state of the schooner is deduced from the course of the wind, and her steering, as estimated by the witnesses; and in the judgment of nautical men upon those data, the schooner must have been on a free wind. The statements of the points of the wind or course of the vessel are not made from observations of

the compass; they are merely the judgments of witnesses, and may doubtless be deemed correct in a general sense; yet the fact is explicitly testified to by three witnesses, who were on the deck of the schooner, that she was close-hauled, hugging the wind, and the helmsman of the Blossom says his boat was running out free, with the sheet off. These facts must outweigh all hypotheses drawn from charts or diagrams framed upon the supposed line of direction of either vessel. The fact positively asserted by uncontradicted witnesses, that the schooner was close-hauled upon the wind, that the pilot-boat was running free when they met, overbears all opinions of experts, that on the given course of the wind and steering of the vessels, both of them ought to have been alike close-hauled or running free. The nautical rule is clear and positive in such case, that the vessel sailing free must avoid the one close-hauled, if not prevented by insuperable obstacles. 2 Dod. 85; 3 Hagg. Adm. 318; Westminster Review, No. 42, p. 65; 3 Kent, Comm. 230. On these facts it was the duty of the pilot-boat to give way, leaving her free course to the schooner. I do not, however, make this the controlling consideration in the case, nor give weight to other particulars urged on the hearing, as that the schooner, being laden and inward bound, was entitled to keep her way under like circumstances against an outward-bound vessel in ballast; or that trading craft have that privilege specially in relation to pilot-boats, whose business it is to edge close upon vessels coming into port, to speak and board them if necessary, and are not to be regarded as having the privilege of vessels making regular voyages. But, in concurrence with the leading authorities in the federal courts and in England, I hold the pilot-boat did not use due care and precaution in running along the coast in the night time without having a competent look-out properly stationed on her deck. The Rebecca, [Case No. 11,618]; 3 Kent, Comm. 230; Story, Bailm. § 611; The Chester, 3 Hagg. Adm. 317. It was culpable negligence to trust this duty to the helmsman alone. His attention must be essentially occupied with his own vessel, and her safe management will leave him imperfect means for observing objects outside of her; and if he may occasionally take a view off her, yet that is not his chief or most important employment. In the case of The Emily [Case No. 4,453], in this court, this point was fully considered; and the vessel which had not a look-out properly stationed, independent of the helmsman, was pronounced in fault, and liable for injuries sustained by collision with others, which were managed with ordinary care and skill. The same rule must be applied in this case. The claimants fail proving the alleged custom and usage of running pilot-boats in the night time, without a look-out properly stationed forward, independent of the helmsman. Such usage, however largely practiced, could never be received in a maritime court as a justification. It is repugnant to all sound rules of navigation, and palpably dangerous to life and property at sea. I should not hesitate to pronounce it grossly culpable conduct to sail a vessel in the night without a sufficient watch stationed forward on her deck, whatever evidence might be given of the practice or custom in that respect. The more general such practice shall prevail, the more necessary it would become for the courts to discountenance and correct it by the severest condemnation and penalties.

I do not regard the accident one inevitable to both parties, but hold, on the proofs, that it resulted from the want of due skill and care on the part of the Blossom.

The damages of the libellant are not to be limited to the mere cost of repairing the schooner. The libellant is entitled to a reparation of his actual injury, that is, his vessel should be made to him staunch and serviceable to a like degree as she was before the collision; but he cannot recover for supposable or consequential damages. The repairs made did not place her in the sound condition she was before this injury; nor is an estimate given of what it will cost to take up the deck, and replace knees, &c.; and in the absence of such estimate, it may be safely concluded that a like expenditure with that already made, will be needed to furnish such repair.

I accordingly decree that the libellant recover $62.60, with his costs to be taxed; but as this valuation may be regarded by the parties below or beyond the actual value of the work required, leave is given to either party to take a reference on the point, as to what it would cost to place the schooner in as serviceable a state as she was before the collision. If both parties do not unite in the reference, then it is to be taken at the expense of the one asking it.

BLOSSOM (FOX v.). See Case No. 5,008.

Case No. 1,565.

BLOSSOM et al. v. SMITH et al.

[3 Blatchf. 316.][1]

Circuit Court, S. D. New York. Oct. 1, 1855.[2]

CARRIERS—BILL OF LADING—DELIVERY OF CARGO—CUSTOM AND USAGE.

Resin is not permitted to be stored in the city of New York. It is the usage, in New York, that, when a vessel arrives there with a cargo of naval stores, such as resin, consigned to different houses, the house to which the largest consignment is made, has a right to select the yard, in Brooklyn, at which the cargo shall be delivered, and all the other con-

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

[2] [Reversing decree of the district court in Case No. 1,566.]

signees are bound to take their consignments at the same yard. Where, in such a case, the largest consignee selected a yard in Brooklyn, but the owner of that yard would not permit the libellant's resin to be landed there, because of some personal difficulty with him, and not for any fault of the master or owner of the vessel; and the master notified the libellant and requested him to send lighters to take his resin from the vessel, but he refused; and the master then sent the resin to a yard in Brooklyn: *Held*, that the master discharged his whole duty, and that no action would lie against the owner of the vessel for a failure to deliver according to the bill of lading.

[Cited in The Mary E. Taber, Case No. 9,209; Devato v. 823 Barrels of Plumbago, 20 Fed. 518.]

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty. This was a libel in personam [by Benjamin Blossom and Charles J. Blossom against Jonas Smith and Paul Hulse], filed in the district court, to recover the value of a quantity of resin. After a decree in that court in favor of the libellants [Case No. 1,566], the respondents appealed to this court. [Reversed.]

Erastus C. Benedict, for libellants.

Daniel Lord and John E. Burrill, Jr., for respondents.

NELSON, Circuit Justice. The resin in question in this case was shipped at Wilmington, North Carolina, in a vessel belonging to the respondents, and was consigned to the libellants. There were several other consignments of resin by the same vessel. She arrived at New York on the 20th of May, 1853, and hauled over to Mitchell's yard, at Brooklyn, to land her cargo, where the different consignments of resin were delivered, except that consignment to the libellants. The agent of Mitchell refused to permit this consignment to be landed at that yard. The libellants were notified of this by the master, and were requested to send lighters to receive the resin from the vessel. This they refused to do, and required that it should be delivered at a yard belonging to themselves, in Brooklyn, about a mile and a half from Mitchell's, or at some other yard there where naval stores were received. The master then hauled over to the vessel's own pier, in New York, and notified the libellants of his readiness to deliver the resin there. They refused to receive it there. Resin is not permitted to be stored in the city of New York. The master then sent the article, in lighters, to a public yard in Brooklyn, and notified the libellants, and tendered to them the receipt given to him at the yard for its delivery, and demanded the freight, including the expense of lightering. The libellants tendered the freight, excluding the lighterage, and demanded the resin.

According to the usage of the trade, when a vessel arrives with a cargo of naval stores, such as resin, consigned to different houses in New York, the house to which the largest consignment is made has the right to select the yard in Brooklyn at which the cargo shall be delivered, and all the other consignees are bound to take their consignments at the same yard. The master is not obliged to deliver each consignment at any yard which its consignee may choose to select, or to go from yard to yard for the purpose of making a delivery.

In this case, the consignee of the largest quantity selected Mitchell's yard. The agent of Mitchell, however, refused to permit the libellants' resin to be landed there, as he had a right to do, for aught that appears. It seems that some personal difficulty existed between the owner of the yard and the libellants, and that orders had been given not to allow any consignment to their house to be landed there. The question is—what was the duty of the master, under such circumstances? He had complied with the usage, so far as was in his power, and was ready to land the goods in conformity to it, but was met by a refusal to permit the landing of this part of his cargo. The usage did not require him to land the article at any other place, but did require that he should have it at that particular place ready to be delivered. It seems to me that, unless the fault which led to the refusal of the owner of the yard was attributable to the master or owner of the vessel, the only further step required of the master, in justice or fair dealing, was taken by him in this case, namely, to notify the consignees, so that they might either provide for the landing of the article at the place designated by the usage, or send lighters to receive it from the ship.

The usage, if of any force or obligation, plainly enough implies that the consignee shall provide for the landing at the place it designates. Otherwise, it would fluctuate according to the caprice or passions of the owner of the yard selected in pursuance of it, and the master be left without guide or direction in the matter.

The case in hand is still stronger. The refusal to permit the landing arose from an exception taken to the conduct of the libellants. No exception was taken to the master or the owner of the vessel, or to their conduct in the matter. And yet, it would seem, from the claim of the libellants, that, in some way or other, the master or owner should be held responsible for the consequences. The claim is neither generous nor just. Nor do I think it the legal result flowing from the circumstances of the case.

It is said, that the master was bound to deliver the goods to the consignees, in order to discharge himself from the obligation in the bill of lading. But this must be according to the usage of the trade. That required him to deliver the goods at Mitchell's yard. They were taken there ready to be delivered, and no one was ready or willing to receive them. After notifying the consignees of the fact, it was their duty to provide a place

there, or receive them from the ship; and, on a refusal, any expense to which the ship was subjected, in the further steps to provide a place, was at their expense. This was not a case where the vessel could select her own dock or place of landing—the one where she was accustomed to deliver her goods, and which her owner provided.

I think that the court below erred, and that the decree should be reversed, and the libel be dismissed, with costs.

Case No. 1,566.

BLOSSOM v. SMITH.

[31 Hunt, Mer. Mag. 203.]

District Court, S. D. New York. April 26, 1854.[1]

CARRIERS—BILL OF LADING—DELIVERY OF CARGO—CUSTOM AND USAGE.

[By law, resin is not permitted to be stored in New York City, and, by local usage, on arrival of a vessel, the consignee of the largest quantity of cargo may designate a public wharf in Brooklyn for delivery, in which designation the other consignees must acquiesce. The largest consignee designated a wharf, but the agent of the wharf owner forbade the landing. Thereupon the master of the vessel notified a consignee of the resin to lighter it from the vessel, which he refused, when the master landed the resin at another wharf, with instructions not to deliver the same unless the lighterage as well as freight was paid. *Held*, that the vessel failed to deliver the resin in the port of New York, as required by the bill of lading, and that her owners were liable for the value thereof.]

[In admiralty. Libel in personam by Benjamin Blossom and Charles J. Blossom against Jonas Smith and Paul Hulse to recover the value of 69 barrels of resin consigned to libelants. Decree for libelants.]

INGERSOLL, District Judge. In the month of May, 1853, sixty-nine barrels of resin were shipped on board the schooner R. W. Brown, owned by the respondents, at Wilmington, North Carolina, to be carried to the port of New York, and there delivered to the libelants, dangers of the sea only excepted, and the master issued the regular bills of lading therefor A law of the state of New York prohibits the storing of resin in the city of New York, and the custom of the port is to land resin at one of the public wharves in Brooklyn, and that the consignee of the largest quantity of such goods on board shall designate which wharf the vessel shall go to. The schooner arrived at this port, with the resin on board, May 26th, 1853, and, in accordance with the custom, the consignee of the largest quantity of naval stores on board named Mitchell's wharf as the one to which the vessel should go. Accordingly she proceeded thither, and landed all the goods on board except the sixty-nine barrels, which the agent of the owner of the wharf forbade the carrier to land upon the wharf. Notice was therefore given to the libelants to lighter the goods from the vessel. They, however, neglected to do this, insisting that the goods should be landed at one of the public wharves in Brooklyn. On the 2d of June, the schooner, with the resin on board, hauled over to pier 28, East river, in the city of New York, and notice was again given to the libelants to come on board the vessel and take the goods there. They still refused; and on the 8th of June the carriers lightered the resin over to Lyon & Haff's yard, in Brooklyn, and stored it there, giving notice to Lyon & Haff not to let the libelants have it unless they paid the lighterage, in addition to the freight. The libelants, having tendered the freight and demanded the resin in vain, brought this suit upon the bills of lading for its non-delivery.

An attempt has been made by the respondents to prove, that when the owner of the wharf selected by the consignee of the largest quantity of goods on board the vessel refuses to permit the goods of a particular consignee to be landed at such wharf, it is by custom made the duty of such particular consignee to send lighters for the goods, and have them lightered from the vessel to another public wharf. But the attempt to establish this latter custom by sufficient proof has failed. In the few cases which have occurred of such refusal, sometimes the consignee has lightered the goods, and sometimes the carrier has lightered them, and sometimes the ship has hauled to another wharf. The general custom is as above stated.

The sole question in this case is, whether the carrier has delivered the resin to the libelants according to the bill of lading; or, if he has not, whether he has shown any good, valid, legal excuse for not so doing. The resin has never come into the actual possession of the libelants. It has been landed on one of the wharves of Brooklyn, where, by custom, the carrier had a right to land it, provided he gave the libelants sole and exclusive control over it, upon their paying freight. This control the respondents refuse, unless the libelants will pay the lighterage, in addition to the freight. If they have the right to demand this, the libelants cannot recover in this suit; and they have no right to demand this, unless the libelants were in the wrong in neglecting to receive the goods according to the notices. The respondent says, that the libelants were in the wrong in two instances. First, in not sending their lighters for the goods when the schooner was at Mitchell's wharf; second, in not receiving the goods on the vessel's deck when she was lying at pier 28.

1st. There is no law or custom which compelled the libelants to lighter the goods from the vessel at Mitchell's wharf. The carrier's contract was to deliver the goods at the port of New York, and on such a contract the

[1] [Reversed by the circuit court in Case No. 1,565.]

custom is to deliver them on one of the public wharves at Brooklyn. There is no custom to deliver at the ship's sides in a lighter. Such is not the usual way of delivery, and an offer to deliver it will not satisfy the contract; and if the owner of the wharf wrongfully prevents the discharge of the goods, the carrier is not excused from fulfilling his contract, which is to land at some wharf. The libelants were not in the wrong, therefore, in neglecting to send lighters for the goods while the schooner was lying at Mitchell's wharf. That was no part of the contract, and there is no custom which makes it such, or imposes any such duty on the consignee.

2d. The libelants were not in the wrong in not receiving the goods on the deck of the vessel at pier 28. By the law of the state, and if that law was not in existence, yet by the custom of the port, the city of New York is established to be not a usual and proper place for the delivery of the resin. And no tender is in conformity with the contract to deliver, unless the place where it is tendered is a usual and proper place for its delivery.

The decree of the court, therefore, is, that the libelants recover of the respondents the value of the resin in controversy at the time when it was demanded, less the freight.

Ordered reference to a commissioner to ascertain that amount.

Case No. 1,567.

BLOUNT et ux. v. DARRACH.

[4 Wash. C. C. 657.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1827.

GUARDIAN AND WARD—ACCOUNTING—DECREE OF ORPHAN'S COURT—CONCLUSIVENESS.

1. The decree of the orphan's court in Pennsylvania of a deceased guardian's account, the subsequent guardian of the infant being a party to the controversy, is conclusive, and a complete bar to a bill in equity in any other court.

[Cited in Rhoades v. Selin, Case No. 11,740.]

2. The doctrine of the conclusiveness and effect of judgments and decrees in courts of peculiar jurisdiction, and others, examined and stated.

In equity. The bill states that the female plaintiff [wife of Blount] is the daughter of Daniel P. Knight, formerly of Philadelphia county, who, on the 22d of April, 1808, conveyed to James Darrach, Thomas Bioren, and John Bioren, a certain real estate in trust for himself for life, and after his death, to the use of his said daughter in fee tail; and in default of issue, to the use of the children of Michael Knight, and his sister Elizabeth, as tenants in common in tail; and in default of such issue, then to the use of said Daniel P. Knight and his heirs. That the said Daniel P. Knight died in the year 1809, leaving his said daughter a minor, to whom the aforesaid James Darrach was appointed guardian, and who continued to act as such until his death. After his death his executors filed an account of the guardianship of their testator in the orphan's court of the city and county of Philadelphia, and auditors were appointed to audit and settle the same; who reported a balance due to the said Elizabeth Knight by the estate of her late guardian, of $1897, to the 1st of February 1816. Of this balance the executors paid to William Bradford, Jun., who had been appointed the guardian to the said Elizabeth after the death of James Darrach, the sum $1798 49 cents, on the 9th of November 1819. That at the time of the aforesaid settlement of the said guardianship account, the said Elizabeth was an infant, and no attention to the said settlement was paid by her guardian, William Bradford, Jun. The bill then charges that the account so settled was replete with errors and omissions, particularly in the following instances: 1. That no interest is credited the ward on the sums received by her said guardian from the commencement of the account to the 1st of February 1815. 2. That no rents are credited for a house, No. 361, North Front street, in the Northern Liberties, except a small amount, much less than was received by her guardian, or if not received, they were lost by the negligence of her guardian. 3. That there are various deficiencies in the account as to rents on a wharf and lot in the Northern Liberties, and that the account throughout is imperfect. The bill calls upon the defendants, the executors of James Darrach, to discover whether rents, and other sums of money belonging to the ward were not received by their testator beyond what are credited in the aforesaid account, and whether divers sums of money did not remain in the hands of their testator from time to time, on which no interest is allowed in said settlement; and whether a sum of money was not withheld by the executors from her guardian, Mr. Bradford, under the pretence of the same being due by the said William Bradford, in his individual capacity, to the estate of James Darrach; to produce the books of their testator, which contain many entries or accounts respecting the estate of his said ward. The prayer of the bill is for an account of the guardianship transactions of James Darrach.

To this bill the defendant filed a plea, setting forth, that on the 20th of October 1809, the orphan's court of the city and county of Philadelphia, on the petition of the grandmother of the said Elizabeth Knight, then seven years of age, appointed James Darrach her guardian; the duties of which he undertook, and exercised until the time of his death, which happened on the 16th of February 1816. That on the 17th of September 1817, the said Elizabeth, being then of

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

the age of fourteen years, chose, and the orphan's court appointed William Bradford, Jun., and Thomas Vanzant her guardians, who continued as such until she arrived at full age. That the defendants, as executors of James Darrach, filed in the orphan's court the account of their testator of his guardianship of the said Elizabeth; and on the 19th of July 1816, auditors were appointed by the said court to settle and report on the said accounts. That one of the guardians of the said Elizabeth appeared before the auditors, and examined the said account, with the vouchers, altered some of the items in it, charged interest on moneys in the hands of the guardian, thereby increasing the balance due to the ward, which account, so altered and examined, was reported to the said court, and was, by the decree of the said court, allowed and confirmed, and the same remains unappealed from or reversed on error. Which settlement, report, and decree, the defendants, after protesting that there are no errors in the same; plead in bar of the bill, and of the account and discovery thereby prayed. [Bill dismissed.]

Mr. Bayard and J. R. Ingersoll, for plaintiffs.

Mr. Dwight and Thomas Sergeant, for defendant.

WASHINGTON, Circuit Justice. This cause having been set down to be argued on the plea, the allegations contained in it must all be taken as true. The single question which arises upon the facts stated in the plea is, whether the account of the guardianship of James Darrach, which by the decree of the orphan's court was allowed and confirmed, is conclusive or not, so as to be a bar to the discovery and relief sought to be enforced by this bill?

The general principles of law in respect to the conclusiveness of the judgments and decrees of the domestic tribunals of the country are well settled, and perfectly intelligible. A judgment or decree of a court of competent jurisdiction, directly upon the point, is conclusive between the same parties, or their privies, upon the same matter, coming directly in question in another court of concurrent jurisdiction. The rule is founded upon considerations as well of abstract justice as of public policy which forbids the litigation of any matter which has been once fairly determined by proper and competent authority between the same parties, or those standing in the relation of privies to them. If the matter, or the parties be different, the former judgment, if admitted in evidence at all, as in particular cases it may be, can be so only as prima facie evidence, but not conclusive. And so extensive and universal is this principle, that it includes the judgments or determinations of tribunals having competent authority to decide, whether they be of record or not. Where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally before another court, the sentence of the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers. Duchess of Kingston's Case, 20 Howell St. Tr. 355; Strange, 481; Doug. 407; 2 H. Bl. 416; Harg. Law Tracts, 446. The subjects of inquiry then in the present case are: Had the orphan's court jurisdiction of the matter on which they made their decree? Is that the same matter which this bill seeks to litigate in this court? Are the parties the same, or in privity with those who were parties in the orphan's court? And lastly, how far is that decree binding on the plaintiff in consideration of the infancy of Elizabeth Knight at the time it passed?

1. By the act of assembly of 1713, of this state, "for establishing the orphans' courts," they are declared to be "courts of record," with power to call on executors, administrators, guardians, and others, who are entrusted with, or accountable for property, real or personal, belonging to any orphan, and cause them to exhibit true and perfect inventories, and accounts of the said estates. By the third section of this act, the orphan's court, upon complaint being made that any person having the care and trust of a minor's estate, is like to prove insolvent, or shall refuse or neglect to exhibit true and perfect inventories, or to give full and just accounts of the estates come to their hands or knowledge; is required to cause such guardians or tutors of orphans or minors, to give such security as the court may think proper. The sixth section provides, that guardians shall not be liable for interest but for the surplusage of the estate remaining in their hands or power, belonging to the minor, when the accounts of their administration are, or ought to be settled and adjusted before the orphan's court, or register general, respectively. The eighth section invests this court with a power to issue attachments for contempt, against those who have been summoned to appear therein, and to enforce obedience to their warrants, sentences, and orders concerning any matter cognizable therein, as fully as any court of equity can do. The party aggrieved by any final sentence of the said court is, by the succeeding section, allowed an appeal to the supreme court. The eleventh section declares, that, when any minor shall attain to full age, if the person entrusted or concerned for them as before mentioned, shall have rendered his accounts to the orphan's court, according to the direction of this and other acts, and paid the minor his full due, the minor shall acknowledge satisfaction in the said court; and if he refuse to do so, the court is required to certify how the said person concerned has accounted and paid, which shall be a sufficient discharge of the guardian, &c., who

shall so account and pay, and thereupon his bond shall be delivered up and cancelled. By the tenth section of the act of 1807, where the personal estate or a minor is insufficient for his maintenance and education, the orphan's court may allow the guardian to sell so much of the real estate as may be necessary for those purposes; and, in a note to Smith's edition of the Laws (volume 1, p. 87), he observes, that the persons directed to sell, are most commonly obliged, by the acts authorising the same, to exhibit their accounts for settlement in the orphan's court. Upon a view of the above provisions respecting the orphan's court, I could not entertain a doubt, were the question before me for judgment for the first time, that that court has jurisdiction to settle and to allow or confirm the accounts, of guardians, and finally to decide upon the different items of those accounts, subject to the reversing and correcting jurisdiction of the supreme court. But if this point were at all doubtful, I take it to be settled by the decision of the supreme court of the state in Richards' Case, 6 Serg. & R. 462. That case came on upon a rule to show cause why the wards should not be permitted to appeal on giving security for costs only; in which it was decided that an order of confirmation by the orphan's court of a report of auditors on the final settlement of a guardian's account is a final decree; but that that court has no authority to go further, and to decree payment of a balance from the ward to the guardian on such settlement. "It is going far enough," observes the learned judge who delivered the opinion of the court, "to say the confirmation of the account shall discharge the guardian, without directly involving the ward in personal liability." It is added, "the orphan's court is ex officio the protector of the ward, and interferes no further than to compel the guardian to account with him."

2. The next inquiry is, whether the matter decreed by the orphan's court, is the same which this bill seeks to litigate? Upon this subject there can be no doubt. The matter presented to that court by the executors of James Darrach for its consideration and decision, was the guardianship accounts of their testator, of the estate of his ward, Elizabeth Knight. That account was referred by the court to auditors, who made their report, stating the balance due by the decedent to his late ward, and this report was by a decree of the said court allowed and confirmed. The object of this bill is to open that account for the purpose of enabling the plaintiff to surcharge and falsify it in the particulars stated in the bill. The prayer of the bill, both as to discovery and relief, is confined to that object.

3. The next inquiry is, was Elizabeth Knight, in whose right the plaintiff claims, a party to the proceedings in that court upon which the decree of confirmation was passed? The plea states that her guardian, duly appointed by the orphan's court, appeared before the auditors, litigated the account presented by the executors, and by objections successively made to some of its items, increased the balance which was finally reported and decreed in favour of his ward. Will it be doubted that he legally represented his ward, so as to make her a party to the proceedings before that court? By the seventh section of the act of 1713, before referred to (1 Smith, 184), the orphans' courts are authorized to appoint guardians, next friends or tutors, over minors; "who shall be allowed and received without further admittance to prosecute and defend all actions and suits relating to the orphans or minors, in any court of the province."

Lastly, it is to be seen, how far the decree of the orphan's court, made during the minority of Elizabeth Knight, is binding upon her, or those claiming in her right? The general rule of the court of equity is, that no decree can be made against an infant, without giving him a day to show cause after he comes of age. When he is plaintiff, he is, unless under extraordinary circumstances, as much bound by a decree, and as little privileged, as an adult. And even in the former case, he will not be permitted to travel into the account, or where a foreclosure has been decreed, to redeem by paying what is reported due; but is only allowed to show an error in the decree. If at law he suffer a recovery, he is so far bound, that he cannot enter on the land until he has reversed the judgment upon writ of error.

It is probable that in this case, the plaintiff in right of his wife, might be permitted, in the orphan's court, to show cause against the decree of that court rendered during her infancy, by showing specific errors in the account, or that the subject might be re-examined in the supreme court by appeal or writ of error. As to this matter, however, it would not become me to give an opinion. But it is clear to my mind, beyond all question, that the correctness of the decree of the orphan's court cannot be examined into by this court, which can only claim to exercise concurrent jurisdiction to compel guardians to settle their accounts where they have not done so before some other competent tribunal.

The plea therefore, averring that the balance decreed by the orphan's court has been paid, and relying upon that decree in bar of the other parts of the bill, is, what it professes to be, an answer to the whole bill, and consequently I must decree the bill to be dismissed with costs, but without prejudice to any remedy which the plaintiff may think fit to pursue elsewhere.

BLUE (BIGGS v.). See Case No. 1,403.

Case No. 1,568.

BLUE v. RUSSELL.

[3 Cranch, C. C. 102.][1]

Circuit Court, District of Columbia. May Term, 1827.

NEGOTIABLE INSTRUMENTS—PLEADING AND PROOF — EVIDENCE — STRIKING OUT PLAINTIFF'S INDORSEMENT ON TRIAL.

1. A note payable in twelve months "with interest" will not support a count upon a note payable in twelve months without interest.

[See Coyle v. Gozzler, Case No. 3,312; U. S. v. Lee, Id. 15,586.]

2. The plaintiff was permitted to strike out his own indorsement of the note, after it had been offered in evidence to the jury and objected to, on account of such indorsement.

At law. Assumpsit upon the defendant's promissory note, payable in twelve months with interest. The declaration omitted the words "with interest."

THE COURT decided the variance to be fatal; there being only one count, namely, on the note.

A juror being withdrawn, the plaintiff had leave to amend his declaration, and THE COURT refused to continue the cause.

The note had upon its back the blank indorsement of the plaintiff (who was the payee) and of another person.

Mr. Barrell, for the plaintiff, was permitted, after offering the note in evidence, and after objection to its going to the jury on account of the indorsement of the plaintiff, to strike out the indorsements.

CRANCH, Chief Judge, doubting.

Verdict for plaintiff, $1700.

Case No. 1,569.

The BLUE JACKET.

[10 Ben. 248.][2]

District Court, E. D. New York. Jan. Term, 1879.[3]

SHIPPING—DAMAGE TO CARGO—PERILS OF THE SEA —NEGLIGENCE OF MASTER—SURVEY.

1. A quantity of sacks of barley were shipped at San Francisco, to be carried to New York, under bills of lading which excepted perils of the sea. The ship met with heavy weather and began to leak before she reached the Horn, and put into Rio in distress. A survey was had, which recommended that the cargo be discharged until the leak should stop or the ship should be in ballast trim. Accordingly, all the cargo was discharged except 3,093 sacks of barley forming the ground tier, with some at the ends of the ship. A second survey was then had, which reported that the underside of the ground tier was damaged by sea-water, but recommended that all the cargo, damaged or not damaged, should be taken forward. The ship was then repaired, the cargo was reloaded, it being all then dry, and the voyage completed. On the discharge of the cargo at New York it was found not only that a portion of it had been damaged by salt water, but that the rest of it, though in external appearance undamaged, had to a great extent lost the malting quality, and it was sold at auction at a loss, and libels were filed against the ship to recover the damage: *Held*, that, as to the cargo which appeared to have been wet with sea-water, the ship was not responsible, because it came from the leak, which was a peril of the sea.

2. That, as to the destruction of the malting quality, the cause of it appeared to be the leak, which, causing a damp atmosphere in the hold, had led to the germination of the grain, and that the presumption was that the leak had caused that damp atmosphere before the ship arrived at Rio, and that there was no evidence to overbear that presumption.

3. That, on the proofs, the master, having followed the advice of a duly constituted survey in good faith, could not be held negligent in taking in the cargo that had been discharged without taking out the ground tier.

[See The Amelie, 6 Wall. (73 U. S.) 27.]

4. That the action could not be maintained, inasmuch as no breach of duty on the part of the master had been shown.

In admiralty.

[See Neidlinger v. Insurance Co. of North America, Case No. 10,086, for decision of a case arising out of substantially the same state of facts.]

Scudder & Carter and W. W. Goodrich, for libellants.

Benedict, Taft & Benedict, for claimant.

BENEDICT, District Judge. These two actions, which were tried together, are brought by David Jones and by Adam Neidlinger et al., the owners of certain sacks of barley shipped in San Francisco upon the ship Blue Jacket, to be transported therein to the city of New York, and there delivered in like good order as received.

The bills of lading admit the reception of the barley in good order and agree to deliver it in New York, perils of the sea excepted.

The number of sacks consigned to the libellant Jones was 9,087; the number consigned to Neidlinger was 16,822. All are proved to have been well stowed in San Francisco, and when the ship sailed she was sound and staunch. On the voyage the vessel met with heavy weather and began to leak before she reached the Horn. The leak increased so that finally she was compelled to bear up for Rio in distress. She arrived in Rio in distress on the 15th of January, 1877, and a survey was had by which it was recommended that the cargo be discharged until the leak should stop or the ship be in ballast trim. In accordance with the recommendation of the survey 22,817 sacks of barley besides other cargo were taken out, leaving in the ship 3,093 sacks, forming the ground tier, with some at the end of the ship. After the discharge of this part of the cargo a second survey was had; according to that survey some of the barley and wool amid-

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

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

[3] Affirmed by the circuit court, July, 1880. [Decree unreported.]

ships was then slightly damaged, and the under side of the lower tier in the lower hold was damaged by sea-water. The recommendation of the survey was that all the cargo, damaged or not damaged, be taken forward to its original destination. In accordance with this recommendation the ship went upon the dock on the 16th of February, and was then repaired. On the 1st of March she began to take in her cargo again, and on the 18th of March she sailed for New York, where she arrived in safety on the 11th of May, and without any further damage from perils of the seas.

Upon the discharge of the barley in New York two kinds of damage were disclosed. Some of the sacks showed ordinary sea damage, caused by sea water having leaked into the vessel and upon the sacks. In the view I take of this case, it is immaterial what number of sacks were damaged from this cause. The remainder of the barley, constituting the greater part of the cargo, was bright, hard and in external appearance sound and undamaged. Upon testing the barley for that purpose, however, it was ascertained that the great proportion of the grains had lost the malting capacity, and consequently the barley was unfit for malting and unmerchantable as barley for malting purposes. Whereupon it was all sold at auction and brought from 47 to 55 cents per bushel, the market price of merchantable barley fit for malting being then $1.10 per bushel.

These actions are brought to recover of the ship the loss as disclosed by the auction sale. In my opinion they cannot be sustained, and for the following reasons:—In regard to that part of the barley with which sea water came in contact, of course the ship is not responsible, because no sea water reached the cargo except through the leak which occurred before the ship put into Rio, and that arose from a peril of the seas. In regard to the destruction of the malting capacity of the rest, the ship is not responsible, for the reason that, if the cause of this condition of the barley can be inferred from any facts proved, that cause was the sea water that leaked into the vessel, which, by creating a damp atmosphere in the hold, started germination in the grain, and that being thereafter stopped, would never start again. As germination in grain is the natural result of dampness, accompanied with the heat of the hold, the proximate cause of the injury was the peril of the sea.

But it is contended that no damage would have ensued if the portion of the cargo that had been wet by the leak had been abandoned in Rio, and that it was negligence to stow barley that had not been wet upon the lower tier which had been wet, for which negligence the ship is liable. The sufficient answer is, that the evidence will not warrant the conclusion that the presence in the ship during the passage from Rio to New York of the barley that had been wet by the leak was the cause of the destruction of the malting capacity of the grain.

The libellants' claim is that wetting of the lower tier, together with heat, caused the destruction of the malting capacity. But there was wetting and heat before the ship reached Rio, and the presumption is that such wetting and heat then produced its natural result.

When, therefore, it is sought to hold the ship liable upon the ground that such result occurred after the ship left Rio, the burden is upon the libellants, to show such to be the fact. This has not been done. For all that has been here proved, the condition of the barley when reloaded in Rio was the same as its condition when landed in New York. Indeed there is direct evidence that such was the fact, and there is no ground to contend upon the evidence that any of the grain was wet when the cargo was reloaded at Rio. The circumstances combine with the positive evidence to show that all the cargo was then dry. Moreover, not only is it impossible to find upon this evidence that the loss of malting capacity in the barley was caused after the ship was reloaded in Rio, but it is also impossible to find the master guilty of negligence in regard to the reloading. Rio, it must be recollected, was a port of distress. The condition of the ship and cargo upon arrival in Rio forced upon the master of the ship the question whether to abandon the barley that had been wet or to carry it forward. Upon this question he took the advice of competent persons given in due form after survey. The advice of the survey was that all the barley be carried forward in the ship. The integrity of the surveyors is not called in question by any testimony to the contrary. No witness who saw the condition of the cargo in Rio is called to say that what was done was not what the facts as they then appeared indicated to be the best course to pursue.

The master followed the advice of a duly constituted survey. His good faith is not disputed. How, then, shall it be said that he was guilty of negligence? The advice of a fair, competent and disinterested survey is always considered to be strong evidence in justification of a course adopted by the master of a ship in a port of distress. The Amelie, 6 Wall. [73 U. S.] 27. If, contrary to his own judgment and contrary to the opinion of experienced persons called to hold the surveys, the master of this ship had sold or abandoned any part of the barley at Rio, could he have made answer to the charge of not performing the contract in the bill of lading? And if not, can he now be held guilty of negligence in omitting to do what it would have been negligence to have done?

If there were testimony to show a defect in the manner of restowing the cargo at Rio, or if it had been proven that the cause of the damage in question was the use of the

old sails for dunnage, upon which counsel laid stress, there would then be ground for the contention that the ship is liable because of the negligence on the part of the master. But the testimony fails to make out such a case.

Upon the evidence it is impossible to say that any different mode of restowing the cargo at Rio should have been adopted. The point endeavored to be made is, not that the cargo carried from Rio to New York should have been stowed differently in Rio, but that there was negligence in permitting the barley that had been wet to form a part of that cargo. In view of the result there may be those who entertain the opinion that it was a mistake on the part of the master to attempt to carry forward the barley that had been wet, and that the result of that mistake is seen in the damage sued for. But if, as it turned out, a mistake was committed in this particular, and if the damage in question is the result of such a mistake—two propositions by no means certain—it does not follow that the master exhibited in this particular such a want of reasonable skill, diligence and care as to convict him of neglect of duty in the premises. In order to maintain this action against the ship, a breach of duty on the part of the master must be shown. Notara v. Henderson, 1 Asp. 278.

The libels must be dismissed, with costs.

Case No. 1,570.

In re BLUE RIDGE R. CO.

[2 Hughes (1877) 224;[1] 13 N. B. R. 315; 8 Chi. Leg. News, 290; 4 Am. Law Rec. 456.]

Circuit Court, D. South Carolina.

BANKRUPTCY — SALE OF BANKRUPT'S PROPERTY — CHARGING PROCEEDS WITH COSTS — SALE FREE FROM MORTGAGE — ADJUSTMENT OF RIGHTS OF MORTGAGEE.

1. When a bankruptcy court, at the suggestion of the general creditors, authorizes the sale of property incumbered by liens, and the proceeds of sale amount to no more than the claims of lien creditors, it has no control over the fund but to pay it to such lien creditors, and the fund is not chargeable with any costs in the bankruptcy proceeding except the actual costs of sale.

2. When property is sold free from a mortgage, the bankruptcy court has no authority to adjust the claims of the trustee under the mortgage against the cestuis que trust, nor to ascertain what is due by him to his counsel.

[Appeal from the district court.]

In bankruptcy. It appears from the record in this case that [bankrupt] the Blue Ridge Railroad Company is a corporation under the laws of South Carolina, and that on the 20th of April, 1854, it executed a mortgage of all its property whatsoever to certain persons therein mentioned to secure the payment of certain bonds named in said mortgage and the interest thereon to accrue. And further it appears that after the mortgage debt aforesaid became due and payable, and was unpaid, certain creditors of the bankrupt filed a petition in the district court, asking that the said corporation might be declared a bankrupt, which was accordingly done, and assignees were duly appointed to take charge of its property. It appears also that the corporation, at the time of its adjudication as a bankrupt, had no other property whatever than that covered by the mortgage, and that the property mortgaged was totally inadequate when sold to pay the debt for which it was pledged. It appears further, that on the 16th of January, 1873, the assignees of the bankrupt filed a petition in the bankrupt court, asking that the property of the corporation mortgaged as aforesaid might be sold, and the court directed a sale thereof, at which sale one Robert K. Scott, who was authorized by his fellow-bondholders to purchase the road in their behalf, became the purchaser thereof, being the highest bidder therefor.

Prior to the sale the bankrupt court made an order directing James Simons, Esq., as special master in the case, "to inquire and report what compensation the trustees and assignees were entitled to, by way of commissions, expenses incurred, services rendered and to be rendered up to and including the sale proposed, and also to inquire and report what fees the counsel for the trustees and assignees were entitled to, and out of what fund payment should be made therefor." Under this order the special master filed his report on the 12th of March, 1874, by which he allowed to the assignees of the bankrupt certain commissions, fees, and expenses for themselves and their counsel, and to the trustees under the mortgage another large sum of money by way of commissions, counsel fees, and expenses, amounting in all to about $30,000, and he directs or recommends that the larger part of these payments be made out of the proceeds of the sale of the mortgaged property, and bases his estimate upon the supposition that the road is worth $250,000. The property of the railroad sold at the sale for fifty thousand dollars. From the order making the reference to Special Master Simons, and from the order overruling the exceptions to his report and confirming the same, the petitioners here file their petition, asking the aid of the supervisory jurisdiction of the circuit court. [Order of reference revoked, and confirmation reversed.]

BOND, Circuit Judge. It is plain from the record in this case that at the time of the filing of the petition in bankruptcy, the bankrupt company had no property the sale of which would produce anything for its general or unsecured creditors. All that it

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

owned was mortgaged greatly beyond its value.

The only justification of the petition of the assignees for the sale of this property by the bankrupt court is, that they supposed it would realize something for the general creditors. This the sale did not do, and every one concerned in the proceeding had reason to know it would not. When a bankrupt court, at the suggestion of the general creditors, authorizes the sale of property incumbered by liens, and all proceeds of sale amount to no more than the claims of the lien creditors, it has no control over the fund but to pay it to such lien creditors, and it is not chargeable with any costs in the bankrupt proceeding except the actual costs of sale. The fund is sacred and is devoted to the payment of the lien creditors whose property has been sold, and they are chargeable with no other or further costs than they would have incurred had they sold the property under their liens. The assignees in this proceeding were acting not for the benefit of the bondholders who were secured by mortgage, but for the general creditors of the bankrupt. By what rule of equity can the lien creditors be required out of their funds to pay the expenses of a litigation which was solely for the benefit of the general creditors? Both they and their counsel must look to the general assets of the bankrupt estate for payment of their claims, if they be entitled to payment at all. Nor can the allowance by the special master to the trustees and their counsel, which was confirmed by the bankrupt court, be permitted.

The district court, when it ordered the sale of the railroad property, was acting solely for the general creditors. When the property was sold under its order, and it was found there was nothing in hand belonging to them, its sole duty was to ascertain who the lien creditors were, the priority and amount of their claims, and to pay over to them the proceeds of the sale. It had no authority in this proceeding to adjust the claims of the trustees under the mortgage against their cestuis que trust, nor to ascertain what was due by trustees to counsel. The mortgaged property in the hands of the bankrupt court was and is bound for nothing but for the lawful charges for the administration of that property in that court. The sale not being objected to, and no motion being made to set it aside, will be allowed to stand, but the circuit court will pass an order revoking the order of the district court referring this cause to Special Master Simons for report, and reversing the order of the district court confirming the report of said master, and will direct that this cause be remanded to the district court with directions to ascertain what were the actual costs incurred in the sale of said mortgaged property, as determined by the bankrupt law, and which in accordance with this opinion are properly chargeable to the proceeds of this sale.

Case No. 1,571.

BLUKEMAN v. The PACIFIC.

[N. Y. Times, Dec. 2, 1854.]

District Court, S. D. New York. Dec., 1854.

COLLISION—STEAMER LANDING AT PIER.

[A steamer on a regular route, on approaching her berth on the side of a pier to land passengers, slowed, stopped her engines, lost her headway, and, moving as gently as possible by the tide, came in contact with an old coal barge which on the steamer's approach had been left at the end of the pier. *Held*, that the steamer was not negligent, and consequently not liable for injuries sustained by the barge.]

[In admiralty. Libel by Henry Blukeman against the steamboat Pacific. Dismissed.]

Hr. Haskett, for libellant.

Benedict, Scoville & Benedict, for claimant.

INGERSOLL, District Judge. This suit is brought by the libellant claiming that the steamboat should pay the damages occasioned to his boat by a collision. This boat, if boat it can be called, was an old coal barge, which had been purchased by the libellant, not for purposes of navigation, but to build a house upon her in the dock, and use her as an oyster stand. She was brought over by a tow-boat from Red Hook, and left at pier 35, East river; a canal boat lying between her and the end of the wharf. The north side of this pier was the regular berth of the Pacific, then running regularly between here and Norwalk. As she neared pier 35, she discovered this barge coming along with a tow-boat, which left her at the end of the pier, just before the Pacific reached it.

Now, although there may have been a collision and damages yet if there was no fault on the part of the steamboat, there can be no recovery. In my judgment, there was none. She had the right to come to her berth, and if she same in a proper way, and without any intention of wilful injury, she is not responsible. It is not claimed that there was any wilful injury, but that there was negligence. But she had the right to land her passengers at that slip, and as she came up she slowed and stopped her engine, and had no headway on her, but came in by the tide, in as gentle a way as she could do. There is some doubt whether the damage was occasioned by the collision, but if it was, it was not by reason of any negligence on the part of the steamboat.

Libel dismissed, with costs.

Case No. 1,572.

In re BLUM.

[2 Spr. 73.][1]

District Court, D. Massachusetts. July, 1863.

HABEAS CORPUS — ACT CONG. 1863, CH. 81 — CONSTRUCTION — DISCHARGE OF PRISONER NOT OF WAR—WHAT COURT MAY O DER.

Construction of U. S. Stat. 1863, c. 81, § 3 [12 Stat. 756]. What court is to make the order therein provided for, respecting the discharge of state prisoners and prisoners not of war, against whom no indictment shall be found.

[On habeas corpus. Petition by Godcho Blum for discharge from imprisonment other than as a prisoner of war. Denied.]

Philip J. Joachimsen, for petitioner.

SPRAGUE, District Judge. This is a petition for an order upon Colonel Dimmick, an officer of the United States commanding at Fort Warren, to bring before me one G. Blum, that he may be discharged under and by virtue of the third section of Stat. 1863, c. 81 (12 Stat. 756).

The petitioner, among other things, sets forth "that on or about the eleventh day of April, 1863, the said G. Blum was arrested at or in or near the city of New York, in the state of New York, and within the southern district of New York, by or under the authority of the secretary of war, and committed to close custody and confinement at Fort Lafayette, and that he was so made a prisoner otherwise than as a prisoner of war."

The petition further sets forth that a grand jury attended the circuit court of the United States for the southern district of New York from some time in April last until the first day of July present, and then terminated its session "without finding an indictment or presentment or other proceeding against him;" and that said G. Blum was transferred to Fort Warren "as soon after the adjournment of said grand jury as practicable." And it is alleged "that by reason of such removal and transfer no proceedings to obtain the liberty of said Blum can be had except in the district of Massachusetts."

The authority to make the order and discharge the prisoner, as requested, must rest wholly upon the statute above referred to, and the question that first presents itself is, By what judge is such order to be made?

The second section provides that the secretaries of state and war shall furnish to the judges of the circuit and district courts of the United States a list of certain prisoners, and that the list shall contain the names of those who reside in the respective jurisdictions of said judges, or who may be deemed by either of said secretaries to have violated any law of the United States in any of said jurisdictions. The same section further provides that "in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged."

This order is to be made by "the judge of said court." What court? Manifestly that which immediately precedes, and which the grand jury has attended. The courts previously mentioned are, in the first place, "the circuit and district courts of the United States;" and in the next place, "the said federal courts;" and afterwards comes the provision that "in all cases where a grand jury, having attended any of said courts having jurisdiction, &c., . . . it shall be the duty of the judge of said court, &c." That is, if a grand jury shall have attended any one of the federal courts having jurisdiction, &c., then the judge of said court, that is, of the one which the grand jury has attended, is to make the order, and no other judge is authorized to do so.

The third section anticipates that the secretaries may neglect to furnish the list, and in such case makes the petition of a citizen equivalent thereto. It provides that such petitioner may "obtain and be entitled to have the said judge order to discharge such prisoner," &c.

No judge is designated by the third section except by the words "said judge," which can refer only to the judge described and specified in the second section, and that, as we have seen, is the judge of the court which the grand jury shall have attended and which had jurisdiction, &c., and no other judge is empowered to make such order.

The district judge of Massachusetts therefore is not authorized to make the order which is now requested.

It has been urged that if the judge in Massachusetts cannot make the order, the purpose of the statute will be defeated, and there will be a failure of justice, because it is said that an order made by a judge in the southern district of New York would be inoperative, the prisoner being now confined in Fort Warren.

I am not called upon to decide upon the extent of the authority of the judge in New York, nor to take it into consideration, except so far as it has been urged as a reason why I should assume power. It seems to me that there is more ground for concluding that the judge of the court in New York has power to make an effective order than that the judge here has any such authority. The statute does not require that the order shall be served by the marshal, or prescribe the manner in which the notice thereof shall be given; and it is believed that, like the writ of habeas corpus, it may be directed to

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

the officer having custody of the prisoner, and that, when duly made known to him, he would be bound to obey it, although not served by the marshal. The statute expressly requires every such officer of the United States to "obey and execute" such order.

The second section requires that the list to be furnished by the secretaries shall contain "the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions." Suppose that the list adopts the second alternative, and says that the prisoner is deemed to have committed an offence in the city of New York, and it is ascertained that he is confined in Fort Warren, and a grand jury afterwards attends a circuit or district court in Massachusetts, and terminates its session without finding an indictment: is the prisoner to be thereupon discharged? If so, then his discharge is consequent upon the not finding of an indictment by a grand jury which had no jurisdiction, and could not by possibility have found an indictment; and this discharge may have taken place before any session of a grand jury in New York, which alone had jurisdiction of the alleged offence.

The investigation must be made by the grand jury in New York, and may result either in their finding an indictment or terminating their session without doing so. If they find an indictment, then the prisoner, by virtue of a prior statute, is to be conveyed from Massachusetts to New York for trial. And if the grand jury should terminate its session without finding an indictment, it may be that this statute of 1863, intended that he should, by the judge's order, be conveyed to New York; that it should be there decided whether he is entitled to his discharge, and, if so, upon what terms and conditions. For it is to be observed that the statute provides that "the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with according to law as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge."

There seems to be good reason why this examination should be had in the district where the prisoner resided previous to his arrest, or where the conduct for which he was arrested took place. That conduct can be best examined where it took place, where those who have knowledge of it are most likely to be found, and where the district attorney, who is to attend the examination, has previously been charged with the duty of collecting the evidence and presenting it to a grand jury, and where, too, the prisoner is most likely to have friends and the means of explaining the conduct or transaction which is to be investigated.

I repeat that I do not think it necessary to decide or express an opinion whether a judge in the southern district of New York can make the order now prayed for or not. But without attempting to exhaust the subject, I have thought it not improper to suggest some reasons why, if any one can make the order, it must be the judge of that court which the grand jury attended, having the jurisdiction set forth in the second section.

This precludes the necessity of considering the other questions presented on the face of this petition. I would only remark that one of them is whether the prisoner must not be a citizen of a state "in which the administration of the laws has continued unimpaired in the federal courts."

Case No. 1,573.

BLUM et al v. The CADDO.

[1 Woods, 64.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1870.

SALE—DELIVERY TO CARRIER—LIABILITY OF CARRIER FOR LOSS — STOPPAGE IN TRANSITU—CONTRACT OF AFFREIGHTMENT—EFFECT.

1. When B., F. & Co., in New Orleans, sold goods to G. D., in Jefferson, Texas, on credit, and charged the price against G. D. on their books, and delivered the goods for transportation to a common carrier, directed to G. D., and consigned to S. & P., at an intermediate port: *Held*, that B., F. & Co. could not maintain an action against the common carrier for the loss of the goods.

2. In such a case the right of stoppage in transitu in the vendor does not affect the right of property in the vendee.

3. A vendor in making a contract of affreightment with a common carrier acts as the agent of the vendee, although the vendee may be a stranger to the carrier.

[Cited in Hobbie v. Smith, 27 Fed. 662.]

[See The Venus, 8 Cranch (12 U. S.) 253; The Frances, Id. 359; The Mary and Susan, 1 Wheat. (14 U. S.) 25; Daniels v. McCabe, Case No. 3,567; Audenreid v. Randall, Id. 644; The M. K. Rawley, Id. 9,-679.]

[Appeal from the district court of the United States for the district of Louisiana.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[In admiralty. Libel by Blum, Frank & Co. against the steamer Caddo for failure to deliver goods shipped. Dismissed.]

Geo. W. Race, for libellants.
R. H. Marr, for claimants.

WOODS, Circuit Judge, stated the case and delivered the opinion of the court.

The libel alleges, that on or about the 12th of September, 1868, the libellants shipped at New Orleans, on board the steamer Caddo, seven cases and one bale of dry goods to be conveyed to Shreveport, Louisiana, and there delivered to Stacy & Poland, consignees; that the steamer failed to deliver a part of the goods, amounting in value to $963.74, which sum, together with the freight, insurance and charges upon said goods amounts to $1,127.54, for which last named sum with interest and costs the libellants ask a decree against the Caddo. A. A. Barnes and Thomas Knee intervene as sole owners and file an answer. The proof shows that the goods were sold on credit by the libellants, who were merchants in New Orleans, to G. Dreyfus, who was a merchant at Jefferson, Texas, and charged to him on books of libellants. The goods were shipped according to the orders of Dreyfus, marked "G. D., Jefferson, Texas," and consigned to the care of Stacy & Poland of Shreveport, which was an intermediate port. The goods were insured by libellants in the Louisiana Mutual Insurance Company, and the premium charged to Dreyfus. The freight was not paid by libellants but by Stacy & Poland of Shreveport, who were agents of Dreyfus for that purpose and also to receive and forward the goods to Jefferson, Texas.

Upon this state of facts the claimants say that libellants had no property in the goods lost and, therefore, cannot maintain this suit. The question whether the consignor or consignee has the right of action in cases where goods consigned to a common carrier are lost or damaged has been somewhat unsettled by conflicting decisions both in England and this country. The decided weight of authorities is now in favor of the proposition that the person having the right of property and the right of possession is the one to sue, whether consignor or consignee. Tindall v. Taylor, 28 Eng. Law & Eq. 210; Potter v. Lansing, 1 Johns. 214; Dawes v. Peck, 8 Term R. 330; Dutton v. Solomonson, 3 Bos. & P. 582; Brown v. Hodgson, 2 Camp. 36; Ludlow v. Bowne, 1 Johns. 1; De Wolf v. New York Firemen Ins. Co., 20 Johns. 214; Price v. Powell, 3 Coms. [3 N. Y.] 322; Everett v. Saltus, 15 Wend. 474; Ilsley v. Stubbs, 9 Mass. 65; The Venus, 8 Cranch [12 U. S.] 253; The Merrimac, Id. 317; The Frances, 9 Cranch, [13 U. S.] 183; Brandt v. Bowlby, 2 Barn. & Adol. 932. The property in the goods shipped is considered to be prima facie in the consignee, and he will be entitled to sue in the absence of proof to the contrary. Lawrence v. Minturn, 17 How. [58 U. S.] 100; Ogden v. Coddington, 2 E. D. Smith, 317; Tronson v. Dent, 36 Eng. Law & Eq. 41; Coleman v. Lambert, 5 Mees. & W. 502. In the case of Evans v. Marlett, 1 Ld. Raym. 271, it was held: "If goods by bill of lading be consigned to A., A. is the owner and must bring action against the master if they are lost. But if the bill be special, to be delivered to A. to the use of B., A. ought always to bring the action for the property is in him, and B. has only a trust per totam curiam."

A delivery to an agent for and on behalf of his principal will transfer the property equally with a delivery to the principal himself. This is an elementary rule in the transfer of property, and the master of a vessel is considered the agent of the consignee. Per Kent, C. J., in Ludlow v. Bowne, 1 Johns. 15. So in Godfrey v. Furzo, 3 P. Wms. 185, the like rule was laid down by Chancellor King, who said, that on the delivery of goods to the master of a ship the property immediately vested in the consignee, who was to run the risk of the voyage. So in Snee v. Prescot, 1 Atk. 248, Lord Chancellor Hardwicke said that if goods are delivered to a carrier to be delivered to A., and they are lost, the consignee only can bring the action, which showed the property to be in him, and he said it was the same when goods were delivered to the master of a vessel, though he allowed at the same time the right of the consignor to stop in transitu.

From these authorities, the following principles may be considered as established: 1. That the right to sue is in the person who has the right of possession and the right of property. 2. That prima facie the consignee is the owner and entitled to sue. 3. That a delivery of goods to the common carrier is a delivery to the consignee. 4. That when the consignee is the owner or agent of the owner he and not the consignor must sue. In the case on trial the proof shows that the goods were sold by libellants to Dreyfus and their value charged to him on their books. They were delivered to the carrier, marked with the initials of Dreyfus and with the place of his residence, Jefferson, Texas, and consigned to Stacy & Poland at Shreveport, an intermediate port. They were insured by libellants, but the premium paid was charged by them to Dreyfus. It seems to me there is nothing wanting to a complete transfer of the property from libellants to their vendee. Here is a sale, a delivery to the common carrier, the agent of the vendee, and the goods are shipped at the risk of vendee. The only right in the goods left in libellants, after their delivery to the common carrier, is the right of stoppage in transitu. The effect of this right upon the question under

discussion is stated by Kent, C. J., in Ludlow v. Bowne, 1 Johns., supra, as follows: "The right of stoppage in transitu, as between vendor and vendee, came from the court of equity. The first case in the books is that of Wiseman v. Vandeputt, 2 Vern. 203, in chancery. On the first hearing the chancellor ordered an action of trover to be brought to try whether the consignment vested the property in the consignee, and it was then determined in a court of law that it did. But equity thought it right to interpose and give relief, and since that time this new rule of stoppage in transitu has been admitted in courts of law as well as equity, between consignor and consignee, in case of insolvency of the latter and before actual delivery. This rule is not considered however as altering the right of property which, by the old rule of law, vested in the consignee upon delivery to the carrier, for him and at his risk. The delivery to the carrier," the C. J. goes on to say, "is a constructive delivery to the vendee and the goods are considered in the possession of the vendee the instant they pass out of the possession of the vendor, to every other purpose but that of defeating the equitable right of reclaiming the property upon the insolvency of the vendee."

The same doctrine is fully recognized in Coxe v. Harden, 4 East, 211, in which the court says that "a delivery to the master of a general ship, under a consignment, is a delivery to those to whom and for whose use the goods were sent, and at whose risk they were during the passage; and that the property was subject only to be diverted by the shippers' right of stoppage in transitu, which was deemed a species of jus postliminii." See, also, Hardwicke, Chancellor, in Snee v. Prescot, 1 Atk., supra. So we may consider it settled that the right of stoppage in transitu remaining in the vendor does not affect the right of property in the vendee. The title to the property remains in the vendee until divested by the exercise of the right of stoppage in transitu. But libellants claim that they are the proper parties to sue because they made the contract of affreightment with the common carrier, to whom the vendee was a stranger and who entered into no contract with the carrier. But it has been repeatedly held that the vendor in making the contract with the carrier acts merely as the agent of the vendee. Dawes v. Peck, 8 Term R. 330; Coates v. Chaplin, 2 Gale & D. 552; Dunlop v. Lambert, 6 Clark & F. 600. I am of opinion on the authorities cited that the libellants have not the right to sue under the facts in this case, and while according to some of the authorities, the suit should have been brought by Stacy & Poland, and according to others by Dreyfus, the owner; yet the great weight of authority is that the right of action is in one or the other of them and not in the libellants. The libel must therefore be dismissed at costs of libellants. Decree accordingly.

Case No. 1,574.

BLUM v. SOUTHERN PULLMAN PALACE CAR CO.

[1 Flip. 500;[1] 22 Int. Rev. Rec. 305; 3 Cent. Law J. 591.]

Circuit Court, W. D. Tennessee. Feb. 12, 1876.

LIABILITY OF SLEEPING CAR COMPANIES FOR MONEY LOST—SLEEPING CAR COMPANY NOT LIABLE AS A COMMON CARRIER.

Neither as a common carrier nor as an innkeeper is a sleeping car company responsible. It must not only furnish a berth to its guests, but keep a watch during the night, exclude unauthorized persons from the car and take reasonable care towards preventing thefts. If loss should occur by reason of negligence in this regard, the company is liable for such articles as are usually carried by a passenger about his person, and such a sum as may be deemed reasonably necessary for traveling expenses.

At law.

D. K. McRae, for plaintiff.
Humes & Poston, for defendant.

Charge of the court delivered by BROWN, District Judge:

Gentlemen of the jury: This is an action to recover of the defendant the sum of $3,135, lost by the plaintiff while riding upon a sleeping car owned and controlled by the defendant.

The plaintiff left Cairo, in the state of Illinois, about five o'clock in the evening of March 28, 1873, taking the boat down the river to Columbus, Kentucky. On the boat, he purchased a through ticket by rail from Columbus to Memphis, and, shortly after midnight, entered the sleeping car of the defendant at Humboldt, Tennessee, in which he was assigned a lower berth in the section nearest the front end of the car. He disrobed himself of his outer garments, placed his waistcoat, in an inside pocket of which was a wallet containing the money in question, under his pillow, lay down and went to sleep. The train arrived at Memphis between three and four in the morning, but the plaintiff did not rise, except for a temporary purpose hereafter explained, until about seven o'clock. Meanwhile, the other passengers had all left the car. A conductor and porter employed by the defendant had charge of the car, to which the conductor and brakemen of the train also had access for the purpose of collecting fares and regulating its movements. Prior to entering his berth, plaintiff paid the conductor of the car $2, for his lodging, and at the same time handed him his through ticket to Memphis to be delivered to the conductor of the train. In rising to dress himself, the plaintiff found his waistcoat and money were missing. The important question of law is presented as to the measure of defendant's liability.

The first count in the declaration charges defendant with the responsibility of a com-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

mon carrier, but there is no evidence to support it, and it was virtually abandoned upon the argument. The contract of carriage was with the railway company. It received the ticket of the plaintiff, offered him accommodation in its passenger car, and was ready to receive his luggage in another car adapted to that purpose. It drew the sleeping car of the defendant, collected fares of its passengers, controlled its movements and provided for its safety. Plaintiff's contract with the railway company was entirely distinct from that with the defendant.

It is strenuously insisted by plaintiff's counsel, however, the defendant should be held to the responsibility of an inn-keeper. If the liability of an inn-keeper at common law does not extend to all losses of his guests not caused by an act of God, the public enemies or the negligence of the guest himself, as held by the older authorities, he is at least presumptively responsible for all injuries happening to the goods of his guests entrusted to his care, and can only exonerate himself by showing that he did all to ensure their safety which it was in his power to do, and that no default is attributable to his servants or guests. In regard to goods stolen from his custody, without evidence to show how, or by whom, it was done, his liability is the same of that of a carrier. It is admitted that if the defendant is held as an inn-keeper, it is liable for the loss of the money in question. The plaintiff's counsel have produced no case directly in point, nor has the defendant produced any authorities determining definitely the scope of liability in such cases, although the supreme court of Illinois has recently decided that the responsibility of a sleeping car company is not that of an inn-keeper. The analogy is certainly a strong one between the hotel and sleeping car. The passenger is invited to undress, and go to sleep in a bed provided for that purpose. To accept this invitation his vigilance must be relaxed, and his clothing and purse exposed to thieves. But the rigid responsibility of inn-keepers and carriers at common law was imposed in older and more troublous times, when goods were carried in common wagons, passengers traveled by coach, making frequent stops at houses of public entertainment, whose proprietors frequently colluded with thieves and highwaymen to plunder their guests. While the ancient rule is still enforced as against those classes of persons, the tendency of modern legislation and judicial opinion has been to limit it strictly to them. The keeper of a private boarding or lodging house, or of a restaurant or coffee house is not an inn-keeper in the view of the law, notwithstanding he may furnish lodgings or food, or both, for the entertainment of his guests. It has also been held that the proprietor of a hotel, for summer resort, is not an inn-keeper. Notwithstanding an inn-keeper was responsible for the loss of the horses and carriage of his guest, the keeper of a livery stable is liable only as bailee for negligence. So, also, notwithstanding seeming analogies in their positions, the liability of common carriers has not been extended to warehousemen, wharfingers, telegraph companies or ordinary bailees. In all these cases, except the last, the opportunities for plunder are no less favorable than those of carriers and inn-keepers. The liability of the inn-keeper, indeed, stands less upon reason than upon custom growing out a state of society no longer existing.

There are good reasons for not extending such liability to the proprietor of a sleeping car.

1st—The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection.

2d—As a compensation for his extraordinary liability, the inn-keeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as inn-keepers are also entitled to pre-payment.

3d—The inn-keeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those.

4th—The inn-keeper is bound to furnish food as well as lodging and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5th—The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend on private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6th—The inn-keeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employes of the train to collect fares and control its movements.

7th—The sleeping car can not even protect its guests, for the conductor of the train has

a right to put them off for non-payment of fare, or violation of its rules and regulations.

I hold, therefore, that sleeping car companies are not subject to the responsibility of inn-keepers at common law, and that defendant cannot be held liable upon that ground.

The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is, undoubtedly, the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot, for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants. Defendant's own testimony tends to show a custom on its part to keep a man on watch all night, and to keep the rear door locked. Upon the night in question, however, both the conductor and porter were asleep at the rear end of car for two or three hours prior to the arrival of the train at Memphis, leaving the front door unlocked and a brakeman sitting in the front end of the car. If you find the loss was occasioned by the negligence of the defendant in this particular, and that the plaintiff himself was guilty of no negligence, you will find for the plaintiff. It is proved, however, that the plaintiff arose once or twice during the night, either before or after the arrival of the train at Memphis, to get a drink of water at a washstand immediately adjoining his section, but separated from it by a board partition, leaving his waistcoat under his pillow. There is some conflict of evidence as to whether he could see his berth from where he was standing. If you find the plaintiff guilty of negligence in this regard, and that this negligence contributed to his loss, then he is not entitled to recover, notwithstanding the defendant was also guilty of negligence in the particulars above specified.

The measure of damages only remains to be considered. The plaintiff again claims the benefit of the law applicable to inn-keepers, and insists upon his right to recover for the entire amount of his loss. The same reasoning would entitle him to recover a fortune if he had seen fit to carry it about his person and lay it under his pillow, and this, too, in the absence of notice to the company. The defendant, however, like a common carrier of passengers, is liable only for such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for his traveling expenses. A man may lawfully carry any sum of money he chooses about his person, but with the modern facilities for obtaining drafts and sending money by express, it is, to say the least, imprudent to carry a large amount. As defendant received but two dollars for the use of its berth, it would be grossly unjust to mulct it in any sum the plaintiff may choose to swear he has lost, when the charges, simply, of transmitting this amount by express, might have been double or quadruple the price paid for the accommodation. The rule claimed by plaintiff would place carriers and owners of sleeping cars completely at the mercy of unscrupulous and designing men. It was, at least, the duty of the plaintiff to notify the conductor of the amount he carried about him, though even then it is very doubtful whether he could have charged him with the responsibility.

The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of his journey, and all the other circumstances of the case.

The jury returned a verdict for $100.

BLUM (UNITED STATES v.). See Case No. 14,614.

Case No. 1,575.

In re BLUMENTHAL.

[18 N. B. R. 555.][1]

District Court, S. D. New York. Aug. 10, 1878.

PARTNERSHIP—WHAT CONSTITUTES—BANKRUPTCY — DISCHARGE — FALSE SCHEDULES — PROPER BOOKS OF ACCOUNT.

1. The bankrupt entered into a contract with one S., by which he undertook to carry on the butchering business for S. as his agent and salesman. The contract provided that the "offal, feet, and the commission on hides and the usual slaughter-house perquisites" were to go to S., and the bankrupt was to receive, in

[1] [Reprinted by permission.]

lieu of wages, all he could make over and above the current price of cattle bought after deducting all expenses. It was also provided that the bankrupt should account daily with S., and pay over to him all moneys received, until S. was fully reimbursed for the stock and expenses. *Held*, that the agreement did not create a partnership.

2. In order to bar a discharge on the ground that the bankrupt swore falsely in the affidavit accompanying his schedules that he was indebted to a creditor named therein, or that he did not disclose to the assignee that the claim was false and fictitious, it must appear that he knew that the claim was false and fictitious.

3. The bankrupt kept proper books of account with customers, but it was conceded that he kept no books showing the transactions between himself and S. *Held*, that his dealings with S. were just as much a part of his business within the meaning of the statute as his dealings with his customers.

[In bankruptcy. In the matter of Isaac Blumenthal. Heard on application for discharge. Denied. The discharge was subsequently granted. In re Blumenthal, Case No. 1,576.]

Learned & Warren, for opposing creditors.
G. H. Yeaman, for bankrupt.

CHOATE, District Judge. This is an application for the discharge of the bankrupt. It is opposed on three grounds. (1) The swearing falsely in the affidavit accompanying his schedules that he was indebted to one Samuels in the sum of four thousand two hundred dollars, and (2) not disclosing the fact to his assignee that Samuels' claim, which was proved, was false and fictitious, and (3) that being a trader he did not keep proper books of account. The first and second charges are not sustained. The relation between Samuels and the bankrupt is claimed by the opposing creditors to have been that of partners. The question depends upon the construction of a written agreement by which the bankrupt undertook to carry on the butchering business for Samuels at his (Samuels') establishment, as expressed in the contract, "and his agent and salesman to purchase cattle, slaughter them and sell the beef, and to do all acts necessary in reference thereto." The contract provided that "the offal, feet, and the commission on hides, and the usual slaughter-house perquisites," in lieu of wages or other compensation, all he can make over and above the current price of cattle bought after deducting all expenses. It also provided that the bankrupt should account daily with Samuels, and pay over to him all the moneys received by him until Samuels was fully reimbursed for the stock and expenses. Samuels' claim was for a balance of money due to him under this contract. The agreement did not create a partnership. There was no sharing in the profits. Moreover, so far as these objections are concerned, it must appear that the bankrupt knew that the claim was false and fictitious. It is clear that there is no proof that the bankrupt knew or believed that Samuels had no right to prove his debt as a creditor. The contract itself is strong evidence that both parties understood that the bankrupt was an agent and not a partner of Samuels. As to the books kept by the bankrupt, the evidence shows that so far as the accounts between him and his customers were concerned though unskillfully kept, they were sufficient to show the true state of those accounts. But under agreement between him and Samuels he was constantly receiving and paying moneys from and to Samuels, and it was conceded on the argument that he kept no books showing these transactions, relying on Samuels to keep these accounts. It is insisted on behalf of the bankrupt that this was not his business, but Samuels' business. I see no ground for this claim however. The statute requiring proper books of account to be kept is for the prevention of fraud, and designed to secure to all parties dealing with a merchant or trader books of account from which the state of his business in case of bankruptcy can be truly ascertained. It is just as important that the moneys received by him from time to time, and his disposition of those moneys should appear, and that his current accounts with those who deal with him as customers should appear. If this is not done, the creditors have not the requisite information as to his assets and liabilities. The bankrupt's dealings with Samuels were just as much a part of his business, within the meaning of the statute, as his dealings with his customers. See In re Winsor [Case No. 17,885]; In re Archenbrown [Id. 505]. The rule withholding a discharge in default of proper books of account, though it may work hardship in individual cases, is no doubt wholesome in its general effect, and in this case I feel compelled to sustain this objection. Discharge refused.

Case No. 1,576.

In re BLUMENTHAL.

[18 N. B. R. 575.][1]

District Court, S. D. New York. Dec. 28, 1878.

BANKRUPTCY—PROPER BOOKS OF ACCOUNT.

The bankrupt carried on the business of butchering as agent and salesman for one S. under a contract which provided that he should account daily with S. and pay over the moneys received until S. was reimbursed for his outlay. The transactions between the bankrupt and S. were entered daily by the bookkeeper of S. in a passbook, which was kept in the bankrupt's possession. *Held*, that such passbook was one of the bankrupt's books, and a proper book within the meaning of the statute.

[In bankruptcy. In the matter of Isaac Blumenthal. A discharge was heretofore denied. Case No. 1,575. The cause is now heard upon further proof. Discharge granted.]

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Gardner & Goodhart, for bankrupt.
Larhed & Warren, contra.

CHOATE, District Judge. In this case a discharge was refused upon the ground that the bankrupt did not keep proper books of account. [Case No. 1,575.] Upon the argument it had been conceded that the transactions between the bankrupt and Samuels & Co. did not appear upon the bankrupt's books. It was claimed that these transactions were not to be considered a part of the bankrupt's business for the purpose of the requirement of the statute in this respect; but it was held that they were so, and consequently the discharge was refused. Upon a suggestion that the concession made by counsel upon the argument was made under a misapprehension as to the facts, the case was referred back for further proof.

As the debt of Samuels & Co. was necessary to make up the requisite number of creditors assenting to the discharge, and their claim was disputed, it was also referred to the register to take further proof as to their claim, the parties stipulating that so far as it affected the question of discharge the determination shall have the same effect as upon proceedings for re-examination of their claim.

The further testimony taken shows that the admission made at the former hearing was a mistake; that the transactions between the bankrupt and Samuels & Co. appear on his books. One of those books is a small pass-book, produced by him to Samuels & Co. from day to day, in which the bookkeeper of Samuels & Co. entered the transactions as they occurred. This book was kept in the bankrupt's possession. It was one of his books, and a proper book within the meaning of the statute. Besides, the same transactions appeared in the cash book up to September 21, 1876, and after that time in the ledger kept by the bankrupt.

As to the claims of Samuels, there is no evidence which overcomes their proof of debt. On the contrary, the testimony both of the bankrupt and the accountant who has been over the books confirms it. Under the agreement between the parties the bankrupt was bound to repay to Samuels & Co. all the moneys received from them for the purchase of cattle. He did not do so, and owes them therefor.

Discharge granted.

In re BLUMENTHAL. See Case No. 7,105.
BLUNT (ALLEN v.). See Cases Nos. 215-217.

Case No. 1,577.

BLUNT et al. v. The FRANK.

[N. Y. Daily T. June 20, 1855.]

District Court, S. D. New York. June 19, 1855.

SALVAGE—BY PILOTS—TOWING VESSEL IN DISTRESS.

[1. Pilots conducting into port vessels in distress or in apprehension thereof are entitled to salvage compensation therefor.]

[2. Towing into port a vessel in peril and distress, and unable herself to reach a place of safety, is salvage service.]

[In admiralty. Libel by George W. Blunt and others against the schooner Frank for salvage. Decree for libellants.]

Brown, Hall & Vanderpoel and Mr. Stoughton, for libellants.

Loomis & Thayer and Mr. Chatfield, for claimants.

INGERSOLL, District Judge. This libel is filed by the owners and crew of the pilot-boat Moses H. Grinnell, to recover a salvage compensation for services rendered to the schooner Frank. The schooner sailed on the 12th of October, 1853, from Aux Cayes bound to Boston, with a cargo of coffee and log-wood. On the 4th of November she experienced a heavy gale, which continued till the 9th, and during which she lost her foremast, which broke off about half way up, her maintopmast, her jibboom and bowsprit cap, sprung her mainmast, and sustained other damage, so that her master deemed it advisable to bear up for New York, she being then about in the latitude of Cape Henry. On the 11th she was fallen in with by the pilot-boat about sixty miles from Sandy Hook. The wind had been fair and moderate till then, and she had made headway without tacking at the rate of three or four miles an hour. One of the three pilots on board the boat, boarded her, and to him the captain represented the condition of his vessel; told him that his crew were good for nothing; that he was about beat out, and had but two days' provisions on board. There was at this time also the appearance of a northeast blow.

The pilot refused to take charge of the schooner unless the pilot-boat was employed to tow her, which was assented to by the master. The pilot-boat accordingly took her in tow, and got up to Staten Island with her about 6 o'clock in the morning of the 12th. The wind, which had been fair, began to die away when they were about twenty-two miles south of the Hook. On the morning of the 12th, there was a light breeze from the northeast, which increased into a heavy blow on the 13th.

The pilot-boat was considerably strained and injured in performing this service, and the three pilots lost other pilotage. They also paid a steamboat to tow the schooner up to New York after she arrived inside the Hook. The schooner and her cargo were worth $6,000.

It was agreed between the pilot who went on board and the master of the Frank, that in case the parties could not agree upon the amount to be paid to the libellant, it should be determined by referees to be agreed upon. From the arrival of the Frank at New York on Nov. 12 to the 30th, various efforts were made by the parties to agree upon referees, but without success, and on the 30th, just be-

fore the Frank was about to sail, the libel was filed.

HELD BY THE COURT: That it is the duty of a pilot to conduct vessels in and out of port for proper remuneration, but that duty is confined to conducting into and out of port vessels in no state of distress or alarm, and having no apprehension of distress arising from antecedent causes. The Elizabeth, 8 Jur. 365.

That a mere towage service is confined to vessels which have received no damage which puts them in peril of loss.

That upon the evidence the Frank, in the crippled condition in which she was, would not have been able to reach Sandy Hook before the gale of the 13th without assistance, and if she had not done so, she would in all probability have been driven to sea or on shore, and lost in either case.

That she was then in distress and in peril, so much so that her master had thought it unsafe to proceed on her voyage. She had been greatly injured, so that it is doubtful whether she could make a tack, and was in no safe condition to navigate in a severe blow.

That the services rendered by the libellants were therefore something more than pilotage services, or than towage services. They were rendered to a crippled vessel in danger of loss, and were therefore salvage services.

That the failure to agree upon referees was not the fault of the libellants, and should not deprive them of the right to recover in this suit.

That on the evidence a fair compensation for merely towing such a vessel, as the libellants did, would be from $500 to $700.

That the libellants are entitled to more liberal compensation, and that $900 is a reasonable sum.

Decree, therefore, for libellants for that amount.

Case No. 1,578.

BLUNT v. LITTLE.

[3 Mason, 102.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

MALICIOUS PROSECUTION — ADVICE OF COUNSEL — EVIDENCE — DAMAGES.

1. In an action for a malicious civil prosecution, the advice and opinion of counsel as to there being a good cause of action given before the commencement of the suit is admissible evidence; but not if given afterwards.

2. But such evidence of the advice and opinion of counsel is not evidence, unless it be shown what the statement of facts was, which was laid before them for their advice and opinion.

3. No suit can be maintained for a malicious prosecution, unless there be both a want of probable cause for the prosecution and also malice in the party. Malice may be inferred from want of probable cause.

[Cited in U. S. v. Taylor, Case No. 16,442; Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 73, 9 Sup. Ct. 459.]

[4. Where damages are excessive, the court may allow plaintiff to remit the excess.]

[Cited in Wiggin v. Coffin, Case No. 17,624; Northern Pac. R. Co. v. Herbert, 116 U. S. 647, 6 Sup. Ct. 590; Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 73, 9 Sup. Ct. 459.]

[5. The granting of a new trial because of a verdict awarding excessive damages rests in the discretion of the court, and may be done if it clearly appears that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury.]

[Cited in Alsop v. Commercial Ins. Co., Case No. 262.]

Case for maliciously arresting the plaintiff and holding him to bail in a civil action, in the sum of $10,000. Plea not guilty. At the trial the jury found a verdict for the plaintiff and $2,000 damages. [Heard on motion for new trial.]

In the course of the trial, which involved very complicated transactions, the deposition of Samuel Fessenden, Esq., was offered on behalf of the defendant, to prove, that he had advised, that a certain award, which, if good, was a bar to the defendant's right of action, was erroneous, and would not be sustained upon trial. But it not appearing, that such advice was given before the defendant commenced his suit, nor that any statement of the facts was laid before Mr, Fessenden for his opinion, the court thought the deposition inadmissible.

The cause was argued at the trial, by Hooper for the defendant, who now moved for a new trial upon various grounds, filed in support of the motion, all of which however upon breaking the cause were abandoned, except two. 1. That the deposition of Mr. Fessenden was erroneously rejected. 2. That the damages were excessive.

Upon these points Hooper (with whom Webster was now joined) argued in support of the motion, and Spooner and Prescott against it.

STORY, Circuit Justice. It was most clearly established at the trial, that the defendant had no just cause of action to support the arrest, on which the present suit is founded. The award, on the setting aside of which the defendant could alone pretend to maintain his action, was at that time in litigation in another suit, and its validity has since been supported by the supreme court of Massachusetts against every objection; and so far as the merits were brought before this court upon the recent trial, they appeared to be unequivocally in favor of Blunt. Indeed no one could reasonably doubt, that under the circumstances, the arrest of the plaintiff, by the order of the defendant's agent, was a rash and precipi-

[1] [Reported by William P. Mason, Esq.]

tate measure, and, to say the least of it, might well be deemed oppressive. If, however, the defendant (for he adopted the acts of his agent) acted with good faith, and under a mistake of his rights, and intended no wanton and malicious prosecution, the jury were expressly told, that the plaintiff, in the present suit, was not entitled to recover. They were farther told, that two things must concur to maintain the present suit; 1. That there must be no probable cause of action; 2. That the suit, and the arrest consequent on it, must be malicious: That if either of these grounds failed, the plaintiff, however aggrieved, was entitled to no remedy: That if there was probable cause for the suit, however malicious it might be, the defendant could not be found guilty; and on the other hand, if there was not probable cause, and yet the circumstances excluded all notion of malice, the same was the legal conclusion: That express malice, however, was not necessary to be proved; that it might be, and ordinarily was, inferred from the want of probable cause: That a malicious prosecution or arrest, in the sense of the law, did not necessarily import that the party acted from base passions, such as revenge and gross malignity: But if the party wilfully and wantonly made an arrest, when he knew or believed he had no just or probable cause of action, with the design to take undue advantage of the other party's situation, and in point of fact, there was no probable cause of action, such an arrest was malicious and sufficient to support the present action. The authorities cited at the bar fully supported this doctrine; and indeed it was conceded at the trial to be correct. See 3 Esp. 33; 1 Ld. Raym. 374; 1 Salk. 13; 1 Wils. 232; 1 Term. R. 493; 1 Bos. & P. 388; 2 Bos. & P. 129; Hob. 267; 2 Phil. Ev. 116; 2 Selw. N. P. p. 806, c. 27.

Several grounds have been suggested in favor of the motion for a new trial in the written application. I pass over those, which have been abandoned at the argument, with the single remark, that they incorrectly state the opinion of the court, and proceed upon a mistake of its reasoning at the trial. The points now insisted on are: 1. That the deposition of Mr. Fessenden was erroneously rejected. 2. That the damages are excessive.

One ground of the rejection of Mr. Fessenden's deposition was, that it did not appear, that his advice or counsel was given previously to the commencement of the suit, and unless it was so given, the court did not perceive how it could legally conduce to prove probable cause of action, or the absence of malice. Another ground was, that it did not appear, that a full, or indeed that any statement of the material facts was laid before him, so that he could form an exact judgment of the controversy. Upon farther reflection I think both grounds are maintainable; but it is sufficient if either can be supported.

It is certainly going a great way to admit the evidence of any counsel, that he advised a suit upon a deliberate examination of the facts, for the purpose of repelling the imputation of malice, and establishing probable cause. My opinion however is, that such evidence is admissible, although it is sometimes open to the objections stated in Hewlett v. Cruchley, 5 Taunt. 277. But it appears to me, that a necessary qualification of the admission is, that it should appear in proof, that the opinion of counsel is fairly asked upon the real facts, and not upon statements, which conceal the truth or misrepresent the cause of action. If the law were otherwise, nothing would be more easy than to shelter the most malicious prosecution under the opinion of counsel, honestly given, but under a total mistake of the facts. Probable cause of action, in the opinion of counsel, must depend upon the facts, which are brought before him; and if the whole facts, which are material to form such opinion, are not presented to his mind, how can the court say, that he has given any opinion as to the true cause of action? In Hewlett v. Cruchley, Id., the court thought, that if the statement of facts laid before counsel was incorrect, his opinion founded thereon was no defence, and there are even intimations in that case, that such an opinion, given upon a full statement of the facts, would not of itself repel the imputation of malice.

Then as to the other ground, I think it ought not to be permitted to any person, after the commencement of his suit, to repel the imputation of malice or prove probable cause, by subsequently getting the opinions of counsel in his favor. What would this be, but to encourage unfounded suits, and to enable parties to get rid of the effects of their own misconduct by matters ex post facto? What constitutes probable cause of action is, when the facts are given, matter of law, upon which the court are to decide; and it cannot be proper to introduce certificates of counsel to establish what the law is. If the party acts upon the advice of counsel, however mistaken, in commencing his suit, and is honestly misled, there is some ground to excuse his act. But when he has gone on without such advice, and in point of law has no probable cause of action, it is, I think, conceding too much to allow the subsequent opinion of counsel to change the legal rights of the parties. No case has been cited, in which such a principle has been admitted; and I am persuaded none such exists.

As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. So far as the contrary doctrine may be supposed to be maintained by Duberley v. Gunning, 4 Term R. 651, it has been qualified or overturned in Chambers v. Caulfield, 6 East, 244, and Hewlett v. Cruchley, 5 Taunt. 277. It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that

the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case. In the present case, there were many aggravated circumstances, and certainly the defendant had no cause of action. It appeared to me at the trial, a strong case for damages; at the same time, I should have been better satisfied, if the damages had been more moderate. I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After full reflection, I am of opinion, that it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere farther.

The plaintiff remitted the damages. Motion overruled.

Case No. 1,579.

BLUNT v. PATTEN.

[2 Paine, 393.] [1]

Circuit Court, S. D. New York. June Term, 1828.

COPYRIGHT—INFRINGEMENT—CHART—USE OF SURVEY—QUI TAM ACTION—QUESTION FOR JURY.

[1. The unauthorized use by a map-maker of the surveys upon which a copyrighted map is based is an infringement of the copyright.]

[2. In a qui tam action for infringement of the copyright of a chart, the question whether defendant copied from plaintiff's survey is for the jury.]

[At law. Qui tam action by Edmund M. Blunt against Richard Patten to recover the penalty for an infringement of copyright. Verdict for plaintiff. For bill in equity to restrain infringement, see Case No. 1,580.]

D. B. Ogden and J. Blunt, for plaintiff.
J. Anthon, for defendant.

This action was brought for a breach of copyright. It appeared in evidence that the plaintiff, in 1821, caused a survey to be made of the South shoal of Nantucket; and that it was then ascertained that the said shoal had been laid down in all the charts previously in use, twenty miles too far to the southward, it being in latitude forty-one degrees four minutes, instead of forty degrees forty-four minutes, as in the old charts.

It was also proved, that the same year the plaintiff projected a survey of George's shoal, and sent a vessel with competent surveyors for that purpose to Boston, to join a vessel which Capt. Hull, the United States naval commander on that station, permitted to assist in said survey; that the said survey was made chiefly at the expense of the plaintiff; and that it was expressly understood by Capt. Hull that it was for the private benefit of the plaintiff. The results of the survey were placed on a chart drawn by Mr. Edmund Blunt, and copies of the same given to an officer of the United States, to be transmitted to the navy department for the use of government, and to preserve the information among the public archives.

The plaintiff published these surveys on his chart of the northeastern coast of the United States in October, 1821, and the copyright was duly secured.

In May, 1827, the defendant published his chart of the northeastern coast, with these shoals substantially copied, in form, position and bearings, from the chart of the plaintiff.

The plaintiff then rested; and the defendant, in his defence, showed that he had obtained a copy of the chart lodged in the navy department, by permission of one of the navy commissioners; and that by being placed there, it became a public document, which he had a right to copy. He also attempted to show that he had obtained the true position of the South shoal of Nantucket, from a survey taken by a British officer in 1805. It did not appear, however, that that survey had ever been published, or that any person except the witness produced by the defendant, had ever heard of it. He produced the draughtsman and engraver of his chart; but on cross-examination, it appeared that the former was directed to omit in draught, Nantucket shoals; and that the engraver copied it from a separate piece of paper, furnished by the defendant, and drawn by some person unknown. The defendant also proved, that the soundings near Nantucket shoal on his chart, were different from those of the plaintiff's, being taken from Desbarres' survey, published in 1776. The defendant's counsel contended that there could be no copyright in the location of a shoal—that it was a thing that by nature could only be placed in one position, and that it was obviously here taken from other authorities than from the plaintiff's chart; he also contended that the chart in the navy department was a public document, and open to all the world, and that the plaintiff had no right to make a monopoly of either that, or the true position of Nantucket South shoal.

Many respectable ship-masters were produced, who testified that they always regarded the discovery of the error in the position of Nantucket South shoal, as having been made entirely by the plaintiff, whom the mariners of the United States had been greatly indebted to for most of the information now obtained concerning their own coast; and had been relied upon as the publisher of the charts and nautical works now in use. They also testified that the survey of Nantucket and George's shoals were highly important, and that they appeared to be substantially copied on the defendant's chart

[1] [Reported by Elijah Paine, Jr., Esq.]

from the plaintiff's. After the testimony had been commented on by the counsel for the parties,

THOMPSON, Circuit Justice, charged the jury that the privilege of an author to the exclusive sale of his works for a limited term of years, although a monopoly, was not so in the odious meaning of the term; it was but a proper reward for his labor provided by law, and to which he was as much entitled as to the exclusive enjoyment of any other kind of property: that the plaintiff could not, it was true, obtain a copyright in the shoal itself, nor in the original elements of his charts; but that he had a right to the results of his labors and surveys. The defendant might resort to the original materials of the chart, and survey for himself; but he could not avail himself, either in whole or in part, of the surveys of the plaintiff. The law was intended to secure to authors the fruits of their skill, labor and genius, for a limited time; and if in this instance the defendant had availed himself of the surveys of the plaintiff in compiling his chart, the plaintiff was entitled to a verdict.

In the case of Nantucket shoal, the defendant produced a witness, who stated that he had communicated to the defendant its true position; and it was a question for the jury to decide whether the defendant had copied from the plaintiff's survey or not: as to George's shoal, no doubt it was copied from his survey, and the pretence that it became a public document from being deposited in the public office, was entirely untenable. The survey was made chiefly at the plaintiff's expense, and, according to the understanding, it was to be for his benefit; it was of great use to the navigating community, and Capt. Hull was justified in aiding him in it upon such terms.

The jury retired, and in less than five minutes brought in a verdict for the plaintiff.

Case No. 1,580.

BLUNT v. PATTEN.

[2 Paine, 397.] [1]

Circuit Court, S. D. New York. June 19, 1828.

COPYRIGHT—WHAT SUBJECT TO—INFRINGEMENT—QUESTION FOR JURY—INJUNCTION — ACTION AT LAW.

1. The natural objects from which a chart is made, being open to the examination of all, a copyright cannot subsist in a chart as a general subject.

[Cited in Johnson v. Donaldson, 3 Fed. 25; Chapman v. Ferry, 18 Fed. 541.]

2. A right in such a subject is violated only when another copies from the chart of him who has secured the copyright, and thereby avails himself of his labor and skill.

3. In all such cases, it is a proper question for a jury whether the one is a copy of the other or not. And if there is some small variance, it would be a proper subject of inquiry whether the alteration were not merely colorable.

[Cited in Johnson v. Donaldson, 3 Fed. 25; Chapman v. Ferry, 18 Fed. 541.]

4. If it is doubtful whether or not there has been an infringement, an injunction will not be granted in the first instance; but a trial at law will be directed.

[In equity. Bill by Edmund M. Blunt against Richard Patten for infringement of copyright. Application for injunction denied pending the outcome of complainant's action at law. Upon verdict being given for plaintiff therein (Case No. 1,579), an injunction is awarded.]

This was a bill filed to obtain an injunction to restrain the defendant from printing, publishing and vending the charts mentioned and described in the action brought in the same case for breach of copyright. 2 Paine, 393 [Blunt v. Patten, Case No. 1,579].

THOMPSON, Circuit Justice. The complainant, by his bill, asks an injunction to restrain the defendant from the further printing, publishing and selling a chart purporting to be a chart of the north-eastern coast of North America, so far as the same relates to the South shoal of Nantucket, and the soundings adjacent thereto; and also to George's bank and the soundings adjacent thereto; and between the said bank and Cape Ann, and Nantucket shoals, alleging that the said chart published by the defendant, and the surveys and soundings copied thereon, were copied and taken from surveys and soundings made by the complainant, and published by him in a chart, the copyright of which had been duly taken out and secured according to the laws of the United States on the 2d of October, 1821.

The complainant alleges that his copyright has been infringed in two particulars: first, as it relates to the position of the South shoal of Nantucket; and secondly, as to George's bank. With respect to the former, he states that on all the old charts published prior to his, this shoal is laid down in latitude forty degrees forty-four minutes. That from surveys made by his direction in the year 1821, it was ascertained that this was about twenty-two miles too far south, which error he corrected, and laid down the shoal in his chart in latitude forty-one degrees four minutes, according to its true position.

And with respect to George's bank, he alleges that it was imperfectly known and described in the charts published prior to the year 1821, when he, at his own expense, caused a survey to be made, and a competent knowledge of the shoal for the first time obtained and published on his chart. And charges the defendant with having availed himself of the information thus acquired by the labor, and at the expense of the complainant in the publication of his chart.

The defendant has not put in his answer, but by his affidavit read in opposition to the motion, he denies, that in compiling his chart

[1] [Reported by Elijah Paine, Jr., Esq.]

of the eastern coast of America, he has in any respect availed himself of the complainant's chart. That he never did until June last look at the soundings on his chart, or compare them in detail with those on his own; and that on making the comparison, he found that the soundings on his chart in nowise compared with those on the complainant's. That they are not in the same latitude or longitude, nor do the depths of water correspond when they approach the nearest position on the different charts. That the latitude and longitude of Nantucket South shoal is laid down from information received from White Matlock, as detailed in his deposition. And that the shoal grounds of George's bank, with the soundings adjacent, are copied from a public document on file in the office of the navy commissioners at Washington, after being reduced to the scale of his chart.

By the deposition of White Matlock, it appears that in May, 1823, he communicated to the defendant the information, that there was an error in the old charts as to the situation of the Nantucket South shoal, and gave him a memorandum thereof, which is annexed to his deposition; and he swears that he received the information from Captain John Naimes, of the British navy, in the year 1805, who at that time gave him a manuscript chart of Nantucket shoals, George's shoals and —— island, which chart has since been destroyed by fire; that Captain Naimes was flag-lieutenant of the Isis, and superintended the survey; and that the Nantucket South shoal is correctly laid down in defendant's chart, according to such information. That from the time he received that information from Captain Naimes, he has been in the habit of passing said shoal as in latitude of forty-one degrees four minutes, instead of forty degrees forty-four minutes, as laid down in the old charts.

With respect to the document on file in the office of the navy commissioners, from which the defendant copied into his chart the shoal grounds of George's bank, with the adjacent soundings, the complainant denies that it was a public document, but alleges that it was delivered to Cheever Felch to be deposited in the navy department, upon the condition and express understanding that it was not to be published except by the complainant; and in support of this allegation the deposition of Edmund Blunt has been read, stating such to have been the understanding with Felch, and that although Captain Hull sent the schooner Science, a public vessel, to aid in the survey, yet it was expressly understood between him and the complainant that the survey was to be made for the exclusive benefit and profit of the complainant, and that the soundings were taken solely by the persons employed by him, and that none were taken by Felch.

Thus stand the leading facts in the case as they now appear before me; and what may ultimately be found to be the real rights of the complainant, is a question not entirely free from doubt; and the circumstances disclosed present a case which appears to me to call for a more full and satisfactory explanation, and requiring a trial of the right at law, before an injunction ought to be granted. If, as seems to be admitted on all sides, there has been an error in the old charts in laying down the position of Nantucket South shoal, and the complainant has, by devoting his time and expending his money, discovered that error and corrected it in his chart, it is of great public utility, and he ought to be protected in the enjoyment of the profits of his enterprise. That he has been at considerable expense in making surveys to ascertain the situation of this shoal, cannot be denied; and it is very probable he was entirely ignorant of the error in the old charts having been discovered by any other person; yet, if such be the fact, and the defendant, in making his chart, has had recourse to such other discovery, and has not availed himself of the defendant's labor and skill, the plaintiff has no right to complain. A copyright cannot subsist in a chart, as a general subject, although it may in the individual work, and others may be restrained from copying such work.[2] But the natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart. And if such surveys and charts are all correct, all will be alike, but no one would complain of his rights having been infringed, and each

[2] In the case of Sayre v. Moore, 1 East, 361, the court instructed the jury, that if they found that the defendant, although he used the plaintiff's chart, had been correcting errors, and not servilely copying, they should find a verdict for the defendant; but that if it was a mere servile imitation, they should find for the plaintiff.

"The charts which had been copied were four in number, which Moore had made into one large map. It appeared in evidence that the defendant had taken the body of his publication from the work of the plaintiffs, but that he had made many alterations and improvements thereupon. It was also proved that the plaintiffs had originally been at a great expense in procuring materials for these maps. Delarochett, an eminent geographer and engraver, had been employed by the plaintiffs in the engraving of them. He said that the present charts of the plaintiffs were such an improvement on those before in use, as made an original work. Besides, their having been laid down from all the charts and maps extant, they were improved by many manuscript journals and printed books, and manuscript relations of travellers; he had no doubt the materials must have cost the plaintiffs between £3,000 and £4,000, and that the defendant's chart was taken from those of the plaintiffs, with a few alterations. In answer to a question from the court, whether the defendant had pirated from the drawings and papers, or from the engravings, he answered, from the engravings. Winterfelt, an engraver, said he was actually employed by the defendant to take a draft of the gulf passage (in the West Indies) from the plaintiffs' map.

"Many witnesses were called on behalf of the defendant, amongst others, a Mr. Stephenson

one may be considered an original chart. A right, in such a subject, is violated only when another copies from the chart of him who has secured the copyright, and thereby availing himself of his labor and skill. And in all such cases it is a proper question for a jury, whether the one is a copy of the other or not. If the two are in all respects alike, the prima facie presumption probably would be, that one was a copy of the other, yet both might be originals; and if there was some small variance, it would be a proper subject of inquiry whether the alteration was not merely colorable, and that the one was in substance a mere transcript of the other.

All these are proper questions to be submitted to a jury to decide. Whether the one is or is not a servile imitation of the other, and not the fair fruit of original labor, upon a subject that is open to all the world. These are the general and well-settled rules by which cases of this description are to be tried and governed. 1 East, 361, and cases collected in note; 12 Ves. 269; 16 Ves. 268; 2 Mer. 436. And if applied to the facts disclosed by the affidavits which have been read, will show that this is a proper case for a trial at law, and not for an injunction, in its present stage, which is granted only to prevent the use of that which is the exclusive property of another, and proceeds on the ground that the title to the property is in the plaintiff.

The defendant swears, that in compiling his chart of the Nantucket shoal, he has not taken one figure from the plaintiff's chart, and that the two, in no respect, agree in the soundings laid down; and that the latitude and longitude of the shoal is laid down from the information received from Capt. Matlock, who swears that he obtained it, as early as the year 1805, from a captain of the British navy, who furnished him with a manuscript chart in which this shoal is laid down as in latitude 41 deg. 4 min., according to defendant's chart.

The defendant, in making his chart, had a right to avail himself of all prior publications, the copyright of which was not secured; and if he has compiled his chart from such other publications, it is no infringement of the plaintiff's right, although it may agree with his chart.

With respect to the chart, so far as it relates to George's bank, the circumstances are a little extraordinary, and require explanation, before an injunction is granted on this alleged infringement of the plaintiff's right. It is very satisfactorily shown, that the defendant's chart is taken from one on file in the navy commissioners' office in Washington, a copy of which was furnished to the defendant, and which, upon its face, purports to be "A Chart of George's Shoals, from surveys made in the United States schooner Science and sloop Orbit, by direction of the Board of Navy Commissioners, and under the orders of Capt. Isaac Hull. By Cheever Felch, 1821." And yet Edmund Blunt swears, that it was expressly understood between the plaintiff and Capt. Hull, and so stated by the latter to the deponent, that while the government should have the

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and Admiral Campbell. Mr. Stephenson said he had carefully examined the two publications; that there were very important differences between them, much in favor of the defendant's; that the plaintiffs' maps were founded upon no principle; neither upon the principle of the Mercator, nor the plain chart, but upon a corruption of both; that near the equator the plain chart would do very well, but that as you go further from the equator, you must have recourse to the Mercator; that there were very material errors in the plaintiffs' maps; that they were in many places defective in pointing out the latitude and longitude, which is extremely essential in navigating; that most of these, as well as errors in the soundings, were corrected by the defendant. Admiral Campbell observed, that there were only two kinds of charts, one called a plain chart, which was now very little used; the other, which is the best, called the Mercator, and which is very accurate in the degrees of latitude and longitude; that this distinction was very necessary in the latitudes, but in places near the equator it made little or no difference; that the plaintiffs' maps were upon no principle recognized among seamen, and no rules of navigation could be applied to them; and they were therefore entirely useless.

"Lord Mansfield, C. J. The rule of decision in this case is a matter of great consequence to the country. In deciding it, we must take care to guard against two extremes, equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors, guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries. In the first, a man may give a relation of the same facts, and in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, whether the alteration be colorable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby becomes more serviceable and useful for the purposes to which it is applied. But here you are told, that there are various and very material alterations. This chart of the plaintiffs' is upon a wrong principle, inapplicable to navigation. The defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and printed from the other, you will find for the plaintiffs."—Verdict for defendant.

credit of aiding to make the survey, it should be for the exclusive benefit and profit of the plaintiff; and that a copy of the chart was delivered to Cheever Felch as an officer of the government, to be deposited in the navy department, upon the condition and express understanding that it was not to be published but by the plaintiff, for whose benefit and at whose instance the survey was made.

I forbear, at present, making any remarks upon the incongruity between this affidavit and what the chart in the navy commissioners' office would, upon its face, seem to import; and also upon the implied imputation against the commissioners, for having permitted a copy to be taken of a document deposited in their office, under an agreement that it was not to be published. All this may be susceptible of satisfactory explanation. It is at present, however, involved in too much obscurity for me to safely act on this part of the case, and I shall leave the explanation to be given on a trial at law.

The application for an injunction is, accordingly, denied.

After the trial of the action at law in this case,—2 Paine, 393 [Blunt v. Patten, Case No. 1,579],—the following decree was entered:

Present: The Honorable SMITH THOMPSON, one of the associate justices of the supreme court of the United States; the Honorable SAMUEL R. BETTS, judge of the district court. The court was opened by proclamation.

Whereas, heretofore—that is to say, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and twenty-seven—Edmund M. Blunt, a native born citizen of the United States, and an inhabitant of the state of New York, exhibited his bill of complaint in this honorable court against Richard Patten, defendant, thereby setting forth that the said Richard Patten, in violation of a copyright of the said Edmund M. Blunt, to a certain chart entitled "Blunt's New Chart of the North-Eastern Coast of North America," extending from latitude 37 deg. 20 min. north, longitude 75 deg. 20 min. west, to latitude 47 deg. 55 min. north, longitude 65 deg. 5 min. west, a printed copy of which said title was deposited in the office of the clerk of the district court of the southern district of New York, before the publication of said chart, to wit: on the second day of October, in the year one thousand eight hundred and twenty-one, had prepared and published a certain chart, purporting to be a "New Chart of the North-Eastern Coast of North America, Nova Scotia, &c., from the best authorities," on which said chart certain surveys taken by the said Edmund, and at his expense, and inserted on his said chart of the South shoal of Nantucket and George's bank, with the soundings thereon and adjacent thereto, and also the soundings between Cape Ann and George's bank, and thence to Nantucket shoal, had been copied, contrary to the will of said Edmund, and in violation of his rights; and further setting forth, that the actings and doings of the said Richard were contrary to equity and good conscience, and requiring relief in the premises. And the said complainant further prayeth the honorable court, that the usual process of subpoena might be thereat awarded against the said defendant, to compel him to appear and answer the said bill, which, being granted, and the said defendant duly served therewith, he appeared and answered accordingly.

And whereas the said defendant, by his answer, admitted the publication of twenty-five copies of the said chart, entitled "A New Chart of the North Eastern Coast of North America, Nova Scotia, &c., from the best authorities," but denied that the said chart, or any portion thereof, was copied from the chart of the said Edmund above mentioned. The said defendant further asserted, that the same latitude and longitude of Nantucket South shoal was laid down by him on the said chart, from information received from one Captain Matlock, on the twenty-second day of May, one thousand eight hundred and twenty-three, from a survey made by one Capt. John Naimes, of the British navy, in the year one thousand eight hundred and five; and that the said shoal, called George's bank, on the said chart, was copied from a manuscript furnished by his agent, Arthur I. Stansbury, who copied the same from a public chart, in manuscript, on file in the navy commissioners' office, and there remaining, as he understood, as a public document for the public benefit, entitled "A Chart of George's Shoals, from surveys made in the United States schooner Science and sloop Orbit, by direction of the Board of Navy Commissioners, and under the order of Capt. Isaac Hull, by Cheever Felch, 1821." And the said defendant further denied all unlawful combination and confederacy, and concluded his answer with a general traverse as by the said bill and answer remaining as of record in the honorable court may now fully appear.

And whereas, afterwards, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and twenty-eight, the said Edmund M. Blunt did exhibit his supplemental bill in this honorable court, against the said Richard Patten, therein setting forth, that upon the bill and answer thereinbefore mentioned, a notice for an injunction, restraining the said Richard Patten from publishing his said chart in violation of the copyright of the said Edmund M. Blunt, and for further relief, according to the prayer of said bill, was made to this honorable court; and that the same was denied, on the ground that as there was cross affidavits and conflicting testimony in this case as appeared to the court to be one, required a trial of the right at law, before an injunction ought to be granted.

And further setting forth, that a suit at law was instituted by the said Edmund M. Blunt against the said Richard Patten, for a violation of the copyright of the said Edmund as aforesaid, which said suit on the twenty-seventh day of May, in the year one thousand eight hundred and twenty-eight, was tried before the judges of the circuit court of the United States for the southern district of New York; and upon trial thereof, witnesses were produced and examined, both on behalf of the said Edmund M. Blunt and the said Richard Patten, for the purpose of determining whether the said surveys of the South shoal of Nantucket and of George's bank had been copied or not on the said chart, published by the said Richard, from the said chart of the said Edmund, in violation of the act in such case made and provided; and the jury appointed for the trial of the same, then and there rendered a verdict for the said Edmund M. Blunt, the plaintiff, in the said suit; and the said Edmund M. Blunt, for this, prayed this honorable court, that a suit of injunction might be thereout awarded, restraining the said Richard Patten in printin, publishing and vending the said charts so published by him as aforesaid, or so much thereof as concerned and related to the South shoal of Nantucket, its position, bearings, form and location, and also of George's bank, its position, bearings, form and location, and the soundings between the said bank and Cape Ann, and Nantucket Shoal, without the consent of the said Edmund M. Blunt, first obtained in writing, or until the exclusive privilege of the said Edmund M. Blunt should expire, or until the further order of the said court to the contrary. And the said Edmund M. Blunt further prayed the honorable court, that the said Richard Patten deliver unto the said Edmund all and every copy or copies of such chart, and also all and every sheet and sheets, being part of the said chart, in the possession of the said Richard; and also the costs and charges being fully sustained by the said Edmund in his behalf. And the said cause, being thus ready for a hearing on the bill, answer, and supplemental bill, a day was appointed by the court for the hearing thereof; on which day, being the fifth day of June, in the year of our Lord one thousand eight hundred and twenty-eight, the said cause came on to be heard before the honorable court; whereupon this honorable court did order and decree, that an injunction issue forthwith against the said Richard, restraining him from publishing his said chart as aforesaid; that the said Richard Patten deliver to the said Edmund M. Blunt all and every copy and copies of such chart, so published by him as aforesaid; and also all and every sheet and sheets, being part of the same now in possession of the said Richard Patten, for the purpose of being forthwith destroyed; and, also, that he pay to the said Edmund M. Blunt the cost and charges wrongfully sustained by him, the said Edmund, in the behalf, to be taxed by the clerk of the honorable court.

Fred. J. Betts, Clerk.

BLUNT (UNITED STATES v.). See Case No. 14,615.

Case No. 1,581.

BLY v. UNITED STATES. HARTLEY et al. v. UNITED STATES. UNITED STATES v. DAY et al.

[4 Dill. 464.][1]

Circuit Court, D. Minnesota. 1877.

CUTTING TIMBER UPON PUBLIC LANDS—EVIDENCE—REMEDY OF GOVERNMENT — INDICTMENT—REPLEVIN—TROVER—MEASURE OF DAMAGES.

1. In certain civil and criminal actions by the United States against trespassers upon its unsold timber land: *Held*, that the official plats and books in the office of the register of the United States land office are admissible as evidence on its behalf to show that the land on which the timber was cut had not been sold by the United States.

2. Parol evidence is not admissible on behalf of the defendants to show that the locus in quo was swamp land within the meaning of the swamp land grant to the several states.

3. The cutting of timber upon the public lands is a criminal offence (Rev. St. § 2461), and the government may proceed both civilly and criminally.

[Cited in U. S. v. Murphy, 32 Fed. 379.]

4. Where timber is cut upon the public lands wilfully, fraudulently, or negligently, and without authority, and made into saw-logs, the government may replevy such logs even when they have reached the boom, or, at its election, may sue in trover for their value, and in either case may recover without deduction for their enhanced value, after severance from the freehold, arising from the labor of the wrong-doer. In such case the government is not confined to the "stumpage" value. Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

[Distinguished in Murphy v. Dunham, 38 Fed. 511.]

5. Whether a different rule of damages would apply if the trespass were neither willful, fraudulent, nor negligent, quaere?

[Error to the district court of the United States for the district of Minnesota.]

The government has brought numerous civil suits in the nature of trover to recover the value of pine saw-logs cut upon the public lands by the defendants [E. F. Bly, B. F. Hartley, and others] or their vendors, and which, before the suits were commenced, had been rafted and brought down into the booms at Minneapolis, Brainerd, and other places. It has also caused the persons [Day and others] who cut the timber to be indicted. Certain questions of law arising in these cases were argued and decided as shown in the opinion of the court.

Mr. Billson, Dist. Atty., for the United States.

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

Davis, Bradley, Secombe and others, for plaintiffs in error.

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

DILLON, Circuit Judge. 1. I am of opinion that the official plats and books in the office of the register of the United States land office, produced and explained by that officer, were admissible in evidence on the part of the government to establish, or as tending to establish, the fact that the lands in question had not been sold by the United States.

These plats and books are the official records of the office, and are kept by the register so as to show what lands are taken under the pre-emption, homestead, or other laws of the general government. These official records, in connection with the testimony of the register, showed that the locus in quo was vacant land which had never been disposed of by the United States, and were sufficient prima facie to establish that fact. Galt v. Galloway, 4 Pet. [29 U. S.] 332, 343.

2. Where the proof shows that the lands have not been sold or disposed of by the United States, and the government proves that the defendant cut timber thereon, and the defendant introduces no evidence of right or title from the United States or the state, we are of opinion that parol testimony on his behalf is not admissible to prove that the locus in quo is "swamp" land within the meaning of the swamp land grant.

3. The cutting of timber upon the public lands is made a crime by the legislation of congress, which may be prosecuted by indictment (Rev. St. § 2461), notwithstanding the provisions of section 4751. And the government may proceed against trespassers upon its land, civilly or criminally, or both, at its election, and judgment in one form of remedy is no bar to the prosecution of the other remedy. The principle of the decision of Mr. Justice Miller in U. S. v. McKee [Case No. 15,688], has no application to such a case.

It sues in these cases civilly, as the proprietor of the trees or timber which have been unlawfully cut and removed from its lands, to recover the value thereof. And it prosecutes the trespassers criminally in its sovereign capacity for a violation of its criminal statute in that behalf.

4. Where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the government, or who has no reasonable ground to believe that it belongs to him, or to some one under whom he claims, and such logs are by him hauled to the water-course, and rafted and taken to a distant boom, by means of which labor of the wrong-doer their value is much enhanced beyond their value when first severed from the freehold, the government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value, and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold, by the labor of the wrong-doer. In such a case the government is not confined to what is called the "stumpage" value, but may recover the value of the logs in the boom.

As in such case the title of the government to logs thus cut continues as against the wrong-doer and all persons (Tome v. Dubois, 6 Wall. [73 U. S.] 548), until at least there has been some greater transformation of the original property than exists while it remains in the shape of logs, if the wrong-doer sells the logs to a person who has no actual notice that they were cut on the public lands, still the government may maintain replevin against such vendee for the logs, if they are in existence, or if he has sawed them into lumber (which is a conversion of the logs), the government may recover from him the value of such logs, when so manufactured into lumber, and is not confined to the "stumpage" value.

On this last proposition the authorities are conflicting, and we adopt and follow the decision of the supreme court of the state upon the point. Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

The rule above laid down is the only one which will effectually protect the timber lands of the government which are remote from settlements and in the wilderness. As against the willful or negligent trespasser the rule of damage indicated is not unjust, and as against his vendee it is perhaps the logical and necessary result of the property in the logs still remaining in the government. At all events, it is the rule which has been approved by the supreme court of the state in the case before cited.

It may also be observed that the conclusions reached have a strong support in the adjudicated cases. Silsbury v. McCoon, 3 Comst. [3 N. Y.] 379; Riddle v. Driver, 12 Ala. 590; Betts v. Lee, 5 Johns. 348; Ellis v. Wire, 33 Ind. 127; Schulenburg v. Harriman [Case No. 12,486].

But there are cases which assert principles more or less in conflict with the cases just cited. Moody v. Whitney, 38 Me. 174; Single v. Schneider, 30 Wis. 570; Wetherbee v. Green, 22 Mich. 311.—an instructive case.

There is also a class of cases, English and American, which hold that where coal or mineral ore is taken by one person from the land of another, the ordinary measure of damages in trespass or trover is the value of the coal or mineral when it first became a chattel, or was converted, and not the value of the coal or ore in place, or as it lay in the earth. The principal cases on this subject are cited and commented on in Barton Coal Co. v. Cox, 39 Md. 1; McLean County Coal Co. v. Long (Sup. Ct. Ill.; Oct., 1876) 81 Ill. 359; In re United Merthyr Collieries Co., L. R. 15 Eq. 46, 5 Eng. Rep. (Moak's Ed.) 707.

The cases last referred to have generally arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is fraudulent, or willful, or negligent. At all events, the doctrine of these cases should not be extended to cases of willful or negligent trespasses upon the public timber lands of the government.

If a private proprietor of timber lands used due precautions to ascertain his boundaries, and, by mistake of the surveyor, or without negligence or fault on his part, or that of his servants, unintentionally cuts on the adjoining lands of the government, he in good faith supposing he was cutting on his own lands, and the government neglected or delayed to bring trover until the logs thus cut were enhanced in value two or three hundred fold by the labor of bringing them to market, in such a case it may be that the court would be warranted in directing the jury to allow as damages the value of the logs when first severed, and interest on that value.

I am inclined to think the true doctrine of the measure of damages in trover is sufficiently flexible to allow this to be done when justice requires no greater recovery; but the cases now before the court do not require a judgment on the point, and I leave it open for further consideration, should it arise.

Judgment accordingly.

NOTE [from original report]. The owner of land may replevy timber severed by a wrongdoer; and accordingly it has been held that the United States may maintain replevin for timber cut on the public lands, and even for timber cut and sold by Indians on land reserved to them, as the fee is in the government, and only a right of occupancy in the Indians. Johnson v. McIntosh, 8 Wheat. [21 U. S.] 574; U. S. v. Cook, 19 Wall. [86 U. S.] 593; Beecher v. Wetherby [95 U. S. 517].

In an action of ejectment (Clowser v. Joplin Mining Co.) in the western district of Missouri, at the April term, 1877, the circuit judge (Krekel, J., concurring), charged the jury as follows, in respect to the measure of liability for ores taken out of the land and sold by the defendant: "On this subject, no uniform rule applicable to all circumstances and all cases exists. Here is a case where (if the plaintiff is entitled to recover at all) the parties were in fact tenants in common, and where each party claimed the whole, and each denied any right in the other; where the defendants were rightfully in possession (for one tenant in common has as much right to the possession as another); where the plaintiff was absent, and for years had paid no attention to the land; where the defendants developed, if they did not discover, the lead mines and worked the same and took ore therefrom; the defendant company was organized and went into possession in 1874, the plaintiff appeared and set up a claim to the land in 1875, each party then claiming the whole. Under such circumstances, the court approves the rule laid down by the supreme court of Pennsylvania: Where 'a tenant in common exercises his undoubted right to take the common property, and has no other means of obtaining his own just share, than by taking at the same time the share of his companion—the value of the ore in place is the only just basis of account.' Coleman's Appeal, 62 Pa. St. 278; Barton Coal Co. v. Cox, 39 Md. 1, and cases cited. Under the statute of Missouri this rule may properly be applied in measuring the right to a recovery in respect to ores taken when one tenant in common recovers in ejectment against another." Wag. St. p. 560, § 13.

Case No. 1,582.

BLYDENBURGH v. LOWRY.

[4 Cranch, C. C. 368.][1]

Circuit Court, District of Columbia. Nov. Term, 1833.

ADMINISTRATOR DE BONIS NON—SUIT AGAINST PREDECESSOR—FOREIGN ADMINISTRATION.

1. Money received by the defendant, for the estate of the intestate, in the lifetime of the first administrator, may be recovered as assets in an action by a subsequent administrator.

[Questioned in Wilson v. Arrick, 112 U. S. 87, 5 Sup. Ct. 77.]

2. Letters of administration granted by the surrogate of Suffolk county, in New York, upon bona notabilia found there, will enable the administrator to recover assets in the District of Columbia, under the act of congress of June 24, 1812, § 11 [2 Stat. 758].

This was an action of assumpsit brought by the plaintiff [Richard F. Blydenburgh] as administrator of Jesse Smith, to recover $1,000 received by [George Lowry] the defendant to the use of the estate of Jesse Smith, in the lifetime of a previous administrator who obtained his letters of administration in Philadelphia, where the intestate died. The declaration contained only the common money counts, and the Maryland count upon indebitatus assumpsit for sundry matters properly chargeable in account, and all the promises were alleged to have been made to the plaintiff, "as administrator of Jesse Smith."

At the trial of the issue of non assumpsit, the plaintiff offered to prove, by contempt witnesses, that a certain John C. Mitchell, being indebted to Jesse Smith, the plaintiff's intestate, in the sum of $1,287, executed a mortgage of a lot in Georgetown, to the said intestate, to secure the same debt; that, upon the death of the said Smith, in Philadelphia, letters of administration were duly granted to a certain F. S. Bailey, who continued to act as administrator until his death; that, previous to the death of the said Bailey, the said lot, so mortgaged, was sold to a certain P. O'Donnoghue, for the use and benefit of the intestate Jesse Smith's estate; that the purchase-money for the same was paid by the said O'Donnoghue to the said defendant, George Lowry, in the lifetime of the said Bailey; but that, before the same was paid over by the defendant to the said Bailey, the said Bailey died. The plaintiff also produced, and offered to read, in evidence, his letters of administration, granted on the 3d of January, 1832, by the surrogate

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

of the county of Suffolk, in the state of New York, reciting that the deceased was, at the time of his death, an inhabitant of the city of Philadelphia, "and that assets now remain in the said county of Suffolk, and state of New York."

To the admission of all which evidence, Mr. Redin, for the defendant, objected, and contended that the surrogate in New York had no authority to grant letters of administration upon the estate of a person who died in Philadelphia. The act of congress of June 24, 1812, § 11 (2 Stat. 755) requires that the foreign letters of administration should be granted by "the proper authority." Letters granted in New York would be of no authority in Pennsylvania. They could only cover the assets in New York. They could give no authority over the assets here. There might be as many administrators as there are states in the Union. The act of congress means administration granted in the state wherein the intestate died. The plaintiff should have letters in Pennsylvania, or here.

THE COURT (THRUSTON, Circuit Judge, absent) stopped Mr. Dunlop, who was about to reply, and decided that the letters were sufficient, having been granted by the surrogate of Suffolk county, in New York, in the usual form, upon a suggestion of assets in that county, and certified according to the act of congress of June 24, 1812, § 11 (2 Stat. 755), and that the other evidence offered by the plaintiff was admissible.

Mr. Redin then prayed the court to instruct the jury, that, upon that evidence, the plaintiff was not entitled to recover.

Mr. Wallach, contra. The plaintiff may recover upon a promise to his predecessor. Catherwood v. Chabaud, 1 Barn. & C. 150; Hirst v. Smith, 7 Term R. 182; Sullivan v. Holker, 15 Mass. 374; Tingrey v. Brown, 1 Bos. & P. 310.

Mr. Redin. The question is, whether the plaintiff can recover this money in this action, or whether the suit should not have been brought in the name of the administrator of Bailey, the first administrator. The money was received by the agent of the first administrator, and remained in his hands. It did not remain as outstanding assets of the estate of Jesse Smith. It was not assets for which the plaintiff could be charged, unless he had received it; but the first administrator was chargeable; and if Lowry had spent the money, and become insolvent, the first administrator must have lost it. An administrator de bonis non can collect only the assets outstanding. Calder v. Pyfer [Case No. 2,299], in this court, in October, 1823. Calder was administrator de bonis non; the defendant had bought goods at the sale made by the first administrator, and was indebted therefor to the first administrator. The court decided, in that case, that the plaintiff, the administrator de bonis non, could not recover in his own name. Hirst v. Smith, 7 Term R. 182; the case of Magruder's Adm'x [Case No. 8,962], in this court, in December, 1825.

The administratrix sold the goods, and took notes payable to herself. She brought suit and died before judgment. Her administratrix entered her appearance, and obtained judgment. The administrator de bonis non prayed, that the judgment might be entered for his use; but the court refused. Barker v. Talcot, 1 Vern. 473. If the first administrator has converted the assets into money, the administrator de bonis non has no authority. There is no privity between him and the first administrator. Maryland Testamentary Law 1798, c. 101, subc. 5, § 6, and Id. c. 14, § 2. In Sibley v. Williams, 3 Gill & J. 52, the court of appeals in Maryland said, that the act of 1798 did not mean to make any thing assets in the hands of the administrator de bonis non, but what remained in specie. The act of Maryland of 1820, extends only to bonds, notes, &c., taken by the first administrator. The defendant could only be discharged by a receipt from the administrator of the first administrator, for whom he received the money. The plaintiff cannot recover upon this declaration. It is upon an implied promise to the plaintiff himself as administrator. In the cases cited, the promise was made to the first administrator, and so laid in the declaration.

Mr. J. Dunlop, for the plaintiff. If the administrator de bonis non stands in the place of the first administrator; if the promise to the first administrator be to him as administrator, and if the money promised, when received by the first administrator, would be assets and the money be not paid, according to the promise, in the lifetime of the first administrator, it is assets unrecovered. There is a privity between the first administrator and the administrator de bonis non. If it be property of Jesse Smith, unadministered, the administrator de bonis non may recover it. If Bailey had a right to recover this money in his name as administrator, the administrator de bonis non may recover it as administrator. Saund. Pl. & Ev. 606. The only question is, whether this money is the property of the estate of Jesse Smith; that is, whether it be assets or the personal property of Bailey.

This debt has never been converted into money. The debt was due by Mitchell to Smith. Bailey never received the money; for although he gave the defendant authority to receive it, and he did receive it, yet he afterwards refused to pay it to Bailey.

MORSELL, Circuit Judge. If the defendant had become insolvent, whose loss would it have been: It might have been the loss of the administrator, but it is not, therefore, less assets. If the property be changed, it is still assets, as in the case cited from Barnwell & Creswell [Catherwood v. Chabaud, 1 Barn. & C. 150], where the first administrator took a bill of exchange for a debt due to the estate, and died before suit

brought upon it. The administrator de bonis non sued on it, and recovered.

THE COURT (MORSELL, Circuit Judge, contra) decided that the plaintiff had a right to bring and maintain this action.

Verdict for the plaintiff.

A bill of exceptions was taken, but no writ of error was prosecuted.

Case No. 1,583.

BLYDENBURGH et al. v. WELSH.

[Baldw. 331.][1]

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

SALE — CONDITIONS — FRAUD — WAIVER — TIME OF DELIVERY — DEMAND — REFUSAL — MEASURE OF DAMAGES — VARYING PRICE.

1. On the 7th of April, A sold B a quantity of coffee "provided it is not sold in New York:" *Held*, that the sale to B. was absolute, if the coffee had not then been sold; the proviso does not refer to a future sale.

2. A purchaser of goods is not bound to answer the inquiries of a seller respecting the state of the market.

3. If after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it on a condition which he has no right to exact, he thereby waives the fraud and cannot set it up in an action on the contract.

4. What is fraud in a purchaser of an article of merchandize, considered.

5. Where no time is fixed for delivery of goods sold, the law makes them deliverable in a reasonable time: if when a demand is made there is no objection made as to time, or it was not then made a question by the vendor, the contract will be deemed to be broken by a refusal.

6. The rule of damages is the market price of the goods at the time when they were deliverable, a jury cannot give damages beyond the market value, though the refusal to deliver may have been with a view to profit. But if the price was not fixed and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate, according to the conduct of the defendant.

This was an action [by Blydenburgh and Burns] to recover damages from the defendant, for not delivering a quantity of coffee agreeably to a contract between him and the plaintiffs, through the agency of Joshua Percival, a regular broker employed by the plaintiffs.

The contract was as follows:

"Sold Mr. Percival all the coffee purchased from Mr. Jacobs, said to be about two hundred and eight thousand pounds at 17¾ cents, at four months, or two per cent. off, provided it is not sold at New York. J. Welsh."

"7th of April, 1825—about eight o'clock, a. m., or between eight and nine o'clock. J Percival."

The quantity of coffee was two hundred thousand nine hundred and fourteen pounds, the price at 17¾ cents, was 35,662 dollars 23 cents. Policy of insurance, at Boston, 8th of April, 1825, by B. & B., 41,000 dollars (exact amount being unknown).

The following letters and papers were read by the plaintiffs:

"Philadelphia, 13th of April, 1825. Sir,—Circumstances connected with the purchase of coffee, which you made of me in the morning of the 7th instant, came to my knowledge yesterday, which will, in my opinion, annul the contract; but in order to avoid inconvenience, I will give the bill of parcels, and deliver the coffee, if your employer, Mr. Blydenburgh, is prepared to make the payment, (yesterday he had not the acceptances) on condition that an amicable action is entered in the circuit court of the United States to try the question, and if the contract is unlawful, to assess the damages I have sustained. Also, on condition that I am protected from the claim of William Read for Le Roy, Bayard & Co., if any should be made. Yours, respectfully, J. Welsh. To J. Percival."

"Philadelphia, 23d of April, 1825. To Blydenburgh & Burns, New York. Mr. Read informs me that he is not authorized to give up the claim of Le Roy, Bayard & Co. to the coffee, and renews the proposal he made (which you rejected), of submitting it to friends. On receiving a protection from you against this claim, either the paper handed you for signature the 12th of April, or any other, I will deliver you the coffee, which remains where it was stored the 7th and 8th instants. I will say a word about this transaction more than that I want the funds, and feel a sincere desire to end the unpleasant controversy. Should you decline, I intend to ship the coffee, having a vessel ready, or dispose of it. Yours, respectfully, J. Welsh."

Paper handed Mr. B. for signature:

"Should any expense or damages arise from a claim for the purchase or supposed purchase or sale of coffee in New York, belonging to John Welsh, and which we purchased on condition it was not sold in New York, we hereby promise to pay all expense or damage, and clear the said Welsh of all liability."

"It is admitted by the defendant, that on the 14th of April, 1825, the plaintiff, Blydenburgh, called on the defendant at his counting-house, and in the presence of a witness, told the defendant that he was prepared to pay him the exact amount of the coffee, in acceptances of Messrs. P. & J. S. Crary of New York, of bills drawn by Blydenburgh & Burns, and acceptances of Blydenburgh & Burns of bills drawn by P. & J. S. Crary; that the defendant said he would not deliver the coffee unless Mr. Blydenburgh complied with the terms specified in a note of the defendant to Joshua Percival; that Blydenburgh then tendered to the defendant seven bills accepted and drawn as above stated, true copies of which are hereto

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

annexed; that the defendant took the bills in his hand, looked over them; said he was perfectly satisfied with the paper, and would rather have it than the money, which Mr. Blydenburgh told him, if he preferred, he might have, and then returned them to Mr. Blydenburgh, saying, he would not deliver the coffee except on the terms before specified. Mr. Blydenburgh then told him he should be under the disagreeable necessity of commencing an action against him. Rich. Peters, for defendant."

Indorsement on above. "I agree that the within shall be read in evidence on the trial of the cause. Richard Peters, defendant's attorney. October 5th, 1830."

Copies of Bills.				*Dates.*	*Payable.*
$5,000	P. & J. S. Crary	on	B. & Burns	9 April, 1825	20 July, 1825
5,000	same	on	same	"	26 "
5,000	B. & Burns	on	P & J. S. Crary	"	1 Aug. 1825
5,000	do.	on	do.	"	10 "
5,000	do.	on	do.	"	13 "
5,000	do.	on	do.	"	19 "
5,662 23	do.	on	do.	"	20 "
$35,662 23					

All dated New York.

It appeared in evidence, that Mr. Welsh had made an offer of the same lot of coffee to Mr. Read of this place, agent of Le Roy & Bayard of New York, at 17¾ cents, at four months, and to deliver it at Hamburg or Petersburg at a certain freight. Mr. Read wrote to Le Roy & Bayard on the 6th of April, 1825, informing them of the offer, to which they replied on the 7th, stating, that they never purchased, unless the debenture was taken in payment. On the 8th Mr. Read offered to take the coffee at short price, the debentures to be in part payment, to which Mr. Welsh replied, that if his offer had been unconditional at short price, he would have considered it a sale to Le Roy & Bayard, but as they had not accepted his offer, it was no sale to them; he had sold it to another person, and it was now too late to sell to them. Mr. Read believed he had no right to the coffee, so informed Le Roy & Bayard, and they never sought to enforce the offer, but there was no evidence that such belief was communicated to Mr. Welsh. Coffee took a rise on the 7th of April, which continued for some time, the price ranging from 18 to 21 cents. Mr. Welsh retained the coffee till the 10th of May, when he shipped it on his own account, invoiced at 19½ cents. It was alleged on the part of Mr. Welsh, that the state of the market for coffee was known to Mr. Percival on the 7th of April, but was concealed from Welsh and misrepresented; this was denied on the other side, and much testimony taken respecting it, which it is not necessary to refer to; in substance, it was, that on the arrival of the ship Crisis at New York, the accounts from Europe relating to the cotton market caused a rise in that article, but no notice was taken of coffee; on the morning of the 7th of April plaintiff, Blydenburgh, came express from New York, in advance of the mail, and gave orders to Mr. Percival to purchase this lot of coffee from defendant, which he had offered the day before but which Mr. Percival had declined. The arrival of the Crisis, and the rise of cotton, was entered on the coffee-house books before this sale was made, and was known to defendant; the rise in coffee took place on account of sales made on that day, and speculations in anticipation of its rise. The avowed object of the expresses was to purchase cotton; the purchases of coffee were more active, in consequence of calculations on its probable demand, and not from any definite information. At the time of the purchase Mr. Welsh asked Mr. Percival if there was anything about coffee, to which he replied, nothing on the books of the coffee-house except the rise of cotton.

Mr. Chauncey and Mr. Sergeant, for the plaintiff.

By the terms of the memorandum of the 7th of April, the sale to the plaintiff was absolute; if Le Roy & Bayard did not accept the offer previously made, defendant was not at liberty to make a new one, or to vary the terms proposed. The offer was not accepted, and both defendant and Mr. Read considered it as no sale; it was therefore not sold in New York on the 7th. Mr. Welsh has no right to claim any indemnity, when he could in no event be subjected to any injury. As no time was fixed for the delivery of the coffee, the law makes it deliverable in a reasonable time, which, in this case, may be taken to be the 14th of April, when the coffee was demanded, and the defendant made no objections to the time, but offered to deliver it if the indemnity he required was given.

The contract was broken on that day by the refusal to deliver, in consequence of which we have a right to recover the difference between the price at which the coffee was sold on the 7th, and the price at which it could have been purchased on the 14th, with interest from that day. The price was then 20 cents, at less than which the plaintiff could not have purchased. This is the true rule of damages, which puts him in the same situation as if the contract had been complied with. [Shepherd v. Hampton] 3 Wheat. [16 U. S.] 204; [Hopkins v. Lee] 6 Wheat. [19 U. S.] 118; 2 Conn. 487; 5 Conn.

222. The contract was fair; Mr. Percival was not bound to communicate his instructions from the plaintiff, nor were either bound to disclose any knowledge they had of circumstances which might affect the market; they did or said nothing tending to impose on the defendant by any falsehood or misrepresentation, and had a perfect right to take advantage of the rise in the market, if they practised no deception on the defendant. The case of Laidlaw v. Organ is decisive of this point (2 Wheat. [15 U. S.] 178, 195); the silence of a party is not imputable as fraud, unless there is an obligation to disclose (2 Brown Ch. 420; 10 Ves. 470; 7 Johns. Ch. 201); there must be fraudulent concealment or misrepresentation to taint the contract with fraud (18 Johns. 403).

Mr. Peters and Mr. Binney, for defendants, admitted the rule of law to be as laid down in [Laidlaw v. Organ] 2 Wheat. [15 U. S.] 195, in relation to the communication of the vendee's information to the vendor of goods. In contracts of insurance, the insured must communicate his whole knowledge of every matter material to the risk, but this is not required in other contracts. In contracts of sale the true question is, whether what is said, or omitted to be said, tends to deceive. The party may be silent when asked, for his silence puts the other on his guard, a contract may be avoided though there is no design to mislead or deceive, if what the party say, is calculated to have that effect. An answer may be true, but by reference to the subject matter may tend to deceive; there may be partial truth yet general falsehood; on this subject the same rule prevails as in contracts of insurance; the assertion of a fact includes all natural inferences (Phil. Ins. 82); if the vendor throws himself on the confidence of the vendee, and he either says what is not true, or does not say what is true, it is a fraud in law (2 Dow, 263, 266; [Laidlaw v. Organ] 2 Wheat. [15 U. S.] 186, 190, note); or has knowledge of any fact not disclosed, which is contrary to his representation (10 Ves. 470). The rule of damages for not delivering articles sold, is not what the vendor could purchase the article for, but the injury sustained; the vendee is entitled only to indemnity, that is, to be put on the same footing, as if the article had been delivered. As a general rule, the price demanded is the market value, for the purchaser must pay it; but if the market is stagnant, if none or but small sales are made, the true rule is, what could the article sold have been sold for, if the plaintiff had had it in his possession, in the state of the market on the 14th of April when it was demanded? The jury must look to what a sale would have produced, and not the price demanded by holders at a time when prices were nominal.

BALDWIN, Circuit Justice, charged the jury as follows:

The contract of sale on the 7th of April was conditional, "provided it is not sold at New York;" as the contract is in writing its meaning is matter of law to be settled by the court. In our opinion, it does not refer to a sale to be made in New York after the 7th, but to a sale then made; the proviso is not prospective, so as to bring a future sale within the condition; if it was not sold before the contract was signed, the sale to the plaintiffs was absolute. On the other hand, if the offer made on the 6th had been accepted by Le Roy & Bayard on the 7th, the coffee would have been in law and fact sold on the 6th, and the plaintiffs would have had no right to it. But to make out a sale on the 6th, the precise offer made by Mr. Welsh must have been accepted; any variance in the terms would have been a new contract, which he was not at liberty to make. The letter of Le Roy & Bayard of the 7th was not such an acceptance, and was so considered by Mr. Welsh and Mr. Read; nor do Le Roy & Bayard even seem to have made or contemplated any demand on Mr. Welsh. The contract thus becomes divested of the only condition annexed to it, without any right in Mr. Welsh to require any indemnity against Le Roy & Bayard. It bound Mr. Welsh to deliver the coffee, if it is not infected with fraud in the suppression of truth, or the suggestion of falsehood. On this subject the law is well settled.

To avoid a contract on this ground of fraud, there must be a concealment of something, which the purchaser is bound to communicate to the seller, or some misrepresentation on a matter material to the contract, which misleads and deceives him, or is calculated to do so. But a purchaser may avail himself of information which affects the price of the article, though it is not known to the seller; though the latter inquires if there is any news which affects the price, the purchaser is not bound to answer, and the contract is binding, though there was news then in the place which raised the price thirty or fifty per cent. [Laidlaw v. Organ] 2 Wheat. [15 U. S.] 195.

When the means of acquiring knowledge are equal to both parties, he who first receives it may avail himself of his activity or of accident; but if he makes use of any circumvention or art to conceal the fact from the other party, it will invalidate the contract. The buying and selling merchandize being for mutual profit, the law exacts only good faith; one is not bound to impart to another his views of speculation, his opinion of the effect of news or events, the bearing of the rise of one article on another, or the results of his mercantile skill and knowledge of the markets, fairly acquired, and not unfairly concealed. An unfair concealment is where pains or means are taken to keep the other party in ignorance of material facts, when he asserts a fact not true, or true to the letter but not the sense—

not according to the common meaning and acceptation of the words used, and calculated to impose upon or deceive—representing a fact to be one way, but concealing circumstances which bore directly upon it in a contrary way; in a word, any declaration which induces another to buy or sell, on the confidence in its truth, according to the common acceptation of the words used in reference to the transaction, is fraudulent suppression, if the assertion is not strictly true as so understood, though it may be true in another sense different from the ordinary import.

Misrepresentation is asserting what is not true in whole or in part; though not bound to answer a question, yet if the party does answer he must do it fully, fairly and in good faith, so as to give the other the benefit of the question and the information sought: if a representation is voluntarily made without being requested, it must be substantially true in every matter material to the contract. As every contract is presumed to be affected by the state of things as represented, any substantial change will vacate it, because not made according to the meaning and intention of the parties; so where confidence is reposed and abused by unfair concealment. In either case it matters not whether there was a fraudulent intention. If the party is in fact deceived or induced by the conduct or declaration of the other to enter into a contract which he would not have made had he known the true state of things, it cannot be enforced. In applying these rules to this case you will inquire whether the agent of the plaintiff said or did anything tending to impose on the defendant, from which you can infer an imposition by the buyer upon the seller, according to the principles of fair dealing as understood between merchant and merchant.

Mr. Percival was not bound to communicate his instructions to purchase, or his opinion of the effect of the rise of cotton on the price of coffee, nor the state of the market as to the sales of coffee then going on, if Mr. Welsh's means of information were the same as his. You will judge from the evidence whether there was any concealment of any other fact material to the sale which ought to have been disclosed, or any untrue representation made in the conversations between the parties. In deciding on this part of the case you will also inquire whether the defendant, on the 13th of April, was ignorant of any facts which had a material bearing on the fairness of the contract; for on that day he made a written offer to deliver the coffee if the plaintiff would sign the paper of indemnity. This is a waiver of the objection to the contract on the ground of fraud, if he was informed of all matters which bore upon that question; if he remained ignorant of them then it is no waiver.

Should you think the contract fraudulent in law or fact you will find for the defendant; if you think it fair, then the only question will be the amount of damages, as it is clear that there has been a breach by the defendant. No time being fixed for the delivery of the coffee, the law makes it deliverable in a reasonable time, which depends on circumstances; as no objection was made in point of time, when a demand was made by the plaintiffs on the 14th of April, and nothing appears in the evidence to show that time ever was or ought to have been made a question between the parties, you may assume that as the time of delivery, and by the refusal of the defendant, that the contract was then broken. The rule of law, as to the measure of damages to which the plaintiff is entitled, is the market price or true value of the coffee in the market on the 14th of April, taking all circumstances into view; you will not confine your inquiry to the price at which the plaintiff could have sold it, if it had been delivered according to contract, or what he must have paid, if he had purchased on that day; but taking these and all other circumstances together, as bearing on the value of the coffee, as an article of merchandize in the hands of the plaintiff, for the purpose of taking the advantage of the market, decide from the evidence what it was then worth, not its intrinsic but its market value.

The plaintiff must be put in as good a situation as if the coffee had been delivered; he must have a just indemnity for the breach of the contract, but you cannot go beyond the value of the coffee at the time of delivery, whatever opinion you may have of the reasons or conduct of the defendant for not making it. If you are satisfied from the evidence that there was on that day a fixed price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you may adopt that which you think best accords with the proofs in the case. You must take what you believe the market price or value, but may take the range of the market as proved by the witnesses, fixing on the highest, lowest, or medium rate, at your discretion. We think the rule applicable to contracts to deliver stocks a correct one in cases of this kind, by keeping within the range of the market on the day of delivery, to fix on the higher, lower or medium value, as the breach of the contract may have been wilful or innocent in your opinion. The plaintiff is entitled to your verdict for such value, with interest from the day of delivery.

The jury found for the plaintiff, whereupon the defendant's counsel moved for a new trial; 1, for excessive damages; 2, for misdirection by the court, in charging the jury that interest was to be given as a matter of law, whereas it was in the discretion of the jury. This point was not discussed at the trial, and no opinion given on it by the court. A new trial was granted on the first ground.

The opinion of THE COURT in granting a new trial was delivered by HOPKINSON, District Judge.

The contract in this case was proved, as it was alleged, by the plaintff, and the violation of it on the part of the defendant, without any legal warrant or justification, was shown to the entire satisfaction of the court. The plaintiff, therefore, had a clear case, and was entitled to a verdict. The cause was tried with ample preparation on both sides, with great deliberation and ability; and the jury, after hearing it fully discussed by the counsel, and receiving an elaborate charge from the court, rendered a verdict for the plaintiff, and assessed his damages at the sum of 5391 dollars 18 cents.

The plaintiff moved for a new trial, and in support of his motion has filed various reasons, the argument of which has brought the whole case into the review of the court. We are now to decide upon the motion; another trial is asked. 1. Because the damages are excessive.

In assessing the damages for the breach of a contract like the present, the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a rule as could be given. The damage to be recovered is to be governed by the price of the article at the time when it should have been delivered, compared with the contract price. This rule is founded on an hypothesis not always true in fact, perhaps not often so, and very favourable to the plaintiff; that is, that he would certainly have sold the article, if he had received it, at the advance of that day, and not have retained it subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of coffee on the day the defendant was bound to deliver this parcel to the plaintiff, we must settle the true meaning or interpretation of the rule, what is intended by the price of the article? On the one side it is contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract, and put into his possession the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be any thing unjust in this rule—any thing of which one has a right to complain who has broken his engagements. But is it the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price—the market-price of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the value—the rate at which the thing is sold. To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour for instance, under a false rumour, which if true would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value, provided the rumour shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages, is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance.

The law does not intend this: it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter. With this explanation of the rule which prescribes the market price of the article on the day of delivery, we must examine whether the jury in this case have executed it clearly in the verdict which they have rendered. It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff on the 14th of April, 1825, at 19¾ cents a pound. Does the evidence support this calculation or estimate for such coffee, or so large a quantity on that day? Was this the buying and selling price? We feel, as the jury probably did, no inclination to force the testimony in favour of the defendant; on the contrary, his unaccounted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him a profitable contract, was calculated to induce a jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff, has been given up at the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to Mr. Welsh a sordid design, we confess ourselves unable to discover the cause of his departure from the course it

was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the application of it to the evidence. Juries may sometimes yield, honestly, to excitements, which judges must not feel. To correct such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury, that we would not oppose ourselves to their opinion upon it, unless where we are assured that they have either mistaken the rule of law, or contradicted the clear purport of the evidence. We inquire then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April, 1825? On a careful examination of the testimony of very intelligent witnesses, well acquainted with the subject, we cannot believe that the value of this coffee was, on that day, so high as 19¾ cents a pound, or that the plaintiff, had it been duly delivered to him, could have obtained any such price for it. Mr. Stacy's quotation of prices to his correspondent in his letter of the 12th, gives no sales or other facts on which this opinion, for it is no more, was founded; nor the quality or quantity to which he applies it; and it is to be recollected too, that Mr. Stacy was a seller, and that Mr. Linn on this same 12th inst. offered, but could not get 19 cents for Mr. Stacy's coffee. As to the day in question, and which, in such a fluctuating market, must be particularly looked to, we have no evidence of value or price, either by actual sales or other data, in relation to coffee on that day.

There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th inclusive, which, in our minds, show such an advance as would have raised the value of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them; but on Tuesday, the 12th, Mr. Linn offered any he had at 19 cents, and could get no bid. We forbear to make a more minute examination of the testimony, or to express a more precise opinion upon it, as it may again come under our judicial investigation. It is enough that we think the jury have so far overrated the value of this coffee, as to support the objection of excessive damages to their verdict. It is not unlikely that they may have not exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the refusal of the defendant to perform his contract to be wilful or inadvertent; proceeding from an unjust violation of his engagement, or a conscientious, although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought and sold. It has even grown into a proverb, that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it.

Being of opinion, on this first reason, that it is well maintained, and that the verdict ought to be set aside on account of the excessiveness of the damages, it is unnecessary to give any opinion on the other reasons filed and argued by the defendant.

We think it is not going out of the path of our duty to suggest that as the right of the plaintiff to a verdict seems to be well established, and the question is only about the amount he should recover, we may recommend a settlement of this matter by the parties, or their counsel or friends; thus avoiding an expensive, troublesome and unpleasant litigation.

BLYTHESWOOD, The (MACPHERSON v.). See Case No. 8,920.

Case No. 1,584.

BOALER v. CUMMINES.

[10 Leg. Int. 122;[1] 1 Am. Law Reg. 654; 5 Pa. Law J. Rep. 246.]

District Court, E. D. Pennsylvania. July Term, 1853.

FUGITIVES FROM LABOR — ACTS OF 1793 AND 1850 —APPRENTICE.

1. The clause of the constitution and the provisions of the acts of congress of 1793 [1 Stat. 302] and 1850 [9 Stat. 462], providing for the rendition of persons held to labor, include apprentices.

2. Where C. had bound himself an apprentice in Delaware, with the assent of his father, who lived in Pennsylvania, and the latter had, upon one occasion, returned C. to his master, from whom he had absconded, *held*, that C. might be arrested by virtue of a commissioner's warrant, and remanded to his master as a fugitive.

This was a hearing, upon habeas corpus. [Denied.]

It appeared that William Cummines, Jr., had, with the knowledge, if not with the assent, of his father, who resided in Pennsylvania, been apprenticed to the claimant

[1] [Reprinted from 10 Leg. Int. 122, by permission.]

[James M. Boaler] under the Delaware act of 5th February, 1827 (Rev. Laws Del. 1852, p. 224), which provides that minors over fourteen years of age, and not having parents or guardian within the state of Delaware, may validly apprentice themselves till the age of twenty-one, if with the assent of two justices of the peace; that the boy having before escaped from his master was returned to him by the father; that having again escaped he was arrested upon a warrant under the "Fugitive Act" of 1850 [9 Stat. 462], carried before the commissioner, by whom the warrant was issued, and the case partially heard, but, at the suggestion of the commissioner, the fugitive was remanded for a further hearing and this writ taken, returnable before his honor, Judge Kane.

The court intimated that the warrant of arrest and the affidavit of the claimant, on which it issued, constituted a sufficient cause for holding the boy, and were a good return to the writ; but, at the desire of the commissioner, (Charles F. Heazlitt, Esq.,) his honor, Judge Kane, sat with the commissioner as advising him.

The facts being fully proved, Crabbe, for the claimant, (J. Murray Rush was with him,) argued:

I. That this was a case within the act of 1850, and clause 3, § 2, art. 4, of the constitution [1 Stat. 18], because the words of that clause were in themselves on the common rules of construction as applicable to apprentices as to slaves, and that those who argued that slaves only were intended thereby, were bound affirmatively to make out their position, and that no text writer or judicial decision had ever expressly confined the operation of the clause of the constitution or the acts of 1793 [1 Stat. 302, c. 7], and 1850, to slaves. That, going further, the intention of the framers of the constitution (3 Madison Papers, 1446, 1456, 1532, 1558, 1589) had been to include more than slaves within that clause, and that such had been the original understanding of the provision (3 Elliott, Deb. 433, 436). That the framers of the constitution had thought it requisite expressly to include "persons bound to service for a term of years," that is, apprentices, among free persons, while, on the other hand, the New York amended fugitive act (2 Rev., 3d Ed., 657) had deemed it necessary expressly to except them from being included in the term "persons held to service or labor." See amended act, Laws 1840. That the same construction had been placed upon the constitutional provision in Jack v. Martin, 14 Wend. 522, 524, 525, and in Johnson v. Tompkins [Case No. 7,416]; and that Commissioners Ingersoll, (Conn.,) Loring, (Mass.,) Scovill, (N. Y.,) and Heazlitt, (Penna.,) had decided apprentices to be within the meaning of the act of 1850. Commissioner Morton (N. Y.) had, however, decided otherwise.

II. The indentures were valid in this court, because, as was in evidence, they had been impliedly ratified by the father, and because, whether so ratified or not, they were valid under the lex loci contractus. Story, Confl. Laws (3d Ed.) p. 186, § 100; Id. p. 189, § 103.

Mr. Parsons, for the apprentice, argued that this was not a case where the commissioner was authorized to issue the warrant of arrest, neither the constitution nor the acts of 1793 and 1850, being intended to affect any other than slaves (2 Story, Const. § 36; 3 Story, Const. § 805; Serg. Const. Law (1st Ed.) 387, 388; 3 Mad. Papers, 1447; Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 611), and that this was shown conclusively by the fact that there were no adjudicated cases which decided apprentices to be within the constitution and acts of 1793 and 1850. That as fugitive slaves were unable to make valid contracts (Glen v. Hodges, 9 Johns. 67; Com. v. Griffith, 2 Pick. 11), this boy, if brought into the same category as a slave, must also be held incapable of validly binding himself to the claimant, and therefore the father's right was superior. That Commissioner Morton's decision was a proper exposition of the law on the subject. That quoad, the father these indentures were of no avail, he having never surrendered his rights over the boy. 3 Bl. Comm. 4; 1 Bl. Comm. 386; 4 Serg. & R. 211; 2 Watts & S. 670; Guthrie v. Murphy, 4 Watts, 80; Com. v. Crommie, 8 Watts & S. 339.

Mr. Rush, for the claimant, was not heard.

KANE, District Judge. I have had my attention called to the clause of the constitution, and the acts of congress of 1793 and 1850, providing for the rendition of persons held to labor, and the mode of so doing, very often; and the result of the attention heretofore bestowed, and the simple nature of the question to be decided, induce me to give my decision now. Taking the words of the clause of the constitution, and those of the act of 1850 alone, there can be no difficulty—the words are, "persons held to service or labor in one state under the laws thereof." Now I know of no words that could more clearly include apprentices than those I have quoted, for the plain effect of the very words of every indenture of apprenticeship is to hold the party to service; and if I could go beyond the words of the act of congress, and those of the article of the constitution, I should say, that every consideration of policy would dictate such a construction; because to decide the contrary, would be to discharge every apprentice in Pennsylvania that chose to cross the Delaware, and every one elsewhere that repaired to this state, and refused to return to his duty. The relation created by an indenture of apprenticeship is of such a character, that minors and orphans, instead of remaining ignorant and unprotected, become acquainted with the arts

and sciences, and are fitted for the duties of life; and to preserve such a state of usefulness the principles of extradition should be applied. It is true that no case has been cited in which a United States court or judge has decided this very question; but, perhaps, it is because the master has enforced his rights by seizing his apprentice and conveying him home, that this law, and that of 1793 has not been resorted to, and the want of use, or non user, has no influence upon the construction of a plainly expressed statute.

It is equally clear, that though a judge in considering the case of a fugitive slave in connexion with the statute, might speak only of a slave as within its purview and another in a case like the present might speak only of apprentices; yet each might with propriety use the words, "a person held to labor." It is equally to be observed, that no decision has been had in which it has been held, that the words of the constitution apply only to slaves. Most certainly this lad is held by a binding under a local proceeding, within the authority of any state to provide, and thereby to affect persons within her limits and subject to her jurisdiction. The marriage of a minor in Delaware, good by the law of that state, would be good everywhere else. Now one of the objects of apprenticeship is to prevent pauperism; and a child whose parents are in another and a distant state, and who have deserted him, is a pauper, notwithstanding the fact of his having lawful protectors who do not discharge their duty to him, and the disposition of him under the municipal regulations of the state in which he is deserted, is binding on him, and his parents too. It cannot, however, be said, that in this case the binding was against the father's will, for it is in proof before me, that it was with the consent of the father, who sent his son to Delaware on trial, to be bound if he was liked, and sent him back to that state after he was bound, when, on one occasion he had absconded. The question, therefore, is between the father and master on this proof; and it cannot be, that the father shall stand by, and see his son bound in another state, to receive education and nurture, and just when he becomes valuable to a master, to take him away; such a course would amount to positive fraud. The consent is so material that it is not going too far to say, that if a slave should come here with his master's consent and bind himself apprentice, or, being here, should so bind himself with the master's consent, in the first case he would not be a fugitive slave within the meaning of the act of congress, and in the second the master would not be allowed to question the validity of the indenture. This case, therefore, returns to the commissioner for adjudication, he being now in possession of my views on the subject. Relator remanded to the custody of the marshal.

BOARDMAN (ATKINSON v.). See Cases Nos. 607 and 608.

Case No. 1,585.

BOARDMAN et al. v. The BETHEL.

[17 Betts, D. C. MS. 58.]

District Court, S. D. New York. Nov. 22, 1849.

SALVAGE—WHAT CONSTITUTES—VESSEL AGROUND—USE OF TACKLE—TENDER—WHEN A BAR.

[1. Rescuing a stranded vessel from impending peril is a salvage service, though the service was not indispensable nor attended with danger.]

[2. Giving the benefit of skill and experience and other incidental acts of relief may constitute a salvage service, though there is no actual labor or effort.]

[3. Employment of wrecking tackle, under an agreement to arbitrate the value of services rendered, is a salvage service, and not a hiring of the articles on a quantum meruit.]

[4. The tender of adequate compensation for salvage service, without deposit in court before answer, is no bar to an action for such service.]

[In admiralty. Libel for salvage by William Boardman and others, owners of the schooner Van Landt, against the schooner Bethel. Decree for libellants.]

BY THE COURT. Salvage is claimed by the libellants, as owners of the schooner Van Landt, for services rendered to the schooner Bethel.

The Bethel, loaded with sugar and molasses, was stranded outside Sandy Hook on the night of the 16th of February last. She was driven head on the bar in a northeast wind, and lay with her stern exposed to the wind and sea. The weather was cold, wind fresh, with appearance of a gale and snow. At 11:30 the next morning an agent of the underwriters came to the Bethel, and, at the request of her master, attempted with a gang of men to get her off. They found her on the outer bar heading to the shore, and about thirty fathoms from the beach at low water. She had then four feet of water round her, was tight and sound, and the tide was rising. The agent supposed she could be got off with the assistance at his command on the full tide. Her deck load of molasses was got ashore, and arrangements made to heave her off.

The libellants owned the wrecking boat or schooner Van Landt, of 40 tons, which was fully fitted out with proper working apparatus, and was on a voyage to Cape Henlopen, with a view to wrecking services. In the afternoon of the 17th of February the Van Landt anchored inside the Hook, and her master went to the Bethel to offer assistance. An agreement was then made between him and the master of the Bethel to get the latter off for the sum for $500, the expense of discharging her cargo to be borne by her master if it became necessary to unload her. At the suggestion of the agent of the underwriters, Captain Brewster cancelled this agree-

ment, and engaged, if his schooner was not got off by the agent at full tide, to employ the Van Landt, and pay what should be decided by two men in Wall street to be proper. There is a disagreement in the evidence as to the terms upon which the Van Landt and her apparatus was employed, by in my judgment the testimony of Captain Tripp to the terms of the bargain not contradicted by Captain Brewster is more reliable evidence of its terms than the impression and understanding of Mr. Wardell (the agent), who did not hear the first agreement. Capt. Tripp's statement of the method by which his compensation was to be fixed under the agreement finally made seems corroborated by the fact that a reference was framed and proceeded in conformably to it in New York, but was broken up by either the nonagreement of the referees or the withdrawal of the claimants from it. I hold the fair bearing of the proofs establishes an undertaking by Capt. Brewster with Capt. Tripp to employ the latter with his wrecking apparatus in getting the Bethel off in case Mr. Wardell should fail doing it on the tide then making, and that the agreement was not, as Wardell interpreted it, for Tripp to furnish his anchors and cables, and to receive compensation for their use only. Mr. Wardell having failed getting the Bethel off, and a cable furnished for the purpose by a revenue cutter having parted, on the 18th of February the Van Landt came round and placed her anchor and supplied her cable, and the Bethel was in the course of the afternoon hauled off. There is again a clashing of testimony as to the parts taken by Wardell and Tripp respectively in this service, and which of them was officially in command. It is not important in my opinion to adjust that difference. The testimony is clear to prove that Tripp was active in assisting and directing in the operation of hauling her off and navigating her within the Hook that night. The next morning she was delivered up to Capt. Brewster, or the agent of the underwriters, and brought to the city. A compensation of $250 was tendered the libellants, which they refused to accept it.

Two answers were interposed to the libel, one by the consignees of the schooner and the other by the consignees of the cargo. They rest on no personal knowledge of the facts attending the service, and are given upon information and belief. The position taken on the defense is that the schooner was not wrecked, and that no salvage services were rendered by the libellants. All they did was to supply one line, a cable anchor, and perhaps blocks, &c., for the use of which $150 would be an ample compensation. A great mass of testimony is put in by the parties on those points.

My conclusion from the results of the whole evidence is that the aid given on the occasion by Capt. Tripp and the schooner Van Landt was a salvage service, for which they are entitled to a reasonable recompense. Without examining at large the various propositions advanced on the argument, I shall indicate briefly the principles upon which this decision is placed.

1st. I consider the service rendered opportune and valuable to the Bethel and her cargo, and that they were by the aid of the libellants relieved from a situation of much peril, considering the season of the year and the then state of the weather. But I do not regard the intervention of the Van Landt as indispensable to the safety of the Bethel, or that the services were rendered with any considerable danger to the lives or property of the salvors. The services did not occupy over 8 or 9 hours, the main labor being performed by Mr. Wardell and his gang of men. No one from the Van Landt except Capt. Tripp was engaged on board the Bethel. The Van Landt was, however, brought round with anchor and cable, and her crew assisted in carrying out and placing the anchor, weighing 2,200 lbs., and connecting the cable with it so as to enable those on the Bethel to haul, and in working the Van Landt back to her anchoring place.

It is a mistake to suppose a stranded vessel must be technically wrecked in order to render her rescue a salvage service. That her position is dangerous, and she is aided by others, when in impending peril, is sufficient to clothe those who come to her relief with the character of salvors. The Traveler, 3 Hagg. Adm. 120; Vromo Margaretha, 4 C. Rob. Adm. 103.

Nor need the services be rendered by actual labor and effort applied by the salvors to the salved vessel. Incidental acts tending to her relief and aid will be treated as of the same effect.

Thus, a vessel coming into port, and apparently in distress, was boarded by the libellants in a fishing smack, under circumstances of exposure and danger, and an order taken to a steam tug to come out and tow her in. The captain of the vessel swore she was in no danger, and that he gave directions to the libellant not to have the steamer come out, unless she came out immediately and in case the weather should moderate. The steamer went out from Ramsgate pursuant to the order, accompanied by the master of the smack, and the next day towed the vessel up to the port of London. A tender of 10 pounds was made to the libellants, which they refused to accept. The court held that they were salvors, and the tender was inadequate, and awarded them 40 pounds. The Ocean, 2 W. Rob. 91. So a lugger with a crew of five men were engaged by a vessel off Dungerness in want of an anchor, to bring one off to her from Dover to the South Dover. The lugger procured the anchor, and cruised all night without finding the vessel, and the next morning put it on board her. For this service 35.10 pounds was tendered. On a suit for

salvage the high court of admiralty awarded 60 pounds for salvage and costs. The Hector, 3 Hagg. Adm. 90.

2. I do not think that the beneficial services were solely in the use of the anchor and cable supplied to the Van Landt as Capt. Tripp aided on board the Bethel by his skill and experience in hauling her off, and also in navigating her round the Hook to a place of safe anchorage.

But independent of his personal services on the Bethel, I think the employment of the tackle of the Van Landt under the circumstances was a salvage service, and not a hiring of those articles on a quantum meruit.

3. The tender of $250, if an adequate compensation, was not so followed up as to serve as a bar to the action. It is directed by standing rule 72 that a tender inter partes shall be of no avail on defence or in discharge of costs unless on suit brought, and before answer, plea, or claim filed in the same tender is deposited in court to abide the order or decree to be made in the matter. Nothing more was done than to offer the $250 to the libellants. That tender unquestionably amply covered the value of the cable and anchor considered as hired for the use of the Bethel, but in my judgment that is not the true relation of the parties, and the compensation is to be adjusted on the footing of salvage, and not on that of work and labor merely, or of hiring out the use of tackle.

There is deficiency in meeting out the appropriate recompense as the principles governing salvage award. The case is to be clothed with the character of salvage; still there are no features in it magnifying it to one demanding extraordinary rewards. The Van Landt and her fitments were devoted to wrecking employments, and she is entitled to reasonable encouragement in the use of her capabilities. This particular is generally adverted to as a ground for according more liberal pay than to ordinary vessels coming casually to aid one in distress, because the means a wrecker or pilot boat or steamer has at her command will tend more certainly to the security of life and property in peril. The Neptune, W. Rob. Adm. 300; The Duke of Clarence, Id. 246; The Frederick, Id. 16; Joseph Harvey, 1 C. Rob. Adm. 306, note; The Raikes, 1 Hagg. Adm. 246.

The Bethel and cargo are stated in the answer to be worth $6575. The captain first engaged to pay $500 for getting her off. He afterward withdrew the offer, although it had been accepted, and agreed to leave the subject to arbitration. This was assented to by the libellants, but its fulfillment has been declined by the claimants. A party is not to be held to any loose conversation, or perhaps perceive stipulations offered previous to the service (1 Sumn. 210 [The Emulous, Case No. 4,480]); yet it is entitled to be taken into consideration to show the estimate then put by the party on the hazard his property was encountering, and I cannot but regard the arrangement every way reasonable on both sides, as it was to abide the efforts of the party then in charge of the vessel to get her off with the next high tide. That effort failed, and she was forced further upon the shoal. The undertaking of the libellants to save her and cargo, as it might involve long services and be finally unsuccessful, and thus without remuneration to them, entitled them, in my opinion, to that amount.

I shall therefore decree that these libellants recover salvage to the amount of $500 and their taxed costs.

BOARD OF.

[Note. Additional cases cited under this title will be found arranged in alphabetical order under the names of the respective boards. See note under "Bank."]

BOARD OF COM'RS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the respective boards.]

BOARD OF COUNTY COM'RS.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the counties; e. g. "Board of County Com'rs of Arapahoe County. See Arapahoe County."]

Case No. 1,586.

BOARD OF FOREIGN MISSIONS OF THE PRESBYTERIAN CHURCH v. McMASTER.

[4 Am. Law Reg. 526.]

Circuit Court, D. Maryland. March 26, 1855.

COURTS—FEDERAL AND STATE — CONCURRENT JURISDICTION—WILLS—BEQUEST IN TRUST—UNCERTAINTY.

1. Where the courts of a state in their ordinary jurisdiction as courts of equity, undertake to aid and direct an administrator in the execution of his trust, and where the interests of the state's own citizens as well as of non-residents are involved, and the non-residents are made parties to the cause in the manner pointed out by special legislation, the rule of comity requires that paramount authority should be yielded to the court before which the proceedings were first instituted, and where the jurisdiction first attaches, notwithstanding the courts may have concurrent jurisdiction, one being a federal and the other a state tribunal.

2. A bequest in a will "I leave the whole of said fund in the hands of my executor, to be by him applied to the support of missionaries in India, as it is my desire to aid, &c., the same to be applied under the direction of the General Assembly's Board of Missions of the Presbyterian Church in the United States," is void for uncertainty.

[Questioned in Loring v. Marsh, Case No. 8,514.]

[In equity. Bill by the Board of Foreign Missions of the Presbyterian Church in the United States of America against Samuel S. McMaster, administrator de bonis non with the will annexed of Anne P. White, to en-

force the payment of a bequest. Bill dismissed.]

Mr. Wallers, for complainant. Mr. Bartol, for defendant.

GILES, District Judge. This bill was originally filed 26th March, 1855, by the complainants above named against the defendant McMaster, as administrator de bonis non, with the will annexed, of Anne P. White, to enforce the payment of a bequest contained in the will of Miss White. Subsequently an amended bill has been filed, making "The Trustees of the General Assembly of the Presbyterian Church in the United States of America" parties complainants to the cause. The will which gives rise to this controversy contains the following provision: "It is my will and desire, that the remainder of my money remain in the hands of Mr. Lewis West and Mr. David White, and I hereby direct them to pay over to my mother the interest thereof every year whilst she is a married woman, and if she should ever be a widow, I leave the whole sum to her to be at her disposal. And if my mother is never a widow and departs this life in a married state, I leave the whole of said fund in the hands of my executor to be by him applied to the support of missionaries in India, as it is my desire to aid in the instruction of the poor heathen in the way to life everlasting. The same to be applied under the direction of the General Assembly's Board of Missions of the Presbyterian Church in the United States."

It is admitted that the mother of Miss White died in 1854 a married woman; that Miss White died in 1843; that George Hudson, the executor named in the said will, is dead; and letters of administration de bonis non, with the will annexed, on the estate of Miss White have been granted by the orphans' court for Worcester county (the place of Miss White's residence) to the defendant, and that he has paid the debts of the deceased and other legacies mentioned in her will, and has now in hand the sum of $4,521.87, to be applied to the bequest mentioned in the clause of the will hereinbefore recited, if the same be valid. The will itself bears date in 1839. The answer filed by the defendant states that the said amount in his hands has been claimed by the surviving husband of Mrs. Williams, the mother of Miss White, and also by her next of kin, on the ground that the above bequest is void and cannot be enforced by any one, and is also claimed by the complainants, and that to protect himself in the settlement of Miss White's estate he has filed a bill of interpleader in the circuit court for Worcester, against all the said parties, which is still pending in that court, and in which cause an order of publication has been passed against the original complainants in this cause, as absent defendants.

This cause has been heard on bill and answer, and is now submitted for final decree. Its discussion involves two very interesting questions.

1st. Has the circuit court for Worcester county full jurisdiction of this case on the bill of interpleader filed by defendant? and 2d. What is the character of the bequest in controversy? Is it not void in this state, as being too indefinite and uncertain? Now, in the examination of the first question, it must be admitted by all, that if the circuit court for Worcester county has jurisdiction, as the bill of interpleader was filed in it in 1854, long before the institution of this suit, it would be the duty of this court to suspend further proceedings in this cause to await the action of the circuit court for Worcester county. This is the courtesy which courts of concurrent jurisdiction should exercise towards each other. For where different courts have concurrent jurisdiction, that before which proceedings are first instituted, and where jurisdiction first attaches, has authority paramount to the others. See Stearns v. Stearns, 16 Mass. 171; Smith v. McIver, 9 Wheat. [22 U. S.] 532; The Robert Fulton [Case No. 11,890]; Peck v. Jenness, 7 How. [48 U. S.] 624; 3 Story, Const. 624; Winn v. Albert, 2 Md. Ch. 42; Brown v. Wallace, 4 Gill & J. 495; Wallace v. McConnell, 13 Pet. [38 U. S.] 136. Now, had the circuit court for Worcester county jurisdiction in this matter so as to affect the rights of the complainants? Complainants being non-residents, have their option to bring their suit in this court, unless they have submitted or are made parties in some form to the cause in the said circuit court for Worcester county. While it is admitted that no judgment in personam will be valid against a non-resident not served with process and who has never appeared to the suit, yet all our courts act daily upon the rights of non-residents through their property, either real or personal, found within their jurisdiction, and such judgments are valid and binding. This is the basis of our attachment laws and of our proceedings to sell real estate for division, &c., even though non-residents may be interested.

The estate of Miss White must be administered by the defendant under and according to the laws of this state, and in the execution of his trust, he had the clear right, if from any circumstances he could not safely administer the estate, except with the aid and under the direction of a court of equity, to apply to the circuit court of Worcester county, in the manner he has pursued. By such a course, the rights of every claimant would be examined, and full and adequate relief and protection afforded to the defendant in the settlement of his trust. And by the act of this state passed in 1826 (chapter 199), full and ample notice of six months by the order of publication, is given to the complainants, warning them to appear and maintain their title to the

said bequest. But the learned solicitor for the complainants has contended that, as they are non-residents, they have a constitutional right to have their cause decided alone by a circuit court of the United States. Such is no doubt the right of the non-resident in suits in personam or in attachments against his property to compel his appearance; and where a judgment is sought against him in personam. But it is doubtful whether it can be extended to embrace a case like this, where the courts of this state in their ordinary jurisdiction as courts of equity, undertake to aid and direct an administrator in the execution of his trust; and where the interests of citizens of this state as well as of non-residents are involved, and the non-residents are made parties to the cause in the mode pointed out by the statute. By the 12th section of the act of congress of 1789, c. 20 [1 Stat. 79], provision is made for the removal of a suit brought in a state court against the citizen of another state, to the circuit court of the United States, where the amount claimed exceeds the sum of $500. But this provision has been decided only to apply to cases where the non-resident is sole defendant, or all the defendants are non-residents. This case, therefore, could not be removed to this court under that act. And the 11th section of the same act gives original cognizance concurrent with the courts of the several states to the circuit court of all suits at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the suit is between a citizen of the state where the suit is brought, and a citizen of another state, &c., &c.

The two cases to which I have been referred to sustain the proposition of the learned counsel, are Suydam v. Broadnax, 14 Pet. [39 U. S.] 67, and Shelby v. Bacon, 10 How. [51 U. S.] 56. In the first case the plaintiffs were citizens of New York, and the defendants were administrators of Newton, a citizen of Alabama, whose estate had been declared insolvent in a proceeding taken under a statute of that state which provided, that in such a case no suit or action should be commenced against the administrator. The supreme court only decided that the plea that the estate of the deceased was insolvent, was not sufficient in law to abate the plaintiff's action in the circuit court. In the second case, the bill was filed in the circuit court of the United States, in Pennsylvania, by a citizen of Kentucky, against the assignees of the late Bank of the United States, to maintain his claim and for a distribution of the assets of said bank. The defence was, that the assignees had filed the accounts for their receipts and disbursements in the proper court in Pennsylvania, and were there alone responsible; and that the circuit court had no jurisdiction in the matter. But the supreme court overruled the plea, and decided, that as the proceeding in the state court was not a proceeding in rem, and as the complainants had not submitted or been made a party in any form, to the special jurisdiction of the state court, the said plea was no bar to the bill of the complainant. I confess that the question is one of great difficulty, but I can see no safer way of preventing a conflict between the action of the federal and state courts, than in cases similar to the one now before me, to adhere strictly to the rule of courtesy to which I have referred, and to leave to the court which first takes jurisdiction of the matter, its final adjudication. And this I understand to be the view of the law upon this subject taken by Judge Curtis in the case of Mallett v. Dexter, Administrator of Fenner, to be found in [Case No. 8,988]. That case was similar in many respects, to this. A bill was filed by complainants, some of whom were non-residents of Rhode Island, in the circuit court of the United States for that state, against the defendant as administrator of Fenner, for an account and settlement of his administration; and the defence was that the defendant was in process of settling his administration before a probate court of Rhode Island, and ought not to be compelled to account in this court; and so Judge Curtis decided, with the case of Shelby v. Bacon, 10 How. [51 U. S.], before him.

The second question, it appears to me, is free from all difficulty, and however much I may regret that the pious intentions of the testatrix will be defeated, yet sitting here to decide this question in accordance with the law of this state, I cannot do otherwise than pronounce the bequest void for uncertainty. The money is to be retained by the executor, to be by him applied to the support of missionaries in India under the direction of the General Assembly's Board of Missions, &c. The executor is the trustee, and the missionaries are the cestui que trusts; and the board of missions is merely the agent to direct the manner in which the money shall be applied to the beneficiaries of the trust. Now, who can enforce the execution of this trust in a court of chancery? What missionaries are meant, all the missionaries in India of every denomination, or only those of the Presbyterian Church? and if the latter, those in India to-day, or only those who were there when the testatrix died? For I take it to be the true rule of law in reference to all such bequests, that the beneficiaries of the trust must be certain and definite; so clearly ascertained that they have a standing in a court of equity to enforce the trust. If such be the case, the bequest is good, although there may be no trustees appointed by the will to carry out the trust, or in whom the legal estate can vest. But whether there be a competent trustee or not, if the cestui que trusts are not clearly ascertained by the will, the de-

vise or bequest is void. Such is the unbroken current of decisions in this and all other states which have not adopted the statute of charitable uses of 43 Eliz.

I need only refer, in support of this, to the following cases: Dashiell v. Attorney General, 5 Har. & J. 398, 6 Har. & J. 7; Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [117 U. S.] 1; Wheeler v. Smith, 9 How. [50 U. S.] 76; and to the case of Meade v. Beale [Case No. 9.371], decided in this court by my brother, the chief justice. In that case, a bill was filed in this court by the complainants, who represented "the Education Society of Virginia," to enforce a bequest "to the Education Society of Virginia for the benefit of the theological students at the Protestant Episcopal Theological Seminary, near Alexandria, in the District of Columbia. The chief justice decided that the bequest in that case was void by the laws of this state; and even if the Education Society had been incorporated and competent to become a legal trustee, the description of the cestui que trusts was so vague and indefinite, that it would be impossible for the court to enforce or supervise the execution of the trust. This view of the law relieves me from the necessity of considering the argument of the complainant's solicitor, in reference to the right and capacity of "the Trustees of the General Assembly of the Presbyterian Church in the United States of America" to receive and take all bequests made to "the General Assembly's Board of Missions," a body not incorporated and not now in existence; or to the right of the original complainants to enforce a bequest made to the "General Assembly's Board of Missions."

Being of the opinion, therefore, that this bequest in Miss White's will is void for the reasons I have given, I will sign a decree dismissing the bill filed in this case, with costs.

BOATMEN'S SAV. INST. (DARBY v.). See Case No. 3,571.

Case No. 1,587.

The BOB CORNELL.

[See Monongahela Nav. Co. v. The Bob Connell, 1 Fed. 218.]

BOBO (MALTBY v.). See Case No. 8,998.

Case No. 1,588.

The BOBOLINK.

[6 Sawy. 146.][1]

District Court, D. California. Dec. 9, 1879.

CARRIERS' LIABILITY — GOODS DAMAGED BY SEA PERILS—REFUSAL OF CONSIGNEES TO ACCEPT.

Where wool arrived damaged, and in a perishing condition, from causes for which the carrier was not responsible, and the consignees declined to receive it, and it was subsequently sold by the carrier to prevent its perishing on his hands: *Held*, that the carrier's duty and liability terminated on the discharge of the wool, and reasonable notice and opportunity given to the consignees to take it away. He thenceforth became a compulsory bailee of the goods, bound only to such reasonable care as a prudent and honest man would take of property of which he has become the involuntary custodian.

In admiralty.

Taylor & Haight, for libelants. James C. Perkins, for claimants.

HOFFMAN, District Judge. I see no ground on which the libel in this case can be supported. The wool in question was shipped "to be carried on deck at the owner's risk." It was injured during the voyage by reason of its exposed situation, and by one of the perils of which the shipper took the risk. The stowage was as careful and safe as under the circumstances was practicable. The vessel on her arrival was hauled into a slip, and the discharge commenced and prosecuted with reasonable and customary diligence. The wool was discharged on Thursday afternoon, and the libelants were notified of the fact on the next morning. They were already aware of the vessel's arrival, but had neither presented their bill of lading, tendered the freight, nor demanded their goods. They seem to have been notified as soon as in the usual course of business was practicable, and as soon as the fact was known that the marks on the packages ("M. & F.") indicated that they were the consignees. They refused to receive the wool, on the ground that the liability to them of the insurers was in dispute. As the wool was rapidly deteriorating in value, the agents of the vessel became alarmed lest it should utterly perish on their hands. They therefore endeavored to have it scoured, which it seems was indispensable to arrest the destructive processes which were going on. They found great reluctance on the part of persons engaged in the business of scouring, to undertake the operation, and a price was asked which seemed to the expert whom they employed to be exorbitant. The latter therefore concluded to accept an offer to purchase it from a party who owned a scouring mill. This disposition of the wool was made in perfect good faith, and under the conviction that it was the most advantageous arrangement that could be made for the interest of all concerned. The sale was made on Saturday. To save the wool it was necessary to keep steam up in the mill during Saturday night and Sunday, and to employ workmen at extra wages to conduct the operation. Its condition admitted, or was supposed to admit, of no delay. Had it been left unattended to until the succeeding Monday or Tuesday, its value would have been greatly impaired, perhaps wholly destroyed.

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

The ship's agents make no pretension to be experts in the wool business. Their duties and liability as carriers terminated on the discharge of the wool, and reasonable notice of the fact and opportunity to take it away given to the consignees. From that moment they became compulsory bailees of the goods; not at liberty, of course, to let them perish by their negligence, but only bound to take reasonable care, such as a prudent and honest man would take of property of which he has involuntarily become the custodian.

I am by no means sure that, under the circumstances, they were bound to incur the trouble and expense of resorting to extraordinary methods to arrest the progress of the damage caused by a sea peril for which they were not responsible. Whether this be so or not, they acted to the best of their judgment and in good faith. The price they obtained was the full value of the wool in its then condition. They are willing to pay, and have offered to the libelants, the amount received by them, less freight and other charges. They have thus discharged their whole duty under the law.

Case No. 1,589.

BOBYSHALL et al. v. OPPENHEIMER.

SAME v. OPPENHEIMER et al.

[4 Wash. C. C. 317.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

INSOLVENCY—DISCHARGE—ASSIGNMENT OF BAIL BOND—SATISFACTION OF BAIL BOND.

1. If the defendant be discharged under an insolvent law of the state where the contract is made, after the bail bond has been assigned to the plaintiff, the court will not order an exoneretur to be entered on the bail piece.

[Distinguished in Richardson v. M'Intyre, Case No. 11,789. Cited in Stockton v. Throgmorton, Id. 13,463.]

2. By the Pennsylvania practice, filing the declaration before the return of the writ is not a waiver of the bail. The English rule is otherwise, unless the declaration be filed de bene esse.

3. The undertaking of the appearance bail can be no otherwise fulfilled than by the defendant giving special bail, if so ruled, and that bail justifying, if excepted to.

4. If, instead of ruling the marshal to bring in the body of the defendant, the plaintiff accept an assignment of the bail bond, and bring a suit thereon, still the court will not fix the appearance bail if certain terms are complied with: one of which is the defendant's entering special bail.

[At law. Actions on a bail bond, by Bobyshall and Sower against Oppenheimer, and by the same as assignees of the marshal against Oppenheimer. For further proceedings, see Cases Nos. 1,590–1,592.]

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

The first of these cases came on upon a rule to show cause why an exoneretur should not be entered upon the bail piece; and the second, to show cause why the writ should not be dismissed with costs. The writ in the original suit issued in January last, and a bail bond to the marshal was executed in February by the parties mentioned in the second rule. Before the return day of the writ, the plaintiffs filed their declaration. On the 29th of May, the bail below entered themselves special bail, and the next day the plaintiffs filed exceptions to their sufficiency. The bail refused to justify, and on the 20th of June the plaintiffs accepted an assignment of the bail bond, and sued out process upon it against the original defendant and his appearance bail, returnable to the present term. On the 17th of October, after the commencement of the present term, the defendant, Oppenheimer, was discharged under the insolvent laws of this state.

In support of the first rule, it was insisted that, as the court will discharge on common bail, where the defendant has been discharged under the insolvent laws of the state where the contract was made, and was payable, which is the present case,—see Read v. Chapman [Case No. 11,605]; Campbell v. Claudius [Id. 2,356],—an exoneretur ought to be entered on the bail piece, where the discharge takes place after special bail is put in. But if not so, still the exoneretur ought to be entered, upon the ground that, by filing the declaration before the return day of the writ, the plaintiff waived the bail.

In support of the second rule, it was contended that it follows of course, if the first be made absolute; but if it should not, still the defendant, having entered, though he has not perfected, special bail, and the plaintiff not having lost a trial, the defendant now offering to confess judgment, he has sustained no inconvenience, and the court will not fix the appearance bail by permitting the suit to proceed upon the bail bond. If the plaintiffs were dissatisfied with the sufficiency of the appearance bail, they should have taken a rule upon the marshal to bring in the body, and not have accepted an assignment of the bail bond. Priestman v. Keyser, 4 Bin. 344; Union Bank of New York v. Kraft, 2 Serg. & R. 284; M'Farland v. Holmes, 5 Serg. & R. 50; Tidd, Pr. 235, 257.

On the other side, it was insisted that the cases cited from Pet. C. C. [Cases Nos. 2,356 and 11,605] do not apply; inasmuch as in those the privilege of the defendant to appear on common bail existed at the time when appearance bail was taken; whereas, in this case, the defendant was not discharged till after the assignment of the bail bond. It was denied that the filing of a declaration before the return day of the writ amounts to a waiver of the bail. Caton v. M'Carty, 2 Dall. [2 U. S.] 141.

As to the second rule, there is no ground for it: since the refusal of the bail to justi-

fy, the case stands in the same situation as if special bail had not been entered at all; and after the fraud practised upon the marshal by the appearance bail, by prevailing upon him to receive them as sufficient, which they afterwards refused to justify, they are not entitled to ask of the court to stay proceedings on the bail bond, much less to dismiss the writ with costs. Whart. Dig. 71.

Ewing and Peters, for plaintiff
Phillips, for defendant.

WASHINGTON, Circuit Justice. The ground laid for the rule to enter an exoneretur on the bail piece is of the first impression in this court, and has certainly never, to my recollection, received its sanction. In the cases cited from Peter's Reports [supra] the person of the defendant having been discharged under an insolvent law of a state where the contract was made, and no new contract having been entered into, no objection existed why the defendant should not be permitted to appear on common bail, that being a matter resting in the discretion of the court. But after the assignment of the bail bond, by which the appearance bail became bound to the plaintiff that the defendant should appear to the suit, a subsequent discharge of the defendant under the insolvent law cannot affect the plaintiff's rights against the bail. If the insolvent law were to declare, in so many words, that such should be the effect of a discharge under it, I should question very seriously its validity; and clearly the court will not give it that effect by construction. The English practice I believe is, to consider the bail as waived, if the plaintiff declare against the defendant before the return of the writ, unless the declaration be filed de bene esse. But I understand that the practice of this state, prior to the institution of the courts of the United States, has been different, and it would be of mischievous consequence were we now to adopt a different rule.

As to the second rule. The undertaking of the bail to the marshal is, that the defendant shall appear at a certain day, which can be effected only by putting in and perfecting special bail, if special bail be required. If the bail, being excepted to, do not justify within the time limited by the rules of the court, they are out of court, and the bail bond is, strictly speaking, forfeited. After this the plaintiff has his choice of two remedies; either to accept an assignment of the bail bond, by which he discharges the marshal; or to rule that officer to bring in the body of the defendant, which if he fail to do, he renders himself liable to the plaintiff. If the former course is adopted, and a suit be brought upon the bail bond, the court, according to the English practice, will nevertheless stay proceedings on the bail bond, provided the plaintiff has not lost a trial, upon the defendant putting in and perfecting bail, paying the costs of the suit, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so that the cause may be tried at the same term. I understand the practice of this state to be the same. In this case, special bail having been put in, but not perfected, in consequence of the bail refusing to justify when excepted to, the bail bond is forfeited; in like manner as it would have been, if bail above had not been put in at all. The defendant has offered to confess judgment, which fully removes the objection that the plaintiff has been subjected to delay by the loss of a trial, as this is the first term at which a trial could have been had. He must, nevertheless, go further, and put in sufficient bail to entitle him to a stay of the proceedings on the bail bond. But at all events, the rule as it now stands, to dismiss the writ with costs, cannot be supported.

Both rules therefore must be discharged. 1 Tidd, Pr. 153, 143; 1 Bac. Abr. 339, 346; 7 Cowp. 71; 4 Bin. 344.

Case No. 1,590.

BOBYSHALL v. OPPENHEIMER.

[4 Wash. C. C. 333.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

BAIL—DELIVERY OF PRINCIPAL BY APPEARANCE BAIL—DELIVERY BY SPECIAL BAIL.

1. The court will not relieve the appearance bail, upon his delivering the principal in court, unless he put in and perfect special bail.

[Cited in Stockton v. Throgmorton, Case No. 13,463.]

2. Although the special bail may deliver up the principal at any time before the second scire facias, it does not follow that the appearance bail may do it. Their engagements are of a different nature.

[Cited in Stockton v. Throgmorton, Case No. 13,463.]

[At law. Action on a bail bond by Bobyshall and Sower against Oppenheimer. For prior proceedings, see Case No. 1,589.]

After the discharge of the two former rules, —4 Wash. C. C. 317 [Case No. 1,589,],—Phillips entered a rule upon the plaintiff to show cause, why proceedings should not be staid on the bail bond, on payment of costs, and confession of judgment by the principal. He contended that, after assignment of the bail bond, the court will stay proceedings against the appearance bail on payment of costs, confessing judgment, and putting in and perfecting bail, as the court decided on one of the former rules. But he insisted that surrendering the principal was equivalent to putting in sufficient bail; and that the court will, in this case, dispense even

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with that form, since the defendant would be immediately entitled to his discharge, having been already discharged under the insolvent law of this state. He cited Rob. St. 87; 5 Term R. 401, 534; 7 Term R. 297, 522; 8 Term R. 822; Cowp. 823; 2 Johns. Cas. 403; 1 Caines, 9.

Peters & Ewing, contra.

WASHINGTON, Circuit Justice. Upon the former rules, it was decided, that although the court had discharged on common bail a defendant who had been discharged under the insolvent law of this state, where the application was made in time; yet that they never had entered an exoneretur on the bail piece, after assignment of the bail bond to the plaintiff, merely upon the ground of such a discharge, and that a motion to that effect would not be listened to. But that the court would relieve the appearance bail by staying proceedings on the bond, upon payment of costs; provided that plaintiff had not lost a trial, and provided the defendant put in and perfected bail.

What is the present motion, as explained by the counsel, but an ingenious device, under a different form, to effect the very object which the former rules were intended to bring about; that is, to exonerate the appearance bail altogether, without a legal appearance of the principal, and to discharge the principal upon the ground of his discharge as an insolvent? But admit that the principal was now in court, ready to be delivered up in exoneration of his bail, would this be a compliance with the condition required by the court, that of giving and perfecting bail? It is contended that it would be so, because if that condition were literally complied with, the special bail might deliver up the principal at any time before the second scire facias should be returned, and then the court would discharge him under the insolvent law. The former part of this proposition I admit, but I do not admit the concluclusion.

The ground upon which the conclusion is denied, that because the special bail might surrender the principal, therefore the appearance bail may do it, will appear, as soon as the nature of the engagement which those two classes of bail respectively enter into, is considered. The special bail is emphatically styled the gaoler or keeper of the principal, and his engagement is, that the principal shall pay, &c., or surrender his body, &c., or that the bail will do it for him; he then fulfils his engagement by surrendering his principal; and the indulgence allowed him of doing so before the return of the second scire facias is as to time only; it does not amount to a dispensation with the performance of his agreement, or to a change of its terms. But the principal is not delivered to the appearance bail upon their giving bond to the marshal. He is absolutely discharged; and the engagement of his bail is, not that he shall surrender himself, but that he shall appear at the return of the writ; that is, as was stated by Lord Mansfield in the case of Harrison v. Davies, 5 Burrows, 2683, by putting in sufficient bail. "It is a settled point," says his lordship, "that nothing can be a performance of the condition of the bail bond, but putting in and perfecting bail." In the case of Hamilton v. Wilson, 1 East, 383, the same principle is laid down, and it is added, that the point decided in Harrison v. Davies has never been since controverted; and that the cases of Jones v. Lander, 6 Term R. 753, and Stamper v. Milbourne, 7 Term R. 122, go no further than to say that the sheriff may accept the surrender before return of the writ, if he please, or may refuse, and insist upon the bail performing the condition of his bond. In the cases cited in this argument from 7 Term R. it appears that the practice certified to the court was, that if the bail do not justify on the day, he is out of court. But upon the circumstances of that case, the court relieved the appearance bail, although bail above had not been perfected, the surrender having been made before the bail bond was assigned. The case from 5 Term R. 401, proceeds upon a recent change in the practice of the king's bench, in conformity with that of the court of common pleas. The case of Meysey v. Carnell, 5 Term R. 534, is a still stronger case, and is founded upon the change of practice above alluded to. But as this court looks to British decisions since the revolution, not as authority, but for the reasons on which they proceed, I choose to adhere to the long established rule recognized and confirmed by Lord Mansfield, in preference to the modern practice of the English courts; particularly as the rule of the supreme court of this state is not pretended to be different from that stated by Lord Mansfield.

In relieving the appearance bail, by staying proceedings on the bond upon the conditions which have been mentioned, the terms of his engagement are not varied, although the time of performance is enlarged. Thus far I am willing to go, but not farther.

Rule discharged.

[For subsequent proceedings, see Cases Nos. 1,591 and 1,592.]

Case No. 1,591.

BOBYSHALL et al. v. OPPENHEIMER et al.

[4 Wash. C. C. 388.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

BAIL—PLEADING—ISSUE—NUL TIEL RECORD—EXECUTION—TIME OF ISSUING.

1. Action by the assignee of a bail bond—plea comperuit ad diem, as appears by the record,—replication, nul tiel record. This forms an issue to the court.

2. When the defendant pleads a record of the same court, the replication of nul tiel record concludes with a verification, and a day is given to the parties to have judgment. If the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment and prayer of debt and damages, in which latter case there must be a rejoinder re-asserting the existence of the record.

3. Comperuit ad diem, prout, &c., affirms a legal appearance.

4. Judgment on the issue of nul tiel record being rendered for the plaintiff, the court directed a writ of inquiry to issue in the original suit to assess the damages to which the plaintiff was entitled; the parties not agreeing to the sum due to the plaintiffs, the judgment against the bail to remain as a security.

5. An execution cannot issue until the expiration of ten days from the judgment, and if it issues the court will set it aside on motion.

[At law. Action on a bail bond by Bobyshall and Sower, assignees of the marshal, against Oppenheimer, Hyneman, Levy, and Morris. For prior proceedings, see Cases Nos. 1,589 and 1,590.]

This was an action of debt brought upon the bail bond given for the appearance of Oppenheimer, and assigned by the marshal to the plaintiff. See 4 Wash. C. C. 333 [Case No. 1,590]. The defendants plead comperuit ad diem. Replication, nul tiel record.

The cause was now called for trial before the court, to inspect the record, when it was objected by the defendants' counsel that the cause is not at issue, there being no rejoinder, and the replication giving no day to the defendant to bring the record in. The plaintiff insisted, that the cause was at issue, and referred to the following cases. 2 Selw. N. P. 515; 1 Saund. 92, note; 1 Ld. Raym. 550; Carth. 517; 2 Bos. & P. 303.

WASHINGTON, Circuit Justice, delivered the opinion.

The pleadings in this case, except the declaration, are, according to the loose practice in this state, entered short; neither the plea nor replication being put into form. The plea of comperuit ad diem affirms, in substance, a legal appearance according to the condition of the bail bond, as will appear by the record. The replication denies that there is any such record, which make a complete issue, so that no rejoinder was necessary, or would have been proper. The objection is, that the replication gives the defendants no day to bring in the record, and is therefore defective. Admit for a moment that the replication had been drawn out, and had not given a day, and was for this reason faulty: still the cause would be at issue, and the objection now made to the trial could not be supported. If the replication be faulty, but yet forms an issue at law or in fact, the cause is ripe for a trial, and it is the fault of the defendant that he did not take advantage of the imperfection of the replication by a demurrer.

But the alleged objection to the replication, even if it appeared on its face, is without foundation. Where the defendant pleads a record of the same court, the replication denying it concludes with a verification, and a day is given to the parties to hear judgment. If the record be of another court, the replication nul tiel record may either conclude by giving the defendant a day to bring in the record, or with an averment and prayer of the debt and damages. In the former case, the issue is complete on the replication; in the latter, there must be a rejoinder, re-asserting the existence of the record, on which account the former is to be preferred. But the rule is different as before stated where the record is of the same court. 1 Chit. Pl. 572; Barnes, Notes, 164.

Upon inspection of the record, the proceedings appeared as stated 4 Wash. C. C. 333 [Bobyshall v. Oppenheimer, Case No. 1,590], and upon the principles there decided, the court was now of opinion that the defendant, Oppenheimer, had not appeared according to the condition of the bail bond, and therefore directed judgment to be entered for the penalty of the bond. Upon this judgment, the plaintiffs immediately took out a fieri facias, and put it into the hands of the marshal to execute.

The defendants, on the same day, moved to quash the execution, and relied on the twenty-third section of the judiciary act of 1789 [1 Stat. 85].

WASHINGTON, Circuit Justice. This section is conclusive in favour of this motion. The defendant has ten days allowed to him to serve a writ of error in the way prescribed by this section, and if he does so, it is then a supersedeas, and stays execution. During the ten days thus allowed to the party for suing out and serving the writ of error, this section is express that no execution shall issue, since if the writ of error issue within the ten days, it would be a supersedeas.

The motion to quash the execution therefore must prevail, which renders the motion

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first argued [2] unavailing, and therefore it is discharged, and a writ of inquiry, is to issue in the original action for the purpose of ascertaining what sum is due to the plaintiffs from Oppenheimer; the form of which the clerk will adapt to a case where no judgment in that action has been rendered. This will be the practice of the court in future, in cases like the present. The present judgment of course remains as a security for the sum that may be found to be due upon the writ of inquiry.

[For subsequent proceedings, see Case No. 1,592.]

[2] WASHINGTON, Circuit Justice, delivered the following opinion upon the motion. The present case is different from all those which have been referred to, except that of Carrew v. Willing, 1 Dall. [1 U. S.] 130, and is not exactly like that. The other cases relate to proceedings for the relief of the appearance bail, prior to the trial of the action on the bail bond, and there the terms on which the relief was granted are those stated by this court at the last session, upon the rules to show cause. This is the case of a trial and judgment in the suit on the bail bond, upon which an execution has issued and been put into the hands of the marshal, stating the sum claimed by the plaintiffs as due from the original debtor, Oppenheimer. One thing is perfectly clear, which is, that the plaintiffs cannot proceed for the penalty of the bond, and are entitled to recover only so much as the original debtor justly owes. The original action being founded upon a book account, some mode of ascertaining the sum due must be adopted. If the parties had agreed upon the sum, the judgment would be entered for that sum in this action. But as the whole of the demand is disputed, the amount must be submitted to a jury; the court cannot decide it. We think that this question ought to be tried in the original action, and the only difficulty is, whether it should be by directing the defendant to plead to that action, or to direct the parties to form an issue to try the point, or to order a writ of inquiry of damages to issue in that action. We think that the latter is the least objectionable mode, and most consonant with that provided by the twenty-sixth section of the judiciary law of the 24th of September, 1789 [1 Stat. 87], which directs that in all causes brought in the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover as much as is due according to equity; and when the sum is uncertain, the same shall, if either of the parties request it, be assessed by a jury. There can be no doubt but that the mode intended for ascertaining the amount due, was by a writ of inquiry, and such has always been the practice. Unless the plaintiffs would agree to accept a plea, without special bail being entered in the original suit, we do not see how the court could direct it. We know no precedent that would warrant such an order. This matter of relieving the appearance bail, and the manner of doing it, being in the discretion of the court, equity demands that the relief granted shall be in the way least embarrassing to the parties, and least susceptible of delay, and that the plaintiff shall lose no part of the security which he has fairly and legally obtained. Upon these principles, we prefer the mode of proceeding before mentioned, and instead of granting the present motion, which would deprive the plaintiffs of the security they have obtained by a delivery of the execution to the marshal, as against the personal property of the defendants; we shall order that all further proceedings upon the judgment and execution be stayed, until the amount due to the plaintiffs shall be ascertained in the original action, and that a writ of inquiry for that purpose issue, returnable to the next session of this court.

Case No. 1,592.

BOBYSHALL v. OPPENHEIMER.

SAME v. OPPENHEIMER et al.

[4 Wash. C. C. 482.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1824.

COURTS—JURISDICTION—PLEADING—CITIZENSHIP—SUIT ON BAIL BOND—AMOUNT OF DEBT—MODE OF ASCERTAINING.

1. If jurisdiction be not shown in the proceedings, no consent of parties can give it. No inference in favor of it can be drawn from the trial and judgment.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 500.]

2. Defendant may at any time before trial object to the jurisdiction on motion, or by a plea, or on the general issue, with notice to the adverse party.

3. After a trial on the merits, and a verdict or judgment given, the defendant is estopped to controvert the fact of citizenship, if it be laid in the declaration.

4. To a suit by the assignees on the bail bond, the defendant may plead that the principal was not a citizen of another state, as laid in the original declaration, for the purpose of objecting to the jurisdiction.

5. The suit on the bail bond is but an incident to the original suit, and it is not necessary to state the defendants to be citizens of a different state from that of the plaintiff.

[Cited in Arnold v. Frost, Case No. 558.]

6. The assignee of a bail bond is not such an assignee of a chose in action as is contemplated by the eleventh section of the judiciary act of [September 24] 1789 [1 Stat. 79].

7. After judgment on the bail bond for the penalty, if the real amount of debt due by the principal, and claimed by the plaintiff be controverted, the court may direct a writ of inquiry in the original suit, to ascertain the sum due; or may direct it in the bail bond suit; or may direct an issue to be made up and tried at bar.

[At law. Actions on bail bonds by Bobyshall and Sower against Oppenheimer, and by the same against Oppenheimer and his sureties. For prior proceedings, see Cases Nos. 1,589–1,591.]

These causes came before the court upon rules to show cause why the proceedings in both should not be stayed, and the causes dismissed for want of jurisdiction, and why the writ of inquiry, and all proceedings under it, in the first case, should not be quashed.

The ground upon which the first part of the rule, in the first of these cases, and the rule in the second, was rested was, that although the declaration in the first case alleges the plaintiff to be a citizen of Pennsylvania, and the defendant a citizen of Maryland, yet in point of fact, Oppenheimer

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was a citizen of Pennsylvania at the time the suit was commenced, to prove which on the one side, and to disprove it on the other, a number of depositions were read. The court informed the counsel that, if an objection to the jurisdiction could now be made, the evidence of the fact of citizenship upon which the question of law must arise is so contradictory, that we should not undertake to decide it, but should refer it to a jury to be ascertained upon an issue to be made up under the direction of the court. The counsel were therefore directed to argue the question, whether the objection can be taken after a trial and judgment in the bail bond suit.

Cases cited by the defendants' counsel: [Kempe v. Kennedy] 5 Cranch [9 U. S.] 173, 185; [Turner v. Enrille] 4 Dall. [4 U. S.] 8; [Skillern v. May] 6 Cranch [10 U. S.] 267; [Corporation of New Orleans v. Winter] 1 Wheat. [14 U. S.] 91; Pet. C. C. 64, 73, 489 [Hartshorn v. Wright, Case No. 6,169; Harrison v. Rowan, Id. 6,140]; [Capron v. Van Noorden] 2 Cranch [6 U. S.] 126; Cro. Eliz. 132; 1 Salk. 8; 1 Bin. 138.

E contra. 3 Johns. 105; King v. Johnson, 6 East, 583; 3 Johns. 113; 1 Mass. 360; 1 Chit. Pl. 426, 427.

Upon the second part of the rule, in the first case, it was contended, that as the writ of inquiry was directed to be executed in the original suit, in which there was no judgment, it was a proceeding for which no precedent can be found. 2 Saund. 107; 3 Com. Dig. tit. "Courts," pl. 14, letter P; 3 Bl. Comm. 398.

Peters and S. Ewing, for plaintiff.

C. J. Ingersoll and Phillips, for defendants.

WASHINGTON, Circuit Justice, delivered the opinion

I. Upon the question of jurisdiction. We are authorized by decided cases to lay down the following positions:

1. That the circuit courts of the United States cannot entertain jurisdiction of causes at common law, or in equity, unless it be laid in the pleadings, and, that in the absence of such statement, no consent or agreement of the parties can uphold the jurisdiction. If it be not stated, no inference in favour of the jurisdiction can be drawn from the trial and the judgment in the cause. The first branch of this proposition is supported by many cases decided in the supreme court; and the second by the case of Capron v. Van Noorden, 2 Cranch [6 U. S.] 126.

2. That the defendant may, at any time before the trial, object to the jurisdiction, either upon motion or by a plea.

3. That the defendant may, even upon the general issue, question the jurisdiction. In relation, however, to this position, we observe that notice to the adverse party, or his counsel, that such an objection is intended to be taken ought to be given. For even if the omission to give it would not be a good ground for excluding any evidence on that point, as to which we give no opinion, it would undoubtedly furnish a good reason for granting a new trial, on the ground of surprise. But the court is now called upon, we believe, for the first time, to dismiss these causes for want of jurisdiction, after a trial on the merits, and after a judgment.

The question of jurisdiction, (we confine ourselves to the case before us) is a mixed one of law and fact. If the defendant, Oppenheimer was a citizen of Maryland at the time this suit was brought, the court had jurisdiction. But whether he was a citizen of that or of this state, was a fact to be proved or admitted, and the question of law arises upon the establishment of that fact one way or the other. Unless the record shows him to have been a citizen of some state other than Pennsylvania, the law presumes that he was not, in point of fact, a citizen of any other state; and no admission of his against this presumption would be sufficient to give jurisdiction to the court. But if his citizenship of some other state be averred in the declaration, as it is in this, that fact may be admitted, or it may be controverted and submitted to the decision of the court or jury, according to the mode in which it is to be decided. Suppose, in the latter case, the jury should, upon a plea to the jurisdiction, or upon the general issue, find the citizenship as laid in the declaration, or find generally for the plaintiff; could the court, after judgment, on the verdict, entertain a motion to dismiss the suit, and re-try the matter of fact which had been decided by the jury? We presume not. The answer to such a motion would be, that the defendant is estopped by the verdict to deny the citizenship as laid in the declaration and found by the jury. And if the defendant, instead of controverting the averment of citizenship in the declaration either by plea or proof, rests his defense upon some other matter, does he not admit the fact so averred? And is not this admission as conclusive against him, as if the fact had been found by the jury? He is as much estopped, in our apprehension, to deny the truth of the averment in the latter, as he would be in the former case. In neither case is jurisdiction conferred upon the court which does not belong to it, because the fact of citizenship being proved or admitted, the law, not the party, gives the jurisdiction.

If after the trial of the cause upon its merits, without an objection being made to the jurisdiction, or being made, it is found not to be supported in point or fact, the same objection may afterwards be insisted upon to avoid the judgment; we can perceive no reason why it may not be urged after the money is brought into court upon the execution, or even in the appellate court, upon motion and evidence taken there. We think that we lay down a sound and reasonable principle in saying, that after the trial of the cause, and

a verdict or judgment for the plaintiff, the defendant is estopped to deny the truth of the averment in the declaration of the fact on which the jurisdiction is vested.

What then are the facts of this case? The defendant, Oppenheimer, having given a bail bond in the original suit, together with Hyneman, Levy, and Morris as his sureties, was unable to justify special bail; in consequence of which the plaintiff took from the marshal an assignment of the bail bond, in which a suit was instituted against all the obligors. Instead of pleading to the jurisdiction of the court, which they might unquestionably have done, if in fact Oppenheimer, the principal, was a citizen of Pennsylvania when the original suit was commenced, they plead compe-ruit ad diem, as appeared by the record, to which the plaintiff replied, No such record. This issue being decided against the defendants by the court, judgment was entered for the penalty of the bond. It is this judgment which the defendants now ask to set aside, upon the allegation that Oppenheimer was not, as the declaration averred he was, a citizen of Maryland.

There was another ground of objection to the jurisdiction, made, or rather hinted at by the counsel for the defendants, of which some notice ought to be taken. It was, that the declaration on the bail bond does not state that the defendants are citizens of some state other than Pennsylvania, and even if it were stated, it is supposed by the counsel, that as assignee of the marshal, the plaintiff would be prevented by the eleventh section of the judiciary act of 1789 [1 Stat. 79] from maintaining this action. The short answer to these objections is, that the marshal being authorised to take appearance bail, the bond for the appearance is a mere appendage to the original suit, and the action brought upon it, either by the marshal or by his assignee, is an incident to that suit, as much so as a scire facias against the special bail is an incident to the original suit. If this be not so, it will follow, that persons suing in the circuit courts of the United States, being themselves citizens of the state where the suit is brought, or aliens, if the defendant be, as in the former case he must be a citizen of some other state, will be denied the benefit which other suitors enjoy of demanding bail for the appearance of their debtors, and for the payment of the debt if the body of the principal be not surrendered, since the bail, in all cases, must be a citizen or citizens of the state where the suit is brought; no other would be received. The objection in short, if well founded, would exclude all such persons from the privilege, intended to be conferred upon them by the constitution and laws of the United States, of suing in the courts of the United States, since no person would bring his suit in those courts, if the same laws deny to him the advantage of demanding bail, in cases where it is demandable in the state courts.

As to the objection founded on the eleventh section of the judiciary act, there is nothing in it. That section is inapplicable to an instrument of this kind, which does not circulate as negotiable choses in action, but which, being merely an incident to the original suit, is in reality taken for the benefit of the plaintiff, if he consents to receive an assignment of it, and which the marshal, who must always be a citizen of the same state with the bail, is authorized by law to assign to the plaintiff. The policy and design of the eleventh section was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the court.

II. The objection to the mode adopted by the court to satisfy its conscience as to the amount really due from Oppenheimer to the plaintiff, proceeds upon a mistaken notion of the counsel that the writ ordered was a judicial writ of inquiry at common law; which, no person will deny, issues only in cases where there is a judgment, but the damages are uncertain. The only object of the inquiry was to inform the conscience of the court; and we hold it to be perfectly clear, that the court had the power to direct the mode in which the inquiry should be made, either by a special writ framed for the occasion and directed to the marshal, as was done in this case, or by directing a writ of inquiry in the suit on the bail bond in which there was a judgment, or by ordering an issue to be made up to ascertain the amount due to be tried at the bar of the court. The former was preferred, out of deference to the practice of the supreme court of this state; which, we understood, was to direct a speedy trial in the original suit, in which of course there was no judgment. The particular mode in which that trial should take place, might be regulated by this court, which clearly possesses authority to establish its own practice.

But admit, for the sake of the argument, that it would have been more consonant with the general rules of practice to have ordered the common writ of inquiry to issue on the judgment in the bail bond suit, or to direct an issue to be tried at the bar of the court, would this afford a good reason for setting aside the inquisition when it is not pretended by the counsel for the defendants that any injustice has been done them, or that the sum found by the inquisition is not justly due to the plaintiff? We think it clearly would not.

Let both rules be discharged.

BOCCALINE (GERNOW v.). See Case No. 5,366.
BOCKEE v. BEEKMAN. See Case No. 1,593.

Case No. 1,593.

BOCKEE v. CROSBY.

SAME v. BEEKMAN et ux.

[2 Paine, 432.] [1]

Circuit Court, S. D. New York. June Term, 1828.

PLEADING—DEMURRER TO PLEA IN ABATEMENT—EJECTMENT—AVERMENT OF SEISIN—LIMITATION OF ACTIONS—RECOVERY OF LANDS—NEW YORK STATUTE OF 1788.

1. Upon demurrer to a plea in abatement, the court will look back to the first fault in pleading, and if the declaration is bad, judgment must be against the plaintiff.

2. To sustain an action of ejectment, an averment of seizin is essential, and it must be alleged to have been within the time limited for bringing the action.

3. The act of New York of 1788, declaring that after the year 1800 no action for the recovery of lands shall be maintained unless on a seizin or possession within twenty-five years next before such action brought, is valid even if applied to a seizin existing at the time the law was passed, and in such case, where the demandant counted on the seizin of his ancestor within sixty years then last past it was held that the count was bad.

[At law. Actions by William Bockee against William B. Crosby, tenant, and by the same against Beekman and wife, for the recovery of lands. Heard on demurrer to a plea in abatement. Judgment for defendants.]

THOMPSON, Circuit Justice. This case comes before the court on a demurrer to a plea in abatement. The demandant counts on the seizin of his ancestor, within sixty years then last passed. The tenant pleads in abatement, that the averment of seizin should have been within twenty-five years instead of sixty; to this plea the demandant interposes a general demurrer.

It is contended on the part of the demandant, that the count is not defective in this respect, but that admitting it to be so, advantage should be taken of it by demurrer and not by plea in abatement. It is unnecessary to express any opinion upon the latter question, for upon this demurrer we must look back to the first fault in pleading; and if the count is bad, judgment must be against the demandant.

An averment of seizin is essential, and that must be alleged to have been within the time limited for bringing the action.[2] By an act of the legislature of this state, passed in the year 1788, it is declared, that after the year 1800, no action for the recovery of lands shall be maintained, unless on a seizin or a possession within twenty-five years next before such action brought. If this law applies to this case the count is bad; it should have averred a seizin within twenty-five years next before action brought. It is contended on the part of the demandant, that this law would be retrospective and void, if applied to a seizin existing prior to its passage, and that the demandant will have a right to show this upon the trial. We think, however, the law is valid, even if applied to such a seizin; it is a statute of limitations applying to the remedy; it is prospective in its operation, giving twelve years for the bringing of suits upon seizin existing at the time the law was passed.

Judgment for the tenant upon the demurrer.

NOTE [from original report]:

A declaration in ejectment, alleging a joint title in several, is not supported by proving title in some of them. Gillett v. Stanley, 1 Hill, 121. Nor will a title in two surviving assignees of an insolvent, support a count averring title in one. Id. And if the title is in A., as surviving assignee, it is wrong to describe him as one of the surviving assignees: but a trifling misdescription like this may be disregarded at the circuit, and is curable by subsequent amendment. Id. Under a declaration claiming the whole interest in certain premises, the plaintiff cannot recover an undivided share. Id. An ejectment plaintiff declares for four undivided ninths, and on trial proves title to one undivided third, he takes a verdict according to the proof; the variance is not fatal; and on motion he will be permitted to amend on terms without costs—the statute forbidding purchase of pretended titles does not apply to judicial sales. Truax v. Thorn, 2 Barb. 156. Where a plaintiff in ejectment stated in his declaration, that he had an estate in the premises for the life of another, and it turned out in proof that he had title in himself by possession, and also as guardian in socage, and the judge at the circuit granted a nonsuit for the variance, the court refused to set aside the nonsuit as erroneous, but let the plaintiff into a new trial upon payment of costs; intimating, however, that a preferable course to be pursued at the circuit in such case would be, to permit the plaintiff to take a verdict notwithstanding a misdescription of the estate or premises claimed, and leave him to apply to the court for permission to amend his declaration so as to conform it to the proof. Holmes v. Seely, 17 Wend. 75. It seems in ejectment, if the plaintiff claim, in his declaration, the whole of certain premises, he may recover part; so, if he claim an undivided share of a specified quantity of acres, he may recover such share in a less quantity. But if he claims an undivided half of certain premises, he cannot recover an undivided fourth, or undivided third, or the whole of the premises; nor, if he claim the whole, can he recover an undivided half, an undivided fourth, or an undivided third of the premises. Id. Ryerss v. Wheeler, 22 Wend. 148. A demise in a declaration in ejectment, laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is cause of nonsuit. Doe v. Butler, 3 Wend. 149. Where a joint demise is laid in the names of several lessors, unless it be shown that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be nonsuited. Id. The demise in a declaration in ejectment must be laid as of a day subsequent to that when the lessor's right of entry accrued. Dickenson v. Jackson, 6 Cow. 147. In ejectment by the mortgagee against the mortgagor, or those claiming under him, the demise must be laid as of a day subsequent to a default in payment, and subsequent to a dissolution of the tenancy, by a notice to quit or otherwise. Id. Several demises added in ejectment on payment of costs, it appearing that the lessors sought to be added had a subsisting legal title. Jackson v. Travis, 3 Cow. 356. The plaintiff cannot recover under a demise from a

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [See note at end of case.]

lessor who has released his interest to the defendant. Jackson v. Foster, 12 Johns. 488. In an action of ejectment, where several parcels of land are claimed in the same declaration, and the defendant concedes the plaintiff's right to recover as to some, and denies it as to others of the parcels, the court, on motion, will, on terms, strike from the declaration the parcels, the right of the plaintiff to which is conceded, and leave the parties to litigate only as to the others. Mower v. Mower, 20 Wend. 635. A declaration in ejectment may contain several counts in the names of several persons as plaintiffs, in the manner before used where the suit was brought in the name of a nominal plaintiff, and separate demises were laid in the names of separate lessors; it is not necessary that it should contain a joint count, or that a joint interest or joint injury should be alleged. Smith v. Dewey, 15 Wend. 601. The point has been frequently declared and adjudged, that tenants in common cannot make a joint demise, and the books frequently speak in terms inconsistent with this position. Jackson v. Bradt, 2 Caines, 169. It has now become immaterial whether tenants in common declare on joint or separate demises. Id. A copartner may declare in ejectment on her separate demise. Jackson v. Sample, 1 Johns. Cas. 231. The demise should be laid at, or after the time when the lessor's right accrued. Van Alen v. Rogers, 1 Johns. Cas. 281. The death of a lessor, however, will not abate the suit. Frier v. Jackson, 8 Johns. 405. In ejectment, separate demises may be laid in the declaration, and the plaintiff, at the trial, may give in evidence the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly. Jackson v. Sidney, 12 Johns. 185. By the practice of this court, before the Revised Statutes took effect, a demise was laid in the declaration from the owner to a nominal person, in whose name the action was brought. Then the day was so far material that the demise must be subsequent to the accruing of the title of the claimant; now, it is sufficient for the plaintiff to aver in his declaration that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them; and, being so possessed thereof, the defendant afterward, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof. 2 Rev. St. p. 304, § 7. This seems to be in accordance with the former practice, so far as it may be applicable. The averment of title must be laid subsequent to the title actually accruing, and an ouster must be stated on some day afterward. On the trial, however, the plaintiff is not bound to prove the accruing of his title precisely as laid: it is enough if he show title before the day laid in his declaration. Siglar v. Van Riper, 10 Wend. 414. Nor is he in ordinary cases bound to prove an ouster at all. Id. The lessors must have a claim to a subsisting title or interest in the premises. Therefore, where the declaration contained eight counts, and the last set forth a demise from eighteen persons, none of whom, as the tenant stated in his affidavit, pretend to claim any title to the premises; and the affidavit of the attorney for the plaintiff stated that it might be a question on the trial, the court, on motion, struck out the eighth demise. Jackson v. Paul, 2 Cow. 502; Jackson v. Richmond, 4 Johns. 483. Where the plaintiff gave evidence of title to two acres, and the supreme court, by their judgment, decided that title to be valid. The remedy is by writ of error; for, the record shows that the plaintiff has recovered an indefinite quantity of land; whereas, he might have taken a verdict for his term in certain premises, describing them, and for the defendant as to other premises, also describing them, and entered his judgment accordingly. The judgment being entire, his whole judgment was reversed. The plaintiff declared in one count for different pieces of land, erroneous recovery as to one, therefore the entire judgment must be reversed. Id. The ancient rule required the description of the premises in the declaration to be so certain, that the sheriff might know from his execution, exactly of what to deliver possession. But the settled rule of the supreme court now, where a general verdict is given for the plaintiff, is, to restrict him to the taking of possession of so much only as he gave evidence of his title to on the trial. Seward v. Jackson, 8 Cow. 427. Where the plaintiff gave evidence of title to two acres, and the supreme court, by their judgment, decided that title to be valid. The remedy is by writ of error; for, the record shows, that the plaintiff has recovered an indefinite quantity of land; whereas, he might have taken a verdict for his term in certain premises, describing them, and for the defendant as to other premises, also describing them, and entered his judgment accordingly. The judgment being entire, his whole judgment was reversed. The plaintiff declared in one count for different pieces of land, erroneous recovery as to one, therefore the entire judgment must be reversed. Id. If there had been several counts in the declaration, it would have been different. Id. Declaration in ejectment (2 Rev. St. 312), "to compel the determination of claims to real property," is to be in the usual form, and its connection with the notice served under the second section of that act can be ascertained by inquiring into extrinsic facts. When the party receiving such notice pleads in bar, disclaims or declares in ejectment, he thereby makes his election as to the mode of answering, and cannot change without leave of the court. Rosevelt v. Giles, 7 Hill, 201. In ejectment, the plaintiff must, in his declaration, describe truly the premises claimed, but is not bound to set forth the nature of the estate, nor the quantity of the interest claimed by him; and it was accordingly held, that a plaintiff was entitled to recover an undivided share, although in his declaration he claimed the whole of the premises. Harrison v. Stevens, 12 Wend. 170. The statute (2 Rev. St. p. 304, § 9) declares, that if the plaintiff claims an undivided share or interest in any premises, he shall state the same particularly in his declaration; but if he claims the whole of certain premises, and it turns out on the trial that the defendant owns a part, he shall not be nonsuited; for the statute is complied with by claiming the whole. Id. A description of the premises claimed, setting them forth as the one undivided third part of all that part of a certain lot, in a certain township, of which the defendant is in possession, under a purchase at sheriff's sale, on executions against A. B., is sufficiently certain; and a farther specification of the premises, by reference to a record of partition in a public office, does not hurt the declaration. Bear v. Snyder, 11 Wend. 592.

Case No. 1,594.

In re BODENHEIM et al.

[2 N. B. R. 419 (Quarto, 133);[1] 2 Am. Law T. Rep. Bankr. 64; 1 Chi. Leg. News, 195.]

District Court, S. D. Mississippi. April Term, 1869.

BANKRUPTCY—DISCHARGE—APPLICATION—TIME OF.

Where debts are proved and there are assets, application for a discharge cannot be filed before the expiration of six months from the issue of the warrant of adjudication.

[In bankruptcy. In the matter of Simon Bodenheim and Jacob Adler. The bankrupts

[1] [Reprinted from 2 N. B. R. 419 (Quarto, 133), by permission.]

applied for discharge, which the register refused. Heard on exceptions to the register's ruling. Exceptions overruled.]

Register McKee certified to the court that the following question under the following stated facts arose in this case and is pertinent to the issue, and at the request of Messrs. Adams & Speed, attorneys for bankrupt, is certified to the Hon. District Judge for his decision. On the 8th of April, 1868, Messrs. Bodenheim & Adler filed their petition in bankruptcy; on the 30th of April, they were duly adjudicated bankrupts. On the 22d of September, Jacob Adler applied for his discharge, and the discharge meeting was held on the 20th of October. No opposition to discharge has been filed. On the 15th of October, Simon Bodenheim, the other partner, applied for his discharge, and his discharge meeting was duly held on the 17th day of November, 1868. No opposition was filed. The returns of the assignee show that on the 2d day of September (the day on which Adler applied for discharge), he, as assignee, had received and paid out moneys on account of said estate. Debts had also been proved before this date. The register took the case under advisement, and now, upon the application of bankrupt for a certificate of conformity for discharge, he refuses to issue the same; to which decision the bankrupt excepts; and the question at issue is, whether or not the register should issue said certificate of conformity under the above stated facts.

By GEORGE McKEE, Register:

The register refuses the certificate to the bankrupt Bodenheim because six months had not elapsed from the date of adjudication before he made his application for discharge. The language of the law is, "That at any time after the expiration of six months from the adjudication of bankruptcy, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days * * * the bankrupt may apply for a discharge." The bankrupt has not come under the above exemption, for it appears that debts have been proved, and that the assignee has both received and paid out moneys on account of the estate; the very opposite to what is required in form thirty-five, which said form must be filed whenever application is made within six months.

It is claimed by the attorneys for bankrupt that their position is sustained by the wording of form fifty-one (application for discharge), which states in a note in the body of the form that "If this petition is filed within six months after the filing of the original petition," &c. The register thinks this phraseology—"filing of the original petition"—but a curious error showing the haste in which the forms were compiled. It is in direct contradiction to the law. In the numerous cases reported, bearing upon the twenty-ninth section of the act, the register finds that "six months from the date of adjudication" is always spoken of as the governing rule. In Re Belamy [Case No. 1,266], Blatchford, J., says that if application is made within six months from date of adjudication a discharge will not be granted unless it is proved that there are debts or assets, &c.

See 1 N. B. R. 8, 9;[2] Id. 115, 131 (quarto), [In re Dodge, Case No. 3,947; In re Woolums, Id. 18,034]. In all these cases bearing upon the very question at issue, it appears that not even a doubt has been raised that the law and not the form was to govern.

Upon the application of Adler the register renders the same opinion. There is a difference of dates only in the two applications for discharge, both being made within six months from the date of adjudication. In the application of Adler the argument of counsel defeats itself, for, as the original petition was filed on the 8th of April, and he applied for a discharge on the 22d of September, six months had not elapsed, even from the "date of filing the original petition."

HILL, District Judge. The question in this case is, whether or not the petition for discharge was prematurely filed. The provisions of the law are, that if no debts have been proven or assets received by the assignee within sixty days from and after the adjudication of bankruptcy, the bankrupt may apply for a discharge, provided it is done within one year from the date of adjudication. If there be assets and debts proven, then he may apply within six months from the date of adjudication—not the date of filing the original petition. When the petition for discharge is filed within less than six months from the adjudication, it should be accompanied by a certificate of the assignee that there have been no debts proven or no assets received.

The presumption in practice is, that the warrant under which the first meeting is held, is issued at the time of the adjudication; hence, the different periods of time, whether "sixty days" or "six months," must be computed from the date the warrant issues. Under the rule of this court, made to enable petitions to be filed before the expiration of the time fixed by law—on the 1st of June last—it was provided that the petition might be filed and proceed to adjudication upon the payment of the fees due to the register and clerk, and to and including that service, without the deposit of the other fees; provided, however, that the consequent stop-

[2] [This citation appears also in the report in 2 N. B. R. (Quarto) 133, and must therefore refer to pages 8 and 9, Quarto, vol. 1. The cases there reported are In re Mott, Case No. 9,879, and In re Hughes, Id 6,841. The case reported in 1 N. B. R. (Octavo) 8 and 9, is In re Robinson, Case No. 11,936. The cases reported in N. B. R. Supp. pp. 8 and 9, are In re Devlin, Case No. 3,841, and In re Metzler, Id. 9,512.]

page of the case at that point should not prolong the application for discharge beyond one year from the filing of the petition. This was done in view of the provisions of section twenty-one of the bankrupt act, which enjoins proceedings against the bankrupt until the question of discharge is determined, provided there is no unnecessary delay in making the application. Bankrupts filing petitions under this rule, should complete the deposit and pay the necessary fees so as to have the warrant issued within six months after the filing of the original petition. This statement is made to disabuse the minds of those who believe they can pay the fees within the twelve months.

In the present case the application for discharge having been filed within less than six months from the adjudication, and there being debts proven and assets in the hands of the assignee, it is decided that the filing was premature, and the decision of the register is sustained.

BODFISH (EASTMAN v.). See Case No. 4,255.

BODILIAN v. SEATON. See Case No. 1,218.

Case No. 1,595.

BODIN et al. v. The THULE.

[3 Woods, 670.] [1]

Circuit Court, N. D. Florida. March Term, 1879.

TORTS—VIS MAJOR—NEGLIGENCE—COLLISION.

It is no defense to a libel to recover damages resulting from a collision to say that it was caused by the vis major, namely, a hurricane, if the collision could have been avoided by foresight, precaution and nautical skill.

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

[Appeal from the district court of the United States for the northern district of Florida.

[In admiralty. Libel by I. Bodin and others, owners of the bark Marie, against the bark Thule, for collision. The district court rendered a decree for libelants, and, on respondent's appeal, that decree was affirmed.]

E. A. Perry, for libelant, cited: The Louisiana, 3 Wall. [70 U. S.] 164; The Merrimac, 14 Wall. [81 U. S.] 199.

R. L. Campbell and G. A. Stanley, for claimants, cited: The Morning Light, 2 Wall. [69 U. S.] 550; The Great Republic, 23 Wall. [90 U. S.] 20; Owners of the James Gray v. Owners of the John Fraser, 21 How. [62 U. S.] 184.

WOODS, Circuit Judge. The libel claims a decree for the damages sustained by the bark Marie, of which the libelants were owners, in consequence of a collision between her and the bark Thule, which happened about three o'clock on the morning of January 24, 1875. The facts were these: On January 19 preceding, the Thule had been moored alongside and near the end of the railroad wharf, in the bay of Pensacola, with her bow pointing to the shore, and the Marie had been moored to the same side of the wharf, bow towards land and her stern distant only about six feet from the bobstays of the Thule. About three o'clock a. m., January 24, a violent squall suddenly came on, as the result of which both barks were forced from their moorings and driven ashore, and considerable damage sustained by the Marie. The claim of the libel is that the Thule was moored in a careless, negligent and insecure manner; that in consequence thereof she parted her moorings and drifted against the Marie, and caused her to break her mooring chains and drift from the wharf and to go ashore; and that the Marie suffered damage by the collision with the Thule, by being driven on shore, and by the delay caused by the said collision.

The answer denies that the Thule was negligently or insecurely moored, denies that the Thule collided with the Marie, whereby the latter was forced from her moorings, and avers that both barks were driven from their respective berths by the squall, and that the Marie was driven from her moorings and out of her berth, and had grounded before she was struck by the Thule. The answer further claims, that if any damage was sustained by the Marie, it was in consequence of inevitable accident and the vis major, against which human prudence and foresight could not provide, and, therefore, the Thule should not be compelled to respond in damages to the owners of the Marie.

The evidence in the case satisfies me that the Thule broke loose from her moorings and collided with the Marie before the Marie parted her mooring chains, and that the collision was the cause of her being driven from her berth. While there is some conflict of evidence on this point, the decided preponderance is in favor of the view just stated. The witness Robert Christy, who was sleeping in a small house on the wharf, came out of the house for fear the storm would blow it over, and standing, as he states, within fifteen feet from the bow of the Thule and the stern of the Marie, saw the relative positions of the two barks. The bow of the Thule was ten feet from the stern of the Marie at that time. He saw the Thule break her moorings, the Marie remaining hard and fast, and in about two minutes the Thule came down and struck the Marie in the stern, and caused her to carry away her moorings. The Marie, he repeats, was fast and secured by her moorings when the Thule struck her. This witness is corroborated by Boyson, who was on watch on the deck of the Marie before and during the squall. Zachariahson, the master of the Marie, who

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

was on board when the squall came on, testifies that he felt the shock of a collision with the stern of his ship. There were marks of the collision on the stern of the Thule, which, according to the evidence, could not have been caused except by the bow of the Thule, which was the only vessel adrift. Moreover, the witnesses are of opinion that the Marie was so securely moored that the force of the squall alone could not have carried her from her berth. On the other hand, no witness for the defense, except the carpenter on the Thule, Winge, testifies that he saw the barks that morning until after they had both broken from their moorings. The witnesses for the defense do not, therefore, contradict the evidence for the libelant, to the effect that the Thule broke away first, and, colliding with the Marie, caused her to break from her moorings.

There is much conflict of evidence as to the moorings of the Thule. Several witnesses for the defense have testified that the Thule was securely moored. The condition in which the lines, by which the Thule was made fast to the wharf, were found after the squall, is stated by a board of survey appointed by the Norwegian consul, who reported, that the moorings consisted of one eight-inch hemp rope, made fast to a cross-tree two and one-half inches in diameter, and this was fastened between two stanchions on deck. These were both rotten. There were also two manilla ropes, both of which were in bad condition; and a four-inch hemp rope, badly worn. Jacob Bug, one of the board of survey, testifies that the Thule was moored to the wharf with one eight-inch hemp rope, which was fastened to the vessel in the manner described by the board of survey, that the cross-tree was rotten at one end, and both stanchions were rotten, that the two manilla ropes were worn and rotten, and that the hemp rope was half worn. None of the fastenings on the wharf gave way. One fact is clear and undisputed, that the moorings of the Thule were not sufficient to hold her fast to the wharf, in the squall of January 24, 1875. She broke away from her moorings, and, as the weight of testimony shows, collided with the Marie, to the serious damage of the latter. The defense claims that the damage was the result of the vis major, that the squall was sudden, unforeseen, and was unprecedented in severity, and, therefore, the collision was an inevitable accident, against which human foresight could not provide.

The collision being caused by the drifting of the Thule from her moorings, she must be liable for the damage resulting therefrom, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major, which human foresight and precaution, and a proper display of nautical skill, could not have prevented. The Louisiana, 3 Wall. [70 U. S.] 164. Is this shown? The condition of the moorings of the Thule shows that she was not sufficiently secured against a storm of much less violence. She had only one good and sufficient rope, and that was fastened to a decayed cross-tree set in two rotten stanchions. Her other ropes were so worn and decayed that they could not hold. But the evidence shows that the Thule might have had warning of the coming storm. The night before the barometer indicated that a blow was imminent. The master of the Marie took warning, and although his bark was moored by two one-inch chains, procured two others of the same size, and used them to make his bark safe and fast. The master of the Thule, with the same warning, took no precautions to make more secure his moorings. He relied on what he had deemed sufficient for gales and rough weather, when his glass warned him that an extraordinary blow was coming. It seems to me, that even if it be conceded that the Thule was sufficiently secure against even strong gales and squalls, yet, that when warned that a blow, which might be a gale, or might be a hurricane, was coming, common prudence would have dictated the strengthening of his moorings. This the Marie did, and, but for the fault of the Thule, would have weathered the squall in safety. The Thule neglected this most necessary precaution, and broke from her berth and caused the damage complained of. The vis major, or act of God, is a natural and inevitable necessity, and one arising wholly above the control of human agencies, and which occurs independent of human action or neglect: 2 Kent, Comm. 597. I do not think the testimony brings the defense within the terms of this definition. The collision might have been avoided by prudence and foresight. It was not an inevitable necessity.

The result of these views is, that the libelants are entitled to recover the damage sustained by the Marie from the collision. A consideration of the evidence satisfies me that the amount found by the district court is substantially correct, and I direct that a decree be entered for that sum, with interest from the date of the decree in the district court, and costs of suit in both courts.

BOECALINE (GERNON v.). See Case No. 5,367.

Case No. 1,596.

In re BOGART.

[2 Sawy. 396;[1] 17 Int. Rev. Rec. 155; 7 Am. Law Rev. 749.]

Circuit Court, D. California. April 21, 1873.

HABEAS CORPUS—JURISDICTION DEFINED—FORMER CONVICTION AND STATUTE OF LIMITATIONS — NAVAL COURTS-MARTIAL CONSTITUTIONAL—CONSTITUTION—FIFTH AMENDMENT — MARTIAL LAW — JURISDICTION IN TIME OF PEACE — "ACTUAL SERVICE"—"CASE" DEFINED—PERSON IN NAVAL SERVICE—PAYMASTER'S CLERK — ACT MARCH 2, 1863 — ARREST AFTER DISCHARGE — ABUSE OF POWER.

1. When it appears on the return to a writ of habeas corpus that the petitioner is held for trial by a naval court-martial, for offenses charged to have been committed while in the naval service, the only questions to be determined are, whether the said court has jurisdiction to try the petitioner for the offenses charged; and is it proceeding regularly in the exercise of that jurisdiction?

2. The power to hear and determine a cause is jurisdiction. The distinction between jurisdiction and its exercise pointed out.

[Cited in Re White, 17 Fed. 724.]

3. Congress has power under the constitution to provide for the trial and punishment of offenses committed in the naval service by courts-martial, without indictment or the intervention of a jury.

[Cited in Re Zimmerman, 30 Fed. 177; Re Spencer, 40 Fed. 150.]

4. The power of congress to provide for the government of the land and naval forces is not affected or limited by the fifth, or any other amendment.

5. That branch of jurisdiction under military law given in the acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces, may be exercised "in peace and war."

6. The clause in the fifth amendment to the constitution, "when in actual service in time of war," has no reference to the regular army, or the navy, but refers only to the militia.

7. An offense committed by a party while actually in the naval service, is a "case arising in the naval forces," within the meaning of these terms, as used in the fifth amendment to the constitution; and congress has power to authorize the trial for such an offense by a court-martial, upon proceedings commenced after the connection with the service of the party charged has been severed.

8. A paymaster's clerk on duty in the navy is a person "in the naval forces of the United States," within the meaning of those terms as used in the act of congress of March 2, 1863 (12 Stat. 696, § 1), and amenable to the criminal jurisdiction provided for in the act.

[Cited in Re Reed, 100 U. S. 23; U. S. v. Hendee, 124 U. S. 309, 8 Sup. Ct. 509.]

9. Under the second section of said act, a party charged with embezzlement under said act, committed while employed in the naval service, and afterward dismissed or discharged, is liable to be arrested and tried by a court-martial, in the same manner as if he had not been dismissed or discharged.

10. A former conviction and the statute of limitations are matters of defense on the merits, which must be investigated in the exercise of jurisdiction, and not facts upon which the jurisdiction to hear and determine the charge depends. These matters cannot be inquired into on a petition for discharge on habeas corpus.

[Cited in Re Zimmerman, 30 Fed. 177.]

11. The fact that power wherever lodged may be abused furnishes no solid objection against its exercise, and no just inference against its existence.

12. A court-martial is a lawful tribunal existing under the constitution and acts of congress, and is supreme while acting within the sphere of its exclusive jurisdiction.

[Cited in Re Corbett, Case No. 3,219; Holmes v. Oregon & C. R. Co., 9 Fed. 233; Re White, 17 Fed. 725; Re McVey, 23 Fed. 879; Smith v. Whitney, 116 U. S. 177, 6 Sup. Ct. 575; Re Zimmerman, 30 Fed. 177.]

[On habeas corpus. In the matter of Robert D. Bogart. Writ dismissed.]

A writ of habeas corpus having been issued and duly served upon Thomas O. Selfridge, in pursuance of the prayer of a petition filed on behalf of Robert D. Bogart, under the act of congress of February 5, 1867 (14 Stat. 385), the respondent produced the body of said Bogart, and made a return to the writ, in which he states, that he, Thomas O. Selfridge, is a duly appointed and acting rear admiral in the navy of the United States, in command at the Mare Island navy yard, a naval station of the United States in the state of California, acting under the orders of the secretary of the navy of the United States; that said Bogart is a person charged with offenses against the laws governing and relating to the naval forces and naval service of the United States; firstly, with the crime of embezzlement of the sum of ten thousand dollars of the funds of the United States in his custody, and committed on or about the first day of December, 1868; secondly, the crime of desertion from said naval service of the United States, on or about the third day of December, 1868, the said Bogart, then and there being in the naval service, and said offenses having been committed in the said service; that said charges and specifications, duly certified copies of which are annexed to and made a part of the return, have been duly prepared and signed by said secretary of the navy; that said Bogart did commit said offenses, and that, at the time of the commission thereof, he was a duly appointed, sworn, qualified, enrolled and acting paymaster's clerk in the navy and in the naval service of the naval forces of the United States, doing duty as such on board the United States receiving ship, Vermont, at the navy yard of the United States, at the port of New York; that for the trial of said Bogart upon said charges, a naval court-martial has been duly ordered, appointed and constituted by the said secretary of the navy, having jurisdiction and competent power to try the same, a duly certified copy of said order, appointing and constituting said court-martial, being annexed to the return as a part thereof; that said Bogart is held in custody under said orders and charges, and certain other orders of the sec-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Am. Law Rev. 749, contains only a partial report.]

retary of the navy for his detention, copies of which are set out and annexed to the return as parts thereof; and that he is held and detained in custody by the respondent under and by virtue of said orders, warrants and charges, in pursuance of the laws of the United States, awaiting trial upon said charges by said court-martial, the said court-martial having authority to try and determine the same, and not otherwise, and prays that the writ be dismissed. One of the orders of the secretary of the navy for detention, states that Bogart for the past three years has been a fugitive from justice. After making general denials of these statements of the return, the same being mostly denials of legal conclusions merely, or denials otherwise disproved by the duly certified copies of the orders and proceedings attached to and made a part of the return, the petitioner, Bogart, sets up certain facts, upon which he relies. He does not deny being in the naval service on the first day of December, 1868, but does deny that at any time since said first day of December, 1868, he has been in the naval service of the United States; or that he has been a fugitive from justice, or in any way concealed, or that he deserted. He then avers that, from June 30, 1867, to December 10, 1868, one A. J. Clark was the paymaster of the United States receiving ship, Vermont, then lying at the Brooklyn navy yard, at the port of New York; that on July 1, 1867, said Clark appointed him (said Bogart) his clerk in and for said receiving ship, Vermont; that he thereupon qualified, entered upon his duties as clerk to said Clark, paymaster, and continued therein until November 30, 1868, upon which day said Clark discharged him and appointed another in his stead; that thereupon, on December 1, 1868, he, said Bogart, resigned his position as clerk; that said resignation was duly accepted by said Clark, and that the acceptance was approved and confirmed by Commander Lewis A. Kimberley, the acting commander of said receiving ship, Vermont. He then alleges a former trial and conviction by a court-martial for stealing and desertion, upon charges based on the same state of facts, alleged in the charges and specifications for embezzlement and desertion now set up against him. He also sets up the statute of limitations.

It is conceded and shown by the testimony, that the petitioner was the clerk of Paymaster Clark, of the navy, and attached to and doing duty as such on the receiving ship, Vermont, at the port of New York, from July 1, 1867, down to and including December 1, 1868; and that he was regularly appointed with the approval of the commander of the ship, the proper officer, and duly qualified in accordance with the regulations for the government of the navy in force at the time. It also satisfactorily appears that no regular severance of his connection with the navy, prior to December 10, 1868, had been made or recognized, whatever the facts may be after that date. It is not denied that he was in the service as such clerk of Paymaster Clark on December 1, 1868, the day on which the offenses charged are alleged to have been committed. Paragraph 249 of the regulations for the government of the United States navy, in force at the time the offenses are charged to have been committed, is as follows: "249. Every officer entitled to a secretary or clerk may appoint or discharge him. But the appointment or discharge of a clerk by any officer not in command shall be subject to the approval of the commander of the vessel; the latter, however, will not refuse his approval except for good and sufficient reasons, which he will state in writing to such officer. No secretary or clerk shall be entered on the muster-roll of any vessel, nor be entitled to any pay, until he shall have accepted his appointment by letter, in duplicate, binding himself therein to be subject to the laws and regulations for the government of the navy and discipline of the vessel so long as his appointment may continue. One of these letters in duplicate shall be transmitted immediately to the department by the officer conferring the appointment, together with the oath of allegiance; the other copy of the letter of acceptance shall be preserved by that officer. In the case of any clerk appointed by an officer not in command, the letter of acceptance sent to the department must bear the approval of the commander of the vessel. The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged, or until the return of such officer to the United States." The clerks of paymasters are staff officers in the same class with surgeons, paymasters, engineers, chaplains, etc. Id. par. 5. They rank with midshipmen in the class, line officers. Id. par. 22.

Pixley & Harrison and J. P. Hoge, for petitioner.

L. D. Latimer, U. S. Dist. Atty., for respondent.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

By the Court, SAWYER, Circuit Judge, after stating the facts. Conceding the jurisdiction over the subject matter and over the person of the petitioner, the navy department appears, in all essential particulars, to be proceeding regularly in the exercise of its jurisdiction.

Upon the facts shown, is the petitioner lawfully detained in custody by the respondent? If a naval court-martial has, at this time, jurisdiction to try the offenses charged, when committed by a party holding the position which the prisoner appears to have occupied on December 1, 1868, then he is

lawfully held for trial. All else relates to the exercise of jurisdiction with which this court cannot interfere. We cannot enter into any examination of the merits of the charges.

The supreme court of the United States has often determined what constitutes jurisdiction, and what its exercise. Jurisdiction is thus defined by that tribunal:

"The power to hear and determine a cause is jurisdiction. It is coran judice whenever a case is presented which brings the power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out a case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites, and in the manner required by law." Grignon v. Astor, 2 How. [43 U. S.] 338.

And again: "The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it; but upon the right to hear and decide it at all." Ex parte Watkins, 7 Pet. [32 U. S.] 572. See, also [U. S. v. Arredondo], 6 Pet. [31 U. S.] 709; [State of Rhode Island v. State of Massachusetts] 12 Pet. [37 U. S.] 718; [Ex parte Watkins] 3 Pet. [28 U. S.] 205; [Kendall v. U. S.] 12 Pet. [37 U. S.] 623.

Has the naval court-martial ordered the power to hear and decide upon the charges and specifications made by the secretary of the navy? If so, that ends our inquiry. In the case of Dynes v. Hoover [20 How. (61 U. S.) 78, 79], wherein, upon a charge of desertion, a seaman in the navy was convicted by a naval court-martial of an attempt to desert, the question as to the powers of a court-martial in such cases arose; and the supreme court of the United States say upon the point: "Among the powers conferred upon congress by the eighth section of the first article of the constitution are the following: 'To make rules for the government of the land and naval forces.' And the eighth [fifth] amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crimes, expressly excepts from its operation 'cases arising in the land and naval forces.' And by the second section of the second article of the constitution it is declared that, 'The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the United States.' These provisions show that congress has the power to provide for the trial and punishment of military and naval offenses, in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the third article of the constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." 20 How. [61 U. S.] 78, 79.

Again, in the same case, it is said: "With the sentences of courts-martial, which have been regularly convened, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws of the sea, civil courts have nothing to do. If it were otherwise, the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal of any kind has been given to the civil magistrates or civil courts." Id. 82.

In Ex parte Milligan, 4 Wall. [71 U. S.] 123, Mr. Justice Davis, in delivering the opinion of the court, says: "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment, before any one can be held to answer for high crimes, 'excepts cases arising in the land or naval forces, or in the militia, while in actual service, in time of war or public danger;' and the framers of the constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subjected to indictment or presentment in the fifth. The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the constitution, congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which congress has created for their government, and, while serving, surrenders his right to be tried by the civil courts."

So, also, in the same case, the chief justice says: "It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the constitution to the present time. Nor, in our judgment, does the fifth, or any other amendment, abridge that power. 'Cases arising in the land or naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the fifth amendment, 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;' and it is admitted that the exception applies to the other amendments as well as the fifth. * * * * We, therefore, think that the power of con-

gress, in the government of the land and naval forces, and of the militia, is not at all affected by the fifth or any other amendment." Id. 137, 138. Again: "There are under the constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during the rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces." Id. 141, 142.

These decisions authoritatively determine the power of congress to confer jurisdiction upon the military and naval authorities to try by courts-martial military and naval offenses; and that this jurisdiction may be exercised, in the language of the chief justice, "both in peace and war." The case of Dynes v. Hoover [supra] arose in time of profound peace. The clause in the fifth amendment, "when in actual service in time of war or public danger," evidently only refers to the militia. It has no reference to the army or navy of the United States. Such is the reasonable grammatical construction, and such is manifestly the view of the supreme court as derived from the observations made in Milligan's Case. A good reason for this distinction may be found in the fact that it is only at those times that the militia are under the jurisdiction and control of the general government; while the army and navy of the United States are always in the service of the government, and there is as much necessity for preserving their discipline, morale and efficiency in peace as in time of war.

If the acts of congress conferring jurisdiction upon naval and military courts-martial, to try offenses committed in the naval and military service, are held to be constitutional, it is further insisted, on behalf of the petitioner, that the offense must not only be committed, but that the jurisdiction must also be exercised, or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal or other discharge; that congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. To support this view, a criticism is made upon the word "case," and it is argued that, although the offense has been committed while in the naval service, yet a "case" does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a "case arising in the land or naval forces" within the meaning of the fifth amendment to the constitution. This is certainly a very finely drawn distinction. It is not merely a "case" that the court is to try, but a "case arising in the land or naval force." A case in ordinary parlance is that which falls, comes, or happens—an event. Also a state of acts involving a question for discussion. Webst. Dict. But the event—that which happens—the state of facts presenting the question for discussion, must have arisen—must have had an origin. What does "arising" mean as here used? Certainly not merely making a statement of the pre-existing facts, which constitutes a case for judicial cognizance. Among the ordinary and most common definitions of the word "arise," are "to proceed, to issue, to spring," and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service. A case originating in the naval forces or service, or, in other words, "offenses" against the laws regulating the navy, committed by a party while in the naval forces. This latter is the very language of the court used in the great case of Ex parte Milligan [supra], which was argued by the most eminent counsel in the country, with unusual zeal, thoroughness and ability, and examined with extraordinary care by the supreme court. Although this was not the precise point decided, yet, in that case, the language of the justices was carefully weighed, and measured with unusual caution. Mr. Justice Davis, in the opinion of the court, quotes the clause of the constitution, "except in cases arising in the land and naval forces," and then in the very next sentence, in alluding to this class of cases, says: "In pursuance of the power conferred by the constitution, congress declared the kinds of trial, and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service;" thus, manifestly, using the phrase "offenses committed while the party is in the military or naval service," as entirely synonymous with, and equivalent to, the phrase in the constitution, "cases arising in the land and naval forces." This indicates the construction put upon this provision by the supreme court in such terms, and under such circumstances, that we should not feel at liberty to disregard it, even if the construction were more doubtful than it appears to us to be. Indeed this seems to us to be the true construction. There is, certainly, no express limitation of the power of congress to authorize a trial by court-martial, for military

and naval offenses committed while the offender is in actual service, after his connection with the service has ceased. If the limitation exists, it must be implied from a strained and unnatural construction to be given to the clause, "cases arising in the land and naval forces."

The question as to the unconstitutionality of an act of congress is always one of the greatest delicacy. Courts, undoubtedly, have the power, and it is their duty, to declare acts of congress to be unconstitutional when they clearly appear to be so. But it is the united voice of a multitude of decisions that, where there is a reasonable doubt as to the unconstitutionality of an act of congress, the law should be sustained. Even the supreme court of the United States has rarely assumed to exercise this delicate power. So late as 1866, in U. S. v. Rhodes [Case No. 16,151], Mr. Justice Swayne says: "Since the organization of the supreme court, but three acts of congress have been pronounced by that tribunal void for unconstitutionality." Marbury v. Madison, 1 Cranch [5 U. S.] 137; Scott v. Sandford, 19 How. [60 U. S.] 393; Ex parte Garland, 4 Wall. [71 U. S.] 334.

When the supreme court and its justices so cautiously and sparingly exercise this power, the case ought to be very clear to justify a subordinate court in assuming such responsibility. The case now under consideration presents no such clear case. We think the acts involved in this case constitutional.

The offenses charged against the petitioner for the trial of which he is now held, are, therefore, cases arising in the naval forces, within the meaning of the constitution, if a paymaster's clerk on duty in the navy is a person in the naval forces, and amenable to its criminal jurisdiction under the provisions of any act of congress.

The act of congress of March 2, 1863 (12 Stat. 696, § 1), so far as it is applicable to this case, provides: "That any person in the * * naval forces of the United States, * * * * who shall embezzle * * any * * money or other property of the United States, furnished, or to be used for * * * the naval service, of the United States, * * shall be deemed guilty of a criminal offense, and shall be subject to the rules and regulations made for the government of the * * naval forces of the United States; * * * and every person so offending may be arrested and held for trial by a court-martial, and if found guilty, shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save punishment by death."

Was the petitioner, while a clerk of a paymaster in the navy, on duty in the manner before stated, a person in the naval forces of the United States within the meaning of this act? It is contended on his behalf that he was not. But upon this point we entertain no doubt. He was not merely an employe or servant of the paymaster, but on the contrary, as we have seen from the regulations of the navy, set out in the statement of facts, he was an officer in the navy. He received his position by appointment, which appointment was required to be approved by the commander of the ship. He was required to give a written acceptance, in which he bound himself to be subject to the laws, regulations and discipline of the navy, which acceptance is required to be filed in the department. He was required to qualify by taking an oath, and to expressly engage to serve till regularly discharged; and this could only be done by the appointing power, approved in the same manner as his appointment had been approved.

He was an officer of the same class as the paymaster himself, the surgeons, engineers, etc., viz: a staff officer; and he ranked with midshipmen, who are line officers. His duties brought him into immediate connection with the administration of the funds of the navy, and these have been aptly styled "the sinews of war." Upon the safety and due application of the funds of the navy depends in a great measure its efficiency. Under this state of facts, if he was not a person in the naval forces of the United States, it is difficult to understand what does constitute that relation. Such an officer is certainly as necessary a part of, or appendage to, an organized and efficient navy, as a seaman, gunner, or any combatant. We think a paymaster's clerk, actually on duty, clearly a person in the naval forces and service, within the meaning of those terms as used in the act of congress cited.

The second section of the same act further provides, "that any portion heretofore called, or hereafter to be called into, or employed in such forces or service, who shall commit any violation of this act, and shall afterward receive his discharge or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial by a court-martial, in the same manner, and to the same extent, as if he had not received such discharge, or been dismissed." Id. § 2.

Testimony was taken upon the point as to whether the petitioner was discharged or dismissed from the service subsequent to December 1, 1868. The district attorney insists, with great earnestness, that the facts developed show a desertion, and that the petitioner is still, in contemplation of law, in the naval forces. On behalf of the petitioner, it is argued with equal earnestness, that upon the testimony, it appears that, at least after December 10, 1868, he was either actually discharged, or else that the facts and acts of the secretary of the navy shown, constitute a valid discharge by operation of law.

Under the view we take, it will be unnecessary to determine this question. It is not denied that on December 1, 1868, the petitioner

was still a paymaster's clerk, in actual service; and his leaving under the circumstances shown by the evidence was, doubtless, a desertion. He is, therefore, in contemplation of law, still in the naval forces, or he has been discharged either expressly or by operation of the acts shown, or otherwise. In the former case he is clearly still amenable to trial upon both charges. In the latter, under the provisions of the act last cited, he is still liable to trial, at least on the charge of embezzlement, whatever the case may be as to the charge of desertion; and if he is lawfully held for trial upon either, it is sufficient.

As to the alleged former conviction, and the bar of the statute of limitations, these are matters of defense, and are questions for the determination of the tribunal having jurisdiction to try the charge. The latter may involve an inquiry as to whether the petitioner has absented himself, or whether other legal impediment to the trial has existed. These are matters that will arise in the exercise of jurisdiction, as in this opinion before distinguished from the fact of the existence of jurisdiction, to hear and determine the charge. They are matters to be pleaded as a defense. Johnson v. U. S. [Case No. 7,418]; U. S. v. Cook, 17 Wall. [84 U. S.] 168.

The liability of the navy department, and of its courts-martial, to abuse their powers in cases like this, has been strenuously urged in various stages of the hearing against the views and construction of the constitution and statutes adopted by us. Similar arguments have often been urged before in courts of justice, in cases involving analogous questions. The answer often repeated in the books is well stated by Mr. Justice Story, in Ex parte Kearney, 7 Wheat. [20 U. S.] 45. That eminent jurist says: "Wherever power is lodged it may be abused. But this furnishes no solid objection against its exercise. Confidence must be reposed somewhere, and if there should be any abuse it will be a public grievance, for which a remedy may be applied by legislation, but is not to be devised by courts of justice."

The same constitution and the same legislative power which conferred civil jurisdiction on the national judiciary, also conferred jurisdiction over military and naval offenses upon courts-martial, appointed and supervised by the war and navy departments. Each is supreme while acting within the sphere of its own exclusive jurisdiction. In the terse and appropriate language of Attorney-General Cushing: "A court-martial is a lawful tribunal, existing by the same authority that any other exists by, and the law, military, is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this, that it applies to officers and soldiers of the army, but not to other members of the body politic, and that it is limited to breaches of military duty." 6 Op. Atty. Gen. 425.

This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositaries of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them. It is, undoubtedly, the imperative duty, and we have no doubt that it will be the pleasure, of the judiciary to jealously and vigorously maintain its own jurisdiction in its utmost extent, for the protection of the citizen in all his rights of person and property; and to confine within their proper limits the special and limited jurisdiction of other tribunals. But, while this is so, it is no less its duty to abstain from trespassing upon, or usurping the rightful powers of any other tribunal, however limited may be the sphere of its jurisdiction. A breach of this latter duty would be no less reprehensible than a breach of the former.

Many minor points have been argued in the course of the hearing, but none of them appear to us to be of sufficient importance to justify a further extension of this opinion for the purpose of specially noticing them. Suffice it to say, that none of them deemed material appear to us to be tenable.

From the views we have expressed, it follows that the writ must be dismissed, and the petitioner remanded to the custody of the respondent, whence he was taken, and it is so ordered.

Case No. 1,597.

BOGART et al. v. The JOHN JAY.

[N. Y. Courier and Inquirer, May 20, 1853.]

District Court, S. D. New York. May, 1853.

SHIPPING—MORTGAGE OF VESSEL—SUBSEQUENT PURCHASER WITHOUT NOTICE.

[In admiralty. Libel by John Bogart and others against the steamboat John Jay, her tackle, etc. (George Logan, claimant). Decree for claimant.]

Before BETTS, District Judge.

The libellants are mortgagees of the boat. The mortgage was not registered in the custom-house nor city register. After its execution, the owner of the boat sold her to the claimant, and the bill of sale was duly registered at the custom-house. It is not proved that the purchaser had actual notice of the mortgage, before the bill of sale and delivery of the boat to him.

Held, that a court of equity might be enabled to bring to light circumstances which would vitiate the claimant's title as against the mortgage, but in this action admiralty can only regard the legal title, and that is with claimant, and he must have a decree, with costs.

BOGART v. The JOHN JAY. See Case No. 7,352.

BOGART (UNITED STATES v.). See Cases Nos. 14,616 and 14,617.

Case No. 1,598.

In re BOGERT et al.

[2 N. B. R. 435 (Quarto, 139);[1] 38 How. Pr. 111; 1 Chi. Leg. News, 211.]

District Court, S. D. New York. Feb. 10, 1869.

BANKRUPTCY — POWER OF REGISTER — PROOF OF DEBT—QUESTION OF LAW OR FACT—CERTIFICATE.

A register has power to pass upon the satisfactory or unsatisfactory proof of debt, but where a question of law or fact is raised in respect thereof, the same must be certified for the decision of the judge under section four.

[In bankruptcy. In the matter of Henry Bogert and Robert D. Evans. Heard on the register's certificate, which was as follows:]

In this cause now pending before me at chambers of this court, the petitioners have been adjudicated bankrupts. There are some thirty creditors, nearly half of whom have proved their claims. Silas C. Evans, of New York City, a brother of one of the petitioners, (previous to the first meeting of creditors,) proved his claim in due form according to law, amounting to twenty-two thousand dollars. George Evans & Son also proved a claim, amounting to about nine thousand dollars. The Columbia Paper Company, of Springfield, Mass., proved their claim, amounting to six thousand five hundred dollars. Some sixteen other creditors also proved their claims, thus placing them in a majority in number but not in interest. Horatio F. Averill, attorney for creditors, filed an affidavit virtually alleging that the Silas C. Evans claim was against Robert D. Evans, and not against the estate of petitioners.

It was also alleged that the creditors, Endus Evans & Son, were respectively father and brother of the petitioner Evans. The creditors, by their several attorneys, objected to the claim of Silas C. Evans, and objected to his voting on said claim, and all the parties in interest then present, consented to my making an order allowing the creditor Evans to give further pertinent evidence to substantiate his claim, the creditors being at liberty to contradict, controvert, disprove or reduce the amount of said Evans' claim; that I was to pass upon the cause and certify the same to the district court, and also to adjourn the first meeting of creditors for one week. I considered it but justice, both to the creditor Evans, as well as to the remaining creditors, that there should be no question as to the amount or validity of the claim of said Evans, but that the amount should be definitely settled; and under section twenty-two, received the additional evidence. The attorney for the creditor Evans, desired me to pass upon the claim, without certifying the same to the district court. I hold, as a matter of law, that by section twenty-two, the register, if he shall see fit, may receive evidence, either for or against the admission of any claim; that it is his duty to do so, as he "has ample authority in the premises, and should exercise it to prevent unnecessary and unreasonable delay." In re Hyman [Case No. 6,984]. As the register has the same power as the district judge, "except that he is not empowered to commit for contempt, or to hear a disputed adjudication on any question of the allowance of suspension of an order of discharge." In re Getttleston [Id. 5,373]. I consider that any other practice would place a great amount of additional labor upon the district judge; to require him to read and pass upon the question of the validity of the proof of claims, would occupy much of his time; and that congress evidently intended that all questions except those above excepted, should be decided by the register: and upon the proof taken under the order made by me February 5, 1869, I allowed the claim of the said Evans at the amount proven, there being no contradictory evidence. I also hold that it is the better practice in cases where there are a large number of creditors having small claims, and a small number of creditors having large claims, that if any of the claims are disputed, and there are assets, that the amount of any claim, when disputed, should be definitely fixed upon by receiving additional proof or otherwise, before the election of the assignee.

In order that your honor may give a decision on the question, whether the register may pass upon the validity of the proofs or certify them to your honor, I make this certificate; not that it is a case where a certificate should be made, but that the practice may be definitely settled.

John Fitch, Register.

BLATCHFORD, District Judge. There is no doubt that the register has power, under section twenty-two, to pass upon the satisfactory or unsatisfactory character of a proof of debt, but in respect of this, as to all other matters, the duties and powers of the register are to be exercised in subordination to the provision of section four of the act, which requires that in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before the register, it shall be the duty of the register to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge. I do not perceive from the certificate that any issue was raised and contested as to the matter certified to me. The certificate would seem to be made rather under the first paragraph of section six, than under section four.

[1] [Reprinted from 2 N. B. R. 435 (Quarto, 139), by permission.]

Case No. 1,599.

In re BOGERT et al.

[2 N. B. R. 585 (Quarto, 178);[1] 1 Chi. Leg. News, 342.]

District Court, S. D. New York. May 8, 1869.

BANKRUPTCY — POWERS OF REGISTER — EMPLOYMENT OF WATCHMAN TO GUARD PROPERTY.

The bankrupts surrendered their property to the register, who appointed a watchman to guard and keep it, and submitted a report of his action to the district judge for approval, who ordered United States commissioner to take testimony as to the facts.

[Cited in Re Carow, Case No. 2,426; Re Brinkman, Id. 1,884.]

[In bankruptcy. In the matter of Bogert and Evans. Heard on the register's certificate, which was as follows:]

I certify that upon the receipt by me of the reference and schedules in the above entitled matter, I was requested, by the attorney for the petitioners, to appoint a suitable and proper person to take charge of the effects of the petitioners at once, as persons were then removing property from the store; the sheriff threatened to remove certain other portions thereof; other persons claimed that they were entitled to certain other portions of the property. I immediately visited the store of the petitioners, found a large amount of property in the store, and various claimants of the same. I immediately sent for and appointed a fit and proper person as keeper and watchman, and made the order in the case, dated December 31st, 1868 (appointing Mulligan watchman), deeming such appointment, under the circumstances, as absolutely necessary to keep and protect the property, until it could be turned over to the assignee. Such has been the uniform practice in this district, and the Case of Hasbrouck [Case No. 6,189] has, as I understand, been uniformly followed. I consider this case as one in which it was my imperative duty to appoint a keeper and watchman, it being a case in which many of the creditors, and those having the largest amounts, requested me to keep a watchman there continuously until the assignee went into possession. there being a conflict between the creditors. The rendition of the services is not disputed by the assignee, and I have made the order of the 6th May, 1869, under section four, bankrupt act, and the Case of Hasbrouck, as above cited. I was personally liable for this property; the attachments had been vacated by the state courts; the sheriff only had a right to the fees due him. I did not dare risk thirty thousand dollars worth of property to any sheriff. I was, for my own safety, as well as for the creditors, in duty bound to protect that property, as I did by appointing a watchman.

John Fitch, Register.

BLATCHFORD, District Judge. Enter an order in this case referring it to Joseph Gutman, Jr., United States commissioner, to take testimony and report it, as to the matters involved in the within papers, on notice to both the assignee in bankruptcy and Mulligan.

[1] [Reprinted from 2 N. B. R. 585 (Quarto, 178), by permission.]

Case No. 1,600.

In re BOGERT et al.

[3 N. B. R. 651 (Quarto, 161).][1]

District Court, S. D. New York. April 16, 1870.

BANKRUPTCY—ASSIGNEE — KINSHIP TO BANKRUPT —DISQUALIFICATION.

At a meeting of creditors, several members of one family offer proofs of claims for a large amount against the bankrupts, which were objected to by counsel for opposing creditors, and a postponement for investigation by the assignee, took place. One of the first named creditors, who is a son of one of the bankrupts, having a claim of fifty-six thousand nine hundred and thirty-nine dollars and eight cents against the estate, is elected assignee, which counsel aforesaid object to. *Held*, the son of a bankrupt is not the proper person to be invested with the power of assignee and investigate the claims of other members of same family. Appointment not affirmed.

[In bankruptcy. In the matter of John B. Bogert and Cornelius Oakley, Jr. Heard on the register's certificate, which was as follows:]

The undersigned, one of the registers in bankruptcy, hereby certifies to this honorable court, that, at the first meeting of creditors, objections were made to the following proofs by Mr. Ira O. Miller, of counsel for J. & D. J. Stewart, two of the creditors, to wit:

Kate B. Bogert	$ 7,456 88
E. A. Bogert	4,979 51
John V. Bogert	56,939 08
Elizabeth C. Bogert	595 92
Tyrril Bogert	516 31
John F. Lowell	19,834 42

Thinking that said claims ought to be investigated by the assignee, I postponed the proof of them until the assignee should be chosen, whereupon said John V. Bogert was elected assignee by the votes, as per statement annexed. Mr. Miller objected to the confirmation of said Bogert as such assignee, on the ground: First. That he was a nonresident of the district. Second. That he is the son of one of the bankrupts, having a claim against the estate of said bankrupt above referred to. Upon said objections, I proceeded, on motion of Mr. Miller, Hon. Charles A. Peabody objecting, and took the testimony of said John V. Bogert, which is hereto annexed.

Pursuant to the requirements of rule 19 of this honorable court, I beg to submit that, during the said meeting, which lasted two days, I saw nothing that tended to throw any suspicion upon the validity and good faith of the claim of the said John V. Bogert, nor do I see any reason why his election

[1] [Reprinted by permission.]

should not be confirmed, save the fact that he is a young man about thirty-two years of age, a son of one of the bankrupts, having a claim amounting to fifty-six thousand nine hundred and thirty-nine dollars and eight cents against the estate; and the further fact that members of the family of said bankrupt above-named present claims against said estate in the aggregate amounting to thirteen thousand five hundred and forty-eight dollars and sixty-two cents; and the further fact that John F. Lowell, who is a young man, the friend and lately a clerk of the bankrupt, and now a clerk in a hardware store at a salary of twelve dollars a week, presents a claim for nineteen thousand eight hundred and thirty-four dollars and forty-two cents against said estate, if indeed these facts be at all reasons why his election should not be affirmed. I think it, however, my duty to call the attention of the court to 2 N. B. R. 45 [In re Powell, Case No. 11,354]. All of which is respectfully submitted.

Memorandum.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the New York Times and Commercial Advertiser, and by special notice served personally, or through the mail, we, whose names are hereunder written, being the greater part in number and in value of the creditors of the said John B. Bogert and Cornelius Oakley, Jr., bankrupts aforesaid, present at this meeting, and who have proved our debts, have chosen, and do hereby nominate and choose John V. Bogert to be the assignee of the said bankrupt's estate and effects, and we do desire that he may be appointed such assignee accordingly:

John W. Stevens, Esq., New York City	$ 750 00
Meriden Butt Co., Meriden, Conn.	141 28
Blackwell & Burr, New York City.	433 50
Charles Van Bokkelin, New York City	400 00
Nathan Weed, New York City	55 65
C. C. Abel, New York City	1,286 61
Frederick H. Polt, New York City.	48 00
Cutter, Tower & Co., New York City	42 85
Clark, Wilson & Co., New York City	169 63
De Witt Broth. & Co., New York City	23 59
Aaron L. Reid, New York City.	300 00
Wm. A. Dodge & Co., New York City	356 35
Greenfield, Tool & Co., Greenfield, Mass.	137 12
W. & S. Butcher, Sheffield, England.	82 80
R. E. Hadley, Deposit, N. Y.	66 58
C. Lockwood & Co., New York City.	204 19
Bless & Drake, Newark, N. J.	122 80
Augustus W. Payne, New York City	2,284 06
Newcomb Bros. & Sons, New York City	34 35
Sampson & Baldwin, New York City.	328 76
J. S. Leverett & Co., New York City.	23 75
John Post, New York City.	121 98

"John V. Bogert called and duly sworn. Mr. Peabody objected to the introduction of his testimony. Objection overruled. By Mr. Miller: (1) Q. Are you the son of the bankrupt? A. I am. (2) Q. Do you keep house or board? A. I have boarded. (3) Where? A. 140 W. 34th street. (4) Q. When? A. To-day. (5) Q. When did you take it? A. I secured my place to-day. (6) Q. Today? A. Yes, sir. (7) Q. Where did you board previous to that? A. Brooklyn, 105 Hicks street, part of the time. (8) Q. How long have you boarded there? A. Whenever I am here, off and on. (9) Q. About how long, some months and years? A. While in town, some two or three years. (10) Q. Where are your things? A. Still in my trunk. (11) Q. In Brooklyn? A. Yes, sir. (12) Q. You have not moved your things? A. No, sir. (13) Q. But you intend to move? A. I intend to do so this day. By Mr. Peabody. (14) Q. Have you a place of business? A. 89 Pearl street, New York city. (15) Q How long have you had a place of business in the city of New York, sir? A. Since '66. (16) Q. Have you had a place of business in the city of New York all the time since '66 to the present time? A. Constantly. (17) Q. And have you been in business all the time there? A. Yes, sir. By Mr. Miller. (18) Q. What is your business there? A. I have an office there for the transaction of the Washington claim business, and also for the operation of a patent. (19) Q. Are you in business on your own account? A. My own account. (20) Q. Not as clerk or employee? A. No, sir."

Taken before me this 14th day of April, 1870. I. T. Williams, Register.

BLATCHFORD, District Judge. As the register has thought it proper to postpone the proof of claims made by members of the family of one of the bankrupts, amounting to thirteen thousand five hundred and forty-eight dollars and sixty-two cents, until an assignee is chosen, on the ground that he thinks that such claims ought to be investigated by the assignee, I do not think proper that the son of the bankrupt, of whose family such persons are members, should become such assignee. I therefore do not confirm or approve of his appointment.

BOGERT v. The JOHN JAY. See Case No. 7,352.

In re BOGET. See Case No. 1,599.

BOGGS (BENNETT v.). See Case No. 1,319.

Case No. 1,601.

BOGGS v. The LOUTRA.

[Betts' Sc. Bk. 533.]

District Court, S. D. New York. March 6, 1856.

SALVAGE—TOWAGE—COMPENSATION — EXORBITANT CONTRACT.

[In moderate weather, a tug brought a Portuguese brig from 15 to 20 miles below Sandy Hook into New York harbor; and her agents libeled the brig for $2,000, alleging that she was disabled and in distress, and that her master had agreed to pay that sum. For the brig, it was shown that she only required a pilot; that no one aboard could speak English; and

that she only intended to offer 200 Portuguese milreas ($224), which had been tendered. *Held*, that the service was a towage, merely, for which $224 was a reasonable compensation, and that even if the master agreed to pay $2,000, under apprehension of losing his vessel, the contract was exorbitant, and not enforceable.]

[In admiralty. Libel by Walter D. C. Boggs against the brig Loutra for alleged salvage services. Decree for libellant, as for a towage.]

S. P. Nash, for libellant.
E. C. Benedict, for claimant.

The brig was a Portuguese vessel of about 100 tons burden, found by the steam tug Huntress, on the 15th of January last, 15 or 20 miles below Sandy Hook light, on the coast, with a signal up for a pilot. The tug took her in tow and brought her into this harbor, without injury or exposure to the tug or her crew, within a period of 3 to 5 hours. The service was all performed in the day time, and in moderate weather. The libellant proves on his part that the master of the brig agreed to pay $2,000 for the service. The action is brought to recover that sum, and the libel charges that the vessel was disabled and in distress, and that the service was a salvage service. For the claimant it is proved that the brig only required a pilot; that neither her master or any of the crew could speak English; and that, by signs and figures passed between the master and the man from the tug, it was understood on the brig that 200 Portuguese milreas, and not $2,000, was the price agreed to be paid. That sum was offered to the libellant, and refused, before suit brought.

THE COURT held that the service was one of towage, merely, and that the sum demanded was unreasonable and exorbitant; that, if the master had made such agreement under apprehension of the loss of his vessel, the court would not enforce it against him; but that in this case the brig was in no peril, and the tug was entitled to no more than a fair compensation, which, on the facts, was adjudged to be 200 milreas, or $224, without costs.

Case No. 1,602.

BOGGS et al. v. PARR et al.

[3 Hughes, 504.][1]

Circuit Court, D. Maryland. July 5, 1879.

COLLISION—BETWEEN STEAM AND SAIL—DIVISION OF DAMAGES AND COSTS.

Example where both vessels are in fault in a collision, and the damages are divided.

[In admiralty. Libel by Joseph E. Boggs and others against Israel M. Parr and Henry A. Parr for damages caused by collision. Decree for libellants.]

BOND, Circuit Judge. This cause having been heard and considered, the court doth find the facts to be the libellants are the owners of the schooner Virginia and her cargo; and that the respondents are the owners of the steam-propeller Ruggles. That between eleven and twelve o'clock on the night of March 1st, 1878, the Virginia was proceeding up the Chesapeake bay on a voyage from Accomac county, Virginia, to Baltimore, and the Ruggles was proceeding on a voyage in an opposite direction down the bay. Each of these vessels saw each other at the distance of a mile or a mile and a half before they collided, but the schooner was navigated in an unseamanlike manner, and instead of holding her course changed it once or twice, and brought about the collision by which she was sunk. But the court finds that, when the steamer saw the unskilful and dangerous way in which the schooner was being navigated, she did not use due and timely caution nor proper measures to prevent the impending danger. And the court finds the loss and damage to have been to the schooner and cargo twenty-six hundred and eight dollars.

And it finds the conclusion of law to be that where a collision is caused by the fault of each vessel the damages and costs are to be equally divided. And a decree will be entered accordingly.

It is therefore, this 5th day of July, A. D. 1879, adjudged, ordered, and decreed that the libellants recover of the respondents the sum of thirteen hundred and four dollars, and that the cost of the case be divided, each party paying one-half thereof.

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

BOGGS (UNITED STATES v.). See Case No. 14,618.

Case No. 1,603.

BOGGS v. WILLARD.

[3 Biss. 256;[1] 4 Chi. Leg. News, 325; 16 Int. Rev. Rec. 22; 7 Am. Law Rev. 172.]

Circuit Court, N. D. Illinois. June Term, 1872.

REMOVAL OF CAUSES—NOT AFTER TRIAL AND FINAL HEARING—NOT TO OBTAIN REHEARING.

1. Under the act of March 2, 1867 [14 Stat. 559, c. 196], for the removal of causes from state to federal courts, a party whose case has been tried in the state courts and appealed to the supreme court of the state, where the decree of the court below was reversed, with instructions to dismiss the suit, has no right to a transfer of the case.

[See Stevenson v. Williamson, 19 Wall. (86 U. S.) 572; Brice v. Somers, Case No. 1,856.]

2. An application comes too late after the issues have been tried in the state courts and a final hearing had.

3. It was not the intention of congress that a party dissatisfied with an adjudication in the state courts should have the right to remove the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Am. Law Rev. 172, contains only a partial report.]

cause into the federal courts and there have a rehearing.

4. If the case is such an one as to give the party a right to a writ of error to the supreme court of the United States under the 25th section of the judiciary act, a review may be had in that manner, but in no other.

This was an application on the part of the complainant, George Boggs, for leave to file in this court a transcript of the record in this case, from the superior court of Cook county. [Application denied.] On the 6th of October, 1868, the complainant had filed his bill in the superior court of Cook county for relief against the sale under a power of sale contained in a certain mortgage given by himself to defendant Willard, setting up in substance that at the time the mortgage became due, complainant was in the state of Louisiana, and was there retained by reason of the state of war which then existed between the Southern Confederacy and the United States; that while the non-intercourse acts and the proclamations of the President in pursuance thereof were in force, the said Willard proceeded to sell the property in question upon the mortgage, and defendant Smith became the purchaser thereof; that afterwards Smith conveyed the property to Willard, and that the defendants, Crane, Apthorp, Fitch, and Cotter, had since acquired some interest in the property by contracts or agreement with Willard, who still held the fee thereof. Of the defendants, Crane and Fitch only were served with process. Willard appeared and answered, and an answer was also filed by Fitch, both of said answers denying the material allegations in the bill of complainant. The defendants, George Smith, Redmond Cotter, and William P. Apthorp, were brought into court by publication. Replications were duly filed, and on the 7th of September, 1869, the case was brought to final hearing and a decree rendered granting the relief prayed for by the bill. The defendants, Willard and Fitch, appealed to the supreme court of this state, where the errors assigned were heard and considered at the September term, 1870, and the supreme court reversed the decree of the superior court, and remanded the case to the superior court for further proceedings, in conformity with the opinion of the supreme court, which was that the bill should have been dismissed. The opinion of the supreme court will be found in 56 Ill. 163. On the filing of the mandate of the supreme court in the superior court at the June term, 1872, the complainant petitioned for a removal of the case from said court to this court, under the provisions of the act of March 2, 1867 (14 Stat. 558). This application was refused and the cause dismissed in conformity with the mandate and opinion of the supreme court. It was conceded that the petition and affidavits asking for the removal were in due form, and that a proper bond had been tendered.

Edward S. Isham, for complainant.

Goudy & Chandler, for defendants.

BLODGETT, District Judge. Complainant now asks leave to docket the cause in this court, notwithstanding the action of the superior court in the premises, on the ground that he has fully complied with the law and is entitled to a transfer of the case into this court, and we concede that his application would be entitled to a favorable consideration were it not for the fact that the case seems to have been fully disposed of by the state court prior to the making of this application.

The act of March 2, 1867, is an amendment to an act for the removal of causes, in certain cases, in state courts, approved July 27, 1866 (14 Stat. 306), which reads as follows: "If in any suit already commenced, or that may hereafter be commenced, in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, it be made to appear to the satisfaction of the court, a citizen of the state in which the suit is brought, is or shall be a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a state other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, may at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, and it shall be thereupon the duty of the state court to accept the surety, and proceed no further in the cause as against the defendant so applying for its removal."

It will thus be seen that the right to transfer a cause from the state to the federal court must be exercised before the trial or final hearing of the cause has transpired in the state court. An examination of the record in this case shows that the superior court had proceeded to hear the issues made by the bill, answers and replication, and had adjudicated thereon; that an appeal had been taken by part of the defendants to the supreme court of the state, where the decree of the superior court was reversed, and the

cause remanded to be dismissed. This seems to me to be clearly a final hearing of the case. It was competent for the supreme court, under the practice of this state, to have dismissed the bill in the supreme court; but instead of doing so, they merely reversed the decree of the superior court, and ordered the case back to the superior court, to be there dismissed in conformity with their opinion. So that the superior court had no alternative, under the mandate of the supreme court, than to dismiss the bill in accordance therewith. The motion for a transfer of the case was not made until after the case had been finally heard in both tribunals, and it clearly seems to me that the application for a transfer came too late.

It was not the intention of congress that a party dissatisfied with an adjudication in the state courts should have the right, after a decision against him, to remove the cause into the federal courts, and there have a rehearing. If the case was such an one as to give the party a right to a writ of error to the supreme court of the United States, under the provisions of the 25th section of the judiciary act [1 Stat. 85], a review may be had in that manner; but it seems clear to me that after a case has had a hearing before the state court and been finally disposed of, the federal courts cannot take jurisdiction of it, except as is provided in the 25th section.

Other objections to this court taking jurisdiction of the matter were also urged by the defendants; but as this point seems to me conclusive, I have not thought proper to allude to them. Application denied.

NOTE [from original report]. On the dismissal of the bill by the superior court, the complainant sued out a writ of error from the supreme court, and the cause was submitted at the September term, 1873, and is now pending. For numerous authorities on this question of removal from state courts, consult, also, Akerly v. Vilas [Cases Nos. 119, 120]; Kingsbury v. Kingsbury [Id. 7,817].

BOGGS, The PAUL. See Case No. 10,846.

Case No. 1,604.

The BOHEMIAN.

[Cited in The W. B. D., Case No. 17,306. Nowhere reported; opinion not now accessible.]

BOHLENS (MULLER v.). See Case No. 9,914.

BOHMER (DUWELL v.). See Case No. 4,213.

BOHN (SMITH v.). See Case No. 13,015.

BOICE (UNITED STATES v.). See Case No. 14,619.

BOILEAU (LAMBSON v.). See Case No 8,030.

BOIT (DE LOVIO v.). See Case No. 3,776.

BOJORQUES (UNITED STATES v.). See Case No. 14,620.

Case No. 1,605.

BOKER et al. v. BRONSON.

[4 Blatchf. 472;[1] 44 Hunt, Mer. Mag. 74.]

Circuit Court, S. D. New York. Oct. 31, 1860.

CUSTOMS DUTIES—INSUFFICIENT APPRAISEMENT—PROTEST—NEW TRIAL—INCOMPLETE TRIAL.

1. A protest against the payment of duties on the ground that "the appraisers had not used or employed sufficient means, or made sufficient examination" of the article, to determine its value, may be sufficient, under the decision in Converse v. Burgess, 18 How. [59 U. S.] 413, as a foundation for proof that the appraisers did not examine samples from the statute number of packages, and did not at all examine either packages or samples, but it offers little information to the collector as to the real ground of the objection.

2. A new trial was granted, on payment of costs, on account of the loss of papers in the custom-house, and because it was doubtful whether the truth of the transaction appeared on the trial, for the want of the proper preparation of the defence.

At law. This was an action [by John G. Boker and others] against [Greene C. Bronson] the collector of the port of New York, to recover back an excess of duties paid under protest on an importation of liquors. At the trial, the plaintiffs had a verdict, and the defendant now moved for a new trial. [Granted.]

Almon W. Griswold, for plaintiffs.

James I. Roosevelt, Dist. Atty., for defendant.

NELSON, Circuit Justice. The principal question in this case is, whether or not the protest is sufficiently explicit, within the requirement of the act of congress of February 26, 1845 (5 Stat. 727). The words of the act are, that, before making payment of the duties, the importer must protest in writing, signed by him or his agent, setting forth "distinctly and specifically the grounds of objection" to the payment of the duties. In Converse v. Burgess, 18 How. [59 U. S.] 413, the following words were held sufficient to raise an objection on the trial that the appraisers had not made the proper examination of the goods from the several packages, as required by the act: "That the goods were not fairly and faithfully examined by the appraisers." In that case, the article imported was sugars from Cuba, and the samples upon which the appraisement was made, had been drawn from the casks, and exposed for some time to the air, and would not afford a true criterion by which to judge of the value of the article. The majority of the judges were of the opinion that the protest was sufficiently specific to cover the objection. In the present case, the question of appraisal arises in regard to an importa-

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

tion of liquors, and the objection is that the examination was defective in not examining samples from the statute number of packages, and also that neither packages nor samples were at all examined by the appraisers. The words in the protest, which are claimed to cover the objection, are, that "the appraisers had not used or employed sufficient means, or made sufficient examination of said brandies," to determine their value.

It may be difficult to distinguish this case, so far as the sufficiency of the protest is concerned, from the case above referred to, but the words, in the connection in which they are found, could afford but little information to the collector as to the real ground of the objection. They are found among a mass of objections covering almost every one that can arise under the revenue laws and extending over several sheets of foolscap. Certainly, the collector would be obliged to go over the entire process of carrying goods through the custom-house, in every instance of entry, in order to meet the almost countless objections enumerated in this paper. The protest seems to have been made without reference to any specific objection, but with a view to hit any that might happen in the course of levying the duties. I think that the departure from a strict construction of the act in the case above referred to, has led to this general and indefinite statement of the objections, and that it may be necessary for congress to interpose and correct the abuse.

The trial in this case was embarrassed on account of the loss of the papers in the custom-house, and it is exceedingly doubtful whether the truth of the transaction appeared on the trial, for the want of the proper preparation of the defence. I shall grant a new trial, with a view to enable the government to furnish the proper evidence, if in their power, but it must be on payment of costs.

[NOTE. For denial of motion for judgment on the verdict because of nonpayment of costs, see Case No. 1,606.]

Case No. 1,606.

BOKER v. BRONSON.

[5 Blatchf. 5.][1]

Circuit Court, S. D. New York. Jan. Term, 1861.

PRACTICE—ORDERS—ENTRY OF ORDER ON DECISION.

1. The practice, in this court, on a decision being made by the court, is to enter a formal order upon it, and not to regard the decision itself as an order.

[Cited in Plant v. Gunn, Case No. 11,205.]

2. Where, on a motion for a new trial, a written decision was made by the judge holding the court, and filed, granting a new trial on condition of the payment of costs "within twenty days after service of this order," and no other or more formal order was made, and the costs were not paid: *Held*, that the party making the motion was not in default, in not paying the costs.

At law. This was an action at common law [by John G. Boker against Greene C. Bronson], in which a verdict was rendered for the plaintiff. On a motion for a new trial made by the defendant, a written decision was made by the judge holding the court, and filed, granting a new trial on condition that the defendant "pay the costs of the trial within twenty days after service of this order." [Case No. 1,605.] No other or more formal order was made. A copy of the decision was served, but, the costs not having been paid, the plaintiff now moved for judgment on the verdict. [Denied.]

Almon W. Griswold, for plaintiff.

James I. Roosevelt, Dist. Atty., for defendant.

SMALLEY, District Judge. The question of practice in this case is, whether the decision of the judge is to be considered as an order, or whether a regular order should have been entered. The practice in this court is, to enter an order upon a decision made by the court. As no such order was entered in this case, the defendant was not in default in not paying the costs. The proper course was for the plaintiff to enter the order and serve a copy of it.

Motion denied.

Case No. 1,606a.

BOKER v. REDFIELD.

[40 Hunt, Mer. Mag. 705.]

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

CUSTOMS DUTIES—WAIVER OF OBJECTION—SIMILAR ARTICLES.

[1. The provision of the tariff act of August 30, 1842 (5 Stat. 564), that when an appraisement is made upon an increased valuation, and not on that in the invoice, the appraiser shall view the property, and that if he does not do so, and the importer pays the duty under protest, the latter can recover it back, is intended for the benefit of the importer, and is waived by failure to protest.]

[2. The law requires that the importer shall specifically and distinctly state in his protest the ground of objection to the payment of the duties, and a recovery thereof can only be had by the importer on the ground stated.]

[3. Under the provision of the tariff act of August 30, 1842 (5 Stat. 565), that there shall be levied on each non-enumerated article which bears a similitude, either in material, quality, or texture, or the use to which it may be applied, to any enumerated articles chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars mentioned, it is not contemplated that non-enumerated articles should in every particular bear a similitude to an enumerated article.]

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

At law. Action by John G. and J. Boker against Heman J. Redfield, collector, etc., to recover back certain duties on importations of brandy and gutta percha paid under protest, and alleged to have been illegally levied. The jury found for the plaintiffs on the gutta percha, and for the defendant on the brandy.]

INGERSOLL, District Judge (charging the jury). The plaintiff or plaintiffs in this case some time ago paid a certain amount of money for duties upon an importation of brandy, and also for duties upon an importation of a quantity of gutta percha. A greater valuation was put upon the brandy at the custom-house than was contained in the invoice, and the duties assessed upon that increased valuation of the brandy, were paid by the plaintiffs. The claim upon the part of the plaintiffs is that that increased valuation was not made according to law; that the money received by the collector from them was unlawful, and that they have a right to recover it back. The claim, so far as regards the gutta percha is, that it was by law liable to a duty of only 10 per cent.; that the collector imposed upon it a duty of 20 per cent.; and the object is to recover back from the collector that additional duty of 10 per cent. which it is claimed was illegally exacted.

I will first turn your attention to the question arising upon the duties paid upon the brandy. Where an appraisement is made upon an increased valuation from that put in the invoice, the law provides that the appraiser shall view the property—and the importer has a right to insist upon it; and if he does insist upon it, and the appraiser raises the duty without viewing the property, the importer has a right to complain. And if he pays the duty upon the increased valuation, and makes his protest, he can recover it back. This provision of law is made for the benefit of the importer, and so far as it is of benefit to him, he can waive it; and if he does waive it, he cannot afterwards say that the requirements of law have not been complied with. In this respect, so far as the brandy is concerned, these requirements of law were not complied with. There was an increased valuation, and the duties on the increased valuation to the amount of $333.56 were collected. But the importer cannot be permitted to say that the property was not viewed by the appraiser, unless he has made a protest to that effect. He is confined to his protest. If there has been an illegal exaction, still the importer cannot complain about it unless he file at the time of the payment, or before the payment, the protest such as is prescribed by law, which protest is a statement in writing, setting forth distinctly and specifically the ground of objection to the payment of the duties. And the construction that I put upon this protest in this case is not that the appraiser did not view the brandy, but the specific objection is that he did not either examine said brandy in casks, nor samples of one cask in ten. And if one cask in ten was examined by samples, and if before this appraisement was made it was examined by samples of one at least in ten in this particular case—if that took place, then the importer cannot recover back the amount paid. So that if you should be of the opinion that, before this appraisement was made, this brandy was examined by samples, at least one sample in ten packages, the plaintiffs could not recover back the amount of duty, even though it may have been illegally exacted. The law prescribes that the importer should set forth in his protest the reasons why he objects to the proceedings of the appraiser; and the reasons in this protest are that he did not examine by sample one sample in ten of the packages, and if the appraiser did not so examine it, then there can be no recovery back of the amount paid. Whether the appraiser has or has not, depends upon the testimony of the witnesses from the custom house, who have been examined before you.

The other items are for an excess of duties paid on the importation of gutta percha by three several importations. You need not trouble yourselves about the protest so far as it respects gutta percha. If the collector had no right to impose a greater duty than 10 per cent., and as he did impose 20 per cent. upon it, in such a case as that the plaintiffs would have a right to recover this 10 per cent. back; and the question resolves into this: What rate of duty was this gutta percha liable to? When the tariff law of 1846 [9 Stat. 42] was passed, congress enumerated all the principal articles upon which duties were to be paid; that is, of such articles as were known to them. India rubber and its uses were known to them at that time; and therefore they imposed upon it a duty of 10 per cent. Gutta percha and its uses were not known to them at that time; therefore they could put no specific duty upon it. But it had been provided in the act of 1842 [5 Stat. 548] that, where certain non-enumerated articles were introduced into the country, they should pay a duty according to a rule which was laid down in that act of congress of 1842. Gutta percha was not introduced into this country until 1847; and the rule is that non-enumerated articles, which are not similar in any respect to any enumerated articles, pay a duty, according to act of congress of 1846, of 20 per cent. But according to this provision of the act of congress of 1842, it is provided that there shall be levied and collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, or texture, or to the use to which it may be applied, to any enumerated articles chargeable with duty, the same rate of duty which is levied and

charged on the enumerated article which it most resembles in any of the particulars above mentioned.

And the question is whether there is within the meaning of this law a similitude between India rubber and gutta percha, either in quality, material, texture or the uses to which they are applied: and if there is within the meaning of this law such similitude, then it follows that gutta percha was subject only to a duty of 10 per cent. The plaintiffs claim that there is this similitude, not only in the use to which it is applied, but also in the material itself. Both India rubber and gutta percha come from the gum or sap of trees. They are both imported from foreign countries, and when vulcanized they are both applied to similar uses; they are made into coats and other articles. After they are hardened by the vulcanizing process, they are made into combs, canes, pencil-cases, knives and forks, picture frames, and every thing of that kind to which a hardened substance is adapted. This law of congress did not contemplate that the non-enumerated articles should, in every particular, bear a similitude to an enumerated article. The law is, that there shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality or texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated articles which it most resembles in any of the particulars above mentioned. And when there is such a similitude, the same duties are assessed on non-enumerated articles as are assessed on an enumerated article which they most resemble. There is no evidence in this case that there is any similitude between gutta percha in the use to which it is applied, and any enumerated article except India rubber. You are, therefore, to determine whether this gutta percha has a substantial similarity either in its material, quality, texture, or the use to which it may be applied, to India rubber; and if it has, it will follow that it was subject to a duty of 10 per cent., and consequently that there was an excess of 10 per cent. received by the collector, which he was not authorized to receive. You need not trouble yourselves with the amount. I will instruct you to call your attention to two question: First, whether, under the instructions I have given you, you find for the plaintiff on the importation of the brandy or for the defendant; and then you are to determine whether you find for the plaintiff or defendant on the claim made for the excess of duty paid on the gutta percha. If you find for the plaintiff on either of these two claims, the amounts can be ascertained by a reference, etc.

BOKER (WHITE v.). See Case No. 17,537.

Case No. 1,607.

BOLCHOS v. DARREL.

[Bee, 74.] [1]

District Court, D. South Carolina. Sept. 29, 1795.

PRIZE—NEUTRAL PROPERTY IN ENEMY'S SHIP—CAPTURE OF MORTGAGED PROPERTY.

Neutral property in an enemy's ship is forfeited by the 14th article of the treaty between the U. States and France. If mortgaged property is left in the possession of the mortgagor who puts it on board the vessel of a belligerent, it is subject to capture, and the mortgagee is without remedy.

[Distinguished in U. S. v. The Arcola, Case No. 14,464a.]

In admiralty.

[Before BEE, District Judge.]

Captain Bolchos captured and brought into this port a Spanish prize; on board of which were these slaves, formerly mortgaged to Savage, whose agent, [Edward] Darrel, by virtue of Savage's mortgage, seized and sold them. The facts have been admitted, and I am called upon to pronounce on the law arising therefrom.

I was at first doubtful whether this court had jurisdiction, Darrel's seizure, under the mortgage, having been made on land. But as the original cause arose at sea, every thing dependent on it is triable in the admiralty. Cro. Eliz. 685, Yel. 135, Le Caux and Eden, and other cases are full to this effect. If, indeed, I should refuse to take cognizance of the cause, there would be a failure of justice, for the court of common law of the state has already dismissed the cause as belonging to my jurisdiction in the admiralty. Besides, as the 9th section of the judiciary act of congress [Act Sept. 24, 1789, 1 Stat. 77] gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.

Bolchos demands restitution of these negroes, by virtue of the 14th article of our treaty with France. The claimant contends that the negroes are not within that clause, as they were not laden on board the prize by the real owner, the mortgagee. And that no unauthorized act of the mortgagor ought to affect an innocent third person. As to this point, it is true that a mortgage vests a right in the mortgagee under certain conditions, and for certain purposes. Yet, while the property continues in possession of the mortgagor, he may exercise the rights of an owner, may maintain trespass or trover for it, or, as in the present case, may hire it to others. But the question of property is here of little consequence; for the mortgagor is a Spanish subject, and the mortgagee a subject of Great Britain.

[1] [Reported by Hon. Thomas Bee, District Judge.]

It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited. Let these negroes, or the money arising from the sale, be delivered to the libellant. But as there was colourable ground for the defendant's seizing them on behalf of his principal the mortgagee, let the costs be paid by each party for himself, and the expenses of the suit be divided.

BOLD RUNNER, The (GOVE v.). See Case No. 5,644.

BOLIER (REILING v.). See Case No. 11,671.

Case No. 1,608.

The BOLINA.

[1 Gall. 75.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

EMBARGO—ACT JAN. 9, 1809—SEIZURE—INFORMATION—SUFFICIENCY—PROCEEDING IN REM—AUTHORITY OF COLLECTOR — SUFFICIENCY OF NOTICE—DISTRICT COURTS—JURISDICTION.

1. In an information on the third section of the act of the 9th January, 1809, c. 72 [4 Bior. & D. Laws, 190; 2 Stat. 507], for not unloading, or giving bonds, the time of receiving the act at the port, where the offence was alleged to have been committed, and also of the notice to unload, were material and traversable.

2. In such an information, it was held insufficient to allege, that notice was given "to discharge the cargo, or to give bond, according to the law in such case provided." The nature of the requisition should have been stated, and to whom the notice was given, that the court might judge of its sufficiency.

3. A prosecution in rem, is authorized by the act 9th January, 1809, c. 72, and an information would have lain upon common law principles, even had no mode of prosecution been provided.

4. The collector, by that act, was authorized to seize for any violation, and would have had the right, even upon general principles.

5. To make such a seizure legal, it was not necessary that it should be made by the collector in person, or by his written authority; nor that a record of such seizure should be made.

6. The court has jurisdiction in revenue causes, although the property seized may never have come into possession of the officers of the court.

[Cited in U. S. v. The Reindeer, Case No. 16,144.]

[See The Abby, Case No. 14; The Little Ann, Id. 8,397; The Merino, 9 Wheat. (22 U. S.) 401.]

7. Of the exchequer practice in England.

8. It was not necessary that the collector's notice, under this act, should specially state the requisitions of the act.

[9. Cited in Robinson v. Hook, Case No. 11,956, to the point that in information on seizures the informer is always, as seizor, named a party, and, if he is entitled to any share of the forfeiture, the judgment of the court ascertains and decrees it.]

[10. Cited in U. S. v. Trice, 30 Fed. 495, to the point that penal acts should be interpreted according to the manifest intent of the legislature.]

[Appeal from the district court of the United States for the district of Massachusetts.]

G. Blake, for United States.

Mr. Prescott, for claimant.

STORY, Circuit Justice. An information of seizure was, on the 13th February, 1809, filed against the Bolina and cargo, for not unlading her cargo, or giving bonds, pursuant to the 3d section of the act of January, 1809, c. 72 [4 Bior. & D. Laws, 190; 2 Stat. 507]. Upon the hearing in this court, the material facts appeared to be:—That on the 17th of January, 1809, the schooner Bolina lay at Newburyport, nearly laden with a cargo of fish and lumber. On the 16th or 17th of the same month, the act of the 9th of January, 1809, was received at the custom house at Newburyport. On the 17th of the same month, the collector of that port sent a written notice to the claimant, as follows. "Collector's office, Newburyport, 17th January, 1809. You are hereby required to comply with the requisitions of the law, by giving bond, or unlading your vessel, the schooner Bolina. I am, &c., Ralph Cross, Collector. Mr. Solomon Haskell." This notice was received by the claimant on the same day. A few days after, the collector called in person on the claimant, and told him he had better comply with the law, by unloading or giving bonds. It does not appear what the claimant's answer was to this recommendation. On the 21st of January, the claimant procured a policy to be underwritten on the vessel and cargo, against seizure and condemnation by the government. On the 28th of the same month, an officer of the customs was sent to the claimant to inform him that the ten days had expired; to which notice he returned no particular answer. On the 1st of February, the collector directed the surveyor of the customs to take possession of the schooner and cargo, as forfeited; which he accordingly did, and gave information of the seizure, on the evening of the same day, to the claimant. From this time to the 20th of December, 1809, the schooner and cargo remained in charge of the inspector of the customs, under the direction of the collector, and was then, upon application of the parties, sold by order of court. On the 23d of February, 1809, process was served on the vessel and cargo, according to the usual manner in revenue causes, and notice thereof was given to the person having charge of the schooner, and also by advertisements in the public newspapers. It was further in evidence, that sometime between the 9th and 20th of January, 1809, a public

[1] [Reported by John Gallison, Esq.]

meeting was had of many of the merchants of Newburyport, at which they voted not to give bonds according to the act of 1809 [supra], but it is not proved that the claimant was present.

A variety of grounds of defence have been presented to the court by the learned counsel for the claimant, and now remain for their decision.

1. It has been contended, that the act does not authorize any prosecution in rem, but confines the remedy for violations of it to personal suits. I do not think that this objection can be much relied upon, because the 12th section of the act authorizes all forfeitures under it to be recovered "by an action of debt, or by indictment or information." Now the latter is equally applicable to proceedings for penalties, and to proceedings in rem, for forfeitures. And it cannot be imagined, that the legislature should have decreed forfeitures in rem, and provided for their recovery either by action of debt, or indictment. And yet they must be presumed to intend, that these forfeitures might, in some shape, be recovered. The word information is therefore justly and rationally inserted by the legislature, for this purpose. But if there had been no mode of prosecution provided, I should have had no doubt that an information would have lain upon common law principles.

2. It is further contended, that the collector had no authority to make a seizure in this case, it not being within the express purview of any statute giving him authority to seize. To this it has been answered, that the case is within the 70th section of the collection act of 2d March, 1799 [1 Stat. 678], which enacts, that the several officers of the customs shall have authority to make seizures of vessels and goods, which shall be liable to seizure, under that act, or any other act of the United States thereafter made, respecting the revenue. I will not undertake to say how far the present may be such an act, because in my judgment, the resolution in the negative will not assist the claimant.[2] At common law, any person might seize uncustomed goods to the use of the king and himself, and thereupon inform for a seizure; and if the informer be not entitled to any part, the whole shall, on such information, be adjudged to the king. This doctrine is supported by the authority of Lord Hale (Harg. Law Tracts, 227); and better authority could not be; and by the judgment of the court in Roe v. Roe, Hardr. 185, and Malden v. Bartlett, Parker, 105. This right of seizure, as to the customs, was restrained to officers of the customs and others specially authorized by the statute 13 & 14 Car. II. c. 11, §§ 15, 17; but it remains in all other cases, as it stood at common law. On general principles, therefore, the objection would be without foundation. But upon the true construction of the act of [January 9] 1809 [2 Stat. 507], I apprehend, that custom-house officers are directly authorized. They are specially required to carry the act into effect; and in cases of seizure, other than by commanders of the public armed ships, the forfeitures are to be distributed according to the collection act of 2d March, 1799, section 91 [1 Stat. 697]. Now by that act, one moiety is in general adjudged to the collector, naval officer, and surveyor of the port or such of those officers as exist in the district; but if the forfeiture is recovered in pursuance of information from a third person, such informer is entitled to one half of the moiety. The other moiety belongs to the United States, unless in cases of information by an officer of a revenue cutter, in which latter case the officers of such cutter take a moiety, and the collector, and the United States, each one half of the remaining moiety. If this be true, it would certainly give an implied authority to the collectors and other informers to pursue, by seizure, the rights which the law attaches to them.

3. It is further objected, that even if the collector was duly authorized, the seizure was not lawfully made, because made by a verbal, and not a written authority of the collector, or by himself in person; and further, because no record or memorandum was made thereof. But I know of no statute requiring such authority to be in writing; and if the objection be well founded, it rides over all the ordinary revenue proceedings. Yet in point of practice, no such order has been usually given, nor deemed necessary; and certainly no record has been required of such seizure. And for what purpose should it be done? The seizure itself is full notice, for the possession is notorious and open. If wrongfully taken, the party has his remedy against the person in possession, even in the admiralty: If rightfully, the proceedings immediately advance into information and condemnation. I have looked into this subject (so far as the books would enable me) to learn the mode of proceeding in England. Lord Hale says (Harg. Law Tracts, 226), as to an information of seizure, which is against no person certain, the party that seizeth the goods, as uncustomed, prefers an information in the exchequer, praying that the goods may remain forfeit; upon which, there goes out a writ to appraise the goods, and upon the return of the appraisement, proclamation is made, that if any man will come in, he shall be heard. If upon or before this proclamation, the owner will come in and claim property, and plead, he may thereupon have the goods delivered upon security, if the same be bona peritura. But if none come in to plead to their forfeiture, judgment is given that the goods remain for-

[2] See Act Feb. 18, 1793 [1 Stat. 315], c. 8, § 27, which gives authority to officers of the customs to seize for any breaches of the laws of the United States.

feited, and this judgment concludes the party's interest; and it is but reasonable it should be so; for he hath notice of the suit by the seizure, by the appraisement, and by the proclamation in court. This is confirmed by other authorities. Malden v. Bartlett, Parker, 105; Mod. Pr. Exch. 141. And where a seizure is made, either in town or country, the officer seizing is by the exchequer rules required to transmit an account thereof to the solicitor of the customs, in order to have a writ of appraisement issued, and an information filed. Mod. Pr. Exch. 139. But it is no where stated, that it is necessary for the officer to make a record of his doings, although it was formerly necessary for him to prove, on the trial, the exact manner and method of seizure: but even this is now, by St. 9 Geo. II. c. 35, § 34, dispensed with; and the allegation of seizure stated in the information is held sufficient proof thereof, and the court is to try the merits, without further inquiry into the fact of seizure. Malden v. Bartlett, Parker, 105. I am therefore well satisfied, that the party can take nothing by this objection.

4. It has been also slightly contended, that upon the facts there was no seizure, but a mere possession and detention: but the possession was diligently followed up by an information of forfeiture: and it seems to me to have been as full and complete as any seizure could be.

5. It has been further contended, that it does not appear that the property ever was in the custody of the officers of the court, without which the court has no jurisdiction: and that the collector could have no legal custody after information filed, this not being a case within the 69th section of the collection act 2d March, 1799 [1 Stat. 678], but to be governed by the regulation of the act 8th May, 1792, § 4 [1 Stat. 277]. Now admitting this argument to be correct, and that I can notice the irregularity, if any exists, (which I think I cannot), still it seems to me, sufficient appears on the record and in the facts, to show that the schooner and cargo were taken into the custody of the court, for it has been sold by its order, and the proceeds are now within its control. The seizure is declared to be by the collector for the use of the United States; possession was held for this purpose at the time of the service of the process, and was afterwards continued with the assent of the marshal, and ought therefore to be adjudged his possession. Besides, the provision of the act 8th May, 1792, is not restrictive of the jurisdiction, but merely directory to the officer. Further; in the admiralty, in all proceedings in rem, the court has a right to order the thing to be taken into the custody of the law, and it is presumed to be in the custody of the law, unless the contrary appears; and when once a vessel is libelled, then she is considered as in the custody of the law, and at the disposal of the court, and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. Jennings v. Carson, 4 Cranch [8 U. S.] 2. The jurisdiction of the admiralty however is not founded on that circumstance. It is notorious, that a condemnation may take place in a prize cause, even when the prize is lying within the port of an ally or a neutral, and this right of jurisdiction and condemnation equally applies to municipal seizures in the name of the sovereign, while the property is in a neutral port. Hudson v. Guestier, Id. 293. If indeed the possession of the sovereign be lost by recapture, or escape, or voluntary discharge, the courts may thereby lose the jurisdiction acquired by the seizure, but such loss is not to be presumed. On the instance side of the admiralty, its jurisdiction is not in general founded on possession of the thing. It may exercise complete jurisdiction as to seamen's wages, as to marine torts, as to collisions, and perhaps as to salvage, without it, and rest entirely on the process in personam. Nor is the objection well founded in the proceedings in the exchequer. As far as I can comprehend them, if the seized goods are not sold on the second proclamation, the seizing officer becomes by the judgment a debtor to the king for the amount of their appraised value, or so much of it, as belongs to the king, and chargeable accordingly. Mod. Pr. Exch. 143, 265, 269. But the king may elect to take the goods himself, or the share to which he is entitled; in which case the judgment is so rendered, and the seizing officer is, by the judgment, declared chargeable accordingly. Attorney General v. Lade, Parker, 57, 67, and cases therein cited. And where the informer or other bidder pays the appraised value, a writ of delivery issues to the commissioners of the customs, in whose custody it seems the goods have latterly been by virtue of the statute 12 Geo. I. c. 28, § 1, and where the goods remain with the seizing officer, and are to be specifically delivered up, a writ of delivery issues for this purpose. Mod. Pr. Exch. 221, 226, 229; Parker, 57. From this, as also from the preamble to the statute of 12 Geo. I., I gather, that previous to that statute, the goods seized had uniformly remained in the hands of the seizing officer; and thereby great frauds had been committed. That at no time had the officers of the court the custody of goods seized; and that the exchequer acted directly by its process upon the persons, in whose custody the goods seized were remaining. Nor do I perceive any inconvenience in this course, as all attempts of authority might be summarily redressed by the inherent powers of the court. But to return. The district court of the United States derives its jurisdiction, not from any supposed possession of its officers, but from the act and place of seizure for the forfeiture. Act Sept. 24, 1789, c. 20 [2 Bior. & D. Laws, 60; 1 Stat. 77, § 9]. And when once it has acquired a

regular jurisdiction, I do not perceive how any subsequent irregularity would avoid it. It may render the ultimate decree ineffectual in certain events, but the regular results of the adjudication must remain. I do not apprehend that an accidental destruction by fire would prevent the court from protecting its officers from prosecution, by pronouncing, if just, a regular condemnation.

6. A further objection is, that the notice given by the collector was in point of law wholly insufficient, and that, as the act is highly penal, every preliminary to the forfeiture should have been minutely and sedulously observed. Without doubt, penal actions are to be construed strictly; but when the language is plain, and the requisitions are clear, the court are bound to give them a reasonable interpretation. See The Harriet [Case No. 6,099]; U. S. v. Winn [Id. 16,740]. The section of the act now under consideration requires, that the owners of vessels laden in whole or in part, at the time when the act should be received at the several custom houses, "shall, on notice given by the collector, either discharge such cargo, or give bond for the same," pursuant to the act. Now it is said, that the notice should have been special, as to the time, within which the unloading or giving bonds must have been perfected. And it has been likened to cases of estoppel under the pauper act of Massachusetts (Act Feb. 26, 1793, § 12; 2 Mass. Laws, 627), and to suits for penalties for harboring paupers, contrary to the statute 10 Geo. II. c. 3, § 1, in which the notice required has been exacted with minute accuracy. 1 Mass. 459, 518; 4 Mass. 180, 273; 5 Mass. 86. It will be a sufficient answer to these cases to state, that the statute has prescribed, that the notice shall be in writing, and contain certain facts, and yet, I believe, that even the necessary allegations have been liberally expounded. I might dispose in the same way of the analogous cases of notices to be given to justices of the peace, and officers of the customs under statute 24 Geo. II. c. 44, § 1, and 28 Geo. III. c. 37, § 25, in which, though great strictness is required, yet the court have been satisfied with a substantial compliance. Osborn v. Gough, 3 Bos. & P. 551. In the present case no form is prescribed by the act, and no writing is directed. At the time when the notice was given, the act had been promulgated. It was known at Newburyport; and the claimant was by law bound to know and to conform to its requisitions. There was no other act in existence, which authorized the collector to make the demand, and this was known to the claimant, at least such is the presumption of the law. The notice which was given, demanded of him to unload the cargo of the Bolina, or give bonds "according to the requisitions of the law." It was certainly sufficient to put him upon inquiry. A few days afterwards he was again admonished by the collector; he makes no reply; he asks no questions; and appears perfectly satisfied with the knowledge of the act, which he then possessed. Nay more, he shows, on the 21st of January, his perfect knowledge of the forfeiture, which might press upon him, and sought indemnity, not in a compliance with the act, which was still in his power, but by a policy of insurance against the very penalties, of which he now argues himself to have been ignorant. If when a notice is to be given to a man, and he voluntarily waives inquiry, or admits his own knowledge, and refuses to comply, a notice in technical form be still necessary, it certainly must be because the law is more indulgent to human infirmity than to strict personal rights. I confess myself somewhat embarrassed in disposing of this objection, and notwithstanding the strong facts indicating a pre-determined non-compliance with the law, if the cause were to rest upon it, perhaps I ought to incline to give the defendant the full benefit of the objection. But on this I give no absolute opinion.

7. But the last objection taken to the form and substance of the information, is in my judgment fatal, and as the parties have expressly waived all benefit of future amendments, I shall decide the cause on that ground. It is alleged in the information, that at the time when notice was received at the custom house for the port of Newburyport of the act, to wit, on the first day of February, the schooner Bolina was laden in whole or in part with a certain cargo of fish and lumber, and that there afterwards, on the same day, notice was given by the collector of said port to the owner or owners, consignee or factor, of said vessel, either to discharge the cargo of said vessel, or to give bond for the same, according to the law in such case provided. Now the time of receiving the act was material, for the offence could not be committed until after that time, and though laid under a videlicet, when material, it is equally traversable as if positively laid, and must be proved as laid. Hayman v. Rogers, 1 Strange, 233; Pope v. Foster, 4 Term R. 590; 2 Saund. 291, note 1; Rex v. Stevens, 5 East, 244. So too the notice to unload was material, and is laid on the same day, to wit, the 1st of February: yet in point of fact the seizure was on this day, and the notice was on the 17th of January preceding. The notice is alleged to be, either to discharge the cargo, or to give bond for the same according to the law in such case provided. I do not dwell on the want of the word "statute," because the objection is more substantial. Though a notice in pais may be good without technical precision, yet in an information there should be legal certainty, and the nature of the requisition should be stated. When notice is required by a statute, it should be shown, what that notice is; and it is not sufficient to say, it is according to law, for of that the court must judge. 1 Saund. 33; 5 Term R. 409; Com.

Dig. tit. "Pleader," 69, 70, 73, 74; 1 And. 62; Lutw. 1089; Plow. 376b.; 3 Term. R. 636. Further, it is not alleged to whom the notice was given. Now although a notice either to the owner, consignee or factor might be good, yet it ought to be averred to have been given to some person in particular; otherwise the party could never be prepared to meet the allegation.

On the whole, I think on this last point the decree of the court below ought to be affirmed, but I shall certify reasonable cause of seizure.

NOTE [from original report]. After the cause was fully argued, and the court was about to deliver the above opinion, the cause was compromised by the parties, so that no decree was actually pronounced.

BOLING (UNITED STATES v.). See Case No. 14,621.

Case No. 1,609.

The BOLIVAR.

[Olc. 474.][1]

District Court, S. D. New York. March Term, 1847.

SEAMEN—WAGES—LIEN—DELAYED ENFORCEMENT — PROCEEDINGS IN REM — VESSEL NAVIGATING DOMESTIC WATERS OF A STATE—REMEDY IN THE MUNICIPAL COURTS — WHEN FEDERAL COURT WILL EXERCISE JURISDICTION.

1. A seaman cannot maintain an action in rem for wages on board a small sailing craft plying on the Hudson river between Troy, Bristol and the city of New-York, if at all, after a year from the sale of the vessel to a bona fide purchaser without notice of the outstanding wages, especially if the seaman was present and knowing of the sale.

[See The Bolivar, Case No. 1,610.]

2. A tacit lien is lost, or will be deemed waived by unreasonable delay in enforcing it. It will not be upheld in prejudice of an innocent purchaser in favor of a party who seeks to enforce it inequitably.

[Cited in The Bristol, 11 Fed. 163. Explained in The Pioneer, 21 Fed. 427. Cited in Southard v. Brady, 36 Fed. 561; Crosby v. The Lillie, 40 Fed. 368.]

[See The Bolivar, Case No. 1,610.]

[See The Admiral, Case No. 84; The Sea Lark, Id. 12,579; Packard v. The Louisa, Id. 10,652; The Lauretta, 9 Fed. 622.]

3. In many systems of jurisprudence secret liens are limited by positive law. They are rejected as stale in all others, when unreasonably delayed or concealed against good conscience and fair dealing.

4. When a seaman is hired to serve on a small vessel navigating the interior waters of the state, and he knows the residence and responsibility of the owner, he will be required to seek his remedy for wages in the municipal courts of the vicinage, at the risk of all costs if he arrests the vessel in this court.

5. This court may refuse to take cognizance of such case unless it be shown that the remedy in the local court is doubtful.

In admiralty. Augustus Josline, of Waterford, in this state, the libellant, alleges, that on or about the 1st of June, 1845, he shipped at Troy, on board the scow Bolivar, as a second hand, at the rate of sixteen dollars a month; that said vessel was owned by James Rynders, the master, and was employed in carrying freight upon the tide waters of the Hudson river, between Troy, Bristol and the city of New-York; that he was employed at that rate from the time he shipped until July, 1845; that his wages amounted to $32, of which he had been paid $16, leaving a balance due him of $16. He further alleges that said vessel was owned by James Rynders, the captain thereof, who had sold her to Isaac Swangler, of Philadelphia; that said Swangler knew that libellant was employed as a hand on said vessel; that immediately after the sale of said vessel, she was taken out of the jurisdiction of this court, the libellant having been discharged from her. He prayed that the owner of said vessel may be decreed to pay him his wages due as aforesaid.

George Donner, the owner of the scow, in answer to the above claim says, that he purchased the vessel from Isaac Swangler; that he knows nothing of the claim of the libellant, and he alleges that he is informed and believes that on or about the 29th of July, 1845, when said Swangler had purchased the scow from Rynders her master and owner, the said master stated in presence of the crew, the libellant being present, that that was the last trip they would make with her, as on her return said Swangler would take possession of her as owner; and that there was no lien or incumbrance of any kind upon her; that neither of said crew dissented from this representation of said Rynders, or made any claim for wages, or that any was due. He further alleges, that on the return of the scow from Troy to Bristol, the said Swangler, or his agent went on board of her for the purpose of taking possession of her; that he conversed with the crew and libellant, telling them of his object; that neither libellant nor any of the crew made any demand or said any thing about wages, or intimated that any thing was due them from the vessel. He further alleges that said Rynders, at that time, and ever since, has been able to respond to any claim for wages due the libellant, and resides at Waterford, in the immediate vicinity of libellant. He further alleges that libellant has never made any claim of said Swangler or himself, previous to the filing of this libel, though said scow has been ever since running between Philadelphia and New-York, and that he purchased her without notice of any outstanding demand of libellant for wages against her, and believing her free of all liens for wages. Wherefore he prays that the libel be dismissed with costs. It appeared in evidence that the libellant shipped and served, as alleged by him, on board of the scow; and further, that the vessel was sold by her master and owner, bona fide, for a full consideration, to Swang-

[1] [Reported by Edward R. Olcott, Esq.]

ler, and by him to the present claimant; the sale took place in Bristol, Pennsylvania, with the knowledge of the libellant, who then made no claim for wages due him or gave any notice thereof, until more than a year after said sale. It also appeared in evidence that the libellant resided in the immediate neighborhood of Rynders, the former master and owner, and subsequently to the sale was employed in the same trade and between the same places as was this vessel for the residue of the season. [Libel dismissed.]

A. Benedict, for libellant.

R. Goodman, for claimant.

BETTS, District Judge. The point contested in this case is whether the libellant can maintain an action in rem for wages, upon the pleadings and proofs presented in the case. Under ordinary circumstances, a sale of a vessel will not divest the lien a mariner has against her for the security of his wages; and if the sale is by process of law, admiralty will uphold and enforce the lien against the proceeds of the vessel, wherever they may be found and identified. Sheppard v. Taylor, 5 Pet. [30 U. S.] 675. But it is necessary that seamen, as well as others, in order to uphold a tacit lien or privilege, should not intentionally conceal it to the prejudice of purchasers acquiring the property bona fide, and in ignorance of the incumbrance.

Wise and equitable provisions are introduced into some systems of jurisprudence limiting their continuance to fixed periods of time. In France and in Louisiana, the privilege upon the ship for the wages of the crew must be claimed and asserted before the ship has made a voyage, (in case of a sale,) in the name and at the risk of the purchaser. If such voyage is made without any claim being interposed by the crew, or if more than sixty days have elapsed between the departure and return of the vessel, she having been sold, the privilege is lost. Code de Comm. 191; Sirey, tom. 25, pt. 1, p. 207; Duranton des Privileges, liv. 3, tit. 18, §§ 2, 6, n. 133; Civ. Code La. arts. 3204, 3210; Terry v. Terry, 10 La. 75. So in Pennsylvania, the time of delay within which a seaman must assert his lien, is fixed by statute as nine months. 2 Laws Pa. 475. By the marine law there is no fixed period of time within which mariners must proceed to enforce their lien for wages, yet such lien will become extinct or barred by unreasonable delay, if the vessel passes into the hands of a bona fide purchaser, ignorant of such claim. 3 Kent, Comm. 196. Judge Ware remarks, it is not doubted that a seaman may lose his lien by lying by for a length of time, and suffering the vessel to be sold to a person ignorant of his claim, without giving him notice. The Eastern Star [Case No. 4,254]. And in Leland v. The Medora, it was held that liens for wages should in no case extend beyond the next voyage, if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. [Id. 8,237.] In the case of Packard v. The Louisa, Judge Woodbury animadverts strongly upon the equities of innocent parties in opposition to secret and stale liens. He says, to allow a seaman, after his voyage is over and his contract ended and his connection with the vessel dissolved and he has embarked for years in employment elsewhere, to retain a secret lien on the vessel, and thus prevent her sale or use unincumbered and embarrass any new purchaser without notice would be very bad policy. [Id. 10,652.]

If the claimant in this case had either actual or constructive notice of the claim of the libellant, he might have protected himself against it by requiring the vendor to extinguish it, or he could have withheld the amount from the purchase money. The conduct of the libellant was calculated to mislead and wrong him. He was present at the negotiation of sale, and was informed, in presence of the purchaser, that it had been made, yet permitted him to buy, without giving him notice there were wages in arrear. These considerations supply an equitable bar to the action in this form, treating it as brought by a mariner for services on a sea-going vessel.

The case is, however, to be considered in another point of view. The bargain for labor on this small craft had relation to services on the waters of the Hudson river, within this state, and was between men who were near neighbors, residing in the interior of the state, the seaman well knowing the responsibility of the master and owner of the vessel, and, except only by intendment of law, hiring himself no doubt solely trusting to that personal responsibility. There was an easy and cheap remedy at his command in the local courts against the owner for his wages, upon which he would naturally rely, and this court discourages actions in rem upon demands of this character, by denying all costs in them where they could be enforced in the municipal courts of the vicinage of the parties, and will even refuse to take cognizance of such demands in rem, unless it be proved that the remedy in the local courts is doubtful. For these reasons, the libel will be dismissed, with costs.

[NOTE. For another case substantially on the same state of facts, see Bouysson v. Miller, Case No. 1,710.]

Case No. 1,610.

The BOLIVAR.

[1 Olc. 480.] [1]

District Court, S. D. New York. March Term, 1847.

SEAMEN—WAGES — LIEN — NAVIGATION WITHIN A STATE—BONA FIDE PURCHASERS — FEDERAL JURISDICTION.

1. A mariner has a lien for wages earned on board a sailing vessel of fifty tons burthen, engaged in the transportation of merchandise on tide waters upon the Hudson river, within the territory of the state.

[See The Mary, Case No. 9,190; The Canton, Id. 2,388.]

2. This lien can be enforced against the vessel in the hands of a bona fide purchaser of her, if she was sold without the knowledge of the seaman and he pursues his claim at the first opportunity after his debt has accrued.

3. Although the mariner and owner are residents of this state, near each other, and the amount in demand is small, the suit therefor need not be prosecuted in the local courts, if demand of payment is previously made of the owner, and the latter fails to prove the seaman had adequate remedy against his property in such courts.

[4. Cited in Maxwell v. The Powell, Case No. 9,324, to the point that, if a state court sell a vessel to which a maritime lien has attached, the lien adheres to the vessel in the purchaser's hands.]

In admiralty. On rehearing.

This action was instituted by John W. Shook for the recovery of a balance alleged to be due him for wages earned as a hand upon the scow Bolivar, a small sailing vessel of fifty tons burthen and over. The pleadings and the evidence for the defense were mainly the same as in the case of Josline v. The same vessel [Case No. 1,609]. For the reasons set forth in the decision in that cause the libel was dismissed with costs. Some days subsequent to the hearing, a motion was made on the part of the libellant for a rehearing, and it appearing upon the allegations and affidavits produced on the part of the libellant, that there is reasonable ground to believe that his case was not fully and accurately presented to the court on the former hearing, and that he was in possession of new and material testimony not known to him on the former hearing and not then at his command, it was ordered, on motion of his advocate, that a new hearing be granted therein, the libellant paying the costs of the former hearing and of this motion. On the rehearing, the libellant produced proofs showing that his hiring on the vessel terminated in this state on the 15th day of July, 1845, wages then being due him, and that she was, a few days thereafter, sold in the state of Pennsylvania, on the Delaware river, and was there delivered to the purchaser without the knowledge of the libellant. It was further proved that the libellant demanded payment of his wages of the former master and owner without obtaining them, and refused to relinquish his lien on the vessel therefor; and the wages not being paid, he directly thereafter left his demand with the proctor in this cause, with directions to have the vessel arrested therefor whenever she could be found within the waters of this state; and that the libel in this case was filed, and the warrant thereon issued, and the said vessel arrested on her first return to this state. Upon these facts it was contended that the libellant was entitled to a decree for the balance of wages due him.

A. Benedict, for libellant.

R. Goodman, for claimant.

BETTS, District Judge. On the former hearing, this cause was dismissed for the reasons given in the preceding case of Josline v. The same vessel [Case No. 1,609]. The new evidence introduced on this hearing has freed the case of the objections upon which the former decree was based. It is not denied that a mariner has a legal right to proceed in rem for the recovery of wages against craft of this character, engaged in transporting merchandise on tide waters; and the evidence now shows that all proper efforts and diligence were used by the libellant to collect the debt of the owner before the vessel was attached in this court, and that her sale was made without notice to the libellant. There having been no laches on the part of the seaman in this case, the lien follows the vessel into the hands of the purchaser, and can be enforced notwithstanding his ignorance of its existence, wherever the vessel can be found. Sheppard v. Taylor, 5 Pet. [30 U. S.] 675; The Neptune, 1 Hagg. Adm. 227; The Mary [Case No. 9,186]; The Batavia, 2 Dod. 500; 2 Sumn. 443 [Brown v. Lull, Case No. 2,018]. This demand was put in train for collection against the vessel within a few weeks after it became payable, and its prosecution was delayed by the absence of the vessel from the state, out of the jurisdiction of the court, and not by the laches of the libellant. The libellant proves an unsuccessful demand of payment from the owner who contracted with him; and his inability to satisfy the wages may be reasonably implied, in the absence of all evidence on his part that he possessed property sufficient to satisfy the debt, and that it was so circumstanced that it could be reached by the process of the municipal courts.

I think the libellant has supplied satisfactory reasons for the delay of his proceeding, and for resorting to this remedy in this court against the vessel. Let the following decree be entered in this cause: It is ordered that there be a decree in favor of the libellant for the amount of wages due him, and that the vessel be condemned therefor, and for the taxed costs of this suit; and unless a stipulation by the parties, fixing the

[1] [Reported by Edward R. Olcott, Esq.]

amount of such wages, is filed within two days after this decree, it is further ordered that it be referred to a commissioner to ascertain and report the wages due the libellant, after deducting all proper charges and allowances.

Case No. 1,611.

The BOLIVAR v. The CHALMETTE.

[1 Woods, 397.] [1]

Circuit Court, E. D. Texas. May Term, 1872.

SALVAGE — COMPENSATION — DISABLED VESSEL IN TOW—DISTRIBUTION.

1. A low rate of salvage should be allowed where the salvors in good weather simply towed a vessel disabled, but in no immediate danger, a distance of thirty miles to a safe anchorage, but incurred no risk of life or property, and no deviation from their ordinary pursuits.

2. When a disabled vessel needed towage only, and her officers applied therefor to a tug, which refused towage and insisted on taking her chances as a salvor, and this was not prevented by the officers of the disabled ship; *held*, that these circumstances tended to reduce the grade of salvage allowance.

[Cited in The New Orleans, 23 Fed. 911; The Cachemire, 38 Fed. 522; Spreckels v. The State of California, 45 Fed. 649.]

3. In this case the decree of the district court allowing ten per cent. salvage was reversed because the allowance was too large, and a decree rendered for five per cent. only.

[Appeal from the district court of the United States for the eastern district of Texas.]

At chambers. In June, 1871, the bark Chalmette, which was at anchor outside of Galveston bar, receiving a cargo of cotton brought by lighters from Galveston, was driven by a storm from her moorings, a distance of thirty miles, when she came to anchor in a disabled condition. She was towed back to her anchorage by the tug Bolivar, whose owners filed a libel against the bark for salvage. The other facts of the case sufficiently appear in the opinion of the court. [Reversed and decree of distribution made.]

O. M. Watkins, for libellant.

W. P. Ballinger, for claimant.

BRADLEY, Circuit Justice. It is admitted that this is a case of salvage. The question is simply one of amount of allowance, and mode of distribution. The conviction is very strongly impressed upon my mind that it is a case of very low grade of salvage. There was no danger incurred by the salvors, no risk of life or property, no deviation even from ordinary pursuits—or if any deviation, a mere extension of them to an unaccustomed distance from shore. The ship salved, it is true, was in a disabled condition, and needed assistance; but she was perfectly safe at the time, lying in almost still water, about thirty miles from Galveston bar, and twenty miles from land, with one anchor and two chains out; and her captain, who was in Galveston, knew her location and situation, and was engaged in seeking the services of a steamer or tug boat to tow her back to her anchorage ground, from which she had been driven. This was known to the salvors. The agent of the steam tug Bolivar was applied to for the services of the tug to bring her in. He declined to undertake the office of towing in the bark for an agreed compensation, but said he was going down to her to take his chances—meaning, it is presumed, his chances of securing her as a salvor, and making a claim for salvage services. Now as towing vessels in and out of Galveston harbor was the business of the steam tug, this conduct, at such a time, and under such circumstances, was somewhat extraordinary. Had not the captain finally yielded to this proposition, and asked for a passage to his ship for himself and some of his crew who had left her, it might well have been doubted whether it was a case of salvage at all. If my ship is disabled, but perfectly safe for the time being, and I go ashore to employ a tug boat to tow her into port, in mild weather, presenting no danger or risk, can the owners of vessels whose business it is to do just such work, decline my employment and hasten off in a race to see which shall first seize my ship as a salvage prize? This, instead of encouraging that enterprise and daring which the laws relating to salvage are intended to foster, would be to encourage sharp practice and unconscionable speculation.

It must be admitted, however, that the Bolivar was entitled to some credit for her efforts to find the Chalmette on the 10th of June, immediately after the storm had subsided. But even with regard to that excursion, it is to be remarked that she had been loading the barque with cotton, and had two hundred bales for her then on board, and desired to be relieved of it, and to finish her job as a lighter. But knowing, as the agent of the Bolivar did, that the captain of the Chalmette desired a tow merely, and that there were other steamers in port or in reach which could be obtained for that purpose, and which it seems, were offered at a reasonable price, and would have been accepted at once but for some delay which they would sustain in getting ready to start; it is evident that his great haste to get off was not so much dictated by anxiety for the safety of the Chalmette as by his anxiety to be first in the race for salvage. And, then, after meeting the pilot boat Eclipse, which had just come from the Chalmette, and learning the exact condition of the latter, and the fact that the second mate was on board, and had sent the first mate with a letter to the captain, requesting him to employ a steamer to tow the barque into port; the agent of the Bolivar must have known perfectly well, that all which the officer in charge of the Chalmette wanted was towage.

The result of the case is, that what the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Chalmette needed, and was endeavoring to obtain, was simply towage; that the Bolivar refused to act as tow, and insisted on taking her chances as a salvor, and that this was not prevented on the part of the officers of the Chalmette. Under these circumstances, whilst the salvors are entitled to a greater remuneration than mere pay for the services of towage, it seems to me that they are only entitled to a low grade of salvage allowance. I think the amount allowed is greater than the case requires. Had the Bolivar found the Chalmette in the situation in which she was, without having been previously applied to to tow her into port, and had she given her relief and brought her into port as in ordinary cases, the amount would not have been at all excessive. It is the peculiar circumstances of the case that put a different aspect upon the question of compensation. The amount allowed by the district court is about ten per cent. I think about five per cent. would have been ample, considering the value of the ship and cargo salved. The decree below will be reversed and a decree made for the allowance of seven thousand five hundred dollars for salvage service in the case, to be distributed as follows: To the owners and crew of the pilot boat, Eclipse, $1,500, and the balance of $6,000 to the Bolivar and her crew, the latter sum to be distributed as follows, to wit: To the owners of the Bolivar, $3,000; to the captain, $500; to the mate, $250; to the engineer, $250; to the second mate, $200; to the seamen, $1,800, to be divided equally between them; and that the claimants pay the costs of suit, both of the district and circuit courts, and that a formal decree, with the proper directions be drawn up accordingly.

BOLLEN (EVANS v.). See Case No. 4,554.
BOLLES (BRADLEY v.). See Case No. 1,773.
BOLLMAN (UNITED STATES v.). See case No. 14,622.

Case No. 1,612.

BOLLMANS et al. v. PARRY et al.

[5 Pa. Law J. Rep. 29; 3 Am. Law J. (N. S.) 468.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1850.

TRIAL—EXPRESSION OF OPINION BY JUDGE.

A judge in a clear case, regarding the infringement of a patent, may express his opinion to a jury on a matter of fact, although the question is for their decision.

This was an action for the recovery of damages for an infringement of the celebrated patent of James Harley, for "A new and useful improvement in the mode of casting chilled rollers and other metallic cylinders." It was tried at Pittsburg on the 20th and 21st Nov'r, 1850, before Honorable R. C. Grier, justice of the supreme court, and Honorable Thos. Irwin, of the district court of the United States. The plaintiff proved the making of five or six sand rollers, made by letting the metal into the mould by a single gate or gutter, at a tangent to the circumference of the neck of the mould. He also proved the manufacture of about 136,000 lbs. of rollers made upon the plan of the patent of John C. Parry, one of the defendants. This patent describes a mode of giving a rotary motion to the iron after it reaches the neck of the mould, by means of a paddle at the end of a perpendicular rod of wrought iron, passing up through the chill and the mould of the upper neck and coupling, and having four iron fans or flanges, (like the gudgeon of a water wheel,) on the lower end, inserted through the whole casting, until the fans reach nearly to the lower end of the lower neck, and projecting out of the upper coupling or mould. The rod is turned on its own centre by means of geared bevelled wheels, by a crank.

The questions chiefly urged by Mr. Dunlop, the defendant's advocate, were, that as to the sand roll, there was no proof of the use or sale of them by defendants, and that they had been run by a tangential gate, without the knowledge, and against the orders of the defendant, and that a single gate, although tangential to the circumference of the mould, was not an infringement of Harley's patent. Also, that the casting of chilled rollers upon the plan of Mr. Parry, as above described, is no infringement of Harley's patent, as it does not profess to produce a rotary motion of the metal, by means of its own gravity, in passing through tubes or gutters tangential to the circumference, but by mechanical means and direct force; by the use of a rod and paddle after the metal enters the mould, at a perpendicular to the diameter of its neck. When the jury came in to deliver the verdict, the plaintiffs took a non-suit. The court, through Judge Grier, having declared its opinion (which the judge said he felt bound to do in a clear case, although the question was entirely for the jury,) that casting rollers under the patent of John Parry, was no infringement of the mode of casting by Mr. Harley. James Dunlop, Esq., conducted the case on the part of the defendants, with marked tact and ability.

Henry L. Bollmans et al. vs. John C. Parry, Harrison Parry and Cornelius McGinnis.

(No. 10, of Nov'r Term, 1850.)

Jury sworn.

We, the jury sworn in the above case, certify that we were ready to enter a verdict at the bar for the defendants, when the plaintiffs took a non-suit.

J. C. Rankin, E. D. Houseman, G. W. Clark, Robert Henderson, Leonare Shryock, M. Borland.

The jury had unanimously resolved to bring in a verdict for the defendants, but separated before all had signed the above paper.

BOLTING (SCHULZE v.). See Case No. 12,489.

Case No. 1,613.

Ex parte BOLTON et al.

[1 Ala. Law J. 58.]

[Also reported in 11 Fed. 217.]

Case No. 1,614.

In re BOLTON.

[2 Ben. 189;[1] 1 N. B. R. 370 (Quarto, 83); 1 Am. Law T. Rep. Bankr. 120.]

District Court, S. D. New York. March Term, 1868.

BANKRUPTCY — SECURED CREDITOR — PROOF OF CLAIM FOR OVERPLUS—SELECTION OF ASSIGNEE.

A creditor, who has a security for his debt, may prove his claim for the overplus, without abandoning the security, but must set forth the value of the security, and may vote, on the choice of an assignee, upon such overplus.

In bankruptcy. In this case [Henry C. Bolton] the bankrupt and creditors requested the register to certify a question as to the rights of a creditor who held a security for part of his claim. The register held, that a creditor having security may prove his claim, to the amount exceeding the value of the security, without abandoning it, but that he was bound to set forth the value of the security; and that he might vote as a creditor in respect of the overplus proven by him, in the choice of an assignee.

[The following is the certificate and opinion of the register in full:]

[I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings, in said cause before me, the following question arose, pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. E. Y. Bell, who appeared for the bankrupt, and Mr. W. W. Wiltbank, who appeared for certain creditors of the said bankrupt: "It is controverted by the counsel for the bankrupt, but on the part of counsel for certain creditors it is claimed, that a creditor having a pledge of personal property, given to him by the bankrupt and a third person in the course of their business as copartners, co-trading, or a lien thereon for securing the payment of a debt owing to said creditor from the said bankrupt, should be admitted at a meeting of the creditors of the debtor to prove their debts and choose one or more assignees of his estate, held at a court of bankruptcy, in accordance with the provisions of the 11th and other sections of the act of congress, March 2, 1867 (14 Stat. 522), to prove his whole debt without, by so doing, abandoning his security, losing his lien thereon, or forfeiting his right to the same." I am of opinion that the creditor having security may prove his claim to the amount exceeding the value thereof, without abandoning the same. But I think the creditor is bound to set forth the value of his security, and that he may vote as a creditor, in respect to the overplus proven by him, upon the choice of assignee. Edgar Ketchum, Register.][2]

BLATCHFORD, District Judge. The view of the register is correct.

Case No. 1,615.

BOLTON v. The BUENA VISTA.

[See Case No. 2,105.]

BOLTON (UNITED STATES v.). See Case No. 14,623.

Case No. 1,616.

BOLTON v. WHITE.

[2 Cranch, C. C. 426.][1]

Circuit Court, District of Columbia. Oct. Term, 1823.

ATTACHMENT—AFFIDAVIT—AUTHENTICATION.

An affidavit made before a judge of one of the state courts, in order to obtain an attachment under the Maryland act of 1795, c. 56, is not good evidence for that purpose, "unless there be thereto annexed a certificate of the clerk of the court of which he is a judge, or a certificate of the governor, chief magistrate, or notary-public of such state, that the said judge hath authority to administer such oath."

This was an attachment under the act of Maryland of 1795, c. 56.

Mr. Marbury moved the court to quash the attachment, because the affidavit made to obtain the attachment was made before a judge of the state of New York, and the notary-public who had certified the judge had not certified that he had authority to administer the oath according to the second section of the act of 1795.

THE COURT, at first, doubted whether Mr. Marbury could be heard, as he did not appear for any party in the cause; and requested him to ascertain what had been the practice in the courts of Maryland.

He afterwards produced the case of Campbell v. Morris, 3 Har. & McH. 535; and the court permitted him to make the suggestion, and quashed the attachment.

BOMFORD (BANK OF UNITED STATES v.). See Case No. 909.

BOMFORD (ERIKO v.). See Case No. 4,517.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 120, contains only a partial report.]

[2] [From 1 N. B. R. 370 (Quarto, 83).]

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

BONAFFON (HILL v.). See Case No. 6,488.

Case No. 1,617.

BONAPARTE v. CAMDEN & A. R. CO.

[Baldw. 205.][1]

Circuit Court, D. New Jersey. Oct. Term, 1830.

COURTS—SUIT BY ALIEN—INJUNCTION — GROUNDS —CONSTITUTIONAL LAW — RAILROAD CHARTER—IMPAIRING OBLIGATION OF CONTRACTS—EMINENT DOMAIN—PUBLIC USE—TAKING—COMPENSATION.

1. An alien resident in New Jersey, who holds land under a special law of that state, may sustain a suit in the circuit court relating to such land. The agents of a corporation may be sued in this court, though the corporation are not suable here.

[See Hughes v. Edwards, 9 Wheat. (22 U. S.) 496; Gassies v. Ballon, 6 Pet. (31 U. S.) 761; Breedlove v. Nicolet, 7 Pet. (32 U. S.) 431; Lorway v. Lousada, Case No. 8,517; Airhart v. Massieu, 98 U. S. 499.]

2. General cases for granting injunctions. It is no objection to an injunction that the defendant acts under the authority of a law, if he exceeds or abuses his power, or if the law is unconstitutional. But it will not be granted if there is a reasonable doubt of the validity of the law or the proper exercise of the power it confers; nor where there is a discretionary power given and exercised with judgment, and within the line prescribed; a party complaining will be referred to his remedy at law, or the special tribunal created by the law which gives the authority to do the act.

[Cited in Atkinson v. Philadelphia & T. R. Co., Case No. 615; Truly v. Wanzer, 5 How. (46 U. S.) 143; Scribner v. Stoddart, Case No. 12,561; City of Detroit v. Detroit City Ry. Co., 56 Fed. 898.]

3. An act of New Jersey incorporating a company to make a rail road, providing for the assessment of damages to the owners of land through which it passes, is not unconstitutional.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[See Pearson v. Yewdall, 95 U. S. 296.]

4. The right to take private property for public use, is incident to all governments; but the obligation to make compensation is concomitant.

5. Though a law divesting vested rights, is not, per se, void, it is so if the right is by a contract, and compensation is not provided or made.

[See Holyoke Water-Power Co. v. Lyman, 15 Wall. (82 U. S.) 500.]

6. The constitution protects property against arbitrary seizure or divesture; not by legal process and on compensation made.

7. The legislature may prescribe the process of taking property for the public use; also the mode of ascertaining compensation without trial by jury.

8. The twenty-second article, securing the right of trial by jury, applies only to criminal cases, and civil cases where a right is to be tried at law; not to mere collateral questions of damages, where no suit is pending, and the right of both parties admitted.

9. A law cannot authorize the taking private property for any other than public use. What are public and private corporations?

[Cited in West River Bridge Co. v. Dix, 6 How. (47 U. S.) 543; Sweatt v. Boston, H. & E. R. Co., Case No. 13,684; Putnam v. Ruch, 56 Fed. 418.]

10. A road, canal, &c., is for public use, when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether it is constructed by the state or corporation. But if the toll amounts to a prohibition, it is a monopoly and the road is not public.

11. The declaration in the charter, that the Camden and Amboy Rail Road is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation.

12. If it is not clear that the use is private, an injunction will not be granted.

13. Under a charter to construct a rail road from Camden to Amboy, with liberty to make a lateral road to Bordentown, and no route designated between Camden and Amboy, an injunction will not be granted, merely because the main road goes through Bordentown. The corporation must confine themselves to the route prescribed, but if there is a discretion not clearly abused, the court will not interfere by an injunction.

14. If the corporation has encroached on any public right at Bordentown, or usurped a franchise at a place not authorised by the charter, it is a proper case for the state to interfere by indictment or quo warranto in a state court. But an individual is not entitled to an injunction against the taking his land for the road, if by any reasonable construction of the charter, there is a power to locate the road through it.

15. Where the charter authorises an entry on land for the purpose of locating the road, and directs the location to be made, and a survey of the route of the road to be deposited in the office of the secretary of state; and when the location is determined on and the survey so deposited, the corporation may take possession of such land, use and occupy it for the construction of the road. The location, and deposite of the survey, are conditions precedent to their authority to enter for the purpose of constructing, and their entry for such purpose is a proper subject for an injunction, if the condition is not performed. An entry on private property, for the mere purpose of locating a road, is not taking it, this power may be given by law without compensation other than for any injury done to it, as the right remains in the owner. But where the divestiture of the owner's right is claimed, and its transfer is necessary for public use by a permanent appropriation of the soil, compensation must be made.

16. A law which directs the taking private property for public use, is not void because it contains no provision for compensation, or the mode of ascertaining it, the law is valid if this is done by a subsequent law.

17. But the execution of the law will be enjoined, till such provision is made by law, and the compensation paid.

18. The payment must be simultaneous with the disseisin of the owner, and the appropriation of his property. The owner must not be put to his remedy. But semb., if the compensation is ascertained, its payment certain, the security undoubted, and the means of collection summary, the construction of the road may be begun before actual payment.

[Cited in Avery v. Fox, Case No. 674; Jones v. Florida, C. & P. R. Co., 41 Fed. 72.]

[See Eidemiller v. Wyandotte City, Case No. 4,313.]

19. The kind of injury impending, and the degree of its danger as a ground for an injunction, considered.

[Cited in Scribner v. Stoddart, Case No. 12,561; Illingworth v. Atha, 42 Fed. 142;

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

Payne v. Kansas & A. V. R. Co., 46 Fed. 554.]

20. This case a proper one for an injunction.

[21. Cited in Commerford v. Thompson, 1 Fed. 424, to the point that equity may inquire into the motive of one seeking an injunction.]

In equity on a motion for an injunction on bill and answer. The bill set forth that the complainant [Joseph Bonaparte] was an alien, that in virtue of a special law of New Jersey, he was enabled to hold land in the state, and had purchased two thousand acres of land adjoining Bordentown, whereon he had made extensive and valuable improvements, at an expense of three hundred thousand dollars, and where he had resided for many years. That the improvements consist of valuable buildings, a park, pleasure grounds, embankments, roads, walks, a lake, gardens, and other works combining utility with ornament, in the enjoyment and possession of which he has been disturbed by the defendants [the Camden & Amboy Railroad Company], their officers and agents. That under colour of an act of assembly, incorporating said company for making a rail road from Camden to Amboy, they have entered upon the land of complainant, laid out and staked a road on and over the park, embankments, wharves and roads thereon, which, if constructed and completed as marked, will be to his irreparable injury. That the defendants have collected materials and workmen to commence the construction of said road, and through the premises, by taking possession thereof, and using the materials thereon found, have commenced excavations thereon, and threaten to proceed and complete the construction of the same, without consent of the complainant, or making him any compensation for the injury he will sustain before the road is finished. The bill then recites various objections to the validity of the act of incorporation, as well as various acts of the defendants, and denies their authority to enter upon his lands, and concludes with a prayer for an injunction. No affidavit is attached to the bill, but a special one was submitted with it, averring the material facts stated in the bill.

The answer of the defendants admits that a line has been run through the land of complainant, designating the route of the railroad; but denies that any final location has been made. They aver that if the road is constructed as laid out, it will produce no injury to the plaintiff which cannot be compensated in damages; that it is necessary for the objects of the incorporation, that the road should pass through his premises; as it is the best route, they feel it to be their duty to the public and all interested, to locate it according to the report of the engineer of the company, who has reported this as the only practicable route, without an increase of the expense to the amount of 100,000 dollars. They deny that they ever intended to take possession of the premises, without the permission of complainant, due process of law, or just compensation, which they are willing to make. The answer concludes by objecting to the jurisdiction of the court over the parties, or the subject matter, because there are alien friends who are stockholders in the company and members of the corporation. In support of this objection, the affidavits of Joseph Billborough and Edwin J. Stephens were read, showing the former to be an alien, resident in Pennsylvania, and owner of one hundred and fifty-five shares in the stock of the company. The affidavit of William Cook, the assistant engineer of the company, was also read, stating the report of the principal engineer, and his own opinion, that the interest of the public and the company required that the road should be constructed through the complainant's premises, and that no irreparable injury would be done thereby.

Mr. Wall, for complainant.

1. The act of incorporation is repugnant to the twenty-second article of the constitution of New Jersey, which provides, "that the common law of England, as well as so much of the statute law as has heretofore been practiced in this colony, shall still remain in force until they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter, and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal for ever." It is provided by Magna Charta, that no man shall be put out of possession of his freehold lands or franchises, but by the lawful judgment of his equals, or by the law of the land, which is by due course and process of law. 2 Co. Inst. 45, 46. The only lawful mode of taking the land of a subject, without his consent, is by making him a full equivalent (1 Bl. Comm. 139), which is by a writ of ad quod damnum and an inquisition (1 Jac. Law Dict. 48), and is the process used when public or turnpike roads are laid out on the lands of individuals (3 Jac. Law Dict. 289, 294); which in England is never taken for public use without compensation awarded by a jury. The thirteenth section of this law takes away the right of trial by jury, by substituting in its place commissioners to assess damages, whose report is made plenary evidence of the right of the company to the land and materials required for the construction of the road. They are not directed to act according to the rules of the common law on the writ of A. Q. D., which directed a jury to inquire only into the damages sustained, but are authorized also to estimate the benefits accruing from the road, and to strike a balance between the value of the land taken and such benefits. This is manifestly unjust, because by the report the land is absolutely vested in the company, while the benefits of the road are speculative and pros-

pective. Though the fourteenth section professes to give a trial by jury, it is under such restrictions as make the right nugatory; for before it can be had, the court must set aside the report of the commissioners, on cause shown, of the sufficiency of which they judge; it is therefore no longer a matter of right, but of mere discretion. No law of this state can take away a constitutional right. Such law is void by the constitution of the state,—9 N. J. Law, 443; S. P., 2 Dall. 304 [Vanhorne v. Dorrance, Case No. 16,857],—as a law directing a jury of only six to decide on cases where the sum in controversy did not exceed 25 dollars, which was adjudged void,—Holmes v. Walton, cited 9 N. J. Law, 444,—and the legislature cannot give the power of a jury to commissioners, if they cannot give it to six men as a jury.

2. This is a private company, incorporated for private objects, to whom the legislature cannot give the power of taking private property for their use, which is a monopoly, an exclusive right of passage on the road, unless on conditions which they may make so onerous as to amount to a prohibition in effect. Though the twenty-eighth section of the act declares the road to be a public highway, such declaration does not make it one, if the terms and provisions of the law show it to be one for private emolument rather than public convenience.

3. Before the company can enter upon private property they must have made an equitable assessment of its value, and the compensation must be made before possession is taken. Gardner v. Trustees of Newburgh, 2 Johns. Ch. 166. It cannot be left to future adjustment according to the fourteenth section, but must be paid before the construction of the road is commenced, though by the thirteenth section the road may be located before compensation can be demanded.

4. By the thirteenth section of the law, the filing a copy of the survey of the road, as located, in the office of the secretary of state, is made a condition precedent to any right of constructing the road. The bill charges. and the answer admits that this has not been done, which is a sufficient ground for an injunction till the survey is filed.

5. The eleventh section gives no authority to locate or construct the main road at Bordentown; they can only take a lateral road to that place, consequently they cannot locate the main road, as has been done, on the complainant's premises. It is an evasion of the law, annulling its provisions to all intents and purposes. It is obviously the intention and direction of the law, that until the main route was completed, the road should connect with the Delaware river only at the beginning point. The twelfth section, which authorizes the construction of a lateral road, is a proviso to the eleventh, which, as the last expression of the will of the legislature, repeals and controls any part of the eleventh which might imply the same power; it makes the construction of the main route a condition precedent to the construction of the lateral road (vide Fitzg. 195); the company therefore have no power to locate the road to Bordentown till that condition is complied with.

6. This is a proper case for an injunction according to the rules of equity. Jeremy, Eq. Jur. 308. It lies for diverting a stream of water by virtue of a law, if no provision is made for compensation to the owner (2 Johns. Ch. 162), where there will be an injurious interruption of the enjoyment of property (Id. 463, 473); and in a case otherwise proper, will be granted against the trustees of a college, turnpike, or canal commissioners, where they abuse, exceed, or deviate from their authority (1 Ves. Sr. 188; 2 Dow, P. C. 519); or a canal company (Coop. 77).

7. On the face of the bill the court has jurisdiction, as it will be presumed that a corporation created by the law of a state is composed of the citizens of the state. Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 88, 90; 1 Paine, 609, 610 [Catlett v. Pacific Ins. Co., Case No. 2,517]. The want of jurisdiction must be pleaded, the court will not act on affidavits, but the company are not necessary parties; the agents by whom they act are citizens of the state, are made defendants, and have answered; the nonjoinder or misjoinder of parties does not affect the jurisdiction of the court, they can enjoin their agents (1 Paine, 410 [Ward v. Arredondo, Case No. 17,148]; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 421; [Carneal v. Banks] 10 Wheat. [23 U. S.] 181); so the agents of a state, though the state is not suable, ([Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 738).

Mr. Sloan and Mr. Wood, for defendants.

1. The plaintiff being an alien, holding land by a special act of the legislature, has no right but what is common to all the citizens of the state; consequently cannot sue one in the courts of the United States. If, however, he could sue a citizen, he cannot sue a corporation, one of the members of which is an alien, for this court has no jurisdiction in a case where both parties are aliens. [Browne v. Strode] 5 Cranch [9 U. S.] 303. All the plaintiffs are one party, all the defendants the other, and each must be capable of suing and being sued; if a corporation is sued, all the members must be averred to be citizens. [Bank of U. S. v. Deveaux] Id. 85, etc.; 4 Wash. C. C. 595 [Kirkpatrick v. White, Case No. 7,850]. It is not sufficient that Stephens and Sloan, the agents of the company, are citizens, if they have no interest. In the Case of Osborn, 9 Wheat. [22 U. S.] 738, the court enjoined the agent, because the state could not be sued, and the law under which the agents acted being void, they were considered as principals. Here all the members of the company have a joint inter-

est, claiming a joint right; they must therefore all be made parties, and the court cannot proceed against those who are agents without affecting the rights of all.

2. The twenty-second article of the constitution applies only to the right of jury trial in criminal cases, and suits between individuals, not to cases where public convenience requires that private property should be taken for public use. Before its adoption, the colonial legislature directed damages caused by roads to be assessed by commissioners, it was the common mode of ascertaining compensation before the revolution (Leaming & Spicer, 440; Allison, 274); since the adoption of the constitution, the legislature have acted in both ways at their discretion, they have directed the valuation by commissioners, or by an inquest, at their pleasure. In the cases of Dorsey v. Morris Canal Co. and Certain Land Owners v. Same the chancellor decided, that the law providing for the assessment of damages by commissioners was valid, and no contrary decision has ever been had in the state. It is enough that an impartial tribunal is appointed, commissioners act as arbitrators appointed by the court; the owner of the land is not bound by their award, which the court may set aside if illegal, and if the thirteenth section is unconstitutional, all proceedings under it will be annulled, and the owner will then have a trial by jury. The plaintiff holds his land subject to requisitions by the state for public use, the right to take it is recognized by the fifth amendment to the constitution of the United States, provided just compensation is made; but the legislature may prescribe the mode of ascertaining it, and this amendment, as well as the constitution of the state, must be construed with a reference to the previously established practice. Neither the proprietary or state government, made any compensation to the owners of land through which public roads were laid out, as five per cent. was allowed by the proprietors in all grants for that purpose. Compensation was first allowed, when companies were incorporated to make roads; this was in the power of the legislature, and when a road is so made, it is as much a public road for public use, as if made by the state. 20 Johns. 743. The twenty-eighth section declares this to be a public highway, and its termini and route show it to be a most important part of a great national communication, important to the whole country. Besides, the state has a present right to become owners of one-fourth of the stock, and a reversionary right to purchase the road after thirty years, and they have a revenue from the tolls, which the defendants swear will amount to ten thousand dollars a year. The provision that the commissioners shall deduct the benefits of the road from the damages it occasions, is neither unconstitutional or unjust; both items necessarily enter into the question of damages, all that is required is, that the compensation shall be just, equitable, and reasonable. 3 Mass. 310; 5 Mass. 435; 9 Mass. 388; 1 Pick. 425. This is not the tortious taking of property, it is done by the supreme power of the state for public benefit, to which each ought to make a common contribution, and no one ought to receive a compensation exceeding the injury he has actually sustained. In ascertaining its amount, the legislature were not bound to adopt the mode in use in England; but the plaintiff's counsel are mistaken in taking it for granted, that it is by an ad quod damnum, that writ is used only where the king creates a franchise, or gives a license to exercise one. 1 Jac. Law Dict. 48, 49. It is not used where private property is taken by the authority of an act of parliament (vide 2 Dow, 519, &c.); it is done by commissioners. The meaning of Magna Charta is not that there shall be a trial by jury, when the exigencies of the public require that private property shall be taken for public use, it only provides, that it shall not be taken without legal process or due course of law, which the legislature is competent to prescribe. The same provision is contained in the fifth amendment to the constitution of the United States: "No person shall be deprived of property without due process of law;" this and the next clause were intended to guard against arbitrary seizures of property without a proceeding according to law and just compensation.

3. It is admitted that the company are bound to make just compensation, but assert their right to take the property before it is made; from the nature of this right, it must precede the obligation. But though this is claimed as a right, the defendants in their answer disclaim its exercise, averring their intention to be to make compensation before taking possession of complainant's property. His affidavit does not aver the contrary, and the court cannot grant the injunction till an attempt is made to take possession. The law gives complainant ample security, as he has a lien on the whole property of the company, on the filing the report of the commissioners, as well as a summary remedy to enforce payment, which satisfies every reasonable demand of the owner, as the lien for damages attaches the moment the right to the land passes to the company. This too is the natural order of proceeding, the land is first taken, in doing which the company are not trespassers, as they enter by authority of law. 20 Johns. 744; 3 Mass. 310. The damages are then assessed, and process goes out to collect them.

4. It is admitted that the survey has not been deposited as directed by law, but the defendants aver in their answer, that the delay was from a desire to consult with and accommodate the complainant; it is not for him to allege this as a ground for an injunction, nor is it a ground for the interference of the court, being a mere matter of irregularity,

the omission does not make the company or their agents trespassers (20 Johns. 743), or afford any ground for arresting the progress of the work.

5. The law does not prescribe the route of the road, it only designates the beginning points, leaving the intermediate route to be located according to the discretion of the company; in such case the court cannot control its exercise, if the proceeding has been in good faith, and within the authority conferred by the law, or affix any limitations not imposed by the legislature. A power to construct a road from one place to another, gives a discretionary power as to the selection of the route; such law must receive a liberal construction, and there must be a clear departure from its directions, before a court can interfere. 10 Johns. 389. By the eleventh section a general authority is given to construct the road between the two points, the right to make a lateral road given in the twelfth section is a privilege; the two sections will be so construed as to make them harmonize, and by the words of the law alone. If the company has a colourable right, and the court have a doubt, if there is room to deliberate on the question, whether they have exceeded or abused their power (4 Johns. Ch. 21), a court of chancery will not interfere by injunction. The case must be referred to the supreme court, which has a prerogative jurisdiction over all corporations, to the same extent as the court of king's bench in England. 2 Johns. Ch. 371, 386; 16 Johns. 13, 14. An injunction is granted, only in a clear case of the excess or abuse of jurisdiction, of which state courts are the appropriate judges in all cases where questions arise about the extent of the authority given by state laws, or on the local common law. [Jackson v. Chew] 12 Wheat. [25 U. S.] 153. On this subject the answer is full, that the location of the road has been made solely with reference to the public convenience and the benefit of the corporation, according to the best discretion of its officers. The only question which can arise is, whether the company have usurped a franchise on the property of the state, or on a route which they were prohibited by their charter from selecting. This is a question affecting the state alone, as to individuals, the acts of the corporation will be presumed valid, unless the state interferes by indictment for a nuisance (18 Ves. 622), or their proceedings are declared illegal on a certiorari, or quo warranto in the supreme court of the state. A court of the United States will not interfere, unless there appears to be a clear departure from the authorized route prescribed and defined in the act of incorporation, which is not pretended here.

6. The injury complained of is not a subject matter for an injunction, if it is a trespass there can be full and adequate remedy in damages; the complainant's possession is not disturbed in his mansion-house, improvements, or other parts of his land, he can use them as before. The only injury is taking the ground occupied by the bed of the road, for which full and complete compensation can be made. It is not like the case of a private nuisance by the diversion of a water course, as in 2 Johns. Ch. 162, and Eden, Inj. 165, where a trespass has become a nuisance, or where there is a privity, as between landlord and tenant, tenant for life and reversioner. To justify an injunction the injury must be irreparable, or so great as to be destructive of the property to the owner for all the purposes to which he had devoted it, and for which there is no adequate remedy at law. 1 Johns. Ch. 318. On this subject the answer and affidavits are full to show that the injury is not of such a nature, nor does the complainant aver it in his affidavit. The court will not regard the averments of the bill, but look to the affidavits on both sides (18 Ves. 622; 1 Swanst. 250; Coop. 77); from which it will be apparent, that the only injury will be to pleasure grounds, roads, a park, &c.; whereas, if the injunction is granted, it will interrupt a great public work, produce injuries which can never be repaired, and for which the company can have no redress, as it will have been caused by the act of the court. They will not grant the injunction if they entertain any doubt upon any point in the case.

Mr. Wall, in reply.

1. By the eleventh section of the judiciary act [1 Stat. 78], the complainant has a right to sue in the courts of the United States as an alien, of which he cannot be deprived; he is authorized to hold lands in this state, with the same rights of property as any other citizen, he claims no other rights under the law of the state, but is not compelled to renounce such as are given him by the constitution and laws of the United States. By answering, the defendants submit to the jurisdiction of the court, and cannot now object to it as they ought to have pleaded it [Mason v. The Blaireau] 2 Cranch [6 U. S.] 264. They do not deny their citizenship; the court have jurisdiction of the subject matter of the bill, and over the persons who, as agents of the company, have done and threaten to do the acts complained of; it is not material that the persons for whose benefit the acts are done, are not in court or within its jurisdiction, an injunction against the actors, answers all the objects of the bill. Jurisdiction cannot be ousted by an affidavit, or on the suggestion of a stockholder.

2. Formerly the king could not grant a monopoly without an ad quod damnum, now he can do it by a dispensation, with a clause of non obstante, this is the meaning in 1 Jac. Law Dict. 48, 49, but he cannot by this authorize the property of a subject to be taken. In England the general road law directs compensation to be made by a jury,

if the owner and surveyor cannot agree on the value of land taken for a road. 13 Geo. III. c. 78; 11 Ruffh. St. 850, 851. The laws of New Jersey relating to public roads, give merely an easement on the lands of individuals, without impairing the right of soil; but when companies are incorporated for making roads, they become owners of the land on which they are located, the owner is disseised and his right divested. The mere subjecting the land to an easement for the public benefit, is very different from granting it to a corporation. It is a fundamental principle, that where governments take private property, compensation is made by agreement, as in the case of the Isle of Man, by persons chosen by the parties, or by judicial process, through the intervention of a jury,—2 Dall. 313 [Vanhorne v. Dorrance, Case No. 16,857],—and must be paid before the title of the owner is affected. This road is for private use, the charter is for a transportation company, who may charge tolls which amount to a prohibition; unless the public will submit to the exaction of six dollars for each passenger, and four dollars eighty cents for a ton of merchandize, there can be no right of passage; this right excludes all competition by the creation of a monopoly for the benefit of the company, which, of itself, divests the road of every attribute of a public highway. If the power to exact tolls was limited to such as are reasonable and uniform, it might be deemed a public corporation, so as to justify a law to appropriate private property for its use. But the features of the charter are such as stamp it with a private character, and the company must be left to make their contracts with the owners of property through which the road passes. We have a right to an injunction if the defendants omit any act required by the law, or violate it in any way; they admit that they have neither filed the survey of the road, or made compensation, yet they aver their intention to construct the road, and that they are making preparations to do it. They have exceeded their authority and violated the law by locating the main road on the Delaware, when they could make only a lateral one to it. We are not bound to wait till the company actually take possession; when they assert their right and avow their intent to do it, the court will restrain them if they are not strictly justified by the law.

The court took time to consider the case, and had met for the purpose of delivering their opinion; as it was about to be read, it was suggested that the parties were about making an adjustment, whereupon the delivery of the opinion was suspended to give them an opportunity of doing it. The parties came to an agreement and the opinion was not read, but as the questions involved were important, and might recur, it is thought proper to publish it.

BALDWIN, Circuit Justice. The eleventh section of the judiciary act gives jurisdiction to this court, in all cases of a civil nature at common law or in equity. 1 Story [Laws] 57 [Act Sept. 24, 1789; 1 Stat. 78]. The complainant has therefore a right to sue here, independently of any state law. It attaches to his character of an alien, which is admitted in this case, and as he holds his land by the law of this state, it matters not whether it is a general or special one, his right of property gives him the same remedy for its violation, as to an alien residing abroad or a citizen of another state. Although it may well be doubted whether the alienage of Mr. Billborough could be taken advantage of by a mere suggestion in the answer, the same effect will be given to it as to a plea. It is not necessary to inquire, whether it would affect the jurisdiction of the court if the corporation was the only defendant, because Mr. Stephens and Mr. Sloan, two of the defendants are admitted to be citizens of the state, and competent parties to the suit. The court can take cognizance of the case as to them, though it could not as to the corporation, as has been heretofore decided by this court. Kirkpatrick v. White [Case No. 7,850]. These defendants too are members, directors, and agents of the company for laying out and constructing the road; they act in the name and by the authority of the company, who must be represented by agents, but this gives the agent no exemption from legal responsibility. If they exceed, abuse, or depart from the power given by the law, they are answerable in the same manner as if they acted in their own right, without making the company parties to the suit, if they are not within the jurisdiction of the court, or are exempted from being sued; there is the same remedy against the agent as against the principal, if suable. The privilege or exemption of the principal, is not communicated to the agent, though the principal is a state which cannot be sued at law or in equity, and the agent a public officer acting in execution of a law of the state, and the subject matter of the suit was money actually in the treasury, in the custody of the defendants for the use of the state. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 743, 744. In that case the state was not a party, yet an injunction was awarded. The court, looking only to the illegality of the law by which the money had been obtained, through the instrumentality of the agents of the state, disregarded all considerations relating to the principal, for whose benefit or by whose orders the illegal acts had been committed. There are then proper parties before the court to enable them to make a final decree, and to enforce it against the agents of the company, if a proper case is made out for an injunction in other respects. The adjudged cases on this subject support this position. 1 Pet. C. C. 317, 320 [Willings v. Consequa, Case No. 17,767]; Jay v. Wirtz

[Kerr v. Watts] 6 Wheat. [19 U. S.] 559; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 451; [Thornton v. Wynn] 12 Wheat. [25 U. S.] 189; [Dandridge v. Washington] 2 Pet. [27 U. S.] 377; [Caldwell v. Taggart] 4 Pet. [29 U. S.] 203, 204. If we should yield to the objection arising from the alienage of Mr. Billborough, it would establish a principle by which a corporation could always elude the justice of the law, by having some shares of the corporate stock held by an alien or a citizen of some other state.

The principles settled by the supreme court in Osborn v. Bank of U. S. [supra] would seem to remove all objections to the power of this court to grant an injunction against persons acting under a law of a state, authorizing the construction of works of public improvement. But the doubt expressed by Judge Washington in 4 Wash. C. C. 601, 608 [Haight v. Morris Aqueduct, Case No. 5,902], whether a court of equity could treat such acts as a private nuisance, however injuriously it might affect a complainant, is deserving of serious consideration. There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act. We know of no rule which excludes from this process any persons over whom the court has jurisdiction, on account of the character or capacity in which he acts, although it is conferred upon him by a law of a state or of congress. If the law is unconstitutional, it can give no authority, if the power it confers is abused or exceeded, the person who acts by colour of law merely is a trespasser; and wherever the court have power to take cognizance of an action of trespass for an offence, a court of equity may, in a case otherwise proper, prevent its commission, as was decided in Osborn's Case, 9 Wheat. [22 U. S.] 738. An injunction was granted against the United States by this court (Armstrong v. U. S. [Case No. 549]); so by the supreme court against the overseers of the poor of a parish (Terrett v. Taylor, 9 Cranch [13 U. S.] 43, 55); by Chancellor Kent against a corporation, claiming to act in pursuance of a law of the state (Gardner's Case, 2 Johns. Ch. 162); and in Belknap v. Belknap, Id. 463, against the inspectors of a corporation for draining marshes. The chancellor cites with approbation the cases in England, where injunctions have been granted against the trustees of a college (1 Ves. Sr. 188), the commissioners of a turnpike (Id.) a canal company incorporated by act of parliament (Coop. 77), canal commissioners (2 Dow, P. C. 519; S. P., 1 Swanst. 244, 250; 4 Johns. Ch. 26; 2 Dickens, 600; vide 2 Johns. Ch. 376-380). In Jerome v. Ross, 7 Johns. Ch. 334, and Rogers v. Bradshaw, this distinguished jurist asserted the same principle, in its application to the commissioners for the construction of the great New York canal (20 Johns. 745), as an established rule of courts of equity; to which may be added the declaration of Judge Washington, in 4 Wash. C. C. 605 [Haight v. Morris Aqueduct, Case No. 5,902]. It must then be taken as settled, that the circumstance of a defendant acting under colour of a law, or as the agent of a corporation for making a road, canal or other improvement, is not of itself a good objection to the granting an injunction. When there is a reasonable doubt whether the law set up as a justification authorises the acts done, it will not be granted (2 Dickens, 600; Coop. 77); or if a discretionary power is given, which is not abused or misapplied, but exercised in good faith, sound discretion, and according to the best judgment of those to whom its execution is confided, the party complaining will be left to his remedy at law. 1 Johns. Ch. 184; 4 Johns. Ch. 352; 7 Johns. Ch. 340; 20 Johns. 739, 740. The court cannot control them in mere matters of discretion (vide [U. S. v. Arredondo] 6 Pet. [31 U. S.] 739); they must keep strictly within their powers, must not deviate from the line or route prescribed, abuse, misapply, or exceed their authority; when they do so, a court of equity will leave a complaining party to resort to the special tribunal designated by the law, to decide on all questions arising in its execution; but if they act otherwise, the court will proceed in the usual way, by injunction. 2 Dow, P. C. 521, 523.

Having no doubt of our jurisdiction, both of the parties and the subject matter in this case, we proceed to the grounds of the injunction.

1. It is alleged that the act incorporating this company is repugnant to the constitution of the state, in appointing commissioners to ascertain damages instead of a jury. This is a question of great delicacy and importance, affecting the rights of every man, and perhaps of every government in the union, the constitution of which does not define the mode of making compensation for private property, taken for public use. If the law

in this respect is incompatible with the constitution of the state, we must declare it void, and the exercise of any authority under this part of it illegal; but before doing it we must have a clear conviction of the incompatibility between them. [Marbury v. Madison] 1 Cranch [5 U. S.] 138; [Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 625. A law of a state, not repugnant to its constitution, is by the thirty-fourth section of the judiciary act made a rule for our decision, in all cases to which it applies, unless the constitution, laws or treaties of the United States otherwise provide.

It is a settled principle of American jurisprudence, that the transcendent powers of parliament devolved on the people of the several states by the revolution [Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 651; [Johnson v. M'Intosh] 8 Wheat. [21 U. S.] 584; [Wilkinson v. Leland] 2 Pet. [27 U. S.] 656. It necessarily follows, that the only restraint on their legislative power, is that imposed by their own, or the constitution of the United States. [Satterlee v. Matthewson] Id. 410, 414. That of New Jersey contains no bill of rights, or any other restriction on the legislative power than the twenty-second article which has been referred to; of course its action is uncontrolled, if the right of trial by jury is preserved inviolate in the cases contemplated by the constitution. It is silent on the subject now before us for an obvious reason, it is an incident to the sovereignty of every government, that it may take private property for public use; of the necessity or expediency of which, the government must judge, but the obligation to make just compensation is concomitant with the right. Vatt. Law Nat. 112; Ruth. Inst. 43; Burlam. Nat. 150; Puff. Law Nat. 829; Gro. De Jure B. 333. This principle of public law is recognised in the fifth amendment to the constitution of the United States, as to the right and obligation, which may be deemed a bill of rights for the people of each state. [Fletcher v. Peck] 6 Cranch [10 U. S.] 138. Though it may well be doubted whether as a constitutional provision, this applies to the state governments,[2] yet it is the declaration of what in its nature is the power of all governments, and the right of its citizens; the one to take property, the other to compensation. The obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined, and exists in this case if the legislature had power to grant the charter to this corporation. Though the divesting of vested rights of property, is no violation, per se, of the constitution of the United States,—[Satterlee v. Matthewson] 2 Pet. [27 U. S.] 412, 413,—yet when those rights are vested by a contract, its obligation cannot be impaired by a state law. [Fletcher v. Peck] 6 Cranch [10 U. S.] 137; [State of New Jersey v. Wilson] 7 Cranch [11 U. S.] 164; [Terrett v. Taylor] 9 Cranch [13 U. S.] 45; [Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 625. In this case the complainant by his contract of purchase, authorized by the law of the state, comes so far within this protection, that his property cannot be transferred to the defendants without his consent by mere legislative power. To make such transfer valid, it must be an appropriation to a public use, in virtue of the inherent sovereignty of the states, which carries with it the obligation to make compensation. When this is done, no contract is impaired, as all persons hold their property subject to requisitions for public service, it is protected only against arbitrary seizure, not when it is taken or appropriated by public right for public use; compensation must indeed be made, but no particular mode is prescribed by which its amount shall be ascertained. It is a principle of Magna Charta, recognised in all the states, that no man shall be disseised or dispossessed of his property without due process of law, or legal process, or the judgment of a jury (2 Co. Inst. 45); but if either mode is pursued, the principle is unimpaired. A law which authorizes the appropriation of property to public use, and prescribes a mode of proceeding by which compensation shall be ascertained and made, is not obnoxious to Magna Charta, or its construction in England or this state. An inquisition on a writ of ad quod damnum, is the usual mode, when a franchise is granted by prerogative, but when a corporation is created by act of parliament, it does not seem to be usual; it certainly is not necessary to give validity to the charter, or power to do the acts it authorizes. The writ of ad quod damnum appears not to have been in such common use in this state, before the adoption of the constitution, that it can be supposed to have been indispensable; on the contrary, the appointment of commissioners was usual from a very early period. Leaming & Spicer, 440; Allison, 274. It has been continued to the present time, and held by the late learned chancellor of the state to be constitutional. This usage, judicially sanctioned, must be taken as the practical exposition of the constitution and antecedent common law of the state, from which we do not feel at liberty to depart; it is also a common practice in England (vide 11 Ruffh. St. 765; 2 Dow, P. C. 521), and in the other states, to appoint commissioners or other special tribunals to assess damages, by some mode or process specially prescribed, where a permanent appropriation of private property is made for a public use, on a

[2] Since this opinion was prepared, the supreme court have decided, that this amendment does not apply to the states, but only to the general government. Barron v. Baltimore, 7 Pet. [32 U. S.] 247; Lessee of Livingston v. Moore, Id. 551, 552.

road constructed by a state or a corporation. When a mere easement or right of passage is granted, it is usual to do it by a jury (11 Ruffh. St. 850); but it is competent to prescribe by law any other process for the same purpose. We are therefore of opinion that the trial by jury is preserved inviolate in the sense of the constitution, when in all criminal cases, and in civil cases when a right is in controversy in a court of law, it is secured to each party. In cases of this description, the right to take, and the right to compensation, are admitted; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate. At the same time we fully concur in the decision of the supreme court of the state, that when a jury is necessary, the legislature cannot reduce the number required by the common law, which defines a jury to be a body of twelve men. It has not been contended that this provision of the constitution applies to proceedings in chancery or the orphans' courts of the state, nor does there seem any better reason for applying it to collateral process for assessing damages where no suit is pending; it is a speedy and cheap mode of adjusting such matters, which are within the discretion of the legislature, unless prohibited by the constitution of the state. In Bennett v. Boggs [Case No. 1,319], we gave our opinion of the extent of the powers of the government of this state and their limitation, which need not be repeated now; we adhere to the views there expressed, and refer to them for more detailed reasons in favour of the validity of the part of the law now under consideration. A similar construction has been given by the supreme court of the United States to the seventh amendment to the constitution of the United States, which directs that "in all suits at common law, when the sum in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." The occupying claimant law of Ohio directed commissioners to be appointed to value the improvements made upon land recovered by ejectment on an adversary title: it was held that the law was not repugnant to the constitution of the United States, and could be executed in the courts of the United States if it was not repugnant to the constitution of Ohio. Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 525, 526. As the proceeding to ascertain damages under the law in question is neither a suit at common law, or the trial of a right in a court of common law jurisdiction, we are clearly of opinion that it is consistent with the constitutions of the state and of the United States.

2. It is next objected to the validity of this law, that it is to effect a private object, in making a road for the benefit of the corporation, and not for public use; that consequently the legislature have no power to authorize the appropriation of any part of the complainant's property for such purpose without his consent. If the law is clearly open to this objection, it is a fatal one, as it is opposed to every constitutional principle which protects the rights of property, to take it from the lawful owner and appropriate it to the private use of another, or a private corporation for its own use. Generally speaking, public corporations are towns, cities, counties, parishes, existing for public purposes; private corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, but their use may be public. [Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 664. A road or canal constructed by the public or a corporation, is a public highway for the public benefit, if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll; its exaction does not make its use private. If the public can pass and repass, and enjoy its benefits by right, it matters not whether the toll is due to the public or a private corporation; the true criterion is, whether the objects, uses and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right, or only by permission. To ascertain this, the provisions of the law must be examined. The second section gives all the powers necessary to "perfect an expeditious and complete line of communication from Philadelphia to New York;" this is undoubtedly a great public and useful purpose, than which none can be more important, as a link in the great chain of national communication. The twenty-eighth section declares the road to be a public highway, and we should feel bound to so consider it, if other parts of the law did not give it a different character. The sixteenth section authorizes a toll which, estimating the length of the road at sixty miles, would amount to 6 dollars for each passenger, and 4 dollars 80 cents a ton for merchandise transported upon it, and the company is incorporated as a "transportation company." In this there are strong features of a monopoly for the sole benefit of the corporation; the toll cannot be called a reasonable one, and the public cannot use the road by right, when they may be subject to the payment of a toll, which is equivalent to a prohibition. These considerations have led our minds to strong doubts whether the declaration of the legislature is not in direct collision with the provisions of the law, but not so strong and clear as to justify us in declaring the law unconstitutional and void, on an application for an injunction.

3. The next ground taken by the complainant is, that the law gives the company no right to locate the road on his land; inasmuch as they were not authorized to construct any other but a lateral road to Bordentown, and the main route, as now located

and about to be constructed, is at that place. No particular line or route is designated in the law, the only definite points are the beginning and end of the road; there is enough in the law to infer the intent and meaning of the legislature to have been, that the main route should be at some distance from the Delaware at Bordentown, but it is not expressed so clearly as to prohibit its present location. We cannot say that the company had not a discretion in the selection of an intermediate route, when none was accurately defined, or that they have not acted in good faith, with sound discretion, and by their best judgment. They may have deviated from the understanding of the legislature, in locating the main branch where they were authorized to construct only a lateral one, but they must depart from the prescribed line before their proceedings can be arrested as unauthorized, and the deviation must be apparent, so as to indicate the want of discretion and judgment in the execution of the law, and an abuse and misapplication of their authority. The answers of the defendants, with the accompanying affidavits, are so full on the fact of the location being made discreetly and in good faith, that we cannot act on the contrary belief; nor on referring the survey of the road to the law, can we say that it is located on prohibited ground. If it is a purpresture or encroachment on the right of the public to the navigation or landing on the Delaware, it is indictable as a nuisance in the state court, where the defendant would have a right to trial by jury. But a chancellor would not consider him as already convicted of the offence, by awarding an injunction before a trial. Columbian State Banking Co. v. Weldon, by Williamson, Ch.; 18 Ves. 217, 219; 19 Ves. 617, 620; 2 Johns. Ch. 283; Harg. Law Tracts, 85. An individual would be entitled to this remedy only in case the company should attempt to take possession of his land lying without the limits of the road as prescribed by the charter; but in this case, as none are defined, it must be left to the legislature to declare them by some future law, or by some legal proceeding in the state courts, to ascertain whether any right of the state has been violated by an usurpation under colour of law.

4. Assuming the validity of the law, the next objection to the proceedings of the company is, that they have not complied with its provisions, so as to have acquired any authority to enter upon and take private property for the purpose of constructing the road. This depends on the eleventh section, which authorizes the company to enter for two distinct purposes, 1st, to locate, 2d, to construct the road. For the purposes of location they may enter at all times, and erect necessary works and buildings, with no other restriction or condition than that they shall do "no unnecessary injury to private property;" but whenever they have exercised this authority, by which they are enabled to make a location, the law directs that it shall be determined on, and a survey of the route to be deposited; and then provides, "that when the location is determined on, and the survey is deposited in the office of the secretary of state, it shall be lawful for the said company, by its officers, &c. to enter upon, take possession of, use, occupy, and excavate any such lands, &c. for the purposes of constructing the road." This language can admit of no construction, it limits the authority to the case provided for, imposes two conditions which must be performed before the power arises, and which can be performed by no other persons than the officers or agent of the corporation. The marked distinction between the right of entering at all times to survey and locate, and to enter to construct only on the performance of the conditions precedent, leaves no doubt that the intention of the legislature corresponded with their words. Independently of the positive terms of the law, the nature of the conditions is such as to make the authority dependent on their performance. It would be most unreasonable, as well as unjust, to permit private property to be taken for the construction of a road before its location had been determined on by the company. And nothing can be more reasonable and just, than that after a definitive location is so made, there should be some authentic evidence of its route in a public office, to which all persons can have access. Unless this is done, no person could know what part of his property was put in requisition, or have any check on the company against altering or deviating from the route determined on. It could not have been the intention of the legislature to confer a power so undefined and illimitable, and as it is not given by the words of the law, we cannot do it by construction. The defendants, in their answer, admit that the final location of the road is not yet determined on, and that the survey is not yet deposited; they cannot therefore have the authority of the law for entering on or taking possession of any part of complainant's property, for the purpose of constructing the road. The omission is exclusively their own, the law gave them ample powers to enter on the premises of individuals for every purpose of location, it pointed to the acts on which their power to construct depended; they have not thought proper to comply with the conditions imposed, the consequence is obvious. The company will be trespassers if they disturb the possession of the complainant, and the court must proceed in the usual way, if he has made out his case.

Compensation is the next subject to be considered. Taking it as an universal principle, that the right of every government to take private property for public use, and the obligation to make just compensation are unquestionable and concomitant; taking it also

as settled, that though the corporation created by this law is private, the objects and uses to be effected are public. The first question arising is, for what compensation must be made; or, in other words, what is the taking of private property for public use, by a canal, rail road, turnpike, or other improvement or work, to be constructed for public convenience? An entry on private property for the sole purpose of making the necessary explorations for location, is not taking it, the right remains in the owner as fully as before; no permanent injury can be sustained, nothing is taken from him, nothing is given to the company. When nothing further is done, it is competent for the legislature to give this authority, without any obligation to compensate for a damage which must be trivial; if the company commit any wanton acts, or do any unnecessary damage, they are trespassers, otherwise they have full power to locate the road, and the law is their justification. 20 Johns. 104, 740; 7 Johns. Ch. 342, 344. But when a claim is made for the permanent appropriation of private property for the use of the public, which requires the title of the owner to be vested in a corporation or state, the case is different. The proprietor is disseised, his right is extinguished, and his property is taken from him and given to another by the law; this creates the obligation to make compensation. There is also another obligation in this case upon the state, in the law authorizing the complainant to purchase and hold real estate. Both would be violated if compensation is not made, and the law would be void for impairing the obligation of a contract; or if not void, inoperative to pass the right of property, till a just compensation was made. It is not intended to lay down the broad proposition, that it is indispensable that the law should contain a provision for compensation, or prescribe the mode of making it. Though the law may be silent on this subject, yet if compensation is actually made in any way, or if the legislature should, by a subsequent law, direct it to be done, the law would be valid. But before this is done, the execution of any authority which the law might profess to give, to take possession of private property, would be enjoined; for the right of the owner to receive, and the duty of the legislature to provide for compensation is absolute, and the rights of property cannot be taken without an equivalent. By suspending the execution of the law by injunction, no permanent injury could be done to the proprietors, and no just complaint could be made by the legislature or the corporation, by withholding the enjoyment of the property for the objects of the law, till they had performed their duty. 20 Johns. 745. We are aware that the supreme court of New York have declared such a law to be void, as violating a great fundamental principle of government. Bradshaw v. Rodgers, Id. 105, 106. A different opinion is intimated by Chancellor Kent, in delivering the opinion of the court of errors in the same case. Id. 745. We should have felt much difficulty in forming an opinion on a point where there was such high judicial authority on both sides, had we not been aided by two analogous decisions of the supreme court of the United States. In Terrett v. Taylor, a perpetual injunction was decreed against parties claiming land under a law of Virginia, which did not constitutionally divest the title of the complainant. 9 Cranch [13 U. S.] 43, 55. In the Bank of Hamilton v. Dudley, they declared, that they would enjoin the execution of a judgment in ejectment, till the decree of the circuit court, on the report of commissioners appointed under the occupying claimant law of Ohio, for compensation to the defendant for his improvements, should be carried into effect. 2 Pet. [27 U. S.] 526. On this authority, we should have no hesitation in enjoining the execution of the law, if it provided no compensation, without declaring it void; this would do justice to the individual and without defeating the objects of the law. But in adopting this course, we should feel it our duty to go further than to enjoin, till the owner should have an opportunity of seeking and obtaining compensation according to the view of Chancellor Kent, in 20 Johns. 745; we would continue the injunction, till the company had made the compensation, without imposing on the owner any burthen of seeking or pursuing any remedy, or leaving him exposed to any risk or expense in obtaining it. The duty of the legislature is to provide for compensation, and of the company to make it, simultaneously with the disseisin of the owner, and the appropriation of his property to the purposes of the law.

As compensation is a necessary qualification to the exercise of any corporate authority over the property of individuals, it must be made previously to the divestiture of their right, and its final appropriation to the public use. 2 Johns. Ch. 166. We do not say that the sum due must in all cases be actually paid, before the company may proceed to execute the law by commencing the construction of the road. Though the fifth amendment of the constitution may not apply to cases arising under the legislative powers of the state (20 Johns. 106), it may be taken as a correct definition of the rule of public law; there must be "just compensation" made to the owner. The public is considered as an individual treating with another for the exchange of property, or rather compelling the owner to alienate his property for a reasonable price. Vide 2 Co. Inst. 45; 1 Bl. Comm. 139; 2 Johns. Ch. 167. When the law makes provision for compensation, prescribes a mode of assessment, an obligation for its payment in a reasonable time, undoubted security and efficient means for its prompt collection, and the company comply with all the requisitions of the law, so that compensation is certain, we are not prepared to say, that it was not a substantial fulfilment of the duties of the

legislature and corporation, so far as to authorize them to commence their works, before the actual payment of the money. This case does not require us to define precisely, the extent to which the legislature may go in giving time for payment; some discretion may be used, depending on the circumstances of the case, of which a court of equity would judge, so as to secure to the owner a just indemnity, without unreasonable delay, or unnecessarily impeding the prosecution of great works of public improvement. In the present case, the law directs compensation to be made, and prescribes the mode of ascertaining it, when the right of the company attaches, and their obligation to compensate is incurred. At present it is not necessary to inquire further, than what are the requisitions of the law before the company have a right of possession, and whether they have on their part taken the steps incumbent on them to bring their power into action. By the eleventh section of the law, it is made a condition precedent to the entry for construction of the road, that its location be determined on, and a survey thereof be deposited in the office of the secretary of state. When that is done, the company may proceed to enter on the route, and carry the objects of the incorporation into full effect, by taking materials for the construction of the road and its appendant works; "subject to such compensation therefor as is hereinafter provided." The thirteenth section provides, that when no agreement can be made with the owner, a particular description of the land and materials required, shall be made out on oath, with the name of the owner and his residence, and given to a judge of the supreme court; who shall, after giving twenty days notice, appoint commissioners to appraise the land and materials, and to assess damages thereon; who shall make their report in ten days, and deposit it in the office of the clerk of the county. Such report, shall be plenary evidence of the right of the company to the land and materials, and of the owner to recover the amount awarded to him, which shall be a lien in the nature of a mortgage on all the property of the company. The fourteenth section gives to either party the right of making an application to the supreme court, to set the report aside, "provided, that such application shall not prevent the company from taking the land and materials on the filing the aforesaid report." As the eleventh section makes the right of the company subject to the compensation provided by the thirteenth, a compliance with the directions of the latter is clearly a condition precedent. Were the words of the law less explicit, the nature of the right asserted by the company, would make it our duty to hold them to a strict compliance with all the injunctions of the law, under which they claim to exercise a special, and a high authority. In the first place, to take possession of complainant's property, in the next to make an absolute and permanent appropriation of it to their use, and in the third to divest all his right and transfer it to them by the operation of this law. The conditions on which the lawful exercise of this authority depends are plainly defined, they are to be performed by the company as the foundation of their right of entry. The law has not first given this right, and made compensation a condition subsequent; it has not left the owner to seek his remedy for property already appropriated and seized, but prescribed the terms on which alone it can be done, by making it the duty of the company so to proceed, that the same act which gives them a right to another's property, shall operate as a mortgage on all theirs, for the just compensation to which he is entitled. No provision is made for an application by the owner, the law makes him passive for the best of reasons; while his rights of property remain unimpaired, he has nothing to ask or complain of. It is not for him to apply for a right in the company to disseise him, and for compensation as the consequence; the company who want his property, must take legal process, or the due course of law to obtain it, their authority is special, limited, and conditional, and must be strictly followed. The law is made for their benefit, and it is their duty to take the previous steps incumbent on them, or they become trespassers. The principle is this, the company should not be interfered with, if they act within their authority, but that for the very reason that such large powers were given, the court will keep them within the limits of those powers. 2 Dow, P. C. 523. They must pursue the precise remedy given them by the law and are entitled to no other. 3 Mass. 307, 310. As it is admitted that these steps have not been taken, which are made indispensable to the right of the company to enter upon, or take possession of complainant's property; they have no right or power under the law to exercise any part of the authority given by the law, to take land or materials for the construction of the road. By their own neglect the law has been taken from under them, and they now stand before the court, as if their charter contained no provision for compensation, and can stand in no better, till they strictly comply with all the provisions of the thirteenth section. It would contradict the law and every principle of justice, to permit the complainant to be disseised, not only without due process of law, but in violation of that which has been prescribed for the benefit of the corporation, and to be turned over to seek his compensation as he may.

The only remaining question, is whether the complainant has made out a case for an injunction. He is the acknowledged owner of the land on which it is intended to construct the road; he has the perfect right to use, occupy and enjoy it as he has been accustomed to do according to his own pleasure; he may devote it to whatever purposes

he pleases, in which the law protects him equally with any other proprietor. His trees, waters, roads, parks, walks and pleasure grounds are his, by the same right as his mansion house, his grain fields or his meadows. 2 Johns. Ch. 378; 6 Johns. Ch. 439; 1 Ves. Sr. 183; 2 Brown, Ch. 88; 15 Ves. 13; 7 Johns. Ch. 732, 734; 16 Ves. 341; 5 Ves. 688; Dickens, 431. By not having complied with the provisions of the eleventh and thirteenth sections of their charter, the corporation, or any person acting by their authority, will be trespassers if they enter upon the complainant's premises without his consent, for any other purpose than locating the road; thus far his case is made out, and his right clear. The injury complained of as impending over his property is, its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed as effectively as if he had never been its proprietor. No damages can restore him to his former condition, its value to him is not money which money can replace, nor can there be any specific compensation or equivalent; his damages are not pecuniary (vide 7 Johns. Ch. 731), his objects in making his establishment were not profit, but repose, seclusion, and a resting place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed, without the authority of law; or if lawless danger impends over them by persons acting under colour of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission. 7 Ves. 307; 2 Atk. 185; 1 Ves. Sr. 476; Dickens, 149, 164; 6 Johns. Ch. 51, 160; 7 Johns. Ch. 331; 3 Atk. 21; 2 Ves. Sr. 453; 6 Ves. 147; 6 Johns. Ch. 497; 15 Ves. 138; 16 Ves. 341; 17 Ves. 109, 128, 281; 18 Ves. 184. So of any act of peculiar trespass, irreparable, great, grievous mischief or lasting injury, destructive of property, a right or franchise (2 Johns. Ch. 474, 162; [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 840, &c.); taking land for a canal without authority, surveying and dividing a farm (2 Dow, P. C. 520); or the permanent appropriation of land (7 Johns. Ch. 336); which is a total destruction of the owner's right (6 Johns. Ch. 501); these are proper cases for injunction. But the danger must be imminent, not imaginary. On this point the answer admits, that the road has been laid off and staked out on complainant's land, in order to construct it; that this route is the only practicable and feasible one, unless at a greatly increased expense and distance; that the excavations have been begun at each end, and some intermediate points of the route; but it denies that they intend to proceed to the construction of the road, without the consent of the proprietors, the filing the survey and making compensation, which the company are ready and willing to make. There is, however, no denial of the allegation in the bill, that the company have collected labourers, vehicles, implements, &c., at Bordentown, with the intention of commencing operations on complainant's land, on the contrary, it is in substance admitted by the answer, which avers that it is essentially necessary, to effect the great public objects of the road, to take the land on which it is located. As the complainant's allegation in this respect was supported by his affidavit, the answer ought to have denied it explicitly; this has not been done, and the court must take this part of the bill to be true. Nor does the answer aver that the company have taken, or intend to take any of the steps prescribed in the thirteenth section, previously to commencing their operations on the road; the general averment of their willingness to make compensation cannot avail them, it is no remedy to the complainant, or a compliance with the terms of the charter. From the whole tenor and purport of the answer, it is apparent that the company stand upon their right to effect the great and public objects of their incorporation, without any previous obligation to make compensation; under such circumstances we think the danger of a lasting permanent injury to the complainant, so imminent as to bring his case within the well established rules of courts of equity in granting injunctions. To entitle a party to this remedy, it is not necessary that there be any threat or declared intention to commit the act which will cause the injury; it is enough that preparatory acts are done, from which the inference is made of the defendant's intention, as if he employs a surveyor who marks trees, it is presumed to be done with the intention of cutting them down (Eden, Inj. 234; 7 Ves. 309; 5 Ves. 638; 8 Ves. 596); though the defendant denies it in his answer (Dickens, 101); so if he insists on his right to do the act (2 Atk. 184; Dickens, 670); or makes claim to land not his own, but the complainant's ([Terrett v. Taylor] 9 Cranch [13 U. S.] 43); mere apprehension, fear or belief is not enough, unless such facts appear as show them to be well founded, so as to satisfy the court that "the axe is laid at the foot of the tree," and that the act will be done without their interference; whenever that is done the injunction goes. 11 Ves. 53, 54; 2 Atk. 182, 183; [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 840. In this case there seems a moral certainty, that without this preventive process the complainant will be expelled from part of his property without lawful authority; an injunction will not injure any right vested in the defendants, or have any effect, if it is not intended to proceed to the construction of the road till all the conditions of the law are performed. That the complainant may recover damages at law, is no answer to the

application for an injunction against the permanent appropriation of his property for the road, under a claim of right; this is deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for its interference. Trespass is destruction, in the eye of equity, when there is no privity of estate, it prevents its repetition or continuance, protects the right, arrests the injury, and prevents the wrong; this is a more beneficial and complete remedy than the law can give, and therefore the proper one for a court of equity to administer. [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 842, 845; 1 Ves. Sr. 189; 2 Johns. Ch. 473; [Lloyd v. Scott] 4 Pet. [29 U. S.] 215.

We therefore feel bound to enjoin any further proceedings, after the road is finally located and the survey deposited, until the filing the report of commissioners, pursuant to the thirteenth section of the charter.

Case No. 1,618.

In re BOND.

[3 N. B. R. 7 (Quarto, 2).][1]

District Court, S. D. New York. May 31, 1869.

BANKRUPTCY—HEARING BEFORE REGISTER—POWER TO PASS ON EVIDENCE.

In the examination of a witness the register has no power to decide on the materiality or relevancy of questions. In re Levy [Case No. 8,296].

[Cited in Re Graves, 24 Fed. 552.]

[In bankruptcy. In Re Addison F. Bond the certificate of the register is as follows:]

I, the undersigned, one of the registers of this court, do hereby certify that while taking testimony in the above entitled case, a question was asked by the assignee which was objected to by counsel for the bankrupt as immaterial, and not pertinent to any issue that could arise in the proceedings. When about to pass upon the admissibility of the question, the assignee objected that it was not competent for the register to pass upon the materiality of questions, insisting that the same rule that prevails in taking testimony before an examiner in chancery, should prevail in bankruptcy, and desired that the point so raised by him should be certified to the court. Under the requirements of rule 19 of this court, the register respectfully submits that the view entertained by him, that it was his duty to pass upon the relevancy of testimony offered and objected to, rests upon the idea that the register, in every instance, when he is required to act at all, acts (within the purview of his powers) as the court, and not as an officer of the court. This is never so in the case of an examiner in chancery. He acts strictly as an officer of the court. But when the register is specifically charged with a duty, such duty, when performed (as by law required), is always the act of the court. The cases, therefore, did not seem to be parallel. Again, to devolve upon the judge the duty of reading immaterial testimony would be to increase the too arduous duties already devolved upon him. And it has seemed to me to be less laborious to occasionally send a case back to a register, with directions to allow questions ruled out by him, than to undertake the perusal of testimony as voluminous as it often might be. Again, this court was understood, in a case which I believe is reported, the title of which I cannot now recall, to favor the opinion above expressed.

Experience has, however, shown that there is another side to the question. The labor that would be required of the register to pass carefully and conscientiously upon every objection that is raised by counsel during the taking of testimony, would often be beyond the capacity of any one man. It is often the case that several parties are taking testimony at the same time. He must keep the run of each case, or he cannot possibly pass intelligently upon the objections as they arise.

It is respectfully submitted to this honorable court that the course pursued by the court in equity cases, has been found practically convenient, and that the same practice should prevail in bankruptcy. Case of Gattleson [In re Gettleston, Case No. 5,373].

Respectfully submitted, I. T. Williams, Register.

BLATCHFORD, District Judge. I have heretofore, in the case of In re Levy [Case No. 8,296], decided the question here raised. The view I took has been concurred in by Judge Field in New Jersey, and by Judge Hall, in the northern district of New York. In re Koch [Id. 7,916]. General Orders No. 10 is very explicit as to what the register is to do. The clerk will certify this decision to Isaiah T. Williams, Esq.[2]

Case No. 1,619.

BOND v. ALLEN et al.

[Brunner, Col. Cas. 3;[1] 2 Mart. (N. C.) 83.]

Circuit Court, D. North Carolina, 1796.

LIMITATION OF ACTIONS—EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF STATUTE.

The fourth and fifth sections of the act of 1789, c. 308 (1 Rev. Code, c. 65; see 1 Rev. St. c. 65, § 12), limiting the time within which suits are to be brought against executors and administrators, must be taken together, and the defendant to entitle himself to the benefit of

[1] [Reprinted by permission.]

[2] In re Reakert [Case No. 11,614]; In re Levy [Id. 8,296]; In re Rosenfeld [Id. 12,059]; In re Lyon [Id. 8,643].

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

the fourth must show that he has complied with the requisites of the fifth section.

At law. On exception taken to the defendant's plea, grounded on the fourth section of 1789, 23, 677, respecting the limitation of time for bringing suit against administrators and executors. [Sustained.]

Mr. Badger, for complainant.
Mr. Baker, for defendant.

THE COURT (PATERSON, Circuit Justice, and SITGREAVES, District Judge), held that the fourth and fifth sections of that act must be taken together; that the defendant ought to have entitled himself to the benefit of the fourth section, by showing he had complied with the requisites of the fifth; and as this was not set forth, the plea was overruled. See Blount v. Porterfield, 2 Hayw. [N. C.] 161; McLin v. McNamara, 2 Dev. & B. Eq. 82; Salter v. Blount. Id. 218.

BOND (BLEECKER v.). See Cases Nos. 1,534 and 1,535.

BOND (BLEEKER v.). See Case No. 1,536.

Case No. 1,620.

BOND v. The CORA.

[2 Pet. Adm. 361.][1]

District Court, D. Pennsylvania. 1806.[2]

SALVAGE—AMOUNT—PERSONS ENTITLED TO SHARE—FREIGHTER — PASSENGER — SHARE OF OWNER AND CREW.

The brig Ceres of New York, on her voyage from the Havana home, fell in with the British brig Cora, deserted by her crew, and with five feet water in her hold. A part of the crew of the Ceres were put on board the Cora, who with much difficulty brought her into Philadelphia. The Ceres was exposed to great danger from the absence of some of her hands. The British consul filed a libel praying that the Cora might be restored on paying salvage. The salvors, owners, and crew of the Ceres filed their libel for salvage; and a Spaniard who had been a passenger on board the Ceres also claimed a proportion of the salvage. There was also a libel for salvage filed by the owners of goods on freight on board the Ceres. One third of the gross amount of sales was decreed by the district court to the owners, crew and passengers of the Ceres, and the claim to salvage by the freighters was dismissed. From this decree there was an appeal to the circuit court, where the decree of the district court was affirmed.

[Cited in Weeks v. The Catharina Maria, Case No. 17,351; Tyson v. Prior, Id. 14,319; Waterbury v. Myrick, Id. 17,253; Hand v. The Elvira, Id. 6,015; The Henry Ewbank, Id. 6,376; Smith v. The Joseph Stewart, Id. 13,070; The Nathaniel Hooper, Id. 10,032; The John Wurts, Id. 7,434; Evans v. The Charles, Id. 4,556; Sinclair v. Cooper, 108 U. S. 358, 2 Sup. Ct. 758.]

[In admiralty. Libel by Phineas Bond, Esq., his Britannic majesty's consul general for the middle and southern states, against the British brig Cora, praying a restoration of the said brig to her owners; also libel for salvage against the said brig by Nathaniel L. Griswold and George Griswold, owners of the brig Ceres, Bartlet Shepherd, master, and others, seamen, of the Ceres; also a libel for salvage by Don Juan de Echevirria, passenger, and by Daniel Ludlow and others, shippers of cargo, on board the Ceres. Decree awarding salvage, directing sale and restoration of residue to claimants, and dismissing libel of the shippers.]

Libel: "To the Honourable Richard Peters, Judge of the District Court of the United States for the District of Pennsylvania. Phineas Bond, Esq., his Britannic majesty's consul-general for the middle and southern states of America, with all due respect sheweth: That a certain British brig, of very considerable value, laden, as he is informed, with coffee and sugar and other articles, bound from Jamaica to London, hath been found at sea, deserted from necessity by her crew, and brought by certain persons to him unknown into the port at Philadelphia, and is now riding at anchor at the Lazaretto. That the said brig is, he believes, named the Cora, but he knoweth not to whom the said brig and cargo belong, but has reason to believe that they are the property of subjects of his Britannic majesty. On behalf of whom it may concern, he prays, that the said brig and cargo, may by the process of the district court, be taken into the custody of the marshal, and restored to the owner, or owners of the same, after payment of reasonable salvage to those who have brought the same into port, or that such other steps may be taken in the premises as to your honour shall seem fit. P. Bond. Edw. Tilghman, Proctor."

"The libel of Nathaniel L. and George Griswold of the city of New York, merchants, Bartlet Shepherd of the same place, sea captain, and of Dennison Wood, late mate, Andrew Eddy, Thomas Ferris, John Brown, and Joseph Chaplis, seamen, and Joseph Lawrence, cook of the brig Ceres of New York, respectfully sets forth: That your libellants, the said Nathaniel L. and George Griswold, are the owners of a certain brig called the Ceres, of which the said Bartlet Shepherd is master, and the said Dennison Wood, mate, the said Andrew Eddy, Thomas Ferris, John Brown and Joseph Chaplis, seamen, and the said Joseph Lawrence, cook, which said brig Ceres, on her return voyage from Havanna, loaded with sugars, &c. and destined for New York, viz. on or about the twenty-sixth day of August last, on the high seas, in latitude 32, and longitude 77½, W. of London, fell in with a certain brig or vessel, called as your libellants believe 'The Cora,' altogether deserted and derelict, with five feet water in the hold of the said brig, and with her rigging very much shattered and injured. Whereupon your libellants, the said Bartlet Shepherd, Dennison Wood and others the crew of the

[1] [Reported by Richard Peters, Jr., Esq.]

[2] [Affirmed by circuit court in Bond v. The Cora, Case No. 1,621.]

said brig Ceres took possession of the said brig Cora; and after much difficulty and danger, and with the exposure of their lives and of the loss of the said brig Ceres, the said Cora was pumped out by some of the crew of the said brig Ceres and taken in tow by the said brig Ceres, and by her drawn towards land. That by order of your libellants the said Bartlet Shepherd, the said Dennison Wood, Andrew Eddy, and Thomas Ferris went on board of the said brig Cora, and have continued on board of her unto this time. That on or about the third day of September a violent squall came on which separated the said brig Ceres from the said brig Cora; and the said Dennison Wood and others on board the said Cora, in obedience to the orders they had received from the said Bartlet Shepherd, and as soon as the said squall had abated, by constant exertion, brought the said Cora into the port of Philadelphia, where they arrived on or about the fourteenth day of September. Your libellants therefore pray, that the said brig Cora, her furniture, tackle, &c. together with her cargo, and every thing found on board of her, may be adjudged to them as deserted, derelict,[2] and by reason of the premises, having become the property of your libellants, in such parts or portions as to this honourable court may seem proper, and according to the laws and regulations of the admiralty. Richard Peters, Jun., Proctor for the Libellants."

"The libel of Don Juan de Echevirria, a subject of his Catholic majesty, most respectfully sheweth: That your libellant is, and for many years now last past has been, a captain or master of ships and vessels in the merchant service of Spain, duly licensed and admitted according to the marine law and regulation of that country; and as such is skilled and experienced in the navigation and management of ships and vessels. That on the fifth of June now last past, your libellant was owner and master of a certain Spanish brigantine called the Felix, and being with his said vessel in the course of a voyage, he was on that day captured on the high seas by a British privateer, and carried with his said vessel into the island of Jamaica, where his person was released and he received a passport from the British government there to go to Batavano, in the island of Cuba, from whence he went to the port of the Havanna: that it being his intention to go from thence to Montevideo on the Spanish American continent, he shipped himself as a passenger at the Havanna aforesaid on board a certain American brig, called the Ceres, Bartlet Shepherd master, of the burthen of one hundred and thirty-five tons, or thereabouts, bound to the port of New York, navigated by the said captain, his mate, and four seamen, making in all six persons, and there were no other persons on board, but the said six persons, the cook and your libellant, who was a passenger as aforesaid, and who agreed to pay to the said captain Shepherd, forty dollars, for the transportation of himself and his effects to New York. That they sailed from the Havanna on the seventeenth of the said month, and continued their voyage until they were in thirty-three degrees north latitude, and sixty-three degrees west longitude, something more or less, when they saw a sail in the evening under a heavy squall, which did not appear to be taking any precautions to guard against it. That your libellant insisted upon it to Captain Shepherd, that there was nobody on board of the said vessel, on which he answered, that she might be a privateer, and that he did not want to go on board, the wind being favourable for continuing our navigation; that your libellant again represented to him that the said vessel had few or no people on board; on which, and on which only, he determined to speak her, which they did about seven o'clock in the evening, and after having hailed her several times, and nobody answering, it was thought proper to put out the long boat: that your libellant offered to go on board of the said vessel, but Captain Shepherd would not permit it, but sent his mate with two men on board of her, who informed us that she was entirely deserted by her crew, and that she made a great deal of water. The boat returned with two more men, in order to pump out the water; but after having pumped the pumps almost dry, it was found that she did not make any water at all; and in the mean time, your libellant and two other persons were the only ones who remained on board of the Ceres, took in reefs, and did the work of that vessel until near midnight, when the boat returned from the deserted vessel. That the next morning at five o'clock Captain Shepherd again put the boat to sea, for the purpose of overhauling the cargo of the deserted brig: he went in consequence to the brig with all his people, leaving the cook alone with this libellant, to take care of the Ceres; that your libellant with the said cook remained on board the Ceres, and kept tacking about until one o'clock in the afternoon, at which time they perceived a dismasted ship, and two of the mariners then returned with the captain on board of the Ceres, leaving the mate and the two other mariners on board of the deserted brig, with directions to sail after them and pursue the same course, but they were afterwards separated by a gale, and the deserted brig was brought into Philadelphia, where she is now libelled in this honourable court for salvage, by the name of the brig Cora; and your libellant further says, that the Ceres then sailed towards the dismasted ship, and having come within hailing distance, and found that there was nobody on board, Captain Shepherd

[2] The claim to the Cora as a derelict, was afterwards given up, and the libellants proceeded for salvage only.

with his two mariners went on board of her and brought from thence sundry articles of apparel and furniture, such as sails, pieces of sail cloth, spy-glasses, compasses, &c., and for the space of three hours while they were bringing the said articles, your libellant remained alone with the cook on board the Ceres, tacking about, and exerting themselves to keep her right, Captain Shepherd not permitting him to go either on board the ship or the deserted brig, and thus they pursued their navigation until they arrived at New York. Your libellant, from the time that they first saw the deserted brig, working on board the said brig Ceres like a common seaman, and making extraordinary exertions from the small number of people that were on board; and your libellant never quitted the Ceres, nor ceased to assist in working on board of her until the whole cargo was delivered at New York aforesaid. And your libellant further says, That in consequence of the necessary assistance that he gave in working the Ceres, which was necessitated by part of her original crew being employed in the salvage of the deserted brig, and of articles out of the dismasted ship, and the risk of his life which he ran by being obliged to work the Ceres with a reduced number of men, and sometimes with the cook alone, he conceives that he has effectually assisted by his labour and danger in the said salvage, and is entitled to a reasonable part of the reward to be allowed by this honourable court for the same. He therefore humbly prays your honour will be pleased by your decree in the cause of salvage now pending before you, at the instance of the said Bartlet Shepherd, his owners and crew, to decree such a proportion of the said salvage to your libellant, as in your wisdom shall seem just, and he shall ever pray, &c. P. S. Du Ponceau, Attorney for Libellant."

"The libel of Daniel Ludlow and others, shippers of the cargo on board the brig Ceres for themselves and all others entitled humbly shews: That on the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and six, the said brig being on a voyage from the Havanna to New York, on the high seas, in latitude thirty-two degrees, and longitude seventy-four degrees and thirty minutes west from London, fell in with a certain brig or vessel, called as your libellants believe 'The Cora,' altogether deserted and derelict, with five feet water in her hold, and with her rigging much shattered and injured. Whereupon the crew of the said brig Ceres took possession of the said brig or vessel called the Cora, with much labour and difficulty, and with the exposure to imminent danger and loss of the cargo of the said brig Ceres. That the said vessel or brig called the Cora was taken in tow by the said brig Ceres, and by her drawn towards land. That some of the crew of the said brig Ceres went on board of the said brig or vessel called the Cora, and thereby left the said cargo in the said brig Ceres aforesaid in imminent risk or danger; and the said part of the crew of the Ceres afterwards, to wit, the —— day of September, in the year aforesaid, brought the said brig or vessel called the Cora into the port of Philadelphia. Your libellants therefore pray, that such part or portion of the said brig or vessel called the Cora, her tackle, apparel and furniture, together with her cargo, or whatever else may be found on board of her may be adjudged to them as reasonable salvage as to this honourable court may seem proper, and according to the laws and regulations of the admiralty. Ingersoll, Proctor, &c."

The value of the Ceres was stated and agreed to be $4500, her freight and the property on board of her belonging to her owners was estimated at $4864 17, and the whole value of the goods on freight on board the Ceres, was $13,400. The Cora and her cargo were sold by the marshal, and produced $47,308 63; and the duties with the costs and expenses attending the proceedings amounting to $9989 37, left the net product of the sales $37,319 26. The claim of the freighters to salvage was opposed by Rawle and Peters, Jun., for the owners of the Ceres, and supported by Ingersoll for Ludlow and others, owners of that part of the cargo of the Ceres which was on freight. In opposition to the claim it was urged that a deviation had been committed by the master of the Ceres, for which her owners were responsible, and who became insurers of the property of the freighters, from the time the deviation took place. Encountering all the risks incurred by the property on board the Ceres in bringing in the Cora, to them only ought the salvage, which would be allowed by the court, for the dangers to which the Ceres and her cargo were exposed, be given. The case of The Blaireau, 2 Cranch [6 U. S.] 240, decided in the supreme court of the United States, was not admitted as an authority in support of the claims of the freighters, as it was contended, one of the charterers and owners of the cargo of the Fame being on board of her, and consenting to the deviation committed by the Fame, in that case discharged her owner from his responsibility under the bills of loading and charter-party, and thus the charterers became entitled to part of the salvage. The case of The Jefferson [Morehouse v. The Jefferson, Case No. 9,793] was also to be rejected, as the captain of the finding vessel and owner of part of the cargo, could have no claim on his owners for the loss of his goods after having himself committed the deviation. These, it was urged, were the only cases in which owners of cargo, who were not owners of the saving vessel, had received salvage.

On the part of the freighters it was stated that the owners of the Ceres, and the master were the agents of the freighters for the pur-

pose of transporting the cargo and not for any other, and that they had no right to put the property on freight at risk. That if the principle upon which the owners of the vessel claim salvage, for the risk encountered by the part of the cargo or freight was correct, it would extend to give the whole of the salvage to the master, as he, being the agent of the owners, would be responsible to them for the consequences of his deviation; and having the responsibility, he should be compensated for the risk incurred by it. It was said, that as property at risk earned salvage, and the owners of the Ceres are entitled to salvage for the risk run by their vessel, the owners of the goods are equally entitled. The case of The Blaireau was claimed as an authority in support of these positions, and it was alleged that the charterer Christie, could not discharge the responsibility of the owner of the Fame for that part of the property which belonged to the co-charterer, and yet the charterers were both allowed salvage. The right of a vessel to stop in order to assist another in distress was contended for, and it was said the insurer was not affected by such a delay.

The removal of the case by appeal to the circuit court being determined on, no further argument took place in the district court, and the following decree was given:

Decree.

I, Richard Peters, judge of the district court of the United States in and for the district of Pennsylvania, having duly considered the libels filed in this case, and the several claims exhibited for salvage, as also the testimony adduced in support thereof, do thereupon adjudge, order and decree, as follows: that is to say—The libel of Daniel Ludlow, claiming salvage as owner of the cargo on board the Ceres, I dismiss with costs. The gross amount of the sales of the said brigantine Cora and her cargo, as appears by the marshal's returns, is forty-seven thousand, three hundred and eight dollars, and sixty-three cents. Of this sum I adjudge, order and decree, that the salvors have and recover, in full satisfaction for and as salvage, the one-third part, or fifteen thousand seven hundred and sixty-nine dollars, and fifty-four cents to be apportioned in the following manner, that is to say:

Nathaniel L. and George Griswold, the owners of the brigantine Ceres, shall receive and take one third part of the said sum of fifteen thousand seven hundred and sixty-nine dollars and fifty-four cents, or.....		$ 5,256 51
The remaining two-thirds parts of the said sum of fifteen thousand, seven hundred and sixty-nine dollars and fifty-four cents, shall be divided into twenty-four equal parts or shares, whereof Bartlett Shepherd, the master of the Ceres, shall receive and take shares	6	2,628 26
Dennison Wood, the mate, shall receive and take.....	4	1,752 17
Andrew Eddy, seaman.....	3	1,314 14
Thomas Ferris do.....	3	1,314 14
John Brown do.....	2	876 8
Joseph Chaplis do.....	2	876 8
Joseph Lawrence, cook.....	2	876 8
Don Juan de Echevirria, passenger	2	876 8
Shares	24	$15,769 54

And I finally adjudge, order and decree, that the duties, costs, charges and expenses shall be deducted from and paid out of the remaining two-thirds of the said gross amount of sales, and that the residue thereof shall be paid over to the libellants for the benefit of the concerned.

RICHARD PETERS.

From this decree an appeal was entered to the circuit court of the United States. [See Bond v. The Cora, Case No. 1,621.]

Case No. 1,621.

BOND v. The CORA.

[2 Wash. C. C. 80; 2 Pet. Adm. 373.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.[2]

SALVAGE—RISK—AMOUNT OF AWARD—COMPENSATION TO FREIGHTER—TO PASSENGER—DISTRIBUTION AMONG SALVORS — MARITIME LAW—DEVIATION.

1. Salvage should always comprehend a reward for the risk of life and property, labour and danger in the undertaking, and should be so liberal as to afford a sufficient inducement to similar exertions to preserve the life and property of others.

2. The only rule for the amount of salvage, is that which is dictated by a sound discretion, under the particular circumstances of the case.

[Cited in Sewell v. Nine Bales of Cotton, Case No. 12,683; Sinclair v. Cooper, 108 U. S. 358, 2 Sup. Ct. 758.]

3. Unless in cases of very extraordinary merit, or where the property saved is very large or very small, one-third has been the most usual rate.

4. What will constitute a deviation on a voyage insured. To go out of her course to save the life of a man, will not be considered a deviation. [But stoppage to save property is deviation, and discharges the insurer.]

[Cited in The Waterloo, Case No. 17,257; The Henry Ewbank, Id. 6,376; The Nathaniel Hooper, Id. 10,032; Peterson v. The Chandos, 4 Fed. 653.]

[See The Boston, Case No. 1,673; The George Nicholaus, Id. 13,578; Crocker v. Jackson, Id. 3,398.]

5. The owner of the vessel, and not the freighter, is entitled to salvage, unless being on board at the time the property was saved, he consented to the same, and thus discharged the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq. Also reported by Hon. Richard Peters, District Judge, and here compiled and reprinted. Bracketed matter from 2 Pet. Adm. 373.]

[2] [Affirming Bond v. The Cora, Case No. 1,620.]

owner of the vessel from the responsibility incurred by deviating to save property.

[Cited in The Nathaniel Hooper, Case No. 10,032; The Dupuy De Lome, 55 Fed. 97.]

[See Williams v. The Adolphe, Case No. 17,712; The Persian Monarch, 23 Fed. 820.]

6. A passenger who assisted in saving the property, is entitled to a portion of the salvage.

[See The Charles Henry, Case No. 2,617; The Anastasia, Id. 346; The Pennsylvania, Id. 10,945; The Connemara, 108 U. S. 352, 2 Sup. Ct. 754.]

7. Distribution of the salvage among the persons entitled to it. The portions of salvage ought not to be so much regarded as the actual sum to be paid to the salvors.

[Cited in Tyson v. Prior, Case No. 14,319; Smith v. The Joseph Stewart, Id. 13,070; Sewell v. Nine Bales of Cotton, Id. 12,683; The John Wurts, Id. 7,434; Waterbury v. Myrick, Id. 17,253; The Pomona, 37 Fed. 816.]

[Appeal from the district court of the United States for the district of Pennsylvania.

[In admiralty. Libel by Phineas Bond, Esq., his Britannic majesty's consul general for the middle and southern states, against the British brig Cora, praying a restoration of said brig to her owners; also libels against the said brig for salvage by Nathaniel L. Griswold and George Griswold, owners of the brig Ceres, Bartlet Shepherd, master, and others, seamen of the Ceres, and by Don Juan de Echevirria (Echeverria), passenger on the Ceres, and by Daniel Ludlow and others, shippers of cargo on board the Ceres. The district court ordered a sale of the Cora, and decreed that salvage be paid out of the proceeds, except to Ludlow and his colibelants, and that the residue be restored to the owners. Bond v. The Cora, Case No. 1,620. The owners, master, and crew of the Ceres, also Ludlow and his colibelants, and the British consul, appeal. Affirmed.]

[3] From this decree [in Bond v. The Cora, Case No. 1,620] an appeal was entered to the circuit court of the United States, and the case was fully argued before the Honorable Judge WASHINGTON. The claims of the freighters to salvage were opposed on the principles urged in the district court. Ingersoll and Duponceau for the freighters, Rawle and Peters, Jun., for the owners of the Ceres.

[The claim of Echeverria, the Spanish passenger, was opposed on the testimony of one of the witnesses, who stated he had not given aid to the Ceres when in time of difficulty and danger. The right of passengers to salvage, who assist in saving property found at sea, was not denied.

[Mr. Tilghman, for the British consul, opposed the decree of the district court allowing one-third of the net proceeds of the Cora and cargo as salvage. A greater allowance was claimed by Rawle and Peters, Jun., for the master, owners, and crew of the Ceres. Judge Washington gave the following opinion:][3]

[3] [From 2 Pet. Adm. 372, 373.]

The statement of the case will be found in the opinion delivered by WASHINGTON, Circuit Justice. This is an appeal from the district court of Pennsylvania, in a case of salvage. The case appears to be, that the brig Ceres, on her return voyage from Havana to New-York, laden with a cargo, partly on freight and partly belonging to the owners, Nathaniel Griswold and George Griswold, commanded by captain [Bartlet][4] Shepherd, and with a crew consisting of the mate, four seamen, and the cook, and having on board one passenger; on the 26th of August fell in with the brig Cora, an English vessel, in latitude 32° north, and longitude 74° 30′ west from London. The captain having hailed the Cora, and received no answer, he boarded her, and found her laden with a valuable cargo, but wholly deserted. He put on board the Cora, the mate of the Ceres [Dennison Wood],[5] with [Andrew][5] Eddy and Farris [Thomas Ferris],[5] two of the seamen, with orders to keep company with the Ceres; and, to enable her to do so, the captain slackened sail on board the Ceres. On the 28th of the same month, the Cora was taken in tow by the Ceres, but they were soon again separated by the breaking of the hawser. The two vessels, however, kept company until the 3d of September, when a violent gale arose and parted them; but not until the captain had given orders to the mate to make for the nearest port in the United States. It appears that it was with great difficulty the Ceres could be navigated, in consequence of the diminution of the crew; and that she was exposed on that account to considerable danger and loss of rigging.

The Cora, when she was boarded, had five feet of water in her hold. The mate and his two men were employed from the night of the 26th to the 28th, in pumping her out. It appears that they encountered many difficulties, and were exposed to much danger, during the storm which separated the Cora from the Ceres. When that subsided, they bore away for the nearest port; took in a pilot on the 7th, and anchored within the Delaware bay on the 8th of September. The Ceres came to anchor on the 11th, off Sandy Hook.

Libels for salvage were filed in the district court by the owners of the Ceres, by the freighters, the captain and crew, and by Mr. Echeverria, a Spanish passenger. The district court having decreed one-third[6] of the

[4] [From 2 Pet. Adm. 373.]

[5] [From 2 Pet. Adm. 374.]

[6] [From 2 Wash. C. C. 81:] The district court proceeded no farther than to decree the rate of salvage, and the appeal was prayed and entered by consent, for the sake of expedition, and to try the principles of salvage. After I had made my decree, I found, upon conference with the judge of that court, that we entirely concurred upon every point; in consequence of which, his decree was made so as to conform to that of this court.

gross amount of the sales of the cargo for salvage, cross-appeals were entered.

The first question to be decided, is the rate of salvage which ought to be allowed to the salvors. I adopt the expressions, as I do the sentiments of the district judge, in the Case of La Belle Creole [Case No. 17,165], "the salvage should comprehend a reward for the risk of life and property, labour and danger, in the undertaking; and should be so liberal, as to afford a sufficient inducement to similar exertions to preserve the lives and property of others."

In appreciating and properly rewarding such services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case, can be laid down; and yet, men possessing equal liberality and minds equally intelligent, would vary very consideably from each other in fixing the quantum of this reward. But, although no certain rule can be established to govern every possible case, yet it is proper to refer to former decisions in cases not very dissimilar from that under consideration, from which principles may be extracted, which may and ought to be regarded. In searching for something like a general rule, through the numerous cases which have been decided on this point, it appears, that in those of very great or very small merit [that except in cases of very great or very small hazard],[7] or where the property saved has been to the property at risk, in a ratio very much beyond, or very far short of a fair compensation for the service rendered, and the risk incurred, the salvage allowed is about the proportion decreed in this case. It is unnecessary to go through all the cases upon this subject, because I think that of The Blaireau, 2 Cranch [6 U. S.] 240, which is the first authority in this court, does, in all its circumstances, as nearly resemble the present as any I have met with.

In that case, one mariner was found on board The Blaireau; and in this, the vessel was totally deserted. This difference, it is contended, renders the former a case of much less merit than the present. But this difference does not strike me to be otherwise material than as the navigation of the two vessels in the former case was rendered in a small degree less laborious, and perhaps somewhat less dangerous, by the addition of Tool, the man found on board The Blaireau. The Cora, it is true, was deserted, but she was not abandoned. This, in substance, was the case with The Blaireau; as it is clear that Tool's remaining on board that vessel was not a voluntary act, but merely accidental. The Blaireau had a navigation of nearly 3,000 miles to accomplish, before she could reach a port of safety. The Cora had scarcely half as far to go, but I believe it to be a fact, that the danger is greater when the vessel approaches the American coast; and besides, it does not appear that the former [the Fame and][8] The Blaireau, experienced any severe weather; whereas the Ceres and Cora were both exposed to the fury of a violent storm. The former, The Blaireau, was an indifferent vessel, was considerably injured, and required pumping frequently to keep her free; The Cora was perfectly strong and well constructed. In these respects, the merits of the salvors in the former, exceeded those of the salvors in the latter case. On the other hand, the former [the Fame][8] retained on board more than two hands; and it did not appear that the seven hands left with The Blaireau, were insufficient to navigate her with safety. Comparing these two cases together, I cannot think of increasing the salvage allowed by the district court; and, on the other hand, considering the risk to which both the Ceres and Cora were exposed, in consequence of the insufficient number of hands by which they were respectively navigated, and recollecting no case of equal merit with the present, where less than one-third has been allowed; I do not feel disposed to diminish this proportion.

The next consideration is, how ought this salvage to be distributed? The rights of the owners of the vessel and freight, and of the master and crew, are not questioned. But these persons contest the claims of the freighter and of the passenger. First, as to the freighter. Salvage being intended as a reward for meritorious services performed; and to encourage others to similar exertions, whenever the occasion may occur, it follows, that all those who risk their property are entitled to participate in the reward. It is contended by the freighter, that the acts done by the captain of the Ceres, amounted to a deviation, which discharged the underwriters, in case the cargo was insured; and increased the risk of safe arrival, if the freighter stood his own insurer. This proposition presents two questions—first, was there a deviation? and, secondly, if there was, on whom would the loss have fallen, had the Ceres not arrived? First, the general definition of deviation is, a voluntary departure from the course of the voyage insured, without necessity or reasonable cause; and I recollect no case, where the justification is not essentially connected with the motive of safety to the property insured. If the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the general rule. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence; but after this object is effected, if the stoppage be continued, or the risk increased, by adding to the cargo, diminishing the crew, or by other means, for the purpose of saving the property found, I think the underwriters are discharged. For

[7] [From 2 Pet. Adm. 375.]

[8] [From 2 Pet. Adm. 371.]

let me ask, if salvage be allowed to the owner in consideration of the risk to which his property is exposed, where is the risk if he be insured? and if the act which produces the increased risk, do not discharge the underwriters, upon what fair principle shall they take all the risk, and the insured receive all the reward?

It is said to be for the general benefit of underwriters, to permit the insured to save property found at sea, without considering the act as a deviation. But I suspect that underwriters are too well acquainted with their interest, to yield a ready assent to this proposition. The underwriters on the saving vessel would take upon themselves an increased risk, without receiving an increased reward; and the insurers on the property saved, could feel no inducement to grant encouragement to those who have the power to save it—since a liberal salvage will never fail to stimulate their exertions. The former can never derive a benefit from an act which increases their risk, and the latter can feel no motive for consenting to encounter a similar danger, when, in turn, they may be insurers of the saving vessel.

If then an act similar to that performed by the Ceres, amount to a deviation, what, in the second place, is the risk to which the property of the freighter is exposed? Whether he be insured or not, the owner of the vessel is responsible to him, if a loss happen in consequence of the deviation. If so, then it is the owner of the vessel, and not the freighter, who risks the value of the cargo, as well as that of the vessel and freight. But it is contended that the owner may be worth nothing, in which case the freighter would lose the effect of his recourse against the owner. To this, there are two answers; first, the owner of the vessel is trusted by the freighter at all events, and he is consequently deemed sufficient to answer for every unlawful act of the master: and, secondly, the argument can never apply, but in a case where the court, who is distributing the salvage, is satisfied of the fact that the insolvency of the owner really exists. I will not say that if such a case were made out, the court might not, upon principles of equity, decree to the freighter what, otherwise, the owner would have been entitled to.

Thus the question seems to stand in point of principle. As to authorities, it is admitted that no instance can be found of salvage being allowed to the freighter in a case resembling the present. In the case of The Mary Ford, 3 Dall. [3 U. S.] 188, though the George had a valuable cargo on board on freight, yet the whole salvage was given to the owner of the vessel, and the crew. In the case of The Jefferson, decided in the district court of New York [Morehouse v. The Jefferson, Case No. 9,793], the owners of the vessel were also owners of part of the cargo, and the master was owner of the residue. They were very properly allowed salvage in consideration of their respective interests in the cargo, because the risk of deviation fell upon them.

It is unreasonable to suppose, that in the multitude of cases which were cited at the bar, some of the saving vessels should not have had cargoes on freight; and yet in not one, except that of The Blaireau, does it appear that even the claim of a freighter was interposed. This is certainly strong evidence of the general understanding of legal and commercial men, as to the rights of such a claimant.

I now come to the cause of The Blaireau [2 Cranch (6 U. S.) 240], in which the freighter was allowed salvage in proportion to the value of his property on board. The supreme court considered the cargo as being at his risk, in consequence of the consent of Christie, one of the joint owners of it, to those acts which tended to increase the risk. But the right of a ship owner to freight, arising out of an express contract, it was not considered that a permission to stop for the relief of the Blaireau, which was as well for the benefit of the owner and crew as of the freighter, could, by implication, release the owner from his obligation to carry the cargo safely before he could claim his freight. No doubt that the court considered the acts of Christie binding upon Jackson; but these acts were not such as operated to vary the contract respecting the freight, though it was construed to go so far as to charge Christie and Jackson with the hazards to be encountered by the cargo.

It appears to me, that the case of The Blaireau applies strongly to the present. It clearly supports the following principles; first, that by acts similar to those done in this, the insurance on the vessel and cargo [freight][9] was vacated; second, that the freighter is indemnified by the owner, in case of loss arising from such acts of the master, and consequently is not entitled to salvage, [except][9] where he does some act which discharges the owner from his responsibility.

The only remaining question respects the claim of Don Juan Echeverria, a passenger on board the Ceres at the time the Cora was found. The facts respecting him, which seem not to be disputed, are; that being at Havana, he took his passage on board the Ceres for New York, for which he was to pay forty dollars; that he had been accustomed to the navigation of vessels, and had commanded them in the merchant service of Spain; that he assisted in the navigation of the Ceres, before and after the Cora was found, whenever the weather was fair. The captain's declarations, if they can be received in evidence, attest his merit and usefulness on all occasions during the voyage, though it is sworn by one witness, that this claimant would afford no assistance in tempestuous weather. Without taking into con-

[9] [From 2 Pet. Adm. 380.]

sideration these declarations of the captain, which have been objected to, but without deciding in favour, or against the propriety of admitting such evidence in a court of admiralty in a case precisely like the present,[10] I am satisfied that the claimant is entitled to the share of a common seaman, in which capacity it is admitted that he acted in the navigation of the Ceres. It is too much to expect that I can credit what is said by the witness, who testifies as to his general conduct, that at a time of danger, which was rendered imminent by the scarcity of hands on board, a skilful navigator, whose life, in common with every person on board was in hazard; would, at such a time above all others, withdraw, or would have been permitted to withdraw, from the common exertions to preserve the vessel and the lives of the crew.

In making a distribution of the salvage, I shall follow the rule which seems to have governed the supreme court in the case of The Blaireau, so far as it applies. I shall therefore allow the owner of the vessel one-third part of the salvage decreed, and divide the residue into twenty-four parts, whereof six shall go to the captain, four to the mate, and three to the two seamen who assisted him in navigating the Cora; and whose danger and labour greatly exceeded that of the crew on board the Ceres; two shares to each of the mariners, including the cook, on board the Ceres, and the same proportion to Echeverria, the passenger.

It is true, that although the owner will receive in this case the same proportion as was allotted to the owner and freighter in the case of The Blaireau, yet it will not bear the same proportion to the property at risk. But I think, with the judge of this district, as reported in one of the cases which were cited, that the proportions ought not to be so much regarded, as the actual sum to be paid by the salvors.

If the property saved be considerable, the proportion will of course increase the reward, both as it respects the property at risk, and the principal danger and labour of the salvors. If it be small, this reward will be diminished; and so it ought to be, because, upon the principles of equality, in which consists the highest equity, a reasonable part or the thing saved should remain to the original owner of the whole. But where the usual rate of salvage, taken from the property saved, would afford a very inadequate reward to the owners of the property at risk, or to the salvors for their personal danger and labour; that might afford a good reason for increasing the rate of salvage, with a view to rendering the compensation adequate, without, at the same time, losing sight of the interest of the owners of the property saved. Taking all these circumstances into consideration, I am satisfied, that though the sum allowed to the owners, in this instance, is less in proportion to the property they had at risk, than was allowed to the owners in the case of The Blaireau, still it is sufficiently ample and liberal.

Decree affirmed.

[10] [From 2 Pet. Adm. 281:] The evidence offered was, the declarations of the captain relative to the conduct of the passenger. These declarations were proved by persons who had lodged with the captain after his arrival in New York. The admission of this testimony, was opposed on the principle that as the allowance to the passenger would be taken from the sum which would be distributed among the crew of the Ceres, and would not affect the amount to be given to the captain, it would be introducing as evidence the declarations of a stranger who was not on oath when they were made.

BOND (EDWARDS v.). See Case No. 4,294.

Case No. 1,622.

BOND v. GRACE.

[1 Cranch, C. C. 96.][1]

Circuit Court, District of Columbia. Nov. Term, 1802.

NEGOTIABLE INSTRUMENTS—ACTION ON FOREIGN NOTE—COMPUTATION.

1. Judgment for sterling money. Difference between English and Irish sterling.

[2. Under an act authorizing the court to settle the rate of exchange, witnesses may be examined to prove such rate.]

Note in sterling money, dated in Ireland. The declaration is for sterling money.

THE COURT, under the act of assembly of Virginia, authorizing them to settle the rate of exchange, at April term last, examined witnesses to prove the rate of exchange between Ireland and England. Irish is turned into English sterling by deducting one-thirteenth of the Irish, and English is turned into Irish by adding one-twelfth of the English. See the record of April term, 1802, in the case of Mahon v. Grace's Ex'rs [Case No. 8,967].

BOND (JOHNSON v.). See Case No. 7,374.

Case No. 1,623.

BOND v. ROSS.

[1 Brock. 316.][2]

Circuit Court, D. Virginia. Nov. Term, 1815.

DEED OF TRUST—RECORDING.

The fair construction of the act of assembly of Virginia, passed in December, 1792, for regulating conveyances, requires, that a deed of trust, or a mortgage on personal estate, should be recorded in the general court, or, in the court of the district, county, city, or corporation, in which the grantor resided, and, consequently, a

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

[2] [Reported by John W. Brockenbrough, Esq.]

deed of trust, or mortgage on slaves, which was recorded only in the court of the county, in which the slaves were usually employed, (the grantor residing in a different county,) was held void, as to a creditor.

[Clayborn v. Hill, 1 Wash. (Va.) 177, followed.]

In equity. On the 6th day of June, 1804, Phineas Bond, as attorney for the creditors of Ezekiel Edwards, a British subject, obtained a decree in this court, for the sum of $180,884 70, against David Ross, payable in installments, viz.: $10,000, payable on the first day of October following, $10,000 on the first day of January, 1805, and $16,666 66, payable semi-annually, until the whole decree should be fully satisfied and paid off. On the 21st day of October, 1807, the said Ross executed a deed of mortgage to William Mewburn and others, covering a very large number of slaves, and other personal property, to secure certain debts due from the mortgagor, to the mortgagees, which slaves were usually employed on an estate, called the "Oxford Iron Works," belonging to said Ross, in the county of Campbell, and state of Virginia. This deed was executed in the city of Richmond, where David Ross then lived, and was recorded in the county court of Campbell. Prior to the institution of this suit, but several years after the execution of the deed of mortgage, a portion of the instalments having been paid, but the residue having fallen due and payable, amounting to a very large sum, under the decree of the 6th of June, 1804, the plaintiff Bond, sued out a writ of fieri facias, against the goods and chattels of David Ross, for the sum remaining unpaid, which was executed upon the slaves covered by the mortgage deed to Mewburn and others. The slaves were exposed to sale, and the sale was forbidden by Mewburn. The plaintiff, Bond, then filed his bill in equity in this court, making the parties to the mortgage deeds, parties defendants to the suit, to set aside the deed of mortgage aforesaid, as "fraudulent and void as to creditors, it not having been recorded in the general court, or the court of the district or county, in which the said Ross then resided, and continues to reside, he having been, at the date of the deed, and ever since, an inhabitant of the city of Richmond." The defendant Mewburn, in his answer, admits the facts recited in the plaintiff's bill to be true, but insists that the deed of mortgage was properly recorded in the county court of Campbell, where the slaves and other property thereby conveyed were, at the time of executing and recording the same. The same position is taken by the other mortgagees in their respective answers. [Decree for complainant.]

The following opinion was delivered by MARSHALL, Circuit Justice. This case depends on the construction of the act of assembly, for regulating conveyances, which was passed in the year 1792.[2] It is with much repugnance that this court proceeds to decide any cause dependent on a statute of the state, which is extremely vague in its expression, and the construction of which does not appear to have been fully settled by the state tribunals. If the means of avoiding it were perceived, those means would be gladly embraced. But were this cause to be postponed, until the statute on which it depends should be expounded by the judiciary of Virginia, the postponement might be indefinite, as it is not understood, that the question is before any of the courts of the state. It is, therefore, the duty of this court to proceed. The first section of the act relates exclusively to lands, and declares the conveyance to be void, as to subsequent purchasers not having notice thereof; and as to all creditors, unless it shall be recorded in the general court, or court of the district, county, or corporation, in which the lands lie. The second section relates exclusively to covenants, or agreements made in consideration of marriage, and declares, that they shall not be valid against a subsequent purchaser without notice, or against any creditor, unless recorded, if land be charged, in the general court, or court of the district, county, or corporation, in which the land lies; or, if personal estate only be charged, in the court of the district, county, or corporation, in which the party, bound by such covenant or agreement, resides.[3] The fourth section relates to conveyances generally, and declares all deeds of trust, and mortgages, whatsoever, to be void as to all creditors and subsequent purchasers, unless they shall be proved and recorded according to the directions of the act. This section governs the case, and the question to be determined is, in what court is a mortgage of personal property alone to be recorded? The words of the act are, that such mortgage shall be void, unless recorded according to the directions prescribing the court in which it is to be recorded. The directions given, respect only those conveyances which comprehend lands, or those which are made in consideration of marriage.

[2] See edition of the Laws of Virginia, 1803, c. 90, p. 156; and 1 Rev. Code 1819, pp. 361–371, c. 99.

[3] But by a subsequent act, all deeds respecting the title of personal chattels, which the law requires to be recorded, must be recorded in that county or corporation "in which such property shall remain." Act Feb. 24, 1819; 1 Rev. Code, p. 364, c. 99, § 11. In the construction of this act, the court of appeals (Brockenbrough, J., delivering the opinion of the court,) held: that where a mortgage of slaves "remaining" in one county, was recorded in the county in which the mortgagor resided, and the slaves were subsequently removed to the county of the mortgagor's residence; 1. That the deed was void before the removal of the slaves. 2. That the removal of them, afterwards, to the county in which the deed was recorded, did not give life and energy to a deed which was void before. Lane v. Mason, 5 Leigh, 520.

In the multiplicity of difficulties growing out of this strange negligence of the legislature, it is not surprising that it should be doubted, whether a mortgage containing personalties only may not be recorded in any court whatever. Such a deed being declared to be void, unless recorded according to directions which the law does not give, would furnish arguments of almost equal plausibility for the opinion, that there was no restriction whatever on the court in which it might be recorded, and for the opinion, that it could not be recorded in any court, but must be for ever void, as to creditors and subsequent purchasers without notice. Since, however, the obvious intention of the act is to preserve the validity of a mortgage of a personal thing, and at the same time to prescribe some court, in which it may be recorded, so as to give notice to the world that the property is incumbered, the court is of opinion, that the law must, if possible, be so construed as to effect this intention. It must be effected, too, with the least possible violation to the words of the legislature. As neither the first nor second section of the act, gives directions respecting the court in which a deed, mortgaging personalties only, shall be recorded, and as the fourth section must be understood to refer to those sections only, it becomes necessary to apply their provisions to such deed, in such manner as to effect, in the most rational and convenient way, the intention of the law.

It has been contended, that, as in a case where personal property is conveyed with real property, the court of the county, in which the land lies, is that in which the deed must be recorded, it would be reasonable to require, that the county in which the personal property resides, or is commonly found, should furnish the court in which a deed for such property would be looked for. For a moment, I was struck with this argument, which seemed to derive weight from the consideration, that, had the Oxford Iron Works themselves, been included in this mortgage, it ought to have been recorded in the court for the county of Campbell, and a subsequent purchaser or creditor, asserting a claim to the slaves in question, would have been bound by such lien upon them, recorded in that court. Since the slaves in question, if mortgaged, together with the lands they worked, would have passed by a deed recorded in Campbell, it seemed reasonable, that creditors should search the records of that court, for any incumbrance on them. But a very slight examination was sufficient to show the fallacy of this idea. If, instead of the Oxford Iron Works, an inconsiderable tract of land, in the most remote part of the state, had been included in the mortgage, the law requires that the deed should be recorded in that county. It is, then, impossible to argue from the court in which a deed for personalties, when mixed with land, is to be recorded, to the court in which a deed for personalties alone, must be recorded. The argument in favour of regulating the place of recording the deed by the locality of the personal thing it may convey, if to be maintained, must rest on other grounds. The argument urged, by the counsel for the defendant, on the reasonableness of considering the residence of the property mortgaged, as giving the place in which the deed shall be recorded, appears to me to be very much weakened by the consideration, that, in contemplation of law, personal property has no locality, and that, in fact, it has none that is permanent.

To pass over property, the tracing of which would be much more difficult, and to confine my observations to slaves alone, where should a mortgage, on slaves usually hired out, be recorded? Where, if the slave be hired sometimes in one county, sometimes in another? If it be said that, in such case, the domicil of the master gives locality to the slave, the answer is, that if this be true, all the locality which a slave can legally have, is derived, not from his own casual residence, but from the residence of his master, on whose will, the place he may at any time occupy, must entirely depend. The slave, shifted, according to the caprice of the master, from plantation to plantation, or hired, sometimes in one county, and sometimes in another, has no place of residence, sufficiently certain and fixed, to furnish a safe guide for the court, in which a lien upon him should be recorded. In contemplation of law, therefore, and, in fact, slaves, and every personal chattel, must be considered as transitory; and being fixed to no place, they adhere to the person of the owner.

The second section of the act, directs the court in which a covenant, or agreement, in consideration of marriage, containing personal estate only, shall be recorded. This is to be in the court of the district, county, or corporation, in which the party resides. This section, it has been already said, is not, in its terms, applicable to conveyances not made in consideration of marriage. But no reason is perceived for directing a lien of personal property, remaining in possession of the grantor, to be recorded in one court, if it be made in consideration of marriage, and in a different court, if it be made to secure the payment of money. The declaration, that deeds of personal property, made in consideration of marriage, should be recorded in the court of the district, county, or corporation, in which the grantor resides, would, certainly, indicate the opinion of the legislature to be, that a lien on the same property, made on any other consideration, should be recorded in the same court. In the one case, and in the other, the object of the record is to give notice to the world that the lien exists, and it would seem reasonable that, in each case, the same notice should be given. An argument entitled to great re-

spect has been urged against this construction. It has been said that the legislature certainly intended to provide for every case, and that the law ought to be so construed as to reach every case. That under this construction, there would be no court, in which a deed for personal property, given by a non-resident of the state, could be recorded. This objection to the construction contended for by the plaintiff is certainly not a light one.

The 5th section of the act provides, that deeds executed by a non-resident of the state, may be acknowledged or proved in a manner prescribed by that section, and recorded in the proper court. This proves that deeds executed by non-residents were in contemplation of the legislature, and such deeds were to be recorded somewhere. It is true, the section, in terms, applies only to deeds conveying land, but there would be nothing extraordinary in extending it, by construction, to chattels also. If this act had been drawn in such explicit terms, as to provide plainly, in other instances, for the cases it contemplates, the difficulty respecting a mortgage for a personal chattel executed by a non-resident, would induce the court to struggle for a construction, which would substitute some other place than the residence of the grantor, as that which should designate the court in which the deed should be recorded. But this law is drawn, in several of its enacting clauses, in such terms as to leave it impracticable to effect the obvious intention, without aiding the words. I very much incline to the opinion, that a deed for personal chattels executed by a non-resident, would be valid if recorded in the general court.[4]

It appears to be the general policy of the law, to make the general court a place where all incumbrances on property may be found. For this reason, a memorial of the deeds recorded in every county or district, is to be transmitted annually to that court. It is also a court of record which is common to the whole state. Its jurisdiction in this respect is universal. It is empowered to receive probate of all deeds whatever. Any deed, comprehending personalties or realties, may be recorded in that court. It is impossible to find a motive for excluding a deed, mortgaging a personal chattel, without land. The exclusion cannot have been intended. If, in such a case, a construction, which would give validity to a deed recorded in that court, can be supported, it ought to be supported. The words are, "no covenant, &c., shall be good unless acknowledged, &c., if lands be charged, before the general court, or the court of that district or county in which the land or part thereof lieth, or if personal estate only be settled, &c. before the court of that district, county, city, or corporation, in which the party shall dwell." The mind of the legislature was directed to the designation of the particular court among those whose powers were limited, in which the deeds described might be recorded, and, therefore, it might not be deemed necessary, after naming the general court in the first instance, to repeat that court in the record. The word general court may be understood, and the act construed as if it had been again inserted. There are certainly few cases in which this freedom of construction can be justified. If any act will justify it, it is the act for regulating conveyances.

Although I at present rather incline to construe the act, independent of precedent, so as to consider it as requiring, that a deed of mortgage for personal estate only, must be recorded in the general court, or court of the district, county, or corporation in which the grantor resides, I am not sure that I should give this opinion were it not supported by the case of Clayborn v. Hill, 1 Wash. [Va.] 177. That case does not decide that a deed of mortgage for slaves, recorded in the county where the slaves happen corporeally to reside, is void, but it decides that such a deed, recorded in the county where the grantor resides, although the slaves be at the time on a plantation in a different county, is good. Either, then, such deed may be recorded indifferently in the one county or the other, or it can be recorded only in the general court, or court of that district, county, or corporation in which the grantor resides. I can perceive nothing in the act which indicates an intention to allow this alternative, and the policy of the law does not appear to require or admit of it. The decision of the court, on the authority of this case, is that this deed is not recorded in the proper county.

NOTE [from original report]. The decree rendered in this cause pronounced the deed of mortgage to Mewburn and others "void as to creditors, it not being duly recorded; and that, therefore, a writ of fieri facias sued out by a creditor of the said Ross, might lawfully be levied on the slaves and other property conveyed by the said deed."

[4] By the act of 1818 (see 1 Rev. Code 1819, c. 67, § 11), it is declared that no deeds of real or personal property executed subsequent to the 1st day of November, 1814, shall be admitted to record in the general court.

Case No. 1,624.

BOND v. The SUPERB.

[1 Wall. Jr. 355.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 3, 1849.[2]

SHIPPING—GENERAL AVERAGE.

A removal in a port of necessity, for the purpose of repairs, of perishable fruit, which increased an incipient decay and precipitated an entire loss of the fruit, is not a matter for general average.

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

[2] [Affirming an unreported decision of the district court.]

[Appeal from the district court of the United States for the district of Pennsylvania.]

The Superb sailed from Palermo for Philadelphia, with a cargo composed in part of tropical fruits. Bad weather compelled her to put into the port of St. Thomas, where it was found necessary for the general safety of the ship and cargo to repair her, and in order to do this, to unload and reload part of the fruit. When the fruit arrived at Philadelphia, some of it was found good for nothing; and the plaintiff contending that the loss had been caused either in whole or in part by the act of unloading, &c., which was necessary for the general welfare, made claim for general average. To what extent the fruit had been injured by the operation at St. Thomas, was not clear; but it appeared, rather, that the decay had commenced before its removal and that the motion and delay consequent upon that act, had accelerated and increased it.

This court agreeing with the district court, whence the case had come by appeal, thought the evidence insufficient to sustain the claim under any assumption of the law. But as the testimony was contradictory, the question was argued, and rested in both courts upon the law also. That part of the opinion is reported. [Decree of the district court affirmed.]

Mr. G. W. Biddle, in favour of the claim.
Mr. F. W. Hubbell, contra.

GRIER, Circuit Justice. Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot claim for general average, notwithstanding the delay of the vessel in the port of necessity, may have added greatly to that deterioration. And this for two reasons: (1) Because there would be no equality between the owners of perishable goods and those not perishable; and (2) because the immediate cause of damage is what the French writers term the "vice propre" of the article, and not a damage incurred or sacrifice made either intentionally or incidentally for the safety of the whole. And perhaps a third reason might be added, to which the facts of this case would seem to give weight, and which has caused the memorandum clause in policies of insurance: I mean, because such commodities carrying within themselves the seeds of deterioration, it is difficult, if not impossible, to discriminate the partial injury induced by inherent causes, from such as might arise within the risks undertaken.

It is true, that where the direct and immediate cause of the damage to perishable articles, is some act done for the general preservation, the owner would have the same right to claim for general average, as if the goods had not been in their nature perishable. Such a case is found in Maggrath v. Church, 1 Caines, 196, 214, where the damage sustained by some corn, was occasioned by water that got upon it, "in consequence of the cutting away the mast of the vessel for general preservation;" and thus the immediate cause of the damage was not the vice propre of the grain, but water which had got upon it by cutting away the mast. The circumstances of the case before us are different. No direct injury was received by the fruit in consequence of unloading and reloading it. The decay of the fruit had commenced before its removal; and assuming that its removal did accelerate and increase the natural progress of decay more than its pitching in the hold of the vessel would have done, still it could hardly be said that the removal was the proximate cause of the decay, and not the vice propre of the fruit. Yet it is the proximate cause to which the law looks. "It were infinite," says Lord Bacon, (Maxims of the Law, Regula 1), "for the law to judge the causes of causes, and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Now, if the mere delay which would undoubtedly increase the damage of these perishable articles when it had once commenced, is no reason why the damage whose immediate cause is the vice propre, should not be brought into general average, we can see no reason why the removal which may have increased, not caused the injury, should have a different doctrine applied to it. But the evidence does not establish the facts, etc.

Decree affirmed.

Case No. 1,625.

BONDHOLDERS v. RAILROAD COM'RS.

[1 Month. West. Jur. 188.]

Circuit Court, D. Wisconsin. July 4, 1874.

EQUITY JURISDICTION — CONSTITUTIONAL LAW — RAILROAD COMPANIES—REGULATION OF RATES.

[1. Equity has jurisdiction of a bill by bondholders to enjoin railroad commissioners from putting in force a statute alleged to be unconstitutional, and injurious to their rights.]

[2. The Wisconsin statute of March 11, 1874, regulating railroad traffic, was not repealed by either of the acts of the following day, which contain some provisions apparently inconsistent with it; it appearing that, by joint resolution of the latter date, the act of the 11th was not to be published until April 28th, and that, in Wisconsin, general statutes go into effect only after publication.]

[3. A constitutional provision that the charters of railroad corporations may be altered or repealed by the legislature at any time after their passage is to be read into all subsequent railroad charters, and into all contracts and mortgages made by such railroad companies, so that every creditor and mortgagee is affected with notice thereof.]

[4. The operation of this principle is not affected by the fact that a railroad company, under authority of the legislature, consolidates with a company chartered by another state.]

[5. Constitutional power in a legislature to alter all railroad charters thereafter granted war-

rants an alteration reducing traffic rates, although this diminishes the value of franchises and tangible property, the latter of which could not be directly taken without compensation.]

[6. In such case, the fact that grants of land were made by congress to the state to promote the building of a railroad thus affected cannot change the rights of the corporation or its creditors and mortgagees.]

[7. Quaere. Whether the carriage of freight into one state from another, or out of the state into another, not being a mere transit through the state, is interstate commerce, so that the carriage within the state is beyond its power of regulation. See Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, and cognate cases.]

[In equity. Bill brought by railroad bondholders against the railroad commissioners of the state of Wisconsin to enjoin them from executing the state act of March 11, 1874, known as the "Potter Act." On motion for preliminary injunction. Denied.]

DRUMMOND, Circuit Judge. We have not had time to prepare any opinion in the case, but, as it was thought desirable that there should be a decision upon the motion for an injunction, I am instructed by the court to present the following as its conclusions upon the points made for a preliminary injunction:

1. On the assumption that the act of the 11th of March, 1874, "relating to railroads, express and telegraph companies in the state of Wisconsin" is invalid, we think the court has jurisdiction of the case. The bill is filed on behalf of citizens of Europe and of other states to enforce equitable rights, and to prevent action by the railroad commissioners which may result, as alleged, in serious injury to those rights. It was not necessary to wait until the commissioners had put the law in full operation, and its effects upon the railroad company had become complete, before the application against them was made to a court of equity. A very important function of that court is to prevent threatened wrong to the rights of property.

2. We are of opinion that the act of the 11th of March, mentioned above, was not repealed by the act of the 12th of March, 1874, the second section of which declares: "All existing corporations within this state shall have and possess all the powers and privileges contained * * * in their respective charters;" and the act of the 12th of March, 1874, the ninth section of which imposes a penalty for extortionate charges. There are apparent inconsistencies between these last two named acts and that of the 11th of March; but it becomes a question of intendment on the part of the legislature. On the same day a joint resolution was passed (March 12th), directing the secretary of state not to publish the act of the 11th of March until the 28th of April. In this state no general law is in force until after publication. We may consider the joint resolution in order to determine whether the legislature intended that the two acts passed on the same day should repeal the act of the 11th of March, and from that it is manifest such was not the intention of the legislature.

3. The charters of the railroad corporations under the constitution of Wisconsin "may be altered or repealed by the legislature at any time after their passage." In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claims its rights of franchise and property in this state the foregoing condition contained in the constitution. It became a part, by operation of law, of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bond holders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state.

4. This principle is not changed by authority from the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power any where to remove it beyond the reach of its authority.

5. As to the rates for the transit of persons and property exclusively within the limitations of this state, the legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchise cannot touch the question of power in the legislature. The repeal of its franchise would have well-nigh destroyed the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for use on the railroad would be gone.

6. The facts that grants of land were made by congress to the state cannot change the rights of the corporations or of the creditors. If the state has not performed the trust, it must answer to the United States.

7. The act of the 11th of March, 1874, while not interfering with the rates of freight on property transported entirely through the states to and from other states, includes within its terms property and persons transported on railroads from other states into Wisconsin, and from Wisconsin into other states. This act either establishes or authorizes the railroad commissioners to establish fixed rates of freight and fare on such persons and property. The Case of State Freight Tax, reported in 15 Wall. [82 U. S.] 232, decides that this last described traffic constitutes "commerce between the several states," and that the regulation thereof belongs exclusively to congress. It becomes,

therefore, a very grave question whether it is competent for the state arbitrarily to fix certain rates for the transportation of persons and property of this interstate commerce, as the right to lower rates implies also the right to raise them. There may be serious doubts whether this can be done. This point was not fully argued by the counsel, and scarcely at all by the counsel of the defendants; and, under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs, it may be further considered at a future time, either on demurrer to the bill or in such other form as may fairly present the question for our consideration.

In view of the decision just rendered, we trust it will not be considered out of the line of our duty to make a suggestion concerning this litigation to the counsel for the defense. It is manifest that the questions involved are grave ones, and that the court of last resort will ultimately have to pass upon them. It is equally manifest that a speedy decision in which all parties are vitally interested, cannot be obtained unless there is harmony of action on the part of both the complainants and defendants. In the mean time, and while this litigation is in progress, would it not be better for the defendants, as far as lies in their power, to have prosecutions for penalties suspended? These prosecutions are not required to settle rights. They are attended with great expense, and, if enforced while an effort is making in good faith to test the validity of this legislation, must cause serious irritation, and cannot be, as it seems to us, productive of any good results.

BONDURANT (WATSON v.). See Case No. 17,278.

Case No. 1,626.

BONE v. The NORMA.

[1 Newb. 533.] [1]

District Court, E. D. Louisiana. March, 1856.

MARSHALS—FEES—SETTLEMENT OF CONTROVERSY.

1. That portion of the 1st section of the act of congress regulating the fees and costs of the clerks, marshals and attorneys of the circuit and district courts of the United States, which provides that "in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one-half of one per cent. on the excess over five hundred dollars," should not be so construed as to give the marshal a right to exact said commission in a case where the claim of the libelant has been settled before any claimant of the property libeled appears in court.

2. The law did not intend to confer a gratuity upon the marshal; it contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or, the possession of the property by the marshal, and the usual proceedings under an interlocutory order of sale, without the sale itself.

[Disapproved in The Russia, Case No. 12,170. Cited in The Clintonia, 11 Fed. 741.]

[In admiralty. A libel was filed by George W. Bone against the steamer Norma for salvage, but, before any claimant appeared in court, the claim for salvage was settled without a sale of the property libeled. Heard on rule by the United States marshal, upon the libelant, to show cause why his commissions should not be paid in conformity to Act Feb. 26, 1853 (10 Stat. 161, c. 80). Rule discharged.]

Wm. Cornelius, for United States marshal.
G. B. Duncan, for libelant.

McCALEB, District Judge. The claim for salvage compensation in this case has been settled without a sale of the property libeled, and before any claimant thereof appeared in court. A rule has been taken on behalf of the United States marshal, upon the libelant, to show cause why a commission of one per cent. on the first $500 of said claim, and one-half of one per cent. on the residue thereof, should not be paid to him (the United States marshal), in conformity to the act of congress approved February 26th, 1853 [10 Stat. 161, c. 80], entitled "An act to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States, and for other purposes." The provision of the 1st section, upon which his claim for commissions is founded, is as follows: "For serving an attachment in rem or a libel in admiralty, two dollars; and the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents per day; and in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one-half of one per cent. on the excess over five hundred dollars: provided, that in case the value of the property shall be less than the claim, then, and in such case, such commission shall be allowed only on the appraised value thereof."

It is admitted that the marshal has received his fees for serving the usual process upon the property, and for the custody thereof. For services actually rendered, therefore, he has been duly compensated; and the question now to be determined is, can he, in conformity to the provisions of the act referred to, be paid a commission on the amount of the libelant's claim? If he can, upon the grounds contended for by his counsel, then it must be given to him as a mere gratuity. Is the law to receive such a construction as would be positively unjust in

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

principle, and render it oppressive in its operation upon suitors, who claim the aid of the court in the assertion of their rights? The language of the law is certainly not free from difficulty. But it can hardly be supposed that the lawgiver intended that an officer of the court should be gratuitously compensated at the expense of a litigant. In this case it is not pretended that any services have been rendered, to entitle him to be paid the commission demanded. The law, I think, contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or it contemplated the possession of the property by the marshal, and the usual proceedings by advertisement, &c., under an interlocutory order of sale without the sale itself. It intended to provide an adequate compensation to the marshal for the trouble and responsibility he assumes up to the moment of sale, and to put it out of the power of litigants to deprive him of such compensation for the trouble and responsibility thus assumed, by a compromise or settlement before a sale under a final decree, or a sale under an interlocutory order of court. This, in my judgment, is the only fair and rational interpretation to be given to the provision of the act of congress referred to.

It is therefore ordered that the rule be discharged.

Case No. 1,627.

In re BONESTEEL.

[7 Blatchf. 175;[1] 3 N. B. R. 517 (Quarto, 127).]

Circuit Court, S. D. New York. Feb. 25, 1870.

BANKRUPTCY — PROCEEDING BY ASSIGNEE TO RECOVER ASSETS.

Where a summary proceeding by petition, by an assignee in bankruptcy, against a third person, to recover assets claimed to belong to the bankrupt, had been entertained by the district court, and it had made a decree thereon in favor of the assignee, and the defendant petitioned this court, under the second section of the bankruptcy act of 1867, to review such decree, this court set aside such decree as founded on irregular proceedings, without costs to either party, and with leave to the assignee to file a bill in the usual way against the defendant.

[Cited in Re Ballou, Case No. 818; Voorhies v. Bonesteel, Id. 17,001; Goodenow v. Milliken, Id. 5,535; Knight v. Cheney, Id. 7,883; Barstow v. Peckham, Id. 1,064; Bradley v. Healey, Id. 1,781; Re Marter, Id. 9,143.]

[See In re Evans, Case No. 4,551.]

[In bankruptcy. Petition by Sophia H. Bonesteel, wife of John E. Bonesteel, a bankrupt, to review and set aside decree of the district court. Granted.]

NELSON, Circuit Justice. This is a petition by the wife of the bankrupt to review a decree [unreported] made by the district court, adjudging, on a claim made by the assignee in bankruptcy, that she holds 1145 shares of the capital stock of a Nicholson Pavement Company in Brooklyn, which belong to her husband. The proceedings against her were by petition, in a summary way, by the assignee, to compel her to show cause why this stock should not be transferred to him. The stock is said to be of the value of $30,000.

I have, heretofore, held—In re Kerosene Oil Co. [Case No. 7,726]—that the suit by the assignee against a third person, to recover assets claimed to belong to the bankrupt, should be commenced by bill in equity or be a suit at law, under the second section of the bankruptcy act of 1867. This decision was made shortly before the question in this case, occurred. In that case, I directed that the petition should be amended and stand for a bill. In that case, however, the proceedings had not extended beyond that pleading. The application made in this case is, that this court will revise the decision made on petition by the court below. If the proceedings are to be regarded as founded on a bill in equity, such application could not be entertained, as the remedy in such a case could only be by an appeal under the 8th section of the act. As the proceedings in this case have not been reformed, as in the case referred to, and as the practice has been heretofore very much unsettled, and as, to hold now, in this case, that the remedy in this court is by an appeal and not by a petition of review, would, the time for taking an appeal having passed, preclude all relief, I think it will be best, and in furtherance of justice to all parties concerned, to set aside the decree of the court below, as founded on irregular proceedings, without costs to either party, and with leave to the assignee to file a bill in the usual way against Mrs. Bonesteel. By the case of In re Alexander [Case No. 160], before the chief justice, I understand this to be according to the true construction of the act; and, also, by a case before Mr. Justice Clifford.

[NOTE. For a subsequent decree, dismissing the assignee's bill in equity, see Voorhies v. Bonesteel, Case No. 17,001.]

Case No. 1,628.

In re BONESTEEL.

[2 N. B. R. 330 (Quarto, 106).][1]

District Court, S. D. New York. Nov. 28, 1868.

BANKRUPTCY—EXAMINATION OF BANKRUPT.

A bankrupt must answer questions put to him in relation to property in which it is shown that he might possibly have an interest.

[Cited in Re Dole, Case No. 3,965.]

[See Ex parte Craig, Case No. 3,322; In re Clark, Id. 2,805.]

[1] [Reprinted by permission.]

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

I, Isaiah T. Williams, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: N. J. Butler, who appeared for the bankrupt, and Mr. F. J. McDonald, who appeared for John P. Faure, a creditor of the said bankrupt.

The facts are as follows: The counsel for the said creditor, upon an examination of the said bankrupt, has shown that a large interest in a certain incorporated company known as the "Nicholson Pavement Company of Brooklyn," had been transferred to the wife of the bankrupt, after his insolvency, by parties interested in the success of that company. It further appeared that the bankrupt had been, prior to the said transfer, engaged in a dry-goods commission business, upon capital furnished to his wife by her father, and that his family had been supported by the profits of such business, aided by a monthly allowance from the said father to said wife; and that some time before the said transfer of said interest to said wife, the said bankrupt had discontinued the said dry-goods commission business, and devoted his time to promoting the interests of said company, during which period his family were supported by the said wife from moneys furnished by her said father, and by him charged to her prospective portion of his estate as heir, or next of kin thereto. That the said services of the said bankrupt were, by the persons who so transferred the said interest, deemed to be of especial value to said company, by reason of the political and other influence of the kins-people of said wife. That the said kins-people had insisted that the said interest in said company should be so transferred to said wife, before they would exert any influence whatever favorable to the interests of said company. The bankrupt claims further, that the conveyance of the said interest to his wife was induced, to a great extent, by the friendly relations existing between the persons who so transferred the said interest, and his wife and himself, for many years past, and that said interest was, in fact, more a gift than a reward for any services performed by the bankrupt.

It is claimed, on the part of the creditor, that the said interest, in said company, of right belonged to the said bankrupt, and passed to the assignee under the deed from the register, and, for the purpose of establishing this position, he proposed to go into a minute examination of the whole matter. The whole examination of the bankrupt touching the said interest and the transfer thereof to his wife, was taken under a general objection of the bankrupt's counsel, founded upon the allegation that the bankrupt was not the owner of the interest in question, and the final refusal of the bankrupt to answer further touching said interest, accompanied by a motion to the register to strike out all the testimony in relation thereto, which motion was denied.

I understand the counsel for the bankrupt to take the ground that the interest in question was never the property of the bankrupt, and therefore the creditor has no right to inquire concerning the same.

The counsel for the creditor, on the contrary, insists that he has shown enough to entitle him to go into the matter, for the purpose of satisfying the court that the consideration for the interest in question flowed in part or wholly from the bankrupt, and that therefore the assignee is, to this extent at least, entitled thereto.

Entertaining no doubt whatever that it was the right of the creditor fully to sift the transaction, and show, if he should be able to show, that the transfer to the wife was a mere cover, or if not wholly that, then that the consideration for the same flowed in whole or in part from the bankrupt; thus establishing an equitable interest therein in the assignee, I directed the examination to continue, and the bankrupt to answer such questions concerning the same as might be pertinent to the end aforesaid. The bankrupt, however, refusing to so answer any further questions upon the subject, I hereby certify the case to this honorable court for decision.

BLATCHFORD, District Judge. The register was correct in his direction, and the bankrupt must answer the questions referred to.

[NOTE. Subsequently a decree was entered by the district court adjudging that the stock in the Nicholson Pavement Company held by the wife was the property of the bankrupt. This decree was set aside by the circuit court (In re Bonesteel, Case No. 1,627), and thereafter the assignee brought a bill in equity to recover the stock, which bill was dismissed. See Voorhies v. Bonesteel, Id. 17,001.]

BONESTEEL (PEREGO v.). See Cases Nos. 10,976 and 10,977.

BONESTEEL (VOORHIES v.). See Case No. 17,001.

Case No. 1,629.

BONHAM v. BOARD OF EDUCATION OF HARRISONVILLE.

[4 Dill. 156.] [1]

Circuit Court, W. D. Missouri. 1877.

SCHOOL HOUSE BONDS — MISSOURI ACT OF MARCH 21, 1870 — LIABILITY TO SUIT.

Bonds issued under the act of the legislature of Missouri of March 21, 1870, for building school houses, and reciting that act as the authority for their issue, are prima facie valid; and the holder may sue thereon, and is not confined to the special remedy prescribed in the act.

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

Action on coupons belonging to school bonds issued by the defendant under the act of March 21, 1870, referred to in the opinion of the court. The petition is in the usual form, and sets forth in full a copy of the bonds. The bonds are signed by the corporate officers of the defendant, and are under its corporate seal. The defendant demurred to the petition. The grounds of the demurrer are stated in the opinion. [Demurrer overruled.]

Mr. Cravens, for plaintiff.

Mr. Sloan and Mr. Flanagan, for defendant.

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

KREKEL, District Judge. Under an act of the legislature of Missouri, entitled "Schools, Cities, Towns, and Villages," approved March 21, 1870, cities, towns, and villages in Missouri were authorized to organize themselves as single school districts upon a majority voting in favor of such organization, upon which they could elect a board of education, which, under the twelfth section of the law, was "authorized, for the purpose of building school houses only, to borrow money on the credit of the city, town, village, or district, and to issue bonds therefor, bearing interest not exceeding ten per cent per annum, which bonds shall not be sold or disposed of at less than ninety cents on the dollar." In case of failure to pay interest or principal of any such bond, the holder, after notice, can go before a county court and show the fact, whereupon the county court is required to notify the board of education, and if they fail to pay after such notice, the county court is authorized to add to the tax list a sum sufficient to pay the amount due.

The complaint or declaration in this case alleges that, under this act, on the 1st day of September, 1871, the board of education of Harrisonville issued certain bonds, on the coupons whereof this action is instituted. A copy of one of these bonds, made part of the petition, shows that the board of education of Harrisonville, Missouri, promises to pay the bearer the sum of fifteen hundred dollars, with interest at the rate of ten per cent, and recites that the bond is issued for the purpose of building a school house only, and refers to the act above cited as the authority for the issue of the bond.

To this declaration a demurrer is filed, assigning for cause that said defendant was never organized in conformity to the act cited, and is therefore no corporation. The answer to this must be that the defendant, in issuing the bonds signed by its officers and sealed by its corporate seal, exercised the usual function of a corporation. Its corporate existence cannot be questioned—at least by itself—in a suit brought upon evidence of debt given by it. Commissioners of Douglas Co. v. Bolles (decided at the October term, 1876, of the supreme court of the United States) 94 U. S. 104. This disposes of all of the causes of demurrer, except the fifth and sixth, which set up that plaintiff was bound to exhaust his remedy given by the act, namely: notify the county court of the failure to pay and await the results of their acts. It is evident from the act, that the legislature, by providing an easy and direct remedy for collection, sought to give value and currency to the bonds—but did not intend to deprive the h[illegible] of the usual legal remedies. Jordan v. [illegible]ss Co. [Case No. 7,517].

With a judgment establishing the validity of the bonds he may feel better armed to meet objections, such as are here raised, when he comes before the county court for the purpose of availing himself of the cumulative remedy that the law under which the bonds issued has given him. The demurrer is overruled.

Judgment for plaintiff.

Case No. 1,630.

BONNELL et al. v. WEAVER.

[5 Biss. 22.][1]

Circuit Court, D. Wisconsin. April, 1856.

COURTS—VACATION—JUDGMENT—BY CONFESSION—VACATUR—NEW JUDGMENT.

1. Judgment in vacation cannot be entered unless in pursuance of a positive statute, whose provisions must be fully complied with.

2. In Wisconsin, the authority to confess the judgment must be in the statutory form, and be produced before the officer entering the judgment.

3. Equivalent provisions cannot be substituted by the court, for the positive statutory provisions.

4. It is competent for the defendant to move to vacate the judgment, and also for the court thereupon, the proper papers being before it, to render a new judgment and issue execution.

[At law. Alexander Bonnell and others against F. M. Weaver. Defendant's motion to vacate the judgments herein granted.]

MILLER, District Judge. These three suits were commenced by attachment, with affidavits annexed, and before the marshal had taken an inventory, the defendant gave to the plaintiffs in such cases a cognovit, whereby he confessed the debt and consented that a judgment might be entered immediately and an execution be issued upon the judgment. There was no express authority from the defendant to the clerk to enter the judgments in vacation, but they were entered in vacation, and executions were issued and served by seizing the defendant's goods in store. The defendant has moved the court that the entry of judgments in these cases be vacated and the executions set aside for

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the reason that the judgments are irregular and void. The reason is not specified, but we understand that these judgments were entered on the docket in vacation without lawful authority.

Rev. St. §§ 534–536, are copied from the statutes of the state of New York, called the Revised Statutes of that state, in 1829. Section 13, provides that "judgments may be entered in vacation as in term upon a plea of confession signed by an attorney of such court, although there be no suit then pending between the parties, * * * if the following provisions be complied with, and not otherwise." Then the provisions are specified, which are not pursued in these cases. The reading of this section is this: "Although there be no suit then pending between the parties, judgments may be entered in the supreme or in any court of record in vacation as in term upon a plea of confession signed by the attorney, if the following provisions be complied with, and not otherwise." The federal courts, in pursuance of acts of congress, recognize the laws of the states in regard to the entering and recording of judgments and these liens. They are rules of property which the federal courts must observe. It would work great confusion to have one set of laws regulating property as to its title in this court and another in the state court. We then pursue in this particular the statutes of the state. A judgment is the sentence of the law pronounced by the court; but the court can only be held in term time as may be prescribed by law, and for the purpose of entering judgments has no existence in vacation; consequently, a judgment cannot be entered in vacation unless in pursuance of a positive statute, whose provisions must be complied with. Under the old system in New York, judgments were entered in vacation upon cognovit, but whether before or after the first term does not appear. Arden v. Rice, 1 Caines, 498; Hogeboom v. Genet, 6 Johns. 325. I have not been able to find a case since the Revised Statutes of 1829, but in 1840 (Laws 1840, p. 334, § 23) it is provided that "judgments may be entered and perfected at any time in term or vacation." We have no such provision in this state. In England, judgments may be perfected after the term, even in vacation, and may be entered even without declaration.

The following points are ruled here: 1. No statute is necessary to enable the court to enter a judgment, although the court will follow the forms of practice prescribed by statute as the rules of this court in the absence of a statute. 2. As the court is only in legal existence to exercise judicial power at such times as may be prescribed by law, a positive statute is necessary to authorize an entry of a judgment in vacation. And then it is only a nominal judgment or statute lien. 3. To make a judgment entered in vacation valid against the defendant, all the forms prescribed by law must be substantially complied with. 4. The cognovits in these cases are not a compliance with the provisions of the statute. They are not signed by an attorney of this court. The authority for confessing such judgments was not in any proper instrument, nor was the authority produced to the officer signing the judgment. 5. A court of law cannot substitute equivalents for positive statutory provisions, when the statute directs that these provisions shall be observed, and not otherwise. 6. These cognovits are confessions of the debt and an authority to the court to enter judgment immediately; that is, whenever they are brought into court. They are no more than if the defendant came into court in his own proper person and acknowledged judgment ore tenus. 7. It is competent to the defendant to move that these judgments be vacated. 8. The court can now proceed after the vacation of the judgments, to render judgments upon those cognovits and to issue executions. 9. The court cannot now determine whether these plaintiffs have any rights by reason of the verbal arrangements stated in the affidavit of Mr. Van Dyke, to the exclusion of the other execution creditors. But if such right be claimed, it will have to be ascertained after the proceeds of sale are brought into court for distribution, which may be done by a rule upon the marshal, or the marshal may bring the money in of his own accord and ask the court to distribute it. 10. These three judgments will now be vacated and the executions set aside. 11. If judgments be now entered and executions be issued, there need not be a new advertisement, as there are other executions in the marshal's hands, upon which the property seized has been advertised for sale.

NOTE [from original report]. See further that a judgment cannot be entered by the clerk of court except in pursuance of positive provisions of statute. Holmes v. Lewis, 2 Wis. 83. And see Hempstead v. Drummond, 1 Pin. 534, decided by Miller, J., when a justice of the supreme court of Wisconsin. A judgment by confession entered upon warrant of attorney in vacation must be signed by a judge or court commissioner. Remington v. Cummings, 5 Wis. 138. A judgment entered by the clerk of court upon warrant of attorney, in 1855, and not signed by a judge or court commissioner, was void and could not be afterward amended by the court by adding such signature so as to give it a retroactive effect. Fairchild v. Dean, 15 Wis. 206. As to the supervision a court of law will assume over a judgment entered by confession, consult Brown v. Parker, 28 Wis. 21.

Case No. 1,631.

BONNER v. NEW ORLEANS et al.

[2 Woods, 135.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—NONPAYMENT—NOTICE.

1. A railroad company is bound as indorser of a negotiable bond issued by a municipal corporation, payable to the railroad company or assigns in twenty years, which the company has transferred by indorsement; the municipal corporation having failed to pay on demand at maturity, and the proper steps having been taken to charge the company as indorser.

2. To charge an indorser, the certificate of the notary need not show that notice of demand and nonpayment was served on the indorser during business hours of the day after demand. If notice was served at any time during that day, it is sufficient.

This was an action brought by [William Bonner] the holder of a bond for $1,000, issued by the city of New Orleans, payable to the New Orleans, Jackson & Great Northern Railroad Company, or their assigns, in twenty years from date, with interest, and dated May 1, 1854.

It appeared on the face of the bond, that it was one of a series of two thousand bonds of $1,000 each, authorized by an act of the legislature of Louisiana, approved March 15, 1854, to be issued by the city to the railroad company in payment of the subscription of the city to the stock of the railroad company, and transferable by the indorsement of the president and secretary of the railroad company. The plaintiff offered the bond in evidence and proved the indorsement of the president and treasurer of the railroad company, which was in these words: "The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns." The indorsement of the bond by the latter company to the plaintiff was also shown. The plaintiff also introduced the certificates of the notary public, under his seal, to the effect that he had demanded payment of the bond of the city of New Orleans, both on the 1st and 4th of May, 1875, and that payment was on both occasions refused, and that on both the 2d and 5th of May, he had delivered notices of protest to S. H. Edgar, the vice president of the railroad company, at its office in New Orleans, the president of the company being absent. Upon these facts, the city of New Orleans admits its liability, but the railroad company denies that any ground for recovery against it is shown. No recovery is asked against the Savings Institution. [Judgment against defendant company.]

John M. Bonner, for plaintiff.

B. F. Jones, City Atty., for city of New Orleans.

T. J. Semmes, for railroad company.

WOODS, Circuit Judge. The bond is a negotiable instrument, having all the qualities of commercial paper. Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175; Myer v. City of Muscatine, 1 Wall. [68 U. S.] 384. But while this general proposition is not disputed, it is claimed that the effect of the indorsement of the railroad company was simply to transfer the title to the bond, and the company did not thereby enter into the conditional contract to pay the bond which results from the indorsement of ordinary commercial paper. In short, that by its indorsement the company did not assume the liability of an indorser. The authorities cited do not justify the distinction drawn. These bonds are said to have all the qualities of commercial paper. One of these qualities is that the indorser becomes bound in case of demand, nonpayment and notice. The act of the legislature, recited on the face of the bond, gives the railroad company express power to transfer the bonds by indorsement. The railroad company has exercised the power and there is no reason why it should not assume the responsibilities of the act, unless it is made to appear that no such responsibility was fairly in the contemplation of the railroad company or the commercial public to whom the bonds were sold. The indorsement is unrestricted. The railroad company might have qualified its indorsement if it had so chosen, and thus have avoided liability. Having power to indorse, it would seem that it assumed by its indorsement the same liabilities as an individual. Doubtless the credit of the bond was improved by the indorsement of the railroad company, and the fair presumption is that the indorsement was made not only to transfer the bond but to add to its credit. If this be true, the company ought to be held to its liability as indorser.

But it is said this liability was not fairly in the contemplation of the parties to the bond; that the bond had twenty years to run; that many similar bonds have forty or fifty years to run, and it is not to be supposed that the indorser or holder contemplated that the conditional liability of an indorser of such paper should hang over him for a time; in all probability reaching beyond his natural life. There would be force in this argument if the indorser were a natural person. But a railroad corporation does not die. It may live for centuries, and there is no reason why it should not indorse bonds, and have its liability as indorser fixed by demand and notice on bonds running twenty, forty or sixty years. In my judgment, the argument to relieve the railroad company of its liability as indorser on these bonds cannot prevail.

It is said by way of further defense that

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

the certificate of the notary does not show that notice of demand and nonpayment was served on the vice president of the railroad company during business hours of the day, after demand. The protest shows that notice was given to the principal officer of the company present in the city at the office of the railroad company during the next day. That is a sufficient service of notice. It need not be served within business hours. Bayley, Bills & N. (5th Ed.) c. 7, § 2,268; Story, Bills, § 288–290, 382; Chit. Bills (8th Ed.) c. 10, §§ 513, 514, 518.

Case No. 1,632.

In re BONNET.

[1 N. Y. Leg. Obs. 310.]

District Court, S. D. New York. Jan. 27, 1843.

ACT OF BANKRUPTCY—TRADING.

1. A judgment given to a particular creditor, followed by an execution, in the absence of evidence that the debtor was insolvent at the time he gave such judgment, or that it covered the whole of the debtor's effects, does not amount to an act of bankruptcy.

2. A mere security, though given as a preference, is not an act of bankruptcy, unless it be made or given in contemplation of bankruptcy.

3. Whether an application for a decree in invitum against a debtor who is described in the petition as a person now using the trade of merchandise, there being no allegation that he was a trader when he committed an act of bankruptcy, can be supported, quaere.

This was an application [in the matter of James Bonnet, Jr.] for a decree of bankruptcy in invitum, the points raised in the objections to which appear in the learned judge's opinion. [Denied.]

P. Clark, for bankrupt.
Mr. Joachimssen, for creditor.

BETTS, District Judge. This is a petition by a creditor for a decree of bankruptcy against the debtor. Objections to the decree are interposed by a third person, a party in interest, which in effect are a demurrer to the petition. The points argued have accordingly been, whether there is enough upon the face of the petition to entitle the creditor to a decree of bankruptcy in invitum against his debtor. The creditor proceeds upon two debts: The first, a promissory note, dated January 1, 1842, for $700, (in part paid,) and on which he alleges there remained a balance of $529.67, due on the ninth day of December last, and the second an account for goods sold on or before the 25th day of July last, on which was due the 18th of August, $362.47, and with interest amounting on the 7th of December to $370.14. The petition was sworn to the 9th of December, and was filed the 12th. The act of bankruptcy charged is, that the debtor "did willingly and with an intent to give a preference over his general creditors on or about the month of September last, confess a judgment in favor of John B. Underhill, a relative of his, for $900, and that an execution has been issued upon said judgment, and is now in the hands of the sheriff, and that the stock of goods, and other property of the debtor, are to be sold out immediately, and as the petitioner believes this very day," etc. To show that the debtor was a proper party to be proceeded against in this manner, the petitioner states, that "he is a merchant, now using the trade of merchandise, etc., or was so using the said trade on the 5th day of December instant, and at the times the (aforesaid) debts were contracted."

It is becoming a point of much practical importance to ascertain how far the confession of judgment, followed by execution, is to be regarded an act contravening the policy of the bankrupt law, and subjecting the debtor to be proceeded against as a bankrupt. The question has been agitated in several cases, but no definite rule of general bearing can be extracted from them. In some instances it seems intimated that such confession of judgment falls within the enumeration of acts under the second section, declared void, and a fraud upon the statute; and in others the inclination of the court would appear to be, to regard the arrest of property on process under the judgment, as willingly procuring it to be taken under execution by the debtor. Wakeman v. Hoyt [Case No. 17,051]; Albany Exch. Bank v. Johnson [Id. 133]; M'George's Case, in this court, Dec. 31st [unreported]; Hall's Case, Sept. 17th [Case No. 5,919]. In M'George's Case it was decided by this court that a confession of judgment to an amount exceeding the value of the debtor's property, the debtor knowing himself to be insolvent, was an act of bankruptcy, being a security or assignment fraudulent in law as against the policy of the bankrupt act; but I refused to regard the taking out of execution by a judgment creditor without any positive participation on the part of the debtor, or any other act in relation to the process to give facility or despatch in the arrest of property as willingly procuring his goods to be taken in execution. See Nelson's Case, Dec. 31st [unreported]. In this case the judgment security was for $900, and there is no allegation that the debtor was insolvent, or that the security covered all his property. A mere security, though giving a preference, is not an act of bankruptcy unless executed in contemplation of bankruptcy. Here there is no averment of such purpose or expectation. That is a material allegation, and cannot be supplied by intendment. To support the proceedings, when the allega-

tion is omitted, it must be shown that the security or assignment was made by an insolvent, and embraced all his property. There is nothing upon this petition that shows the debtor could not discharge his entire indebtedness, or that the security he gave one creditor by judgment must necessarily prejudice the others; and the petition is defective in substance for that cause. The petitioner also fails in describing the debtor as a party subject to compulsory proceedings in bankruptcy. "All persons being merchants, whenever such person being a merchant," shall do certain acts, shall be liable to become bankrupts, and may be proceeded against by their creditors for that purpose. Section 1.

The phraseology of the English act of 13 Eliz. c. 7, carried into the consolidated acts of 6 Geo. IV. c. 16, is: "Any person using a trade, or seeking a living by buying and selling," etc., may be subjected to a commission of bankruptcy. In the construction of this act it has been held by Lord Eldon, that persons were liable to be made bankrupts for acts of bankruptcy committed after they ceased to be traders. 15 Ves. 449, 458, 495; 1 Rose, 403; 2 Rose, 357. It may be very questionable whether the change of expression in our statute would not lead to a different construction of the provision here, for the legislature uses language of great distinctness and force to denote the actual continuance of the trading at the time the act of bankruptcy is committed. I have had occasion to advert to the point before,—In re Hill, July 16th [Case No. 6,485], and In re Smith, Oct. 28, 1842 [Id. 12,994],—but the case has not yet arisen demanding an explicit decision of the question.

The petitioners fail in this instance to charge the acts of bankruptcy to have been committed whilst the debtor was a trader, for, though the averment that he was so in January, August and December, 1842, may raise an implication, that he was also in September, when the judgment was confessed, yet if the construction of the act shall demand as a pre-requisite to the proceeding, that the debtor continued to be a trader when he made the preferential security, the courts would require that fact to be affirmatively averred, and not act upon a mere implication, however probable it might be. I have strong doubts, whether the proceedings could be sustained without a direct allegation, that the debtor was a trader at the time he committed the acts of bankruptcy.

On the other point, however, it appears to me, the case is clear, that enough is not stated to subject the party to these compulsory proceedings, and I shall accordingly allow the broad objection that, upon the petition, it does not appear that the party has committed any act of bankruptcy, and refuse the decree prayed for by the creditors, on the papers as they now stand.

Case No. 1,633.

In re BONNETT et al.

[19 N. B. R. 168.] [1]

District Court, S. D. New York. Jan. 23, 1879.

LANDLORD AND TENANT—RENT — USE AND OCCUPATION — BREACH OF CONTRACT — MEASURE OF DAMAGES.

The bankrupts were lessees of the premises in which they carried on business. In June, 1877, they sold to the claimants, by written agreement, for a specified price, the goods and merchandise, including machinery and fixtures, used in the business in the aforesaid premises, and including the right to use the premises until May 1, 1878, without further rent or charge, the same being included in the purchase price. The agreement also contained a covenant for peaceable enjoyment. The bankrupts made default in the payment of rent to the landlord, and the claimants were ejected in November, 1877. The register assessed their damages for breach of the covenant at the rate of rent payable under the bankrupts' lease. *Held*, error; that the proper measure of damage was the fair rental value of the building.

[In bankruptcy. In the matter of Bonnett, Schenck, and Earle. Heard on motion to confirm register's report, which motion was denied.]

C. M. Marsh, for claimants.

H. G. Atwater, for trustee.

CHOATE, District Judge. This is a motion to confirm the report of the register assessing the amount of the damages of the petitioners, Wm. J. Stitt & Co., for breach of a contract between them and the bankrupts. June 9, 1877, the bankrupts made a written agreement by which they sold to Stitt & Co., for the gross price of thirteen thousand and five hundred dollars, certain goods and merchandise, including machinery and fixtures used in their business in a building on the corner of College Place and Park Place in this city, and "including the right to the use of said building from the date thereof to the first day of May, 1878, without any further rent or charge whatever, to said Stitt & Co., such rent or charge being included in said purchase price; and we hereby agree to protect them in full and peaceable enjoyment of said premises until said May 1, 1878."

The full price of thirteen thousand and five hundred dollars was paid to the bankrupts before the commencement of these proceedings in bankruptcy. The bankrupts were lessees of the building, and made default in the payment of rent to their landlord, and Stitt & Co., their sub-tenants, were evicted Nov. 23, 1877. It is for damages on account of this breach of the agreement for their peaceable possession, from Nov. 23d to May 1st, that this claim is made. The register has allowed damages at the rate of the rent payable under the lease of the premises which the bankrupts held. In this I think he is in error. For the injury done to the claimants, by the breach of the agreement, they are entitled to an indemnity. If a cer-

[1] [Reprinted by permission.]

tain sum had been paid by them for the rent in advance, then they would be entitled to damages at the same rate, provided there were no fraud on the landlord's part. This rule of damages in that particular case is settled by authority in the state of New York. Mack v. Patch'n, 42 N. Y. 167. The rent so agreed upon is taken to be the value of the term; but this measure of damages being impossible of application in this case, other tests of value of the thing lost must necessarily be resorted to, and evidence should be taken of the fair rental value of the premises. But the rent reserved in a lease of the same premises held by the vendors, and made at an earlier time, cannot afford any proper measure of the claimants to damages. Is it possible that their damages can be any way greater or less than they would have been if the vendors had supposed they owned the building, and the eviction had been by a party claiming a paramount title? Or should the claimants recover less than the actual value of the premises for the period during which they have been deprived of their use, because their vendors may have had the good fortune to secure a lease at a very low rent, when real estate was much lower than at the time of the agreement? Or should they receive more than a fair indemnity for their loss, because the vendors may have made their lease at a time when rents were higher than at the time this agreement was made? It is argued that it was within the contemplation of the parties that the bankrupts should apply so much of price received as was the equivalent of the rent reserved in the lease for the residue of the term to the payment of that rent, and thus keep good their covenant of quiet enjoyment, and that therefore it may be presumed that, in finding the gross price, the amount added for rent was equal to what the vendor had to pay. But if any presumption as to intention is to be indulged in, it is that the claimants did not give more nor less for the use of the premises included in the entire price paid than they were then fairly worth, and of this the rent their vendor happened to have stipulated to pay to his landlord constitutes no measure, and cannot be presumed to have been the gauge, though by accident it may have been the equivalent of the estimated rental value.

Report referred back to the register for further proceedings under the order of reference.

Case No. 1,634.

In re BONNETT et al.

[19 N. B. R. 309.] [1]

District Court, S. D. New York. Nov. 25, 1879.

BANKRUPTCY—PROCEEDINGS TO REALIZE ESTATE—COMMITTEE—POWERS OF TRUSTEE.

One of the members of a committee appointed under section 5103, Rev. St., rendered services to the trustee, at his request, in preparing for market, and putting in condition to be sold, a large stock of tobacco, and also in effecting the settlement of an important litigation affecting the estate. On an application for compensation, *held*, that the services were not such as the trustee could call on the committee to perform in the ordinary course of their duty; that it was inconsistent with the statute that they should be employed by the trustees to act in any other capacity for a compensation; and that the claimant was not entitled to compensation.

[Cited in Re Hicks, 2 Fed. 853.]

[In bankruptcy. In the matter of D. Blake Bonnett and others. Application denied.]

H. C. Atwater, for motion.

CHOATE, District Judge. This is an application by one of the committee of the creditors, under Rev. St. § 5103, to be allowed compensation for special services rendered to the trustee at his request. The services rendered were in preparing for the market, and putting in condition to be sold, a large stock of tobacco and cigars, which have been sold by the trustee at private sale, and also in going to Cincinnati, and spending some nine days in effecting the settlement of an important litigation in which the estate was involved. The services rendered are shown to have been beneficial to the estate, and the amount claimed as compensation is not unreasonable, and the services rendered were not such as the trustee could call on the committee to perform in the ordinary course of the performance of their duty, as members of the committee. The question therefore is whether such employment is compatible with the position which the committee hold towards the trustee and the estate. By the section above cited, it is provided that "if, at the first meeting of creditors, etc., three-fourths in value of the creditors, etc., shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate under the direction of such committee." The section then provides for confirmation of the resolution by the court, and that, in case it is conformed, "the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustee shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy."

The supreme court has interpreted this

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section as meaning, with respect to the trustee, that he is entitled to the stated compensation allowed by the statute to an assignee, and extraordinary compensation to be allowed by the court upon the like proceedings as in case of an assignee. See General Order No. 30. No express provision is made for the compensation of the committee. Their powers under this section are very large, and their discretion in directing the assignee as to the proper performance of his duty on winding up and settling the estate is practically unlimited. So long as they act in good faith and keep within the range of lawful acts, they take the place of the court in advising and directing the trustee, and their duty and power embrace the entire range of the duty of the trustee in administering the estate. Their duties are quasi judicial. In re Jay Cooke & Co. [Case No. 3,169]. In view of the nature of the duties they are to perform, I think it is inconsistent with the statute that they should be employed by the trustee to act in any other capacity for a compensation. They cannot voluntarily, or with the consent of the trustee, withdraw from the position and duty which, by accepting the position assigned them by the creditors, they have assumed. The whole body of creditors have a right to insist that as to every detail of administration they should hold themselves ready to advise and direct the trustee impartially and without any personal interest which shall impair or affect their judgment. Such employment for compensation does withdraw the member of the committee so employed from this position. The very question whether the services he is employed to render are necessary and expedient, and for the best interest of the estate, and, if so, who will be a suitable person to be employed to perform them, are clearly questions in the determination of which the trustee must act by the direction of the committee in the ordinary performance of their duty. It is no answer to say that a majority of the committee shall remain able to act on these questions. The creditors and the trustee are entitled to the services of all the committee. No doubt if all are able to serve, and are duly notified and consulted, a majority may act; but it is incompatible with the statute that any member of the committee should disable himself from acting. If he can do so, the trustee and creditors will to that extent be deprived of benefit of having the advice and direction of such a committee as was resolved upon by the creditors and approved by the court. It is obvious that, if one of the committee may accept such employment, all of them may do so, and they may divide among them all the employment which the trustee may have to distribute with its emoluments. In the present case there is no suspicion of any intended wrong, but I am unwilling to make a precedent which is capable of so great abuse, and to authorize an employment which I think is impliedly forbidden by the statute. I am referred to a decision of Judge Fox in the case of In re Treat [Case No. 14,160]. So far as that case is consistent with the views herein expressed, I am unable to agree with its conclusions; the allowance was made in that case, however, on the theory that the services for which compensation was made were rendered by the member of the committee in that capacity. In the present case the services for which compensation is claimed seem to me not to be such as the trustee could have required of this petitioner as a member of the committee. The question whether, as officers of the court, the committee can, for their ordinary services be allowed a compensation, is not before the court.

Motion denied.

BONNEY v. The HUNTRESS. See Cases Nos. 6,912–6,914.

BONTZ (GRANT v.). See Case No. 5,694.

BONTZ (GREGG v.). See Case No. 5,798.

BONTZ (PIPSICO v.). See Case No. 11,183.

BOODY (FISHER v.). See Case No. 4,814.

Case No. 1,635.

BOODY et al. v. RUTLAND & B. R. CO.

[3 Blatchf. 25;[1] 24 Vt. 660.]

Circuit Court, D. Vermont. May, 1853.

CONTRACTS—PERFORMANCE—CONSTRUCTION.

1. Where B. contracted with a railroad company, in writing, to build certain bridges on its road, at a certain sum per foot, to be paid, one-fourth in cash, and three-fourths in the stock of the road at par value, and the contract was entirely silent as to the time or place of payment: *Held* that, looking to the contract alone, B. could not call for payment, either of the cash or stock, until a complete performance of the contract on his part, or, at any rate before, or oftener than a bridge was fully completed. Nor could he then sue and recover for the stock without proof of a special request and of a refusal to deliver it. For, if no time be fixed in the contract, or by other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action.

2. The company, after the commencement of a suit by B. on the contract, having mortgaged its road, to secure the payment of debts due from it to third persons: Held, that the act of mortgaging the road would not work or amount to a disability to perform the contract, or make the defendants liable to pay money in lieu of the stock.

3. Where it appeared that it was the custom of the company to make monthly payments to B. and its other contractors, for work done on its road, upon estimates made by the engineer at the end of each month: Held, that this must be considered the rule of payment under the contract, established by mutual consent, and binding upon the parties, so as to make a special request for the stock unnecessary.

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

4. Held, also, that, under the circumstances of this case, no tender or offer of the stock having been made by the company, B. was entitled to recover its value.

5. After the making of the original contract, B. proposed to put in iron bearings, instead of wood, for so much per foot of the bridges, varying, like the prices in the original contract, according to the different spans in the bridges, "in addition," as B. said, "to the former proposal;" but nothing was said as to the manner of paying the additional expense: Held, that it might be well inferred, that the mode of paying for the iron bearings was to be the same as that provided for building the bridges.

[At law. Action of account by Azariah Boody and Andrew B. Stone against the Rutland & Burlington Railroad Company. Judgment for plaintiffs.]

Jonathan D. Bradley, for plaintiffs.

Charles Linsley and D. A. Smalley, for defendants.

Before NELSON, Circuit Justice, and PRENTISS, District Judge.

PRENTISS, District Judge. This is an action of account to recover the balance of book accounts between the parties, a form of action given by statute in this state for such purpose, and long in use here. After judgment to account was confessed by the defendants, and duly entered up, the action, by agreement of the parties, and order of court founded thereon, was submitted to the determination of referees. The referees have made and returned into court a report, awarding to the plaintiffs the sum of $13,699.19, as being due to them from the defendants to balance the accounts between them, and stating specially the facts and grounds upon which the award was made. Both parties have filed exceptions to the report, objecting to certain allowances made by the referees, and insisting that the report should be modified and corrected in those particulars and judgment be rendered upon it accordingly.

The dealings between the parties, forming the subject of the action, originated in the undertaking of the plaintiffs to build for the defendants, and in their actually building for them, all the railroad bridges in the Rutland and Bellows Falls division of their road. The original contract, consisting simply of a written proposition, made by the plaintiffs in a letter, in August, 1847, and accepted by the defendants in the same month, is very short and somewhat meagre, embracing but few details or particulars. After stating the general plan or model of the bridges, it merely regulates the rate and mode of compensation, without specifying the time or place of payment; that is, it only gives the prices of constructing the bridges per foot, varying according to their different spans, to be paid one-fourth in cash, and three-fourths in the stock of the road at par value.

For the unpaid balance due and payable under the contract in cash, according to the stipulated prices, including the work conceded to be extra, which was, of course, payable in money, it is not denied by the defendants that the plaintiffs are entitled to recover. The only questions presented by their exceptions are: Have the plaintiffs a right, on the facts stated in the report, to recover the value of the stock agreed to be paid? And, if so, should the rule of estimate be its value in February, 1850, as allowed by the referees, which was sixty per cent. of its par value, or its value at the time of commencing the action, which was only fifty per cent.?

The written contract, as we have already seen, is entirely silent as to the time or place of payment; and, looking to that alone, the plaintiffs could not call for payment, either of the cash or stock, until a complete performance of the contract on their part, or, at any rate, before, or oftener than, a bridge was fully completed. Nor could they then sue and recover for the stock, without proof of a special request and of a refusal to deliver it. It is an undeniable rule of law, that where a promise is made to do a collateral thing on request, the request is parcel of the contract, and no right of action arises until a request be made. So, if no time be fixed in the contract, or by other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action. Here, no direct, formal request having been made by the plaintiffs for the stock, the question is, whether, on the facts found and stated by the referees, a time was fixed for the payment of the stock, so as to make a special request or demand unnecessary, or whether the facts otherwise supersede or dispense with the necessity for such demand or request.

If the fact of the defendants' having, since the commencement of the suit, mortgaged their road, to secure the payment of debts due from them to third persons, and thereby put it out of their power to give to the plaintiffs unincumbered stock, could be considered as disabling the defendants from performing their contract, it would no doubt render a request for the stock unnecessary, and a recovery could be had for it here, since the law allows a recovery, in this form of action, for items of account accruing or becoming due after the commencement of the action, as well as for those which had accrued or become due before. But we think that the act of mortgaging the road would not work or amount to a disability to perform the contract. The debts were really as much a charge upon the road, or incumbrance upon the stock, before as after the mortgage. The mortgage, it is true, might have the effect to depreciate the stock in the market, and render it less valuable to the holder; but every purchaser of or contractor for stock knows that he must take and hold it subject to all charges incident to the completion and use of the road, and the accomplishment of other legitimate objects of the

corporation. We cannot, therefore, say that, by the act of mortgaging the road for the purpose mentioned, the duty of the defendants to pay stock was converted into an obligation or liability to pay money in lieu of the stock. The right of the plaintiffs to recover for the stock, if any such right exists, must rest, then, upon other facts reported in the case.

The time of payment, there being no stipulation in the written contract on the subject, may, unquestionably, be inferred from other evidence—such as the usage of the company in paying their contractors, the acts of the parties, or the course adopted and pursued by them under the contract. Such evidence does not contradict any of the terms of the contract, but is mere suppletory matter, showing the understanding and intention of the parties, or rather the practical construction put by them upon the contract. Now, it is expressly stated in the report, that it was the custom of the defendants to make monthly payments to their contractors, for work done on their road, upon estimates made by the engineer at the end of each month; and that this practice was adopted with the plaintiffs. It thus appearing to have been the usage of the company to pay monthly on the estimates, and that usage having been adopted in referente to the plaintiffs, the referees might well consider it as the rule of payment under the contract, established by mutual consent and binding upon the parties.

The report says nothing as to the place of payment. If the place, as well as the time of payment, had been fixed, it would be sufficient for the defendants to show that they were ready at the time and place to make payment. But, if no place was fixed, it would be the duty of the defendants, at or within the time, to tender or offer the stock to the plaintiffs. If the payments were not made monthly in full, by reason of the estimates not being made in full, as appears to have been the case, the fault would seem to be on the part of the defendants, the estimates being made by an officer in their employment and acting under their control. It was owing to the estimates not being made in full, as is stated to have often happened in practice, that there was so large an unpaid balance due to the plaintiffs in cash and stock, on the completion of their contract in December, 1849. After that, I suppose, no estimates were necessary. The plaintiffs soon called for money on account of the contract, but the defendants declined paying any until there had been an examination of the accounts. For the purpose of such examination, and with the view of making a final adjustment of the plaintiffs' claims, the parties met in February following; but no settlement was effected, as they could not agree on the amount due, or on the mode of payment of some of the items in the account, the plaintiffs claiming that the extra work and iron bearings should be paid for wholly in cash, and the defendants claiming that all extra work connected with the bridges, and also the iron bearings, should be paid for in stock and cash, as under the contract, and refusing to settle upon any other terms. On these and other facts stated, the defendants having made no tender or offer of stock, the referees found that the plaintiffs were entitled to recover the value of the stock; and, they having so found, we are not disposed, under the circumstances of the case, admitting the point to be not entirely free from doubt, to disturb the award on that account. It follows, of course, that, if the plaintiffs had a right of action at law in February, 1850, to recover for the stock, it should be estimated according to its value at that time.

The other question in the case arises out of the exceptions filed by the plaintiffs, and relates to their claim for the iron bearings. The question is, whether this claim falls within the terms of the original contract, to be paid in the manner therein stipulated—one-fourth in cash and three-fourths in stock; or whether it should be treated in the nature of a claim for extra work, to be paid, of course, wholly in cash. The referees considered it as subject, in that respect, to the terms of the original contract, and have allowed the claim and stated the account according to the mode of payment therein prescribed; and we think they were justified in so doing.

Where the parties deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra and out of the scope of the contract, and may be recovered for as such. But it is otherwise, if the original terms be not inapplicable, and there be evidence from which it may be inferred that it was the intention of the parties that the new work should be subject to those terms. Here, the original agreement contains particular stipulations as to the mode of payment for building the bridges, and the subsequent agreement, under which iron bearings were substituted for the wooden bearings contemplated in the original plan, is wholly silent as to the manner of paying the additional expense they would occasion. From that circumstance, taken in connection with the expressions employed in the latter agreement, it might be well inferred that the mode of paying for the iron bearings was to be the same as that provided for building the bridges. The plaintiffs propose to put in iron bearings instead of wood, for so much per foot of the bridges, varying, like the prices in the original contract, according to the different spans in the bridges, "in addition," as they say, "to the former proposal" —thus referring to the original contract. The

intention and effect of the second agreement would seem to be simply to vary the original plan, so far as to substitute iron bearings for wood, and to make a corresponding alteration of the original stipulated prices, by adding thereto so much per foot as would cover the additional cost, leaving the mode of payment unchanged. It was not intended as a separate, independent contract, but merely as supplemental or additional to the other; and, no doubt, in pleading, a declaration stating the original contract and the agreement altering its terms in the particulars mentioned, would be good in law.

Such being the views we take of the points raised in the case, the consequence is, that the exceptions of both parties must be overruled, and judgment be rendered on the report for the sum awarded to the plaintiffs, with interest thereon from the time of filing the report.

Case No. 1,636.

BOODY et al. v. UNITED STATES.

[1 Woodb. & M. 150.][1]

Circuit Court, D. Maine. May Term, 1846.

POSTOFFICE—PRINCIPAL AND SURETY—PAYMENT—APPLICATION.

1. A deputy postmaster is the agent of the postmaster-general. And though the latter is not by law liable for the misconduct of the former, he can employ him as agent to keep safely the money collected by himself, or other deputies near, and his sureties are liable on his official bond to the extent of its penalty for any neglect by the deputy as such agent.

2. The sureties are liable for his noncompliance with subsequent as well as past laws or orders, till his official term expires, if the orders be such as are justified by law.

[Cited in U. S. v. Gaussen, Case No. 15,192; U. S. v. McCartney, 1 Fed. 107.]

3. Where a balance became due from such a deputy, July 20, 1836, after the expiration of the previous quarter, and a payment was made as large as all of it, but $8.34, on the 12th day of the same month, and a second bond was not taken till the 16th of the same month, the presumption is, that the payment was to be applied on the balance due under the first bond, and that the money did not come from accruing receipts under the second appointment, being much larger than their ordinary amount.

4. A payment is to be applied to the oldest debt, if the debtor gives no directions; and it must be proved, that the payment came from receipts, accruing under a second bond, if that is relied on against the propriety of applying it to any balance whatever, still due under a prior bond.

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

5. The act of 1836 [5 Stat. 80], c. 270, § 1, requiring the revenue of the postoffice department to be paid into the treasury, does not require each payment to be carried in by a separate warrant, but they may be carried in quarterly by large "covering warrants."

This was a writ of error by the plaintiffs [H. H. Boody and others] on a judgment rendered in the district court, September term, 1841, in favor of the United States, against the present plaintiffs, as sureties on three official bonds, for Thomas Todd, as postmaster of Portland. [Affirmed.]

The whole case, as agreed upon by the counsel, and as disposed of in the district court, is annexed, and forms a part of the record. Agreed statement of facts:

This is an action of debt, wherein plaintiff declares in three several counts against the defendants jointly on three several bonds—one dated December 15th, 1834; one dated July 16th, 1836; and one dated January 9th, 1837. Said Boody and Nutter were the only sureties on each bond. Todd, one of the defendants, makes no appearance, and is defaulted. The other defendants appear, and plead non est factum to each count, and file a brief statement, by leave of court, and according to the practice of the state courts, alleging that they, in one bond, which was a joint and several bond, and not a joint bond only, bearing date as set forth in plaintiff's first count, became the sureties of said Todd for his faithful discharge of the duties of the office of postmaster in Portland, to which office he had been appointed—and makes his commission, which bears date December 15th, 1834, a part of their brief statement: and further allege, that said commission expired on the 2d July, 1836, and with it expired the operation of said bond, in consequence of a new appointment and a new commission of said Todd, bearing date on the day last mentioned—this second commission is also made a part of the said defendant's brief statement. They further allege, that during said period of the operation of said first bond and commission, to wit, from December 15th, 1834, to July 2d, 1836, the aggregate of said Todd's indebtedness to, or receipts of money, in said office, for the government, was $11,502.67—and his credits or payments, on the same account, were $10,302.72—leaving a default of $1,199.94 under said appointment and bond: and that for said default no suit was instituted, within two years next succeeding the accruing thereof, by the plaintiff, against said sureties, and by reason thereof they were forever exonerated from liability for the same.

In further answer to the plaintiff's second count, and the bond therein declared on, said defendants, Boody and Nutter, allege, that they gave a joint and several bond, and not a joint bond, with said Todd, bearing date July 16th, 1836, and as his sureties for the faithful discharge of the duties by said Todd, in the office aforesaid, to which he had been appointed as set forth in the before named second bond and commission, and that said bond was superseded and rendered of no continuous effect, by the substitution of a new bond, dated the 9th day of January, 1837, for said preceding bond—and that during the operation of said preceding

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

bond, to wit, from July 16th, 1836, to January 9th, 1837, said Todd's indebtedness to, or receipts in said office, for the plaintiff, amounted to $3,973.50—and that his credits, or payments, on the same account, were $3,599.01—being a default under said bond of $375.49; and that for said default no suit was instituted against said defendant's sureties, within two years next succeeding the accruing of the same; whereby they were forever, and absolutely released from liability therefor to the plaintiff.

In further answer to the plaintiff's third count, and to the bond therein declared on, said defendants, Boody and Nutter, allege, that they gave a joint and several bond, and not a joint bond, with, and as the sureties of, said Todd, bearing date January 9th, 1837, for the faithful discharge of the duties of said office of postmaster, to which said Todd had been appointed—and that from said date until said Todd's removal from said office, to wit, September 21st, 1839, said Todd's indebtedness to the government, or receipts of money in said office, were $16,517.93—and his credits, or payments, on the same account, were $16,621.71—showing an excess of credits, or payments, of $103.78; and that for sundry receipts of said Todd, certified in the account of the postoffice department, by the auditor thereof, to wit:

Under date of December 18, 1837, for money received by said Todd of U. S. Marshal	$ 52 41
March 1, 1838, for money received of postmaster at Bath	976 30
January 4, 1838, for money rec'd of postmaster at Bridgton	34 36
June 2, 1838, for money received of U. S. district attorney	72 83
October 3, 1838, for money received of postmaster at New Gloucester	20 52
October 26, 1838, for money received of postmaster at Upper Yarmouth	2 14
February 21, 1839, of same	2 05
January 5, 1839, for fine received of U. S. Dist. Attorney	5 00
Amounting in the aggregate to	$1,165 61

the said Boody and Nutter are in no wise responsible according to the true intendment of their bond, because said receipts of money did not appertain to, and were not received on account of the duties of said office of postmaster; nor by virtue of any agency authorized by law—but were paid to the said Todd in violation of law. The before named certified account of the auditor of the postoffice department was referred to, and made a part of said defendant's brief statement, in confirmation of the allegation above specified.

The writ bears date June 1st, 1840.

The counsel for the plaintiff, United States district attorney, introduced the deposition of Allen Macrea, to prove the existence and loss of the two first bonds; also a bond, dated as set forth in the third count, executed by said Todd, Boody and Nutter, and joint and several in its provisions. To this testimony, the counsel for the defendants objected, on the ground of its variance from the several bonds declared on; they being joint bonds, and not joint and several bonds. But the court overruled the objection, and received said evidence.

The plaintiff's counsel next introduced the deposition of Elisha Whittlesey, auditor of the postoffice department, which proves a part of the case, and may be referred to, accordingly.

The plaintiff's counsel then introduced Peter G. Washington, who testified that he had been a clerk, in the postoffice department at Washington, since September, 1836; that it is the practice of postmasters to render quarterly accounts to the department; that it had been the practice, as long as he had been in the department, for the department to draw balances due from postmasters into the hands of other postmasters; that there was a necessity for it frequently, when a postmaster goes out of office, that he should pay the amount in his hands over to his successor in office, or to some postmaster whom the department should designate; that the new system of keeping the accounts of the department, described in Whittlesey's deposition, commenced under the new postoffice law of 1836; that the account C, in said deposition, is copy of a book of deposits made by the postmaster in a bank—the date of the deposit is derived from the date of the certificate that is forwarded from the cashier of the bank by the depositing postmaster, according to a general rule of the department, which provides as follows:

"Every postmaster, who is so directed, will deposit the proceeds of his office in the bank designated by the assistant postmaster-general, and take duplicate certificates of each deposit, signed by the proper officer of the bank, one of which should be transmitted to the department by the first mail thereafter, as the postmaster will not be entitled to a credit therefor until its reception at the department. The cashier of the bank in which the deposit is made, should be required by the postmaster, to make the entry of the sum deposited, to the credit of the 'postoffice department,' with the name of the postmaster, and the name of the office and state. Every postmaster who is directed to deposit, will, when the proceeds of his office does not amount to six hundred dollars in one quarter, deposit his whole quarterly balance within fifteen days after the close of each quarter. When the quarterly balance exceeds the rate of six hundred dollars per quarter, he will make his deposit monthly, within seven days after the close of each month: and when the quarterly balance exceeds the rate of three thousand dollars per quarter, he will make his deposit weekly—the proceeds of each month being paid within the succeeding seven days—and the whole quarter's balance being always paid, within fifteen days, after the close of each quarter."

Witness never knew of any general regulations, or instruction of the department, making any one or more postmasters the depositors of any other postmaster's receipts, or of the balances due from them; that when such receipts or balances are paid to, or deposited with another postmaster, it is under a special instruction for the particular case; and such was the manner of the several payments made to Todd, in the items making up the $1,165.61. Witness testified that when Todd, or any other postmaster, had paid money to a bank, or to any other postmaster as depository, pursuant to instructions, the postmaster so paying was considered as discharged for so much, and the bank, or depository, thenceforward was deemed alone accountable to the department for the amount —it was considered as payment into the treasury of the department. Witness testified that in May, 1837, on the suspension of the banks to pay specie, a general circular was addressed to the postmasters, by the postmaster-general, directing them thenceforth to keep their own deposits, and not to deposit in banks; that under this circular Todd ceased to deposit monthly in a bank, and made no deposit of the receipts of his office, and made no payments to the department, except on special drafts or orders of the department in favor of particular individuals. The transcript from the postoffice department, and the bonds and conditions thereof, to be made part of the case; and it appeared also, by the papers annexed to Mr. Whittlesey's deposition, that directions were given by the postoffice department, to make the payments to Todd, which he has credited as agent of the postoffice department, viz, $1,165.61. It appeared by the auditor's statement, that between the 2d and 16th of July, 1836, viz., the 12th July, that said Todd paid $1,190.60; that the said second bond had been destroyed by fire, and that the third was consequently required; that the whole default of Todd was $2,637.26—and it was contended that by the statement of the accounts and operation of law, that this sum all became due within two years. The plaintiff's counsel moved to amend the counts in the declaration so as to describe the bonds as joint and several, but it was adjudged by the court to be unnecessary.

The evidence having closed, the attorney for the plaintiff waived the claim for the recovery under either of the first two counts, or first two bonds declared on—and claimed to recover the general balance certified by the auditor, and deduced from the accounts arising under all the bonds, as the balance arising under the last or third bond, declared on in the third count, being $2,637.26, with interest.

The defendants' counsel moved, 1st. To instruct the jury generally, that it was competent for them to find the several results stated in the brief statement above, filed by the defendants; if satisfied, from the facts in the case, that such finding would be just and equitable between the parties.

2dly. That, inasmuch as when the last, as well as the preceding bonds were entered into by the defendants, the rule or regulation of the department, existing with the obligatory force of a statute law, respecting the duties and liabilities of Todd to pay the receipts of his office to the department, required such payments to be made by him monthly into a depository bank, selected by the department for the purpose, and to cause such payments to be certified to the department by the cashier of such bank, and operating to discharge both said Todd and his sureties, the defendants, from accountability, pro tanto, monthly; and inasmuch as by the general circular of the postmaster-general, in May, 1837, the postmaster-general repealed said rule, or regulation, and directed the said Todd to retain to himself, as his own depositor, the monthly balances of his office, instead of discharging himself therefrom, and not only made him the permanent depository of his own receipts, as postmaster, but also of the receipts or revenue of other postmasters—thereby augmenting materially the responsibilities of his office, to the prejudice of his sureties, and altering the substantive obligations, and removing the conservative provisions of the sureties of Todd, as the same existed under the general rules and regulations of the postoffice department at the time the bonds were executed—should the jury be satisfied, that, in consequence of this alteration of the duties of Todd, and of the liabilities of his sureties, any of the defaults charged in the writ had been occasioned, the defendants, as sureties, should be exonerated wholly therefrom, under the last bond—or, if not wholly, then to the extent of any losses occasioned by, or which the jury should be satisfied were imputable to, this change, or repeal, and new arrangement of deposits, in the regulations of the postoffice department; and that it was competent for the jury to pass upon and determine, as a question of fact, the actual effect, in this case, of the general order of the postmaster-general, issued in May, 1837, and find for the defendants, to the extent that they were satisfied the same had operated to enlarge the defendants' undertakings, or exposed them to onerous risks, not within the contemplation of the parties at the time of the execution of the bonds.

3dly. That the transfer of funds from other postmasters to Todd, for no purpose, except to make Todd the depository thereof, until needed by the department, was a violation of the intent and provisions of the first, third and fourth sections of the act of congress of July 2d, 1836 [5 Stat. 80], reorganizing the postoffice department; and for transfers or deposits thus illegally made, the defendants, as sureties for Todd, were in no wise liable; and that the several items constituting the $1,165.61 before mentioned,

were of this nature. That statutory bonds must be construed strictly under the law authorizing them, and that the law of March 3d, 1825, § 3, under which the bonds in question were given, limited the operation of such bonds to duties, and embraced only the obligations, which should arise under, or be incident to, the execution of such laws and regulations of the postoffice department, as were in their nature and design general, applicable to the officers of the whole government, and of uniform requirement—and would not cover special, local and temporary instructions, designed to be executed by a single officer only, or bear upon a single postoffice to meet a particular emergency—and that inasmuch as the several receipts by Todd, making the $1,165.61, were under instructions of the latter character, and not such as could have been contemplated under any law, general instructions, or rule of the postoffice department, existing at the time the bond was executed, the sureties of Todd were not responsible for them, but they should be regarded as acts done outside of the conditions of the bond.

4thly. That the bond cannot be made to operate retrospectively, to cover defaults accruing prior to the date of it; and that sureties under a new bond cannot be made responsible for moneys received by their principal prior to the date of their bond, though retained by him subsequently—and that each set of sureties is entitled to be credited with the payments made from funds derived under their respective bonds—to effectuate which, it is competent for the jury to inquire and determine the derivation of the respective payments involved, and apply them to discharge their appropriate bonds, according to equity and good faith between all parties concerned—that in the present case each preceding bond terminated in its operation by the institution of its successor; and if the jury could be satisfied that the payments made by Todd under the respective bonds, were derived from the operations of his office, during the continuance of the particular bond in force when such payments were made, they should make the application accordingly; leaving a deficit, if any, to attach to the bond, under which it thus in fact accrued. That the law requires the application of the payments to be made to the oldest obligation, when no special direction is given by the paying party, or in case of running accounts, to the oldest item, and to each succeeding one in its turn. But that this rule is subject to qualification when different parties, or different sets of sureties, upon distinct obligations, are interested, and when this is the case, then the application is to follow the equity of the interest involved, having regard to the right of each party under each obligation; if the jury are satisfied that the payments are not made from any fund which each set of sureties have more specific interest in than another set, or are satisfied that these payments were made from the principal's private funds, then the interposition of the rule of applying such payments to the oldest debt, would not be any infraction upon the rights of sureties on the subsequent debt; but if satisfied that these payments were made from a specific fund arising from the operations of the obligations, entered into by a particular set of sureties, and if the payments were from funds of a mixed character, in which the jury could discover equal or unequal interests of different sets of sureties, the application should be divided and apportioned to them respectively, according to the inequality, if any, of such different sets of sureties, the paramount rule of the law, being in all cases, to make the application in each case, according to the equity of the particular case, to which end it is made competent for each party to go into evidence of the time, origin, and mode of each payment.

5thly. That the act of July 2d, 1836 [5 Stat. 88], c. 270, § 37, establishes the application of payments contrary to the general rules above specified, only in the particular case to which it relates, viz.: only between the different sureties of the same postmaster, acting under the same commission, and where the new set of sureties are called in on account of the specified insufficiency of the first set; that in such case the new set, having notice of a prior unsatisfied debt, from the circumstances of their own undertaking, may rightfully be regarded as assenting to the application of each subsequent payment to such prior debt, if they omit to cause a contrary application to be directed by their principal; that this distinguishes such cases from the case of a new bond, under a new commission, or required avowedly to replace a former one which had been destroyed—that in each of the latter cases, no notice, expressed or implied, is conveyed to the new sureties, of the existence of a prior debt unsatisfied, against which it is incumbent on them to protect the proceeds of their obligations in behalf of their principal, if they do not elect to have such prior debt satisfied out of such proceeds at their risk—and further, that said 37th section of the last named act, should be regarded by the jury as a legislative construction, which negatives the authority of the jury to make an application of the acknowledged proceeds of a subsequent bond, to extinguish the unsatisfied obligations of a prior bond, except in the particular cases specified in said section; and that the general rule of enforcing the application of payments, in the absence of instructions by the payor at the time, according to the equity of the particular case as found in the facts proved, different obligations being involved, should be considered as established legislatively, as well as in accordance with the dictates of justice, by this statutory exception.

6thly. That by the provisions of the 18th

section of the before named act of July 2d, 1836 [5 Stat. 83], all prior accounts and liabilities were intended by congress to be separated from, and adjusted independently of, all subsequent operations of the department; and the necessity of new appointments, commissions, and bonds, for postmasters, created by said act, could not, per se, operate, nor reasonably be regarded, as notice to sureties of prior outstanding debts against the principals—the obvious purpose and policy of said law being to free the operations of the postoffice department, from that date, of all prior defaults growing out of the prior defects or imbecile administration of the laws of the department; and that, therefore, it was competent for the jury to separate all payments subsequently made, from all debts or defaults of Todd previously incurred; and that, by operation of the limitation act, for such prior debts or defaults, Todd's sureties could not be made liable in this action.

But the court instructed the jury, that the order of the postmaster-general of May, 1837, by which Todd was directed to retain the money which he collected in his own hands, instead of depositing in a bank, as had been before required, did not exonerate his sureties from their responsibility—but that they continued liable for his defaults, after that order, to the same extent that they were before: That the account between Todd and the general postoffice being an open and running account, all payments made by him from time to time, in the absence of any specific appropriation by him at the time of making them, were by law appropriated to the payment and extinction of the oldest charges on the debit side of the account; that this was the general rule of law with respect to the appropriation of payments upon an open and running account, when no special appropriation was made, either by the debtor or creditor, at the time the payment was made, to any particular item of the account; that the proviso in the 37th section of the act of July, 1836 [5 Stat. 88], c. 270, which directed that payments made subsequent to the execution of a new bond, by a deputy postmaster, shall first be applied to the discharge of any balance which may be due on the old bond, unless when the debtor specially directs it to be applied to his new account, at the time of the payment—is not limited to the cases where a new bond is required at the request of the sureties, in order to be released from their suretyship—but extends to all cases where a new bond is required by the postmaster-general, or he shall deem it necessary, for any cause, to require a new bond: That the sum of $1,165.61, which was received by Todd from other postmasters, under orders from the postmaster-general directing the same to be deposited in his hands, was covered by that clause in his bond, which required him to account for all moneys, bills, bonds, notes, receipts, and other vouchers, which he, as agent of the general postoffice, should receive for the use and benefit of the general postoffice; that the order of the postmaster-general, directing him to receive and hold these moneys for the United States, was authorized by the 3d section of the act of March 3, 1836 [5 Stat. 80], c. 270; and that his sureties were responsible for his default in not paying over and accounting for the same, as they are for his not accounting for the money received in the ordinary discharge of his duties as postmaster.

The jury accordingly returned a verdict for the sum of $2,637.26, and interest amounting to $192.50, making a total of $2,829.76: all which, as said defendants allege, is erroneous—and that a verdict should have been in their favor.

The exceptions to the rulings of the judge below were argued at this term, in writing.

F. O. J. Smith, for plaintiffs in error.

A. Harris, Dist. Atty., for the United States.

WOODBURY, Circuit Justice. The first exception taken to the ruling of the district court, is the instruction to the jury, "that the order of the postmaster-general of May, 1837, by which Todd was directed to retain the money which he collected in his own hands, instead of depositing it in a bank, as had been before required, did not exonerate his sureties from their responsibility—but that they continued liable for his defaults, after that order, to the same extent that they were before." It is sufficient to remark on this, that the condition of the bond, signed by the plaintiffs in error, is, that "the said Thomas Todd shall well and truly execute the duties of the said office according to law and the instructions of the postmaster-general." The only exceptions, which can be raised to this instruction, under that condition, are two. The first one is, that this order was issued after the date of all the bonds, and that the condition does not apply to subsequent orders. But there are no words, limiting its application to past orders; and, in the nature and reason of the case, it should not be limited to past orders any more than to past laws. The object is to preserve obedience, and uniformity, and harmony among that class of officers; and hence, orders given,—whether after or before the bond—are general, and require a strict compliance, till the whole term of office of the postmaster expires. The term of office is the limitation during which the orders may be issued; else both obedience and uniformity, and all improvement in former orders or regulations, by experience or discoveries, are defeated, as to all old postmasters under their existing bonds. It follows, also, that if new laws can be passed, and must be obeyed, and the sureties held, if passed during the continuance of the term of office, new orders may be, when the language in

the condition, applicable to both, is the same; and furthermore, that a new law, however great an improvement, would, in many respects, become inefficient and unequal, and not uniform in its operation, if the postmaster-general could not issue a new order, directing the details of its execution, which his deputies were bound to obey, and their sureties held responsible for. Congress have expressly authorized the postmaster-general to issue such orders, and to make suitable regulations, it being impossible to legislate with sufficient minuteness for every thing in such a department, more than in the army or navy. Act 1825 [4 Stat. 102], c. 64, § 1. In all these, however, the orders issued must, of course, not be in conflict with any law. And hence, the other exception, which can be made in some cases with success, is made here, and is next to be considered. It is, that the new order is one contrary to law.

It is undoubtedly true, that the condition, requiring obedience to orders of the postmaster-general, cannot exact it to orders not justified by the acts of congress. But I can see no illegality in this order to the deputy, to retain the money collected, till drawn for by the postmaster-general, rather than to deposit it in banks. These last at that time had ceased to pay out specie, and had forfeited their situation as public depositories. Under the fiscal system of the United States, all collecting officers and their sureties are responsible, and ever have been, for the money they officially receive, till it is paid over to public creditors on some order from the treasurer, or paid to some other officer having the control over their receipts. And whether that order be to deposit it periodically with some bank or receiver-general, or be to pay it out on particular drafts, where no public depository exists by law, or the sums collected are too small for requiring a deposit of them for safety, is immaterial under the language of the bond and the spirit of the financial system which then prevailed. The sureties agree to be responsible for his fidelity in these and other matters, according to the current and changing laws of congress and the legal orders of the postmaster-general under them, during the whole of the official term, and to the amount of the penalty in the bond. Their security is, they are liable only to that amount, however much the collections in the hands of their principal may accumulate, or his other receipts as agent of the department, exceed the penalty.

The second exception is to the instruction, "That the account between Todd and the general postoffice being an open and running account, all payments made by him from time to time, in the absence of any specific appropriation by him at the time of making them, were by law appropriated to the payment and extinction of the oldest charges on the debit side of the account; that this was the general rule of law with respect to the appropriation of payments upon an open and running account, when no special appropriation was made, either by the debtor or creditor, at the time the payment was made, to any particular item of the account; that the proviso in the 37th section of the act of July, 1836 [5 Stat. 88], c. 270, which directed that payments made subsequent to the execution of a new bond, by a deputy postmaster, shall first be applied to the discharge of any balance which may be due on the old bond, unless when the debtor specially directs it to be applied to his new account, at the time of the payment—is not limited to the cases where a new bond is required at the request of the sureties, in order to be released from their suretyship—but extends to all cases where a new bond is required by the postmaster-general, or he shall deem it necessary, for any cause, to require a new bond." The correctness of this instruction is not material to the plaintiffs, who were sureties in all the three bonds, given in behalf of Todd, and who are of course liable for all the balances, except in one respect. They might avail themselves of the statute of limitations as to the balances that were due on the first two bonds, if they have not been since legally discharged. Act 1825 [4 Stat. 103], c. 64, § 3. The limitation is two years from and after any default, and this action was brought June 1st, 1840, while the first commission and bond expired, July 2d, 1836, and the second bond, January 9th, 1837, both more than two years before suit. The third commission and bond terminated September 21st, 1839, not two years before suit. On a careful comparison of dates, however, the objection to the instruction on this point is not very material as to the balance due, July 2d, 1836, because before the second bond was given, viz., on the 12th of July, 1836, a payment was made by Todd, which reduced that balance to only $8.34. It is objected that this payment may have been made on the second bond. But this payment could not in any view be regarded as made under or upon the second bond, as that bond was not in existence till four days after, viz., the 16th of July, 1836. As a further evidence, that this payment must have been made on account of the former balance, under the first bond, the quarter had just ended on the first of July, and he owed nothing to the department, except on that balance, till the 1st of August; after which, any thing due before and from the month of July, probably he paid on the 8th of August, as $350 were then paid; and after August had expired he paid for that month, probably, $400, as that sum was then paid. It would hardly answer to presume, that on the 12th of July he was paying money, not intended to be on account of what was already due, but in advance of what was not due, and of what he afterwards appears to have paid in

a different manner, when it became due. Nor is there any evidence that this payment, on the 12th of July was made, from accruing receipts, under the second bond or commission, so as to bring it within the case of Eckford hereafter examined, nor is there any such presumption, but rather the reverse, as the second bond had not been in existence, and the amount being $1,191.60, was much larger than the usual receipts since the second appointment.

In relation to the second balance, it is to be sure much larger, being $1,567, and deserves more consideration. It would be barred by the limitation of two years, from the 9th of January, 1837, the date of the third bond, if it had not been extinguished by the subsequent payments, which were applicable to it. They are so applicable by the express words of the 37th section of the act of 1836 [5 Stat. 88], c. 270, even under its limited construction, as reaching only cases of new bonds given within the official term—this bond being a new one given within that term. The case of U. S. v. Eckford's Ex'rs, 1 How. [42 U. S.] 250, is not like this; because in that case no express provision of law existed, requiring, as here, subsequent payments to be applied under a preceding bond, where no direction to the contrary was given by the debtor. And if the $8.34 should also be held to be extinguished by force of subsequent payments on the general and equitable principle at common law, that the payments of a debtor, where no specific direction is given by him at the time, shall be applied to the oldest debts, it would not conflict with the Case of Eckford, unless it appeared that this sum and all these subsequent payments were made from subsequent and accruing receipts, about which there is no evidence in the cause. Other cases hold, that the creditor has his election, and may apply the payment before suit to any debt he pleases, where a special statute or the debtor gives no direction how to apply it. 1 Mer. 606; 2 Strange, 1194; 14 East, 239; 5 Taunt. 596; Postmaster General v. Norvell [Case No. 11,310]; 1 McLean, 497 [Myers v. U. S., Case No. 9,996]; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720.

The general principle in favor of an application of the payment to the oldest debt, where nothing has been done or directed, seems too well settled to be overturned by straining the case of Eckford beyond the facts proved here, and for only the sum of $8.34. 1 Ld. Raym. 287; Peake, 64; Mayor of Alexandria v. Patten, 4 Cranch [8 U. S.] 317; Field v. Holland, 6 Cranch [10 U. S.] 8, 27; Postmaster General v. Furber [Case No. 11,308]; [U. S. v. Eckford's Ex'rs] 1 How. [42 U. S.] 250; Gratiot v. U. S., 15 Pet. [40 U. S.] 336; Devaynes v. Noble, 1 Mer. 606. A rule in accordance with this principle existed under the civil law. Dig. B. 46, tit. 3, § 5. For if neither the creditor nor the debtor applies the payment, nor a special statute, the law ought to do it, and, as a general rule, to the oldest debt. Myers v. U. S. [Case No. 9,996]. Either of the above rules would decide this point in favor of the United States. It is true, that some exceptions exist to these principles; but I do not think that any of them include the present case. See some in [U. S. v. Eckford's Ex'rs] 1 How. [42 U. S.] 250, and 5 Mason, 85 [U. S. v. Wardwell, Case No. 16,640]; U. S. v. January, 7 Cranch [11 U. S.] 572; Gilp. 126 [Postmaster General v. Norvell, Case No. 11,310]; [Farrar v. U. S.] 5 Pet. [30 U. S.] 373.

The test of the exception, in the case of different bonds and commissions, is, that money actually collected and accruing under one, cannot be applied to the other without the consent of all concerned. Myers v. U. S. [Case No. 9,996]. But here there is no evidence whatever, that the small balance due after the 12th of July, or the payment then made, was from money accruing under the second appointment. Indeed, as before shown, the presumption is evident that it could not be, as it was so much larger than the ordinary receipts during only twelve days. Nor do I mean by this conclusion to impugn the case of U. S. v. Giles, 9 Cranch [13 U. S.] 212, any more than the case of U. S. v. Eckford's Ex'rs [1 How. (42 U. S.) 250], because the former decision holds merely that the sureties in each official bond are liable only for defaults happening within the term each covers. And the whole inquiry, as to the correctness of this second instruction, is founded entirely on the idea, that such a principle is applicable here, though the sureties in all the bonds are the same. U. S. v. Kirpatrick, 9 Wheat. [22 U. S.] 720. And I give the sureties the benefit of it, in order that they may avoid the balance due under each bond by the statute of limitations, if it has not been paid or discharged since, in conformity to sound legal principles and the provision of the act of congress specially referring to a part of it. This is treating sureties liberally, as the cases require (Miller v. Stewart, 9 Wheat. [22 U. S.] 680), though I think that the law in many cases has been construed quite beyond any reasonable intention of its makers or of parties to contracts, from a natural sympathy in their behalf.

The third and last exception is to the instruction—"That the sum of $1,165.61, which was received by Todd from other postmasters, under orders from the postmaster-general directing the same to be deposited in his hands, was covered by that clause in his bond, which required him to account for all moneys, bills, bonds, notes, receipts, and other vouchers, which he, as agent of the general postoffice, should receive for the use and benefit of the general postoffice; that the order of the postmaster-general, directing him to receive and hold these moneys for the

United States, was authorized by the 3d section of the act of March 3, 1836 [5 Stat. 80], c. 270; and that his sureties were responsible for his default in not paying over and accounting for the same, as they are for his not accounting for the money received in the ordinary discharge of his duties as postmaster." It is to be remembered, that the postmasters in different cities or towns are in fact and in law deputies, or agents of the postmaster-general. It was once contended, that he on that account was liable for their default. But their agency being public, and the liabilities of each regulated by law without imposing such a responsibility over on him, he has not in such cases been made chargeable for their misfeasances. Thus it was held in the following cases, after much deliberation, that the postmaster-general is not liable personally or officially for the neglect or wrong of a deputy or of a letter or mail carrier. Whitfield v. Lord Le Despencer, Cowp. 754; Lane v. Cotton, 1 Ld. Raym. 646, 12 Mod. 472; 3 P. Wms. 394, note; Story, Bailm. § 461 et seq. They are still, however, his agents, and are liable to be called on as such to transact business for him, connected with his official duties. One of his duties is to collect and disburse the money received for postage, and to keep it safely till expended. Hence he can make his deputies agents for this purpose, within convenient limits; and the sureties, as in respect to the collections of each deputy at his own office, do not act in the dark or at random, as to their responsibilities, because they cannot be held liable beyond the amount of the penalty in their bond, and they knowingly and deliberately stipulate to be liable to the extent of that. Besides this, in the bond itself, the acting of postmasters as agents is thus recognized:—Said Todd "shall also faithfully do and perform, as agent for the general postoffice all such acts and things as may be required of him by the postmaster-general, and moreover shall faithfully account with the United States for all moneys, bills, bonds, notes, receipts, and other vouchers, which he as agent aforesaid shall receive for the use and benefit of said general postoffice." The act of 1836 [5 Stat. 79], c. 270, § 1, which requires the revenues and debts due to the postoffice department, to be paid into the treasury of the United States, and the money disbursed, to be drawn therefrom, does not refer to each individual collection or payment, but the aggregate quarterly and yearly collections and expenditures. This is, in order to make them appear on the exhibit of the annual receipts and expenditures of the country, and also in the annual appropriations, which was not the case formerly. This is effected by large "covering warrants," quarterly or otherwise, and not by a deposit and warrant in each individual case over the Union; else the labor and details would be insuperable, without a great additional force in the department. The collections, then, till disbursed, are kept as formerly by the postmaster-general with his deputies, or, when safe deposit banks exist, with them. The responsibility of depositing is usually small on this account, as the current demands of the deposit, being greater, or as great as the receipts, quickly and constantly absorb most of the receipts.

There are several other points, stated in argument, and at the trial. But as these alone were made at the time of the charge to the jury, and as the rulings or opinions concerning others, such as the accounts of Todd being all open and running, or the bond being joint, instead of joint and several, even if incorrect, do not reach and alter the merits of the case, as decided on other grounds, it is unnecessary to enlarge upon them. For the reasons I have given, let the judgment below be affirmed.

Case No. 1,637.

In re BOOK.

[3 McLean, 317.][1]

Circuit Court, D. Ohio. Dec. Term, 1843.

BANKRUPTCY—PRACTICE — PETITION BY INFANT — HOW BROUGHT—EFFECT OF JUDGMENT—RELIEF FROM TORT — DISCHARGE—"PERSONS IN INTEREST."

1. A formal plea in bankruptcy is not necessary nor usual, and, if filed, will be treated as a motion.

2. An infant is entitled to the benefit of the bankrupt act.

3. The proceedings may be had in his own name.

4. The bankrupt law relieves against a judgment for a tort.

[See In re Comstock, Case No. 3,073.]

5. Any one interested in the administration of the effects of the bankrupt may object, though technically he is not a creditor.

[Cited in Re Sheppard, Case No. 12,753; Re Derby, Id. 3,815.]

[On certificate from the district court of the United States for the district of Ohio.

[In the matter of Samuel Book. Answers certified.]

Shannon & Carroll, for bankrupt.

OPINION OF THE COURT. The following points have been certified to this court from the district court, under the bankrupt law.

1. "Whether a plea in abatement is a regular and authorised form of opposition to a petition in bankruptcy, and whether the motion filed in the above case to strike out such plea ought to prevail." Formal pleading in such a case is not usual or necessary; but there is no reason why the objection should not be so stated. The form of the objection may be governed by the discre-

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

tion of the party making it. The plea should be treated merely as written objections.

2. "Whether the infancy of the applicant is good grounds of opposition to his discharge as a bankrupt." An infant is bound to pay certain debts. The bankrupt law extends its benefits to all persons who are in a state of bankruptcy, without exception as to persons; fiduciary debtors only are excepted. An infant, therefore, may claim the benefit of the bankrupt law. When an infant brings his case within the bankrupt law, the law vests his property in the assignee.

3. "Whether the fact of the applicant's being a minor, petitions in his own behalf and in his own name, and not by his next friend, is a good ground of opposition to his discharge as a bankrupt?" If an infant be a proper subject of the bankrupt law, it would seem to follow that he may make application in his own name.

4. "Whether a judgment in a court of law obtained in an action of tort, is a debt dischargeable under and by force of the bankrupt law?" As the law makes no exception as to debts, except those of a fiduciary character, the discharge is from all other debts.

5. "Whether a creditor who has not proved his debt, and is not otherwise interested as a creditor in the proceedings in bankruptcy, can appear and contest the right of the applicant to his discharge?" By the 4th section of the bankrupt law, "notice to all creditors who have proved their debts, and other persons in interest, to appear to show cause why such discharge and certificate shall not be granted," is required.

In Re King, S. D. N. Y. [Case No. 7,784], it was held, "that the terms, 'other persons in interest,' used in the 4th section, are employed to designate those who could not prove debts as creditors, and does not embrace, but excludes creditors." That these words may embrace those who are not properly creditors, but have an interest in the matter, may be admitted; but that they exclude creditors who have not proved their debts, is a gratuitous assumption not warranted by law. In 5 Law Rep. 263 [In re Tebbetts, Case No. 13,817], Justice Story says, in reference to this clause, "if the objectors in that case are not strictly creditors of the bankrupt, they are at least equitably creditors, and have an interest in the property to be administered in bankruptcy."

The above answers may be certified to the district court.

BOOK (UNITED STATES v.). See Case No. 14,624.

BOOKER, The HELEN E. See Case No. 6,330.

BOOM CO. (MASON v.). See Case No. 9,232.

Case No. 1,638.

BOOMER et al. v. UNITED POWER PRESS CO. et al.

[13 Blatchf. 107; 2 Ban. & A. 106.][1]

Circuit Court, S. D. New York. Aug. 23, 1875.

PATENTS—CHEESE PRESSES — REISSUE — ASSIGNMENT — ACTION FOR INFRINGEMENT — MEASURE OF DAMAGES—INJUNCTION.

1. Letters patent were granted to George B. Boomer, Rufus E. Boschert and Thomas G. Morse, November 1st, 1870, for an "improvement in cheese presses." They were reissued to Boomer and Boschert, January 28th, 1873. The claim of the original patent was, "A cheese press, composed of the double frame A, a, A', the press beam B, h, H, sliding standards G, G, double levers C, C, nuts e, and the screw D, with a hand-wheel F, and square end d, all constructed, arranged and operating substantially as described." The claim of the reissue was: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." It was contended that the reissued patent was for a different invention from the original patent, because the claim of the reissue did not include in the combination the press beam, the double levers and the nuts. The invention was an improvement in a press in which double levers and a press beam were necessary, and they were fully described in the specification, and the only ingredients which entered into the invention were those specified in the claim of the reissue: *Held*, that the objection was not tenable.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 420.]

2. As the claim of the reissue embraces the improvement invented, and the elements of the invention are operative in connection with the mechanism described in the specification, the claim is not invalid because the elements specified in it do not, of themselves, accomplish anything.

3. The reissue is not invalid for want of novelty.

4. The plaintiffs, after bringing this suit, conveyed away their exclusive right to the patent for all of the United States, except the New England states and Ohio, reserving their rights "so far as they are connected with said suit, with the profits and damages therein, and the right to have said patent declared valid, and for an injunction:" Held, that the plaintiffs reserved no right to damages or profits for infringements committed after the conveyance, and were entitled to a decree for the damages and profits down to the time of the conveyance, but not to an injunction.

[In equity. Bill by George B. Boomer and Rufus E. Boschert against the United Power Press Company and others for an accounting, and for an injunction to restrain the infringement of patent No. 108,753. A decree was given for complainants for an account, and directing an ascertainment of damages to April 10, 1874, with costs.]

William B. Smith and Andrew J. Todd, for plaintiffs.

John Van Santvoord, for defendants.

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[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 106; and here republished by permission.]

SHIPMAN, District Judge. This is a bill in equity, filed February 5th, 1874, praying for an account and an injunction.

Letters patent for an "improvement in cheese presses" were granted to the complainants, and to Thomas G. Morse, on November 1st, 1870. A reissue was granted to the complainants on January 28th, 1873, Morse having previously assigned his interest in the invention to Boomer. The United Power Press Company, one of the defendants, is a corporation established in the city of New York, of which corporation the other defendants are the trustees. The defendants are charged with the infringement of the reissued letters patent in the city of New York. The complainants, on April 10th, 1874, granted and conveyed to the Boomer and Boschert Press Company all their interest in the invention which was secured by the reissued letters patent, for all of the United States, except the New England states and the state of Ohio. On the same day the grantees executed an agreement, the material portions of which are as follows: "And whereas, a suit is pending against the United Power Press Co., instituted, among other things, to establish the validity of said reissued letters patent, and for an injunction; and whereas, said Boomer and Boschert have, in fact, assumed to have a good title to said letters patent, and the invention therein described, and have undertaken to carry forward said suit to a successful termination, if possible: Now, then, it is understood, that all their rights under said reissued letters patent, so far as they are connected with said suit, with the profits and damages therein, and the right to have said patent declared valid, and for an injunction, are not to be affected by said patent deed, but the same is subordinate to said rights." The answer avers that the reissued patent is not for the same invention for which the original letters patent were issued, denies the novelty of the alleged invention, and denies infringement.

The alleged invention of the patentees related to an improvement in that class of presses known as toggle-lever presses. An ordinary toggle-lever press consists of a frame having a base and head-block suitably connected by rods or posts, in which frame runs a follower. The follower is elevated or lowered by two toggle-levers jointed at their centres, which levers are operated by a right and left-hand screw-shaft passing through the knuckles of the levers. The defect in this kind of press arises from the fact that, when the resistance under the follower is unequal, the follower tips at the end where there is the least resistance. This depression of the platen or follower, causes the arms of the lever on the side of greater resistance to become more angular than the arms of the opposite lever, and the lozenge-shaped configuration of the four arms of the levers becomes distorted. This distortion causes an endwise motion of the screw-shaft towards the side of the press where the arms of the lever are more angular, and the side of greater resistance. Consequently, the end or side of the press where the greatest pressure is needed, becomes least capable of exerting such pressure, and the action of the press becomes unequal. Prior to the complainants' invention, this defect in toggle-lever presses was of a very serious character, for the usefulness of such presses depends upon the uniformity with which the platen is kept level, and the uniformity of the pressure under the platen. The alleged invention of the patentees consisted in constructing sliding standards, the lower ends of which are attached to the platen, and the upper ends extend through a socket in the head-block. When one end of the platen is depressed, these standards tend to incline towards the side of least resistance, and in an opposite direction from that towards which the screw-shaft tends to move. In order that these opposing tendencies may be made to counteract each other, a central hub is attached to the screw-shaft between the standards. When the standards incline to the side of greatest depression, this central hub or bearing, being attached to the screw-shaft, comes in contact with the standard, prevents its further movement, and, at the same time, by its pressure upon the standard, prevents the movement of the screw-shaft to the side of greatest resistance. One of the patentees describes the manner in which the follower is kept level by this invention, notwithstanding the resistance may be greater under one side of the follower than under the other side, as follows: "It (the follower) will be kept level, or very nearly so, because, if the resistance is greater under, say, the right end of the follower, the tendency is to depress the left end, which would draw the standards to the left; but, if the follower is depressed at the left, the left pair of arms or toggle-levers will become straighter than those on the right, and the screw will move to the right, bringing its central bearing in contact with the standards, which will prevent both the movement of the screw to the right and the standards to the left. The two opposite movements are thus made to counteract each other, and the power of the press is kept in equilibrium." The principle of the invention is, that the active force exerted by the movable standards and the hub, at the instant when the tendency of the screw-shaft to deflect commences, is more efficacious than a much greater amount of resistance which can be exerted by fixed bearings or posts, and that the tendency to distortion is easily overcome by making the opposite movements of standards and screw-shafts to counteract each other. The press of the plaintiffs has been largely sold, and is a highly useful improvement.

The two styles of machines which the de-

fendant corporation manufactured and sold, in the city of New York, prior to April 10th, 1874, differ only in immaterial details from the press of the complainants. In the defendants' press there is but a single sliding standard, and, instead of the complainants' central hub, collars are attached to the screw-shaft on each side of the standard. It is virtually conceded by the witnesses for the defendants, that their machines embody the invention which is claimed in the complainants' reissued patent, and differ from the complainants' machine in form only and not in substance.

The defendants contend, first, that the reissued patent is void, because it is not for the same invention as the one which was claimed in the original patent. The claim in the original patent was as follows: "A cheese press, composed of the double frame A, a, A', the press-beam B, h, H, sliding standard G, G, double levers C, C, nuts e, and the screw D, with a hand-wheel F, and square end d, all constructed, arranged and operating substantially as described." The reissued patent also contains a single claim, as follows: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." The defendants insist that two material parts of the originally patented invention, to wit, the press-beam or platen, and the toggle-levers and nuts, have been dropped in the reissued claim, and that these omissions constitute a material change in the reissue, as compared with the original patent, and that the reissued patent attempts to secure combinations fewer in number than the whole described in the original patent. The improvement which is declared in both the original and reissued patents to have been invented by the patentees, is an improvement in a toggle-lever press, in which toggle-levers and a platen must necessarily be found. The specification of the reissued patent describes fully, and in substantially the same terms which are employed in the original patent, the manner in which the whole press is constructed. The claim of the reissued patent embraces, in comprehensive terms, the actual invention, and describes what is claimed to be new, and it was not necessary to mention, in that part of the specification, that toggle-levers and a platen were also used in the press. The only ingredients which entered into the invention for which the original patent was granted, are those which are specified in the claim of the reissued patent.

The defendants insist, in the next place, that the complainants' patent is invalid, because the elements which are specified in the claim as forming, in combination, the invention, do not of themselves perform or accomplish anything. The claim is properly confined to the invention, and specifies only the improvement which the patentees invented. The elements of the invention are operative in connection with the mechanism of the press, which is accurately described in the specification.

The defendants contend, thirdly, that the complainants' patent is void, in view of the previous state of the art, as shown in the presses which are described in the patent of Robert Harding, of September 3d, 1842; in the patent of P. G. Gardner, of February 28th, 1845; in the patent of Nathan Chapman, of January 12th, 1858; in the patent of Pickens B. Wever, of August 21st, 1860; and in the French press of P. Samain. No one of these presses contained the combination of sliding standards with the central hub of the complainants' press, and no one was constructed upon the principle of keeping the platen level by means of the active resistance which standard and hub make to the tendency of the screw shaft to move towards the side of greater resistance, when the platen commences to tilt. The point upon which the defendants most strongly relied, in this part of the case, was, that the sliding standard of the Harding press and the central hub or wheel of the Gardner press could have been combined, and thus the complainants' press could have been constructed without the exercise of invention. This theory is not supported by the facts, and it is manifest that an operative machine could not, prior to the date of the complainants' invention, have been constructed from a combination of the two machines of Gardner and Harding, without inventive skill of more than ordinary character.

The remaining question is as to the terms of the decree. The complainants, on April 10th, 1874, and after suit had been brought, granted to the Boomer and Boschert Press Company the exclusive right to the reissued patent for all of the United States, except the New England states and the state of Ohio. The grantees, having obtained, by this grant, the exclusive right and title to the patent for the state of New York, and having recorded the deed in the patent office, could alone institute suit for any infringement which might be committed after the date of the grant, within that state. Moore v. Marsh, 7 Wall. [74 U. S.] 515, 521. The complainants had parted with all their previous title in the patent for the territory which was named in the grant. The grantees declared, in the agreement which they executed, and which was dated April 10th, 1874, that all the rights of the complainants, "so far as they are connected with said suit, with the profits and damages therein," are not to be affected by the deed. By this language, the grantees did not confer upon the complainants any right to damages for future infringements, and did not declare that any such right was understood by the parties to the grant to have been reserved.

The grantors made no express reservation in their deed, and retained nothing but their right to recover whatever sums might be determined to belong to them for infringements which had theretofore been committed. The "rights under said reissued letters patent, so far as they are connected with said suit," were the rights which they had to obtain compensation for the damage which they had previously suffered, and "the profits and damages therein," which were declared not to have been affected by the grant, were simply those profits and damages which they might then be entitled to recover. The complainants aver, in their bill, that they are the exclusive owners of the reissued letters patent for the state of New York. Since the filing of the bill they have conveyed all their title to the patent for that state, and are not now entitled to an injunction against an infringement therein. Wheeler v. McCormick [Case No. 17,499]. The understanding or agreement of the parties, that the right of the complainants to an injunction should not be varied by the grant of April 10th, 1874, does not alter the legal effect of that conveyance. If it had been averred in the bill, or in a supplemental bill, that the complainants are the owners of the patent for the New England states and the state of Ohio, and that the defendants are infringing, or threaten to infringe therein, this court could enjoin against such unlawful use. Wilson v. Sherman [Case No. 17,833].

Let there be a decree for the complainants, declaring the infringement, and directing an account of profits and an ascertainment of damages until April 10th, 1874, with costs.

[NOTE. Patent No. 108,753 was granted to Boomer, Boschert & Morse November 1, 1870; reissued January 28, 1873, No. 5,256.]

Case No. 1,639.

BOON et al. v. AETNA INS. CO.

[12 Blatchf. 24; 2 Am. Law T. Rep. (N. S.) 179; 9 Am. Law Rev. 150; 4 Ins. Law J. 27.][1]

Circuit Court, D. Connecticut. April Term, 1874.[2]

INSURANCE—THE CONTRACT—BREACH—DESTRUCTION BY MILITARY POWER—DEFINITION—"MILITARY POWER."

1. A policy of insurance, on goods in a store, against loss by fire, contained this proviso, in its body: "Provided, always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire." The city, in which the store was, was occupied by the United States army, and its city hall contained military stores for the use of such army. The military forces of rebels against the United States government attacked the city and the United States forces. The commander of the latter, in order to prevent such military stores from falling into the possession of the rebels, who were gaining successes in the attack, and ultimately occupied the city, ordered the destruction of such stores. This was done by setting fire to the city hall, and consuming it and its contents. The fire spread through three adjacent buildings to the store containing the insured goods, and they were consumed. After this, the rebels occupied the city: Held, that the proviso did not exempt the insurer from liability for the loss.

[See note at end of case.]

2. The loss did not happen by means of the unlawful and rebellious attack on the city, within the meaning of the proviso.

[See note at end of case.]

3. Between the attack and the fire a new power intervened, as a sufficient cause of the fire, rendering the attack, as a cause of the fire, too remote.

4. Whether, even the setting fire to the city hall was not a cause too remote to be the means by which the loss happened, within the meaning of the proviso, quere.

[See note at end of case.]

5. The words "military power," in the proviso, have no reference to the lawful acts of the military forces of the United States, and the proviso does not exempt the insurer from liability for loss caused by the acts of such military forces.

[See note at end of case.]

6. Words of exception in the proviso should be taken most strongly against the insurer.

[At law. Assumpsit [by William C. Boon and others] on a policy of fire insurance brought to the circuit court of the United States for the district of Connecticut, and tried, on an issue closed to the court, before WOODRUFF, Circuit Judge, and SHIPMAN, District Judge, at the April term, 1874.][3]

Francis Fellowes, for plaintiffs.
George W. Parsons, for defendant.

WOODRUFF, Circuit Judge. The facts in this case are not doubtful nor in dispute. The action is brought [by William C. Boon and others] to recover from the defendant the amount of an insurance, against loss by fire, upon the goods of the plaintiffs, in their store in Glasgow, Missouri, in the sum of $6,000. It is founded on a policy executed by the defendant, dated September 2d, 1864, and the goods were destroyed by fire on the 15th of October, 1864, within the term of the insurance. The loss was sufficiently great to entitle the plaintiffs to recover, if the defendant is liable at all, the whole sum insured. The plaintiffs have complied with all the terms and conditions of the policy, by the payment of premium, furnishing proper preliminary proofs of loss, and compliance

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 9 Am. Law Rev. 150, contains only a partial report.]

[2] [Reversed in Aetna Ins. Co. v. Boon, 95 U. S. 117.]

[3] [From 4 Ins. Law J. 27.]

with all other requirements. The policy, however, contained the following express proviso, annexed to the agreement of insurance, and in the body of the policy, namely: "Provided, always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire." The defense herein rests solely on this proviso, and the facts which are claimed to bring the plaintiffs' loss within its operation, so as to exempt the defendant from liability under the policy.

At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied, as a military post, by the military forces, and portion of the army, of the United States, engaged in the civil war then, and for more than three years theretofore, prevailing between the government and the citizens of several southern states, who were in rebellion and seeking to establish an independent government under the name of The Confederate States of America. As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the army of the United States, which stores were in a building called the city hall of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' store, three buildings being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer of the United States government, and in command of the military forces of the United States, held the possession of the said city, and had lawful charge and control of the military stores aforesaid. On the said 15th of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings and killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battles between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the government from their position, compelled their surrender, and entered and occupied the said city. During the battle, and when the government troops had been driven from their exterior lines of defense, it became apparent to Colonel Harding that the city could not be successfully defended, and he, thereupon, in order to prevent the said military stores from falling into the possession of the rebels, ordered Major Moore, one of the officers under his command, to destroy them. In obedience to that order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city hall, and thereby the said building, with its contents, was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid, to the building next adjacent to the city hall, and from building to building, through two other intermediate buildings, to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of, or entered, the city.

Upon these facts, and in view of the before mentioned proviso in the policy of insurance, the question arises: Is the defendant liable for the loss of the plaintiffs' goods, or does that proviso exempt the defendant from liability? That question depends upon the answer to be given to some other questions. That is to say:

1. It is insisted, that, within the just and proper meaning of the proviso, the fire in question happened by means of the unlawful and rebellious attack upon the city, by forces acting in assumption of usurped power, endeavoring to capture the forces of the United States, obtain possession of territory in the lawful possession and power of the United States, in aid of the usurped rebel government, and forcibly accomplish its objects and designs; that the fire, and, therefore, the destruction of the goods, were a military necessity, created by such attack by an illegal armed force, and so they happened by means of the rebellion, and the employment of organized forces to effect the objects thereof, and the actual attempt of such forces to overcome the authority and government of the United States; that this was, therefore, the direct or proximate cause of the loss, or, in the words of the proviso in the policy, "the means" by which the fire destroying the goods "happened." We think that this reasoning cannot prevail. Fire destroyed the goods. The fire was not communicated to the goods, nor to the building from which it spread, by the rebel forces, nor by any person acting in co-operation with them; nor was it so communicated, in any wise, in furtherance of the rebellion, its purposes or objects. No act of the rebels, in any physical sense, caused the fire. There is nothing to justify the inference, that the rebels would have destroyed the government stores, found in the city hall, by fire, or otherwise, nor to justify the inference that the destruction of the goods, or any loss thereof, would have happened to the plaintiffs, by the capture and the occupation of the city by the rebels. As

matter of fact, there was no connection, direct or by necessary inference, between such destruction of the goods and the attack of the rebels, the capture of the United States forces, and the occupation of the city.

But, it is said, that such attack by a superior armed force created a military necessity that the government stores should be destroyed, which destruction, in the manner in which alone it could be done, involved the destruction of the plaintiffs' goods, and, so, that destruction was the necessary result of the attack, and that, the fire being thus the necessary result of the attack, it "happened by means" thereof. The fire was actually and voluntarily communicated to the city hall by the military authority of the United States. It is conceded, on this trial, that, in the exigency, it was a lawful exercise of such military authority. The power was discretionary, and, if the circumstances were such as made it discreet—and, no doubt, they were—such setting fire to the city hall may have been a duty. In saying that it was voluntary, we only mean that it was not a physical necessity, nor the physical result of any agency or act of the rebels, or of their unlawful or usurped power. It was physically independent of them, hostile to them, and an act which they not only did not commit, but would not have committed, and would, if possible, have prevented. What is called a military necessity was, therefore, nothing more than this—it constituted the motive, and, no doubt, the sufficient motive, to the burning of the city hall. This was not even an act of resistance to the attack upon the city. It was no part of the defence, nor a force employed in any wise in maintenance of the authority or possession of the government. It was done in an exercise of military discretion, for the incidental purpose of preventing an accession to the means of the rebels for maintaining their rebellion. The importance of preventing such an accession to their means furnished a motive, and, it may be conceded, a controlling motive, to the burning of the city hall, but that did not make the fire happen by means of anything done by them. In a certain sense, it may be true, that the city hall was set on fire by reason of the attack upon the city by an armed force of rebels, but, between that attack and the fire was interposed another actor, who caused the fire, who set in operation the means by which it happened. An efficient and a sufficient cause of fire, and the means by which it happened, intervened between the acts of the rebels and the fire itself, and a cause or means without which, notwithstanding the acts of the rebels, the fire would not have happened at all. In the language of Mr. Justice Miller, in the supreme court of the United States, in Insurance Co. v. Tweed, 7 Wall. [74 U. S.] 52: "If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote." That language was used in reference to a similar provision in a policy of insurance, and in aid of the inquiry by what "means" the fire happened. There, as in this case, there was, in some sense, another cause but for which the fire would not have happened at all; and the opinion shows that the existence of just such an influential cause is not enough to bring a case within the proviso. The facts here are much stronger than the reasoning there, in withdrawal of the case from the operation of the proviso, because, although the fire would not have happened but for the existence of such remote cause—the attack by the rebels—it is equally true that such remote cause would not have produced the fire at all. To apply the criterion suggested by Mr. Justice Miller, there was here the intervention of distinct, new, affirmative power and force, other than the acts of the rebels, not only sufficient but efficient, as the cause of the fire in the city hall, and the actual means by which it happened. We think, therefore, that it cannot be held, that, within the meaning of the proviso in question, the fire which destroyed the plaintiffs' goods happened by means of the rebellion, or of anything done by the rebel forces.

2. An obvious inquiry is suggested by the facts stated—whether the setting on fire of the city hall was the cause of the loss, in such sense that, within the proviso, it was "the means" by which the fire happened, or whether that, also, was not the remote cause of the fire which destroyed the plaintiffs' goods. In our preceding discussion, we have assumed that the setting on fire of the city hall was the means of the fire to the plaintiffs' goods, within that proviso, unless the rebellion or the acts of the rebels should be held to be such means; and that, in this sense, the acts of the lawful military authorities of the United States were the proximate and efficient cause and means by which the fire happened, and of the destruction of those goods by fire. We do not find it necessary to discuss the question, what was the proximate and what was the remote cause of such destruction, under this head. The suggestion, that the setting on fire of the city hall was only the remote cause, while the casual and incidental communication of the fire to the plaintiffs' store, from the burning building next adjacent thereto was the proximate cause of the fire, and the means by which the fire happened, within the meaning of the said proviso, is not made by the counsel for either of the parties. The contrary is conceded, if not, in truth, insisted upon by both. The decision by the supreme court, in Insurance Co. v. Tweed [supra], was assumed by both to be decisive against such a suggestion. We are, therefore, not called upon to pursue that subject.

3. It remains to consider the claim of the defendant that the fire happened by means

which exempt the company from liability, upon the ground that it was caused by "military power," and was, therefore, within the very words of the proviso. It is insisted, by the plaintiffs, that the word "military," in the connection in which it is found in the proviso, does not mean the lawful military power of the government, acting lawfully in the performance of the proper duty of the government forces, whether engaged in hostile contest with an invading army, or in a forcible endeavor to suppress an internal rebellion. For reasons which seem to us convincing, we are of opinion that the word "military," in the proviso in question, has no reference to the lawful acts of the military forces of the government. Neither the reasons for the insertion of the proviso in policies of insurance against fire, nor the history of that insertion, nor any judicial decisions upon the meaning and purport of the proviso, nor the discussions had upon its construction, with especial reference to the meaning of other terms employed therein, sustain the interpretation for which the defendant contends. It is true, that the precise question, what is the import and legal effect of the word "military," does not appear to have been decided in any case to which our attention is called; and, had that proviso been now, for the first time, employed to exempt the defendant from a portion of the liability which the preceding general agreement for insurance imports, there would be much plausibility in the argument, that the defendant intended not only to exclude liability for the consequences of an insurrection, invasion or rebellion, but for the possible consequences of those violent and forcible means which may be necessary to repel or suppress it. And yet, if this was the intent, it may pertinently be asked—why was the exemption limited to the employment of military force, and not made to include the forcible or violent measures which municipal authorities or police organizations might find it necessary to employ to suppress a riot, insurrection or other civil commotion?

The proviso containing the words "military or usurped power" was inserted in policies as early as 1720, and the history of the subject, as given in Ellis on Insurance (page 42, etc.), Park on Insurance (page 445, etc.), and Marshall on Insurance (page 791, etc.), shows that the occasion thereof was manifestly the liability to loss by fire caused by a foreign enemy and invasion. And the terms "military or usurped power" were used in reference to the existence of claims to the exercise of governmental authority enforced within the kingdom, and constituting rebellion against the recognized government. The clause originally embraced no other terms than were apt to indicate the violence of enemies from abroad, and of usurpation exercising governmental authority or rebellion, sustained by organized forces within the kingdom. The exception, as then introduced into policies, read as follows: "No loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company." The idea of interference with the peace and safety of the realm by organized force from abroad, or rebellion rising to the proportions of actual or, at least, formal usurpation of governmental authority, whether more or less successful, and manifestly hostile to the lawful government, is indicated by this language. The experience of the country in those days of not infrequent invasion and rebellion, the result of disputes touching the right or the succession to the crown of England, gave occasion for the exception, and, by suggesting its cause, furnished, also, an explanation of its meaning. Foreign invading armies and the organized forces rallied, in whole or in part, within the kingdom, to overturn the government or to enforce the alleged title of a claimant to the crown, usurping or endeavoring forcibly to usurp governmental authority, were in view. Reason for refusing to become liable for losses caused by these forces, in either form, is found not only in helplessness and inability to resist them, and the magnitude of the destruction they may effect, but in the want of recourse for indemnity to those who commit the violence. It is well and pertinently suggested, that while, on the one hand, no one would think of obtaining insurance against the lawful acts of the government, so, on the other, an insurer would not think of excepting such lawful acts as a cause of the fire against which he insured. The citizen without insurance and an insurer making insurance, if that contingency was contemplated, would regard his government as bound and, presumptively, always ready to indemnify against losses sustained by acts done in its own defence or in maintaining the authority of the laws. The subsequent extension of the proviso to "riot, insurrection and civil commotion," rather confirms than impairs this view of the meaning and intent of the original proviso; and these were held to import occasional local or temporary outbreaks, or lawless violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. The observations made by the court in the few early cases in which this proviso came under consideration, (although any possible separate meaning of the word "military" is not suggested,) indicate that the clause has reference to acts done in disregard, or in subversion, of lawful authority, and includes only such affirmative acts. Drinkwater v. Assurance Corp., 2 Wils. 363; Langdale v. Mason, referred to by the text writers above cited. In the last named case Lord Mansfield used this significant language (cited in Park, Ins. p. 446): "What is meant by military or usurped power? They are ambiguous; and they seem to have been the sub-

ject of a question and determination. They must mean rebellion, where the fire is made by authority; as, in the year 1745, the rebels came to Derby, and, if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case—it must be by rebellion got to such a head, as to be under authority."

The term "military" is employed, in the proviso, in a meaning synonymous with the usurped power intended to be described, or as qualifying and explaining what was meant by "usurped power." It was in this view, and as a ground of distinguishing between the usurped power specified in the proviso and the power of a mob, that Mr. Justice Bathurst, in the Case of Drinkwater, construed "usurped power" to mean, either an invasion by foreign enemies, to give laws and usurp the government thereof, or an internal force or rebellion, assuming the power of the government, by making laws and punishing for not obeying those laws. An "invasion" necessarily supposed organization and military power or force. So, of the words, "foreign enemy;" and, in the use of a phrase which should include, also, violence within the kingdom, viz., "military or usurped power," something, in like manner, hostile to, or subversive of, the laws and of lawful government, was intended, as plainly as if the clause had been, "or any other military or usurped power." That the terms used in the proviso have express application to force illegally employed and adverse to the government, is indirectly but impliedly involved in the decision and opinion of the court in Insurance Co. v. Corlies, 21 Wend. 367. The court deemed the meaning of the words "usurped power" long settled. The property there in question was destroyed by order of the mayor of the city of New York, for the purpose of arresting a conflagration. It was claimed that this was usurpation of power and authority, in disregard of the law. The court deemed that, if the mayor had no authority to do the act, the company were still liable, for that it was not a usurpation of the power of government, "against which the defendants intended to protect themselves." The case of Spruill v. Insurance Co., 1 Jones (N. C.) 126, tends strongly in the same direction; and, if an armed patrol may be deemed a military power, that case is especially pointed and significant. These considerations and the significant fact that every other word used in this proviso to designate the means by which a fire may happen, for which the company will not be liable, expresses clearly and unequivocally what is unlawful, employed in disregard or in subversion of the laws or the government, furnish a strong case for the application of the maxim relied upon by the plaintiffs—"noscitur a sociis." This maxim is not conclusive, but, in a case of doubt, and where like meaning will satisfy the provision, where there is no other clause or language hostile to the like interpretation, and, especially, where other considerations tend to support it, the maxim has especial force and significance. We think it not too much to say, that most, if not all, intelligent readers of the proviso in question would at once declare that the word military therein was employed in a sense kindred to the other terms, and that it described an organization military in its form but unlawful and hostile to the government in its character and purpose.

Again, it is a familiar rule in the construction of provisoes and exceptions of this sort, made in qualification of the general positive agreement, that words susceptible of either construction should be taken most strongly against the speaker or party whose language is to be interpreted, and that the general and positive agreement should have effect, unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result. To this should be added, that it is the duty of an insurance company, seeking to limit the operation of its contract of insurance by special provisoes or exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisoes, exceptions, qualifications and special conditions in, or indorsed upon, policies, have been often condemned, and such special modifications are justly characterized as traps to deceive and catch the unwary. An insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it. Where, as in this case, such construction gives a signification to a word "ejusdem generis" of all those with which it is found associated, and in harmony with the general character and purpose of the provision in which they are found, he is clearly entitled to insist upon such construction.

Our conclusion is, that the plaintiffs are entitled to judgment, for the amount of the insurance, with interest thereon from the expiration of sixty days from the 2d of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, that is to say, with interest from the 1st of July, 1865, and with costs.

[NOTE. Reversed by the supreme court, upon the ground that the risk was within the proviso; Strong, J., after disposing of preliminary questions and reviewing the facts, saying: "It must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers."]

Case No. 1,640.

BOON et al. v. The HORNET.

[Crabbe, 426.] [1]

District Court, E. D. Pennsylvania. May 26, 1841.

ADMIRALTY—PLEADING—MARITIME LIENS—MATERIALS—DOMESTIC VESSEL—ADMIRALTY PRACTICE—LIEN BY STATE LAW.

1. The libel should always show the jurisdiction of the court.

2. This court takes jurisdiction of claims for work and materials furnished to a domestic ship, because the law of the state of Pennsylvania gives a lien on the ship for such supplies.

3. Where a canal boat, built and used for service in the interior canals of Pennsylvania, and not in tide water, was hauled on shore and repaired at a part of the river Schuylkill where the tide ebbed and flowed, this court had no jurisdiction of a claim for such repairs.

[See Reppert v. Robinson, Case No. 11,703.]

4. By the general maritime law no lien is given on a domestic vessel for work or materials furnished to her.

5. There can be no suit in rem, unless there is a lien on the thing sought to be charged.

[Cited in The America, Case No. 288.]

6. When a case comes rightfully into a court of admiralty, it is to be conducted, tried, and decided, according to the usage and practice of that court.

7. Where the law of a state gives a general lien on ships for all debts incurred on their account, this court will take cognizance, under such statute, of all contracts or charges of an admiralty or maritime nature, notwithstanding no lien was given therefor by the general maritime law, but not of contracts or charges not of an admiralty or maritime nature, although a lien may be given therefor by such state statute.

[Cited in Marsh v. The Minnie, Case No. 9,117; The Richard Busteed, Id. 11,764; The Avon, Id. 680; The Rapid Transit, 11 Fed. 332.]

This was a libel [by William Boon and Henry L. Boon, trading as William Boon & Son, against the canal boat Hornet, Samuel Bisbing, owner] for work and materials. It appeared that the boat Hornet was built and used for the navigation of the Schuylkill canals, and not in tide water; that, having been brought to Philadelphia, she was hauled on shore at that part of the river Schuylkill where the tide ebbed and flowed; that while in that situation the libellants furnished certain work and materials necessary to her repair; and that there was due, on that account, $112 63. The respondent pleaded to the jurisdiction. [Libel dismissed.]

The case came on for a hearing, before Judge HOPKINSON, on the 22d May, 1841, and was argued by Vandyke, for the libellants, and H. Hubbell, for the respondent.

Against the jurisdiction were cited: Davis v. The New Brig [Case No. 3,643]; Thackeray v. The Farmer of Salem [Id. 13,852]; and Dunl. Adm. Pr. 42, 43, 54. For it were cited Dunl. Adm. Pr. 55; Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 325, 341; and the act of 13th June, 1836, relating to the attachment of vessels (Dunlop, Laws, 3d Ed., 681).

HOPKINSON, District Judge. The libel in this case sets forth that the libellants have performed certain work and labor, as ship-carpenters, and furnished certain materials in and about repairing, reconstructing, and fitting a certain vessel or canal boat, called "The Hornet," now lying and being in the port of Philadelphia in the river Schuylkill, upon the faith of the said vessel; that the whole amount chargeable thereon was $129.-88, of which there is now due and unpaid the sum of $112 63, and prayer is then made for process of attachment against the said vessel. This libel was obviously drawn in great haste, and has none of the averments usually and purposely introduced to show the jurisdiction of this court in the premises. There is no allegation that the boat ever has been, or is ever intended to be, used on the high seas; or in waters within the ebb and flow of the tide; or that her employment has been, or was to be, of a maritime character; or where the work was done and the materials furnished to her. The libel is the commencement of the pleadings, and although, in the admiralty, mere form is not strictly attended to, and amendments are liberally allowed to correct errors, yet, more attention ought to be paid in setting out the complaint of a party asking for the process of the court. This court takes jurisdiction of work and materials furnished to a domestic ship, because the law of the state gives a lien on the ship for such supplies, but the libel in such cases, according to the forms known to the court, states that the work and materials were necessary in building, furnishing and equipping the vessel for her navigation on the high seas. In the case of a foreign vessel, the jurisdiction of the court is, in a like manner, shown, on the face of the libel, by the allegations that the work and materials were done and furnished to render the ship seaworthy and competent to proceed on her voyage; that without them she could not safely have proceeded to sea, &c. In both of these cases the employment of the vessel is shown to be maritime, and the repairs to have been necessary to enable her to be so employed.

The answer of the respondent, besides matters of defence on the merits, has brought the question of jurisdiction directly before the court, and that must be disposed of before we can take up the other matters. The respondent is the owner of the boat, which, he says, is a canal boat, and so she is denominated in the libel; that she is of the burthen of about forty or forty-five tons; that she never was built, designed, or intended to navigate the high seas, nor has ever been used for such purpose, but only for a regular canal boat to navigate the Schuylkill canals; and that, as such, she is not a subject for the jurisdiction of this

[1] [Reported by William H. Crabbe, Esq.]

court. No denial is made on the part of the libellants to these allegations, but they are admitted to be true, and the case has been argued upon them. The question then is, whether such a boat is a subject of the jurisdiction of this court? Can the libellant have the remedy he seeks for in this court, for the work and materials furnished? In the case of Thackeray v. The Farmer of Salem [Case No. 13,852], I had occasion to give a very careful examination to the question of the jurisdiction of this court in cases of boats actually employed in our waters, within the ebb and flow of the tide, but whose employments could not, on the most liberal construction, be considered as partaking of a maritime character. It was there assumed that waters within the ebb and flow of the tide are to be considered, on the question of jurisdiction, as the sea, but it was held that in cases of contract, locality is not enough to give jurisdiction, but that the service must also be essentially a maritime service. The subject-matter of the contract generally determines the question of admiralty and maritime jurisdiction; the contract must be maritime, that is, a contract which relates to the "navigation, commerce, or business of the sea;" and includes, "among other things, contracts for maritime service in the building, repairing, supplying, and navigating ships." It is clear that, according to the principles affirmed in that case, this court could not take jurisdiction of a contract for services performed on board the canal boat Hornet, on her passages to and fro in the canal, as for the wages of her hands; not only because those services were not performed on the high seas, nor on waters within the ebb and flow of the tide, but also because the services were in no respect of a maritime character; they had no relation to the "navigation, business, or commerce of the sea," in the most enlarged meaning of the terms. Can, then, the court have jurisdiction over a contract for work and materials never intended to conduce to any such service, nor to be used or employed on the high seas? In the case of a contract with seamen, the service must be substantially performed on the high seas, which, by our decisions, is satisfied if it be within the ebb and flow of the tide. This, in the case of a person employed in and about the navigation and safety of a ship, is a maritime service; and the admiralty has jurisdiction of it although the contract be made on the land. But even this locality of the service will not always be sufficient for the jurisdiction; we must also look to the subject-matter of the contract, that is, whether the service is truly and essentially maritime; had it relation to the navigation of the sea, or of waters within the ebb and flow of the tide? Was it, in any sense, a maritime labor or service? Had it any connexion with, or relation to, maritime affairs? Locality is always necessary to jurisdiction, —the service must be on the high seas; but locality is not always enough,—the subject of the contract must also be maritime. In the case of The Farmer of Salem, it was said, "the circumstances of any given case, the kind of vessel, the business she is engaged in, the places between which she is navigated, may make it apparent that it can not be one for the cognizance of the admiralty." This is the law even where the service was performed on waters within the ebb and flow of the tide; and the case is still stronger where the locality of jurisdiction is also wanting; and the boat in question never has floated, and is never intended to float on the tide.

The libel alleges that the work and materials put upon the Hornet were furnished to her while she was lying at the port of Philadelphia in the river Schuylkill. This is the only intimation we have that the service was actually done at a place where the tide flowed, nor is it said whether the limits of the port of Philadelphia do not go beyond the reach of the tide in that river. The fact seems to have been, as it appeared on the argument, that this boat was hauled up on the shore of the Schuylkill, at a place where the tide did flow. And this is the only circumstance on which it is attempted to found the jurisdiction of the court. The work was done at a place where the tide flowed. Can this give jurisdiction? I think not. It is the place where the vessel is to be employed, the service in which she is to be engaged, that is material to decide whether the contract for that service was maritime or not. The contract was made on shore; the work was done on shore; it was to repair, fit, and equip the boat for an employment that had no ingredient of a maritime character in it, and, after a careful consideration of the case, I cannot perceive anything in it on which I can found the jurisdiction of this court over the contract or service in controversy.

The act of assembly of this state has been referred to by the counsel for the libellant. It does not, in my opinion, help his case. By the general maritime law, no lien is given on a domestic vessel for work or material furnished to her. It is presumed to have been done on the credit of the owner, and not of the ship, and, of course, no proceeding in rem can be had in an admiralty court to recover the money due for them. It has, however, been decided by the supreme court of the United States, that where the laws of a state give a lien on the vessel for such work and materials, then such lien may be enforced by a suit in rem in the admiralty. But it will be enforced there according to the established rules and principles of the admiralty, and according to the jurisdiction properly exercised by courts of admiralty. The act of assembly, as decided by the supreme court, may bring a subject within the admiralty jurisdiction

by attaching to it a circumstance or responsibility, without which the process of the admiralty could not reach it; for there could be no suit in rem, unless there was a charge or lien upon the thing to answer for the debt; but the act of assembly cannot enlarge or regulate the jurisdiction of the admiralty by its own provisions, or make the admiralty jurisdiction coextensive with that which it has thought proper to give to its own courts, or direct the manner of proceeding in such cases. I have decided, in another case, that although the act of assembly will bring a domestic vessel into this court, to answer for work done or materials furnished to her, yet, that when the suit is here, the jurisdiction will be exercised according to the modes of proceeding in the admiralty, and not in the manner prescribed by the act of assembly. I allude to the case of Davis v. The New Brig [Case No. 3,643], where this question was fully discussed and considered. It was then contended that as this court has cognizance of the case by reason of the local law of Pennsylvania, its jurisdiction must be governed and exercised according to the provisions of that local law; that is, as was claimed in that case, by a trial of questions of fact by a jury. I do not think so. It was my opinion, as it is now, that where a case comes rightfully in a court of admiralty, it is to be conducted, tried, and decided according to the usage and practice of that court; that the jurisdiction over the case is not obtained by any grant, express or implied, from the legislature of Pennsylvania, but that it is derived, incidentally, as a consequence of the lien given, by the local law of the state, upon the vessel, for the satisfaction of the debt incurred by building or repairing her. In the case now under our consideration the libellant might have gone with his claim into the state court, and he would have had his trial according to the practice of that court, as directed by the act of assembly; and that court would have had all the power over the case which is granted to it by the law of the state. But he has come here, and must take the power of this court as it is established by the maritime and admiralty law, in cases of suits against vessels for work done and materials supplied for them. Now it is the settled law of the admiralty, that no such suit can be sustained there unless on a maritime contract, for a maritime service; and if the case which has been brought here is not of that description, this court cannot hold jurisdiction of it merely because the law of the state gave a lien on the vessel, which may be enforced in a state court. Lien, of itself, will not always give admiralty jurisdiction, although it will authorize a proceeding in rem, provided the debt to be recovered—the contract to be enforced—be also of admiralty jurisdiction, or maritime in its character. The act of assembly of Pennsylvania makes ships and vessels of all kinds, built, repaired, &c., within the state, liable for all debts contracted for the work done or materials found. Can it be believed that a court of admiralty may assume a jurisdiction so extensive as that given to the courts of Pennsylvania, because the supreme court of the United States have decided that where the law of the state gives a lien on the vessel it may be enforced by a suit in rem in the admiralty? Is the builder or repairer of a boat of any description and for any employment, in the interior of the state, far from any tide water, a batteaux or a mud flat, to come into this court for the recovery of his debt; to claim the jurisdiction of a court whose power, under the constitution, extends to "cases of admiralty and maritime jurisdiction," and no further? Can we stop our inquiry with the fact that the state law gives a lien upon the subject of dispute, and never ask whether the case is one of admiralty and maritime jurisdiction? There can be but one answer to these questions. A lien given by a state law may be enforced by a suit in rem in the admiralty; but it must be such a suit as the admiralty can entertain; in other words, in cases where the contract or service are maritime, or of the "admiralty and maritime jurisdiction," although they are not such as would authorize a proceeding in rem in the admiralty, because there was no lien for them, yet when the state law supplies this deficiency and gives the lien, the court of admiralty will enforce it. This is not enlarging the jurisdiction of the court, but the remedy of the party. It does not authorize a suit in the admiralty on a subject-matter not of admiralty jurisdiction, but only gives to the party a particular proceeding or remedy for the recovery of his debt.

I have thus endeavored to explain and justify my opinion of this case. The unsuccessful party may have an appeal; or he may take his case into the state courts, either by a libel or the ordinary common law proceeding. The libel must be dismissed for want of jurisdiction.

Case No. 1,641.

BOONE v. CLARKE et al.

[3 Cranch, C. C. 389.][1]

Circuit Court, District of Columbia. Dec. Term, 1828.

TRUSTS — POWER OF JOINT TRUSTEE — DEATH OF JOINT TRUSTEE — POWER OF ATTORNEY—DEATH OF PRINCIPAL—POWER COUPLED WITH INTEREST.

1. If there be two joint trustees with a joint power of attorney to sell, the trust cannot be executed by one alone, either in the lifetime of the other, or after his death.

2. A power of attorney becomes invalid by the death of the principal, except so far as the attorney has an interest coupled with the power.

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

3. Upon the death of one of two joint trustees, the trust does not survive to the other, unless such a provision be inserted in the deed of trust.

Bill in equity by [John Boone] the executor of a creditor of Francis Boone, against Walter Clarke and wife, and Thomas Scott and wife, the personal representatives of the said Francis Boone, deceased. The material facts of the case, as they appear in the record, are that Francis Boone, the owner of certain slaves, by deed dated March 21, 1801, conveyed them, and other personal property, to Robert Bowie and Alexius Boone jointly in trust to pay certain debts due by Francis Boone to those two trustees and others, and to pay over the surplus to himself, with a joint power to the two trustees to sell the property at public or private sale, either in their own names, or in the name of the grantor, Francis Boone. The deed was duly acknowledged and recorded, but the property remained in the possession of the grantor, until his death, in November, 1815. On the 16th of April, 1814, the same Francis Boone, by deed of that date duly acknowledged and recorded, conveyed the same slaves to the plaintiff's testator, John Boone, to secure a debt of $385.70, due by Francis to John, with power to John to sell the same in execution of the trust, but the possession still remained in Francis, who at his death was possessed of property more than sufficient to pay all his debts. That the debts secured by the first deed were paid off in the lifetime of Francis Boone; but not the debt due to the plaintiff's testator. Francis Boone was the father-in-law of the defendant, Walter Clarke, and lived and died in his family. After the death of Francis Boone, Robert Bowie, one of the trustees, the other trustee having "relinquished," sold to the defendant, Walter Clarke, for the consideration of $1,000, on the 24th of June, 1816, "all his right, title, and interest," in the slaves in question, without notice of the deed of Francis Boone to John Boone. This suit was brought to set aside that deed of Robert Bowie to Walter Clarke, and to obtain a decree for the sale of the slaves under the deed from Francis Boone to John Boone. [Decree for plaintiff.]

Mr. Key and J. Dunlop, for plaintiff.

C. C. Lee and Mr. Jones, for defendants.

CRANCH, Chief Judge, after stating the case, delivered the following opinion, in which the other judges concurred:

From the circumstances thus appearing in evidence in this cause, a strong presumption arises that the debts mentioned in the deed of 1801 were fully paid off before the death of Francis Boone, and that Mr. Bowie had no authority, as trustee, to sell the property. The power of attorney contained in the deed became invalid by the death of F. Boone, except so far as the interest of the trustees was coupled with the power; and if their interest had been extinguished, the power did not survive. It does not appear that Alexius Boone, the co-trustee, was dead at the date of the deed from Mr. Bowie to Mr. Clarke. The trust was joint, and could not be executed by one. There was no provision in the deed that the trust should survive. Upon the death of one, the trust failed. After all the debts were paid, the trustees had only a power to transfer the legal estate to F. Boone, or his legal representatives, that is, his executors or administrators. One trustee alone could do no valid act. He could not divest himself of any part of the legal estate, nor transfer the personal trust. The trust was not only personal, but jointly personal. Neither could act without the other. I am of opinion, therefore, that the bill of sale from Robert Bowie to Walter Clarke was absolutely void; and the presumption being strong that the debts secured by the deed of 1801 were paid off in the lifetime of Francis Boone, I think the plaintiff has a right, under the deed of 1814, to pursue the property in the hands of the defendants.

Afterwards, at the same term, on the 2d of April, 1829, Mr. C. C. Lee, for the defendant, moved for a rehearing, and the court agreed to receive any further notes of argument on the part of the defendant.

Mr. Lee submitted his notes, which were filed with the papers in the cause. Mr. Jones did not send any notes.

On the 30th of July, 1829, CRANCH, Chief Judge, said:

Upon reconsidering this case, and Mr. Lee's notes, I am still of the same opinion as before. The defendant Clarke acquired no title whatever from Bowie, and is, therefore, not such a purchaser for valuable consideration, without notice, as can be protected by that principle. The plaintiff is only pursuing the property in the hands of the defendant, who can claim nothing but a naked possession against a mortgagee for a valuable consideration. And of that opinion was the court.

Case No. 1,642.

BOONE v. JANNEY.

[2 Cranch, C. C. 312.][1]

Circuit Court, District of Columbia. May Term, 1822.

DEPOSITION—MISNOMER IN CAPTION—AMENDMENT.

The mistake of the clerk in misnaming one of the parties in a commission to take the deposition of a witness may be amended by the order in case of the death of the witness before the trial.

[See Keene v. Meade, 3 Pet. (28 U. S.) 1.]

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

An order had been given to the clerk to issue a commission to take the deposition de bene esse of one J. B. Hewes in the cause of Arnold Boone v. John Janney. The clerk, in the commission, had misnamed the defendant Thomas, instead of John. After the deposition was taken, the witness died before the trial.

Mr. Jones, for the plaintiff, moved for an order to the clerk to amend the commission; it being a clerical error, there being no such suit against Thomas.

Mr. Swann, for the defendant, objected.

But THE COURT overruled the objection, and ordered the amendment.

Case No. 1,643.

BOONE v. QUEEN.

[2 Cranch, C. C. 371.][1]

District Court, District of Columbia. April Term, 1823.

NEGOTIABLE INSTRUMENTS—CONSIDERATION.

If a promissory note be delivered by the maker to a third person, to be delivered to the payee upon his executing such a bond of conveyance as E. B. C. should draw, respecting a contract of sale between the payee and the maker, and such a bond be drawn by E. B. C., and executed by the payee of the note, and thereupon the note be delivered to the payee, he may recover upon it against the maker, although the bond may not be in all respects conformable to the original contract of sale; there not being a total want of consideration. But if the bond be so drawn in consequence of instructions fraudulently given to E. B. C. by the payee, he cannot recover upon the note.

Assumpsit by [Robert Boone] the payee against [Charles J. Queen] the maker of a promissory note for $1,300, payable twelve months after date. It appeared in evidence that the note was delivered by the defendant to one John Queen, with directions to go with the plaintiff to Mr. E. B. C. who was to draw or have drawn a bond of conveyance from the plaintiff to the defendant of the right of the plaintiff and his wife to the real estate of the late Joseph Queen; and that upon the plaintiff's executing such a bond of conveyance as Mr. E. B. C. should draw or have drawn, the said John Queen was to deliver the note to the plaintiff, all which was done. That the purchase was of the right of the plaintiff and his wife to the personal as well as real estate of the deceased, Joseph Queen, and that the personal estate and a small part of the real estate were not mentioned in the bond of conveyance.

THE COURT (THRUSTON, Circuit Judge, absent), at the prayer of the plaintiff, instructed the jury, that if from the evidence they should be satisfied, that the defendant, who was in the possession of the said real estate at the time of the sale, had ever since continued in possession of the same, and enjoyed the profits thereof; and that the said E. B. C. was authorized, by the parties, to draw a bond of conveyance, on the subject of the said agreement, and that John Queen was authorized by the defendant to deliver the said note to the plaintiff upon his executing such a bond as E. B. C. should draw; and that such bond of conveyance was so drawn and executed by the plaintiff; and that the said John Queen delivered the said note to the plaintiff upon receiving the said bond,—then there is not such a failure of consideration as will prevent the plaintiff from recovering in this action. To this instruction the defendant objected, and took a bill of exceptions.

Mr. Wallach and Mr. Key, for the defendant, then prayed the court to instruct the jury, in effect, that if the bond so drawn by E. B. C. did not conform to the agreement of the parties, and that the plaintiff did not instruct, and inform E. B. C. truly and fairly as to the contract between the plaintiff and defendant, the plaintiff was not entitled to recover.

This instruction THE COURT refused to give, but instructed the jury that if they should be satisfied by the evidence that the plaintiff fraudulently instructed E. B. C. to draw a bond differing materially from the agreement of the parties, and that the bond so drawn did so differ, and that by means of the delivery of the bond so obtained by the fraud of the plaintiff he obtained possession of the said note, the plaintiff could not recover in this action; to which refusal, the defendant took a bill of exceptions.

Verdict for the plaintiff. No writ of error.

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

Case No. 1,644.

BOONE et al. v. SMALL et al.

[3 Cranch, C. C. 628.][1]

Circuit Court, District of Columbia. May Term, 1829.

INJUNCTION — ENJOINING ENFORCEMENT OF JUDGMENT—GROUNDS FOR.

It is no equitable ground for enjoining a judgment at law, that the complainants have commenced a suit at law against the plaintiffs at law to recover unliquidated damages upon a contract, unless those plaintiffs are insolvent, or some good ground exists to believe that the complainants would not be able to obtain payment of the damages which they might recover.

Bill for injunction, demurrer and answer, and motion to dissolve the injunction. [Bill dismissed.]

The bill states that Boone and Johns, under the name of Arnold Boone & Co., contracted with Lawrason and Fowle and G. Harrison for the delivery by them to the complainants, of a certain quantity of plaster of Paris, by a certain day, which they failed to do, whereby the complainants sustained damage to

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

a greater amount than the judgment recovered by one Small [defendant] upon a note given by the complainants to him for a load of plaster, delivered by him under the contract with Lawrason and Fowle, and G. Harrison. That they had supposed that they could set off those damages in the suit at law, against that note; but being mistaken, they have brought suit at law against these defendants, but they are pressing their execution against these complainants. The bill also states that the complainants, about the time they gave their note, lent to the said Harrison, one of the defendants, another note of about the same amount, which they have been obliged to take up, and which was always understood and intended by them, and they believe by the said Harrison, to go in settlement of the aforesaid note; wherefore they pray injunction, &c., until the decision of their suit at law for damages, or the further order of the court.

The defendants answered that the suit at law was, upon the trial, duly nonsuited, and as to the residue of the bill, they demurred, and the cause was set for final hearing by consent.

Mr. Marbury, for the defendants, contended that there was no equity in the bill; and that the pendency of a suit at law for unliquidated damages created no equity against a judgment at law. Kempshall v. Stone, 5 Johns. Ch. 195; Lansing v. Eddy, 1 Johns. Ch. 50; Barker v. Elkins, Id. 466; Barrett v. Floyd, 3 Call, 464; Billon v. Hyde, 1 Atk. 126.

Mr. Key, and Mr. Dunlop, contra. The demurrer admits that the complainants have suffered damage, by the non-performance of the contract, to a greater amount than the judgment at law. There was a good ground of equity when the injunction was granted, and the court having once possession of the case, will proceed to final relief, although that relief might be obtained at law. 1 Rand. (Va.) 300; 6 Mun. 464. The complainants supposed they could set off these damages at law, and therefore did not commence their action simultaneously with that of Small. This mistake is a ground of equity. Equity will relieve if the complainant has not had a fair trial at law. The lent note is also an equitable set off.

CRANCH, Chief Judge. This bill certainly never contained any ground of equity, even for an injunction; for the pendency of a suit at law for unliquidated damages, is no reason why the plaintiff at law, who has recovered his judgment, should not avail himself of it, unless his insolvency be averred, or some ground to believe that the complainant, if he should recover damages in his cross-action, would not be able to get payment from the plaintiff; such as his having no visible property, or being about to leave the country, &c. The note, lent by the complainants to Harrison, could not either at law or in equity, be set off against a debt due to Lawrason and Fowle and Harrison; and it is evident, from its date, (15th October, 1818, at 90 days,) that it could not, when it was lent, be intended as a set-off against the complainants' note to Small, which fell due about the 1st of March, 1819, and being at ninety days, must have been given about the 1st of December, 1818. But if it be a set-off, it might as well be set off at law as in equity, and no sufficient reason is stated why it was not. I am, therefore, clearly of opinion that this injunction ought to be dissolved; and as the cause is, by consent, set for final hearing, that the bill should be dismissed.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, absent.

Case No. 1,645.

In re BOOTH.

[14 N. B. R. 232;[1] 8 Chi. Leg. News, 307; 1 Cin. Law Bul. 131.]

District Court, S. D. Ohio. April 27, 1876.

TAXATION—FUNDS HELD BY ASSIGNEE IN BANKRUPTCY.

No state can tax the funds in the hands of an assignee.

[Disapproved in Re Mitchell, Case No. 9,658.]

On the 7th day of January, 1876, the treasurer of Hamilton county, Ohio, made proof of and filed a claim in this case for taxes for the year 1875, alleged to be due to the state of Ohio from Samuel F. Cary, assignee of the bankrupt, John K. Booth. The tax bill prepared by the county auditor amounts to seven hundred and twenty-three dollars and ninety-six cents, which is claimed as the tax for the year 1875, chargeable upon moneys of the estate in the hands of the assignee, at a valuation of twenty-nine thousand one hundred and sixty-nine dollars. On the 10th of January, 1876, the assignee, acting in pursuance of the 34th general order in bankruptcy of the supreme court of the United States, filed his petition with the register, praying for an order for the re-examination of said claim, and a day was assigned for the hearing of said petition, of which due notice was given to the county treasurer; and on the 1st day of February, 1876, the county auditor, by Mr. Capellar, the tax omission clerk, and the county treasurer, by Mr. Logan, his attorney, appeared before me, Mr. Cary, the assignee, appearing in person. From the testimony produced in the cause I find established the following state of facts: Captain Booth was adjudicated a bankrupt in this court July 18, 1874. The property of which he was then possessed consisted of several steamboats and barges, a house and lot of land in Cin-

[1] [Reprinted from 14 N. B. R. 232, by permission.]

cinnati, and a small amount of outstanding debts due him. In October of that year the assignee, by order of this court, made sale of the boats and barges and also of the real estate, and deposited the whole proceeds to his credit, as assignee, in the First National Bank of Cincinnati, in pursuance of the order of this court, and out of this fund, by virtue of another order of court, he paid to the county treasurer all the taxes due the state of Ohio on the real and personal property of the bankrupt, as provided for by section 5101 of the Revised Statutes of the United States. Bankrupt Act, § 28. A portion of these proceeds, amounting to nineteen thousand four hundred and forty-five dollars, remained in the bank until after the annual assessment in April, 1875, and was then held by this court, subject to the termination of a complicated litigation which had arisen between various claimants, who asserted divers and conflicting liens upon the fund, which litigation was not ended so as to enable the court to distribute the fund to its various owners until November, 1875. The assignee, who resided at College Hill, in Millcreek township, in said county, but whose law office was in Cincinnati, in listing, in April, 1875, his personal property for taxation, did not include this fund or any part of it, "as it was not within the control of this petitioner, but was in the custody of this court for the purpose of distribution among the creditors of the bankrupt when the proper lien-holders were ascertained." The auditor of the county, however, ascertaining this fact, caused the fund to be listed as personal property of the assignee in Cincinnati, adding to it the penalty of fifty per centum imposed by the law of Ohio against such persons as "shall make a false return or shall evade making a return." Upon this state of facts the following questions arise: First. Is this fund so in the custody of this court, through its officer, subject to taxation under the laws of Ohio? Second. If so liable, is the assignee guilty, under the circumstances, of making a false return, or of evading making a return? Third. If the fund be taxable, shall it be listed as property in Cincinnati, or in College Hill, in Millcreek township?

The tax law of Ohio subjects to taxation among other things all moneys and credits, and it defines the terms "money" or "moneys" to mean "and include gold and silver coin and banknotes in actual possession of solvent banks, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand." Under the revised instructions, by the auditor of state to township assessors, it is provided that "all gold and silver coin, banknotes, and deposits with banks or persons payable on demand, are moneys, and must be returned as such, whether in national banknotes or greenbacks." Is this fund, therefore, "moneys payable on demand," within the meaning of the tax law and the instructions just quoted? The assignee is an officer of this court. He is required by the bankrupt act to deposit all money belonging to the bankrupt in some bank in his name, as assignee. Rev. St. U. S. § 5059; Bankrupt Act, § 17. And by General Order 28 this court is required to designate in each district a national bank "in which all moneys received by assignees or paid into court, in the course of any proceedings in bankruptcy, shall be deposited." The rule further provides "that no moneys so deposited shall be drawn from such depository, unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn." Under these rules these funds were deposited by the assignee in the First National Bank of Cincinnati, where they were held by the court, and subject alone to the control of the court. The assignee could not withdraw a dollar of it except by the special order of the court. Such a fund comes neither within the letter nor spirit of the tax laws of Ohio, and is not such a fund as the assignee was required by those laws to list for taxation as a trust fund in his hands payable on demand.

The bankrupt law (Rev. St. U. S. § 5101; section 28 of the original act) provides "that all debts due to the state in which the proceedings in bankruptcy are pending, on taxes and assessments made under the laws thereof," shall be entitled to priority of payment next after the costs and expenses of the bankruptcy and all debts and taxes due the United States; and that provision has been strictly complied with by this court in directing the assignee to pay all the taxes assessed upon the real and personal property of the bankrupt, and from which the fund in controversy was derived. But it is claimed by counsel for the treasurer, that inasmuch as that fund received the protection of the laws of Ohio after it came to the hands of the assignee, it, in common with all other taxable property in the state, should bear its proportion of the burden of taxation. This is true enough as a general proposition of law applicable to all property receiving the protecting care of the state government. But this is not such a case. From the moment the fund came into the possession of this court, that moment it ceased to be under the protecting care of the government of the state. It passed into the custody of a court of the United States, under and by virtue of the laws of the United States, and was therefore necessarily under the sole protection of the government of the United States. No state court and no officer of the state had control over it or any power to interfere with it. "The sovereignties of the United States and of a state are distinct and

independent of each other, within their respective spheres of action, although both exist and exercise their powers within the same territorial limits." Ableman v. Booth, 21 How. [62 U. S.] 506, per Taney, C. J. Such portions of that fund as were decreed to belong to the citizens of Ohio constituted "credits" within the meaning of the tax laws of Ohio, which those citizens were required to list for taxation in their annual returns, and it is to be presumed that those citizens performed their duty in making such returns; if not, it is not too late for the auditor to have such omissions corrected, as he has attempted to do in the case now before the court. The view I have taken of the first proposition renders it unnecessary for me to consider the two others. I shall therefore order that the claim of the treasurer filed in this cause be expunged.

F. BALL, Register, etc.

NOTE [from original report]. The question in the above case was not certified to the court, but the judge expressed his approval of the decision.

Case No. 1,646.

BOOTH v. GARELLY et al.

[1 Blatchf. 247;[1] 6 N. Y. Leg. Obs. 99; Fent. Pat. 77; 1 Fish. Pat. Rep. 154.]

Circuit Court, S. D. New York. Oct. Term, 1847.

PATENTS — EXTENT OF CLAIM — ABANDONMENT — QUESTION OF FACT — SALE — WHAT AMOUNTS TO INFRINGEMENT — INJUNCTION — PREREQUISITES.

1. Where, in a patent for a new and ornamental design for figured silk buttons, under the act of August 29, 1842 (5 Stat. 543), the specification claimed the radially formed ornaments on the face of the mould of the button, combined with the mode of winding the covering of the same, substantially as set forth, and the specification described the configuration of the mould, and the winding it with various colored threads, but did not describe the process of winding the silk: *Held*, that the claim did not cover that process, but was for the arrangement of the different colored threads in the process, so as to produce the described ornaments on the button.

[Cited in Kane v. Huggins Cracker & Candy Co., 44 Fed. 292.]

2. The patentee having manufactured the buttons, and put them into market for sale two or three months before he applied for his patent: *Held*, that the question whether the design was thereby abandoned to the use of the public, was a question of fact to be settled on a trial at law.

[Cited in Anderson v. Eiler, 46 Fed. 781.]

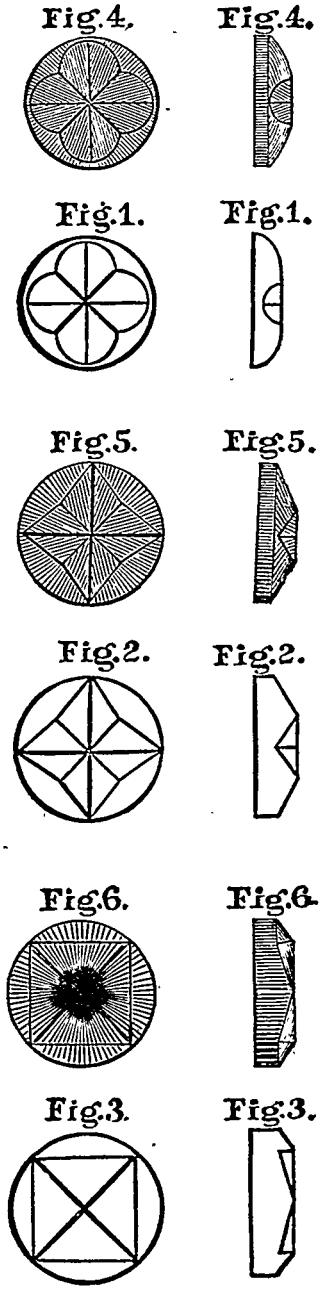
3. The question of abandonment is, in such a case, a question of intention on the facts proved.

4. Whether the sale of the manufactured button was a sale of the design patented, quere.

5. Where, on a motion for an injunction to restrain the infringement of such patent, the novelty of the invention was denied, and it was admitted that large quantities of the buttons, in packages marked as imported from Paris, were sold by the patentee before he applied for his patent: *Held*, that there was an implication against the patentee as the original inventor, and that an injunction ought not to be granted till the plaintiff's right was established at law.

[6. Cited in Anderson v. Eiler, 46 Fed. 781, to the point that section 7, Act Aug. 29, 1842, applies to design patents.]

In equity. This was a motion [by Don Alonzo Booth] for a provisional injunction to restrain the defendants [Julius Gross Garelly and others] from infringing the plaintiff's patent. The case is sufficiently stated in the opinion of the court. [Denied.]



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

Samuel Sherwood, for plaintiff.
Abijah Mann, Jr., for defendants.

NELSON, Circuit Justice. The letters patent to the plaintiff were issued July 24th, 1847, for "a new and ornamental design for figured silk buttons." The design is described as consisting of two distinct elements or characters, to be used in combination, in order to insure the beauty of the article: 1st. The configuration of the mould or block, having radial indentations thereon, forming the foundation of the button; 2d. Winding the said block with silk, in the manner thereafter described. The beauty and effect of the design, it is said, depend upon these two things, which together form the design, and without which it cannot be produced. Accompanying the patent are several drawings, representing wooden moulds, with different radial figures cut upon the faces of them, and also others wound with silk of different colors, presenting samples of figured buttons of various hues. The mode of securing the thread with which the mould is wound, to prevent the same from slipping, is particularly described, and suggestions are made that the mould can be varied to any figure desired, and also that the silk covering may be varied in its combination of colors. The process of winding the silk upon the mould is not described. Then follows the claim, which is, "the radially formed ornaments on the face of the mould of the button, combined with the mode of winding the covering of the same, substantially as set forth."

The patent is granted under the act of August 29, 1842 (5 Stat. 543, § 3), which authorizes the granting of the same for any new and original design for a manufacture, or any new and useful pattern, or any new and original shape or configuration of any article of manufacture, not before known or used by others. The invention in this case falls within the first clause of the section, if within any, as a "new and original design for a manufacture"—a design for the manufacture of an ornamental button.

It was supposed on the argument, by the counsel for the defendants, that the process of winding the mould with the silk thread constituted a part of the invention; and that if it could be shown that this was not new, but had been known and in public use before, the patent was void. This process is not described in the specification, and we are inclined to think it was not intended to be claimed. The mode of winding claimed to be new, is the arrangement of the different colored threads in the process, so as to produce what is called the radially formed ornaments on the face of the button. For this purpose and to this extent, the description, in connection with the drawings, appears to be sufficiently full and explicit, and a person of ordinary skill in the art would, probably, find no difficulty from the description as given, in working the silk ornaments of varied color and shade, upon the face of the mould.

It is admitted that the patentee manufactured these buttons and put them into the market on sale, some two or three months before he made application for his patent, and it is hence insisted, that the "design" has been abandoned to the use of the public. It is claimed, however, that in every instance of sale, he gave notice that he was preparing to apply for a patent, and intended to secure his exclusive right to the invention. The evidence on the point of abandonment raises a question of fact, which must be settled upon the trial of the suit at law, which is now pending between the parties. The seventh section of the act of March 3, 1839 (5 Stat. 354), provides that every purchaser of a newly invented machine, manufacture, or composition of matter, from the inventor, prior to his application for a patent, shall be held to possess the right to use the article, and to vend it to others to be used, but that the patent shall not be held to be invalid by reason of such prior purchase, sale or use, except on proof of abandonment of the invention to the public, or that such purchase, sale or prior use, has been for more than two years prior to the application. As the sales in this case were made but a short time before the application, the question will be upon the abandonment—a question of intention upon the facts proved.

There may be some doubt whether the sale of the manufactured button by the inventor, amounts to a sale of the thing invented within the meaning of this seventh section. If the button be regarded simply as a product of the invention, it is clear that a sale of it would not be a sale of the invention; for a sale within the provision must be a sale of the invention or patented article. The patent is not for the manufacture of a new and ornamental button, but, for a new and ornamental design in the manufacture of the article. The "design," however, is worked upon the face of the button, and may therefore, perhaps, be said to be sold with it. In this view, a sale of the button would be a sale of the "design," the thing patented, and not simply of the product of the invention.

The novelty of the invention is denied by the defendants, and it is admitted that large quantities of the article, in packages marked as imported from Paris, were sold by the patentee before his application for the patent, thereby affording an implication against him as the original inventor, and in favor of the allegation of the defendants.

Upon the whole, therefore, we shall withhold an injunction until the plaintiff's right shall have been established in the suit at law.

BOOTH (ILLINOIS MASONS' BEN. SOC. v.). See Case No. 7,009.

Case No. 1,647.

BOOTH et al. v. L'ESPERANZA.

[Bee, 92.] [1]

District Court, D. South Carolina. March Term, 1798.

SALVAGE—RESTORATION OF VESSEL.

A vessel in distress, met with at sea, and brought into the port of a neutral power, must be restored, after payment of salvage, to those who were in possession of her when she was met with.

[Cited in Packard v. The Louisa, Case No. 10,652.]

Before BEE, District Judge.

The actors, in this case, owners and mariners of the American schooner Ranger, libel for salvage, L'Esperanza, her crew, and a negro slave on board. The facts on which they ground their claim, and which arise out of the evidence and pleadings, are, that on the 28th of February last, in latitude 27, 36, between the little bank of Bahama, and the Florida shore, the crew of the Ranger discovered L'Esperanza making a signal of distress. That, suspecting her to be a privateer, they kept on their course; but, perceiving that a boat from the Esperanza with only two hands on board was following them, hove to. When the boat came up, there were in her a Spanish boy, and a negro called Williamson, who said that the Esperanza had been captured, sixteen days before, off the Moro castle, by the Charlotte, a privateer belonging to New Providence, who put this boy and two negroes into the prize, and ordered her to that port. That they were driven into the gulf stream by a gale of wind, had been drifting about for sixteen days, not knowing where they were; and had neither provisions, water, compass, nor chart. Captain Booth supplied them with all these, and they then returned to their vessel. But the Spanish boy and negro Williamson came back, and requested they might remain on board the Ranger; saying that the other negro, who was a slave, refused to quit the vessel, or give her up. Booth, however, was apprehensive of some risque; sent them back to their vessel, and made sail to proceed on his voyage. Finding they still followed him, he again lay to, and let them come up, when they all consented to abandon the vessel to Booth. He accordingly sent his mate, Cooke, to take charge of her, together with the Spanish boy, and the negro slave; and kept the other negro on board of the Ranger, in lieu of his mate. Cooke navigated her safely into this port; and now they demand a liberal salvage for their trouble and care. The British consul has filed a claim on behalf of the captors; the consul of Spain claims on behalf of the original owners. A third claim is interposed by Cooke, the mate, who navigated this vessel into this port; and who demands salvage to himself, on account of the risque he ran, and the fatigue he underwent: alleging that the safe arrival of the vessel was solely owing to him. Both the consuls admit that salvage is due.

Restitution is contended for to the captors, on the ground of possession, (by virtue of the capture, and of the laws of war) at the time the Ranger met with their prize. The Spanish consul claims, because the vessel was in possession of a Spanish subject, as commander thereof, at the time the libellants found her at sea. It is insisted that no other white person was on board; that the two negroes were under his orders; and that they were endeavouring to make the best of their way to the Havanna; that she is still Spanish property, in possession of Spanish subjects. In discussing this question, the first point to be considered is, in whose possession was the Esperanza found by the Ranger; the last possessor being the only one whom neutral powers can notice. Great stress has been laid by the counsel for the Spanish consul, on the doctrine laid down in Molloy and other writers, that, before condemnation, there can be no change of captured property. But this doctrine is clearly set aside by the case of The Mary Ford [M'Donough v. Dannery], decided in the supreme court of the United States, 3 Dall. [3 U. S.] 188. That vessel had been captured from British subjects, and remained some time (above twenty-four hours) in possession of the French captors, who, for want of hands to man her, endeavoured to set her on fire without success, and, finally, abandoned her. In that situation she was found at sea by an American vessel, and carried into Boston. She was libelled in the district court for salvage; and, subject to this, restitution was claimed by the French and British consuls, on behalf of the French captors, and original owners, respectively. The district court decreed one third for salvage; and ordered restitution of the remainder to the owners. But this decree was reversed by the circuit court, and afterwards by the supreme court, who said that, "immediately on the capture, the captors acquired such a right as no neutral nation could impugn, or destroy." I must consider this decision as my guide in every similar case; and I readily assent to it, more especially as the question of prize, or not, is thereby evaded. But it is said that putting the Spanish boy on board, though as prizemaster under the British, alters the question: for that as he was still a Spanish subject, and has, on oath, declared an intention to carry the vessel into a Spanish port, he must be considered as holding her for the Spanish owners. The two negroes, on the contrary, maintain that they held her for the captors. But it is said that, as slaves, they were incapable of possession for any purpose whatsoever. This doctrine, however, goes too far; 1st. Because by the laws of this state, a slave authorized by his master to do an act, which a slave could not

[1] [Reported by Hon. Thomas Bee, District Judge.]

otherwise do, is justified, provided the master avows the order. 2dly. Because, as most of our coasters are navigated by slaves, and frequently commanded by a slave, the owners would be continually exposed to loss of their property, in case a vessel should be blown to sea, as is often the case. There can be no doubt, however, that slaves in such a circumstance would be allowed to represent their owners, and to prove their property. It was determined in this court on solemn argument, in the case of Stone v. Godet, that the owner of a slave could maintain a suit for his wages as mariner on board a coaster. The general policy of the country as to slaves must, therefore, admit of exceptions in particular cases.

It will now be necessary to inquire whether any and what circumstances took place on board the Esperanza, amounting to a recapture, or divestment of the British right. Admitting the boy Pelaiz to be a Spanish subject, yet he was found on board acting under British authority. The copy of the commission had not, indeed, been filled up; but at the bottom of it is a memorandum to shew that he was prizemaster of the Esperanza, a prize to the Charlotte privateer of New Providence, and consigned to Edward Sherman of Nassau. Under this authority he acted on board, under this he claimed to be commander, and, as such reported himself and vessel to the captain of the Ranger, when he first went on board. No expression or hint ever escaped him as being in possession for the Spanish owners, or as being a Spanish subject, till after his arrival in Charleston. Every thing on his part impressed the crew of the Ranger with the conviction that the Esperanza was a prize, bound to Providence. But Pelaiz says in his evidence that he always meant to carry the vessel into a Spanish port, if possible; and that he had no other object in view when he went on board. Yet, in the next breath, he acknowledges that he looked on himself as master, after the first day; the negro being then in command. Under the peculiar circumstances of this case, no evidence of the negroes being admissible in this court, we must search for the real fact by comparing the former conduct of this boy with his present declarations. When first he went on board the Ranger he called himself prizemaster of this vessel, and said she was bound to Providence. But it is said he was compelled to do so, lest the negroes should discover his intentions. If this was the case, he had not such a command on board as enabled him to go where he pleased, contrary to the consent of the owners. And this is further evinced by the conduct of the old negro, who, after Pelaiz and the other had offered to give up the vessel to the Ranger, still refused to go any where but to Providence. Pelaiz, in fact, relinquished his command to the black man, who, by his own account, held her for the British. As to concealment of his intentions, it was, at any rate, unnecessary; for the mate proves, and Pelaiz confirms it, that when, in his conversation on board the Ranger, he called the vessel a prize to the British, the negro Williamson was in a different part of the vessel, and could not hear what was said. Captain Booth says that their course was for Providence when he met them. I shall, therefore, set aside the evidence of this boy, as insufficient to destroy the right of the British captors; and shall dismiss the claim of the Spanish consul: but without costs, as he acts merely in a public capacity.

It is agreed that salvage is due, and it remains only to fix the quantum. The Esperanza was in distress for want of provisions and water, but was staunch, and seaworthy, and cannot be in any manner considered as a wreck. By changing one seaman for another, she made land in four days. On the other hand, she owed much to the Ranger, for necessary supplies, and the persons on board were relieved from great fatigue, and great possible danger. Much of this, however, would have been effected by being merely furnished with necessaries, and with compass and chart. These would, probably, have enabled the three persons on board to reach a port; so that I cannot consider her as an abandoned vessel. Nevertheless, I think great credit is due to captain Booth and his crew for the services they rendered; and I decree that they receive one fourth of the vessel and cargo as salvage. Let the mate, under the circumstances of this case, receive a share equal to that of the captain of the Ranger.

BOOTH (NATIONAL BANK OF COMMERCE v.). See Case No. 10,036.

Case No. 1,648.

BOOTH v. PARKS.

[1 Flip. 381;[1] 1 Ban. & A. 225; 6 Chi. Leg. News, 407.]

Circuit Court, N. D. Ohio. May 9, 1874.[2]

PATENT—COMBINATION—INFRINGEMENT — INJUNCTION—WHEN A COMBINATION IS PATENTABLE.

If a combination produces useful and new results it is patentable, notwithstanding all the elements that go to make it up were in general use and well known before the combination.

[See note at end of case.]

[In equity. Bill by Jonathan L. Booth against George Parks, Grant B. Turner, William A. Taylor, and James A. Vaughn to restrain infringement of a patent.]

Willey, Terrell & Sherman and W. T. Coggswell, for complainant.

Bakewell & Christy, for defendant.

WELKER, District Judge. The bill of the complainant is founded upon a patent for

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [Affirmed in Parks v. Booth, 102 U. S. 96.]

a new and useful improvement in grain separators. The original patent issued on the 20th day of December, 1859, and on the 25th day of September, 1860, an amended patent; and the same was amended and reissued to him on the 29th day of November, 1864, for the term of fourteen years from September 20th, 1859. The bill was filed on the 21st day of April, 1871. The claims in the reissued patent of the complainant are as follows:

1st—The combination of the zigzag screens and boxes B C, when the same have a lateral shake motion, or at right angles to the passage of the grain, in such a manner as to have the grain pass consecutively over and through them, and arranged relatively with each other to operate substantially as and for the purpose herein set forth.

2d—The series of zigzag screens and boxes B C, with or without the troughs E, and having a lateral shake motion, in connection with the fan G and span H, substantially as herein set forth.

The complainant charges that both of these claims have been infringed by the defendants.

The answer of the defendants denies both the novelty and patentability of the invention claimed, and denies also the infringement charged in the bill. The object of the complainant's invention is stated in the original patent to be, "to separate oats and other foreign substances from small wheat, after the latter has been separated from screened heavy wheat by any of the known implements in use." And this also appears as the leading object in the specification of the reissue. It is claimed by the defendants that the reissued patent differs from the original in one particular, and that one an important element in the question of patentability of the complainant's machine. That is, in the original, the motion is described as a "shake motion," and in the reissue as a "lateral shake motion, or at right angles to the passage of the wheat."

On examination of the original drawings, which are to be regarded as a part of the specification of the original patent, I find that they show the motion of the screens to be of necessity a lateral one, and at right angles to the passage of the wheat over the zigzag screens. This then obviates that objection to the reissued patent.

In determining this case, the first question presented is, was the invention of the complainant patentable? It is not claimed that the machine is new in its separate parts. It is but a combination of old devices invented and used before the issuing of the patent to complainant. It is not claimed even by the defendants that the parts of this machine in combination in the form it presents, were used before the complainant's patent; but that parts of it were invented and used before in the devices given in evidence on behalf of the defendants. From a careful examination of the machines given in evidence by the defendants, and claimed to have become in use before the issuing of this patent, I find that wheat separators were before that in use, having, first, zigzag screens and boxes having a shake motion; second, zigzag screens and boxes having a side shake motion; third, zigzag screens and boxes having a shake motion, and a side shake motion used in connection with a fan blast and vertical spout. All of these devices are used in the complainant's machine, but all of them are not used in any one of the machines in use before the complainant's patent. The combinations are different in the complainant's machine. He does not claim that any one of the devices used by him in the combination singly is a new invention, but claims his combination.

In the case of Hailes v. Van Wormer [20 Wall. (87 U. S.) 353] it is said by Justice Strong: "It must be conceded that a combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be the product of the combination and not a mere aggregation of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention." In the light of this decision let us examine the complainant's machine, as to the object sought to be obtained by the combination, and the results of that combination actually produced by this aggregation of old devices. The purpose to be accomplished is the complete separation of oats from wheat. This is done by the manner in which the screens and boxes are located and constructed, their width, inclination, and motion, as well as relation to the blast from the fan through the vertical spout.

The evidence shows that it does accomplish this result. The evidence does not show that either of the machines referred to by the defendants, as in use before this patent, obtains this result. Several of them, no doubt to some extent separate some of the oats with other impurities from wheat, but they do not attain the object of this machine. They fall far short if it. And what they do accomplish is not done by the same combination. The result of this combination of complainant is, then, a new result, one that has not before been obtained. Is it a useful result? To effectually get oats out of wheat before manufacture into flour which, if retained and ground with it, materially depreciates the market value, as well as the use of flour, cannot certainly be denied

to be useful in its results. I am of the opinion, therefore, that the complainant's machine is patentable, and that his patent is a valid one.

The next question is: Have the defendants infringed the complainant's patent? On this point there seems to be but little controversy. The machines used and manufactured by the defendants are almost identical with that of the complainant. They only differ in the size of the machine, and the location of the fan being across instead of lengthwise, and the location of the grain spout. Otherwise the construction is the same substantially, having in fact all the combinations and principles, only slightly differing in their location, that characterize the complainant's machine. I find, therefore, that they have infringed upon the patent of the complainant, and a decree may be entered in favor of the complainant, with the usual reference to a master to take and state an account of damages.

No injunction was asked for on the hearing, as the original term of the complainant's patent had expired; although it was conceded in the argument that the patent had been extended since the commencement of this suit. This needs to be set up by a supplemental bill or other proceedings in order to authorize an injunction.

NOTE [from original report]. This case went to the master, and after final decree to the supreme court of the United States. The decree of the court was modified in certain particulars, but the principles announced in this opinion were affirmed. See [Parks v. Booth] 102 U. S. 96.

[NOTE. Affirmed on appeal to the supreme court, Mr. Justice Clifford assigning as a ground, with others: "Machines called 'grain separators,' it is admitted, are manufactured and sold by the respondents; but they denied in their original answer that their separators were in all respects constructed in the same manner as the apparatus of the complainant. * * * They still insist that the reissued patent of the complainant differs from the original, but they substantially admit that the machines which they construct and sell do infringe the invention of the complainant, as described in the reissued patent, which is sufficient for the complainant, as the respondents have failed to make good their defense that the reissued patent is not for the same invention as the original. Irrespective of any admission, however, the court is satisfied, from a comparison of the two exhibits, that the charge of infringement is fully sustained." Parks v. Booth, 102 U. S. 96. Patent No. 25,484 was granted to J. L. Booth, September 20, 1859; reissued November 29, 1864 (No. 1,826). For another case involving this patent, see Booth v. Seevers, Case No. 1,648a.]

Case No. 1,648a.

BOOTH et al. v. SEEVERS et al.

[19 O. G. 1,140.]

Circuit Court, D. Maryland. April 8, 1881.

PATENTS—INFRINGEMENT — ACTION FOR DAMAGES —EFFECT OF RECOVERY.

The recovery of profits and damages from the manufacturers of an infringing machine debars the patentee from recovering from a user for the use of the same machine.

[Cited in Allis v. Stowell, 16 Fed. 787. Disapproved in Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

This suit was brought under reissue patent No. 1,826, granted to complainant on November 29, 1864, for improvement in grain separators, for the use of a machine, which was one of a number, for the manufacture of which the complainant had recovered from the makers. [Bill dismissed.]

Sebastian Brown and J. B. Perkins, for complainant.

Bakewell & Kerr, for defendants.

Before BOND, Circuit Judge, and MORRIS, District Judge.

This cause having been argued by counsel and submitted for decree, the pleadings, exhibits, and testimony have been read and considered, and it appearing to the court that the machine used by the defendants, complained of in the complainant's bill of complaint, and therein alleged to be an infringement of complainant's patent, is one of the machines manufactured by Turner, Parks & Co., and by them sold to Grant B. Turner, and sold by him to the defendants, and is also one of the machines included in the account in the case of the complainant against Turner, Parks & Co., No. 2,249, in equity, in the United States circuit court for the northern district of Ohio, and is one of the machines for which, since the institution of this suit, the complainants, by the decree in that case, recovered from said manufacturers profits and damages, and it also appearing that said decree has been satisfied, it is considered by the court that the complainant is not entitled to any recovery in this suit against the defendants in respect to their use of said machine; and it is therefore, this 8th day of April, 1881, ordered and decreed that the said bill of complaint be, and the same is hereby, dismissed, but with costs to the complainant. Perrego v. Spaulding [Case No. 10,994]; Steam Stone-Cutter Co. v. Windsor Manuf'g Co. [Id. 13,335]; Parks v. Booth [102 U. S. 96]; Birdsell v. Hagerstown Co. [Case No. 1,437].

[NOTE. For another case involving this patent, see note to Booth v. Parks, Case No. 1,648.]

Case No. 1,649.

BOOTH v. SMITH.

[3 Woods, 19.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

NEGOTIABLE INSTRUMENTS—VOLUNTARY DESTRUCTION OF PROMISSORY NOTE—RECOVERY.

Where the payee and owner of a promissory note has voluntarily destroyed the same, he cannot recover judgment against the maker ei-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ther upon the note itself, or upon the debt which was the consideration for which the note was given.

Action at law. This cause was heard upon a peremptory exception to the petition, of which the following was a copy: "To the Honorable the Circuit Court of the United States for the Fifth Judicial Circuit and District of Louisiana. The petition of William B. Booth, an alien, subject of the queen of Great Britain and Ireland, residing in the parish of Placquemine, in this state, with respect represents: That the succession of Mrs. Amanda H. Smith, now under administration in the parish court for the parish of Placquemine, in this state, and whereof Mrs. Caroline Reddick, wife of William S. Reddick, is administratrix, she being a citizen of the said state of Louisiana, is justly and truly indebted unto your petitioner in the full sum of five thousand dollars with interest and cost for this, viz.: That on the first day of July, 1876, a settlement of accounts took place between your petitioner and said deceased at the residence of said deceased in said parish of Placquemine, wherein your petitioner claimed a sum in excess of five thousand dollars for money advanced to, and for the benefit of said deceased, and said deceased admitted a balance in favor of your petitioner of five thousand dollars, and in settlement thereof gave unto your petitioner a certain promissory note for said sum of five thousand dollars to bear interest at the rate of six per cent per annum from the first day of July, 1876, and payable in one year after date. Your petitioner further represents that he is unable to produce and file said promissory note by reason of the same having been destroyed by petitioner on the fifth day of July, 1876, that the said sum is justly due and owing to your petitioner by the estate of the said Amanda H. Smith, who departed this life in said parish of Placquemine, in November, 1876, and that although legal demand therefor has been made, said administratrix refuses to pay your petitioner said sum or to acknowledge him as a creditor." Then followed a prayer for judgment. The exception taken to the petition was as follows: "Plaintiff, by his own showing, has no cause of action against defendant."

Joseph P. Horner and W. S. Benedict, for plaintiff.

E. Howard McCaleb, for defendant.

WOODS, Circuit Judge. The exception must be sustained. Applying the rule that a pleading should be most strongly construed against the pleader, the petition in effect avers a voluntary destruction by the plaintiff of the evidence of the debt, to recover which his suit is brought. In such a case there can be no recovery, based either on the instrument itself or on the debt, which was the consideration for which the instrument was given: Angel v. Felton, 8 Johns. 149; Vanauken v. Hornbeck, 2 Green [14 N. J. Law] 179; Fisher v. Mershon, 3 Bibb. 527; Blade v. Noland, 12 Wend. 173; Joannes v. Bennett, 5 Allen, 173; Broadwell v. Stiles, 3 Halst. [8 N. J. Law] 58; Rev. Civil Code, art. 2279; Code Nap. art. 1348; Nagel v. Mignot, 7 Mart. [La.] 657.

Judgment accordingly.

Case No. 1,650.

BOOTHE v. BROOKS et al.

[12 N. B. R. (1875) 398;[1] 1 N. Y. Wkly. Dig. 125.]

District Court, N. D. Mississippi.

BANKRUPTCY—ACT OF 1867—CONSTRUCTION—FRAUDULENT CONVEYANCE.

1. The phrase of 35th section [Act March 2, 1867; 14 Stat. 534], "in fraud of the provisions of this act," construed.

2. If a mortgagor conveys in fraud of the bankrupt law, actual notice must be brought home to the mortgagee who has taken conveyance under circumstances promising material relief and assistance to the debtor, and apparently for that purpose.

3. The new rule controls cases in which conveyance was made before the passage of the amendatory act, provided there was no judicial passage on the conveyance previous to the amendment.

[Bill by J. B. Boothe, assignee in bankruptcy of Hightower & Butler, against Brooks, Neely & Co. Dismissed.]

HILL, District Judge. This cause is submitted upon bill, answer, exhibits, and proof. The purpose of the bill is to have set aside and declared void a deed of trust executed by said Hightower & Butler, bankrupts, on the 31st day of January, 1874, by which certain real estate described in the bill belonging to said Hightower individually, and certain other real estate belonging to the firm of Hightower & Butler, was conveyed in trust to secure the payment of the indebtedness then due from them to the defendants of three thousand six hundred and eighty-eight dollars and fifty-two cents, being a balance due from the mercantile transactions between the parties for a number of years. The bill alleges that said Hightower & Butler were, at the time of this conveyance, insolvent, and that said conveyance was made with the intention to give to defendants a preference over their other creditors, and to defeat the object of the bankrupt law, and in fraud thereof; that at the same time defendants had cause to believe, and knew of the insolvency of Hightower & Butler, and of the intention and purpose of said conveyance as stated, and accepted the same in fraud of the provisions of the bankrupt law; which defendants, by their answer, deny. The proof shows that at that

[1] [Reprinted from 12 N. B. R. 398, by permission.]

time Hightower & Butler were commercially insolvent, if not legally so, and also shows that defendants then had knowledge of such facts as constitute such commercial insolvency, that is, that they were unable to meet their commercial obligations as they fell due in the usual course of business. Few, even among commercial men, draw the distinction between commercial and legal insolvency, and I take it for granted that defendants do not make this distinction.

The main question to be determined is, did defendants at the time the conveyance was made for their benefit, have cause to believe that Hightower & Butler were insolvent, and did they then know it was in fraud of the provisions of the bankrupt act? If they did, then the conveyance must be declared void under the provisions of the 35th section of the act, but if these two facts did not then exist, the conveyance must be upheld. The existence of the first fact I am satisfied did exist. The second fact necessary to exist to avoid the deed being denied by the answer, throws the burthen of proof for its establishment upon the complainant.

The meaning of the words, "In fraud of the provisions of this act," is anything which will give a preference to one creditor over another (except those who at the time have an existing lien or priority), and which will prevent an equal distribution of, and participation in, the assets of the bankrupts among their general creditors.

The proof shows that the property conveyed was encumbered by prior conveyances, amounting to some eight thousand to ten thousand dollars, which was then known to defendants, which was the principal indebtedness then known to defendants other than that due them. The proof further shows that when the negotiations for this security was being had, Hightower stated to J. C. Neely, one of the defendants, that the firm owed about ten thousand dollars, and owned assets worth fifty thousand dollars. Hall, the attorney who drew the trust deed, states in his testimony that Hightower then stated to him that he had plenty to pay all his debts, or twice enough for that purpose. The trust only conveyed the real estate of the firm, leaving the stock of goods then on hands, together with the debts due them, amounting nominally to a large sum, which was unencumbered, from anything appearing in the evidence. Time was extended on the indebtedness due defendants, on one thousand dollars, to April 1st; on thirteen hundred and forty-four dollars and twenty-six cents, to November 1st, 1874, and on thirteen hundred and forty-four dollars and twenty-six cents, to January 1st, 1875. It was further promised by defendants that they would make further advances to Hightower & Butler to enable them to carry on their business, thus postponing the time of payment on much the larger amount until the cotton crop would come in, from which it was reasonable to presume a considerable amount might be realized from the indebtedness due Hightower & Butler. It often happens among commercial men, that an extension of time for payment enables them to realize from their means, whether stock in trade or debts due them, by which they are enabled to escape bankruptcy and ruin, and when made in good faith for that purpose and not with the intention to obtain a preference over other creditors, or to prevent the debtor's estate from being distributed under the bankrupt law, and especially where the party for whose benefit the conveyance is made has reason to believe, and does believe, that the debtor has sufficient means to discharge his other debts,—I am of opinion a conveyance made to secure such extended indebtedness so made, and free from any fraud or intention to obtain a preference over other creditors, or to defeat the purpose and object of the bankrupt law, is not obnoxious to its provisions as amended by the act of June 22d, 1874 [18 Stat. 180, § 10], which was evidently intended as a modification of the law in relation to conveyances before that time, held void under the law then in force. This was done to relieve the honest debtor who was striving to extricate himself from his embarrassments and meet his liabilities, and was no doubt induced from the large number of this class, who, although owning assets nominally greatly in excess of their liabilities, could not, owing to the financial crisis of 1873, realize them. This amendment, however, does not change the law where the intention is to obtain a preference over other creditors, and thus defeat the object and purpose of the bankrupt law, that is, equality among the creditors of the debtor's estate.

But it is insisted that this amendment does not embrace or apply to this conveyance, as it was made before that enactment. The first case decided by me under this amendment, was a motion made by defendant's counsel to set aside the adjudication of bankruptcy of these bankrupts, on the ground of the retroactive operation provided in this amendment. I then decided that as the decree of bankruptcy had been made, and rights vested under it, that the congress had no power to disturb the decree, but in all cases where rights had not been fixed by the decrees of the court, that all the modifications contained in the act would be given the retroactive effect. And, hence, where conveyances were good at common law, and only void under the provisions of the bankrupt act, it was competent for congress to repeal the law, modify, or change it, and such change will be enforced by the courts in all cases where rights were not, before the enactment, fixed and settled. The validity of this conveyance not having been declared by the proper tribunal before the

passage of the amendment, and not being void by the common law, must be tested by the law as amended.

Without further comment upon the pleadings and proof, I am satisfied that the proof fails to show that the defendants at the time they obtained this conveyance knew that the conveyance was in fraud of the provisions of the act as already defined, and for the want of the establishment of this fact, the prayer of the bill must be refused and the conveyance held valid.

Case No. 1,651.

BOOTHE v. GEORGETOWN.

[2 Cranch, C. C. 356.][1]

Circuit Court, District of Columbia. Oct. Term, 1822.

MUNICIPAL CORPORATIONS—ENFORCEMENT OF BY-LAWS—APPEAL.

1. A warrant for the violation of a by-law should specify the by-law and the manner of violating it. So should the judgment.

[Cited in Delany v. Washington, Case No. 3,755.]

2. No appeal lies to this court from the judgment of a justice of the peace for the penalty for violating a by-law of Georgetown.

This was an appeal from the judgment of the mayor of Georgetown, who has, by charter, the powers of a justice of the peace, upon four warrants for the violation of an ordinance or by-law of the corporation of Georgetown respecting taverns. Neither the warrant nor the judgment specified the by-law, nor the nature of the violation of it by the defendant. The judgment was simply for ten dollars upon each warrant. [Appeal dismissed.]

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that the warrants were too vague, and were not aided by the judgment.

But Mr. Dunlop, for the appellee, contended that this court has no appellate jurisdiction in cases of violation of the by-laws of Georgetown. This court has no appellate jurisdiction of a judgment of a justice of the peace, except by analogy to the appellate jurisdiction given to the county courts in Maryland by the act of 1791, c. 68, which is only in cases of contract. The act of congress of the 27th of February, 1801 (2 Stat. 103), "concerning the District of Columbia," declares that the laws of Maryland as they then existed should continue in force in this part of the district; and that the justices of the peace here should have all the powers vested in justices of the peace, as individual magistrates, by the laws of Maryland, and should have cognizance in personal demands to the value of $20. If the act of Maryland of 1791, c. 68, for the recovery of small debts, gives to the justice of the peace, in Maryland, a jurisdiction subject to appeal and revision in a higher court, and if there should be no appeal here from the judgment of the justice, the law of Maryland upon that subject would not be continued here. It would be a different law. It would give a justice of the peace here an absolute and conclusive jurisdiction; when in Maryland he had a jurisdiction subject to revision. His judgment would be conclusive here, but in Maryland it would be only nisi; that is, unless reversed upon appeal.

It was upon that ground that this court first entertained an appellate jurisdiction over the judgments of the justices of the peace as individual magistrates in civil causes; and it is apparent that its appellate jurisdiction could not extend beyond the original jurisdiction there given to the justices of the peace in Maryland by the act of 1791, c. 68, which, by the 10th section, is expressly confined to cases of contract. If a new jurisdiction is given to a justice of the peace, of cases not within the Maryland statute, this court has no appellate jurisdiction in those cases, unless it be expressly given by some statute. In Georgetown, the justice of the peace takes cognizance of violation of the by-laws, under the by-laws themselves, and not under the law of Maryland or any act of congress. In the charter of Washington of 1802, § 7 (2 Stat. 197), it was expressly provided, that "all the fines, penalties, and forfeitures imposed by the corporation of the city of Washington, if not exceeding $20, shall be recovered before a single magistrate, as small debts are by law recoverable." The 7th section of the amended charter of the 4th of May, 1812 (2 Stat. 726), recognizes the jurisdiction of the justices of the peace for the recovery of fines and penalties incurred by breach of the by-laws of the corporation; and by the 9th section of the new Washington charter of 1820 (3 Stat. 588), it is provided that "in all cases where suit shall be brought, before a justice of the peace, for the recovery of any fine or penalty arising or incurred for a breach of any law or ordinance of the corporation, execution shall and may be issued, as in other cases of small debts." Fines and penalties under the by-laws of the corporation of Washington, being thus put upon the same ground as small debts, which by the law of Maryland were to be recovered before a justice of the peace, it was right in this court to entertain appellate jurisdiction equally in both classes of cases. But there are no such provisions in the charter of Georgetown, in regard to the by-laws or ordinances of that corporation, nor in any act of congress respecting the same, which can give this court any such appellate jurisdiction in cases of violation of those by-laws or ordinances.

Mr. Taney, contra. The fines and penalties under these by-laws are debts; and if

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

under $20, are small debts. Every corporator binds himself to obey the by-laws; and if he violates them, he violates his contract. If a by-law can give jurisdiction to a justice of the peace, he may decide causes to an unlimited amount. The right of appeal is coextensive with the jurisdiction of the justice. The act of congress of the 27th February, 1801, § 11 (2 Stat. 103), only authorizes the justices of the peace to exercise the same jurisdiction which they exercised in Maryland. The corporation of Georgetown could not extend that jurisdiction; nor could they erect a judicial tribunal to take cognizance of their by-laws.

THE COURT (upon consideration) ordered the appeal to be dismissed.

Case No. 1,652.

In re BOOTHROYD et al.

[14 N. B. R. 223.][1]

District Court, E. D. Michigan. May Term, 1876.[2]

BANKRUPTCY—PARTNERSHIP—EXEMPTION.

1. The individual members of a firm are not entitled to exemption from the partnership stock.

[Cited in Re Hughes, Case No. 6,842; Re Corbett, Id. 3,220.]

2. When a partner took notes belonging to the firm and with these purchased a homestead, three days before the bankruptcy of the firm, and with knowledge of its insolvent condition, *held*, that he was not entitled to retain the homestead as exempt.

[Cited in Re Sauthoff, Case No. 12,380; Re Parker, Id. 10,724; Re Melvin, Id. 9,406.]

[See note at end of case.]

In bankruptcy. The question in this case arises upon the bankrupts' claims to exemptions under the statute. These claims, as set forth in their schedules, are by said bankrupts [William H. Boothroyd and Frederick G. Gibbs] jointly in Schedule B, 5, as property claimed to be exempt by state laws: 1st. Materials and stock, etc., proper to enable the petitioners to carry on their profession, trade, occupation and business of stationers and booksellers, to be excepted from their stock and fixtures in their store on Woodward avenue, Detroit, five hundred dollars. 2d. By said bankrupt Boothroyd, on such Schedule D, 5, "none." 3d. By said bankrupt Gibbs, of Schedule F, 5, as property claimed under the bankrupt act, "lot 16, in Bagg's subdivision of Park lot 65, according to plat on file in recorder's office, Wayne county, being south side of Parsons street. incumbered as stated in Schedule F, 1, being that of the individual property of said Gibbs," and then stated to be "mortgaged five hundred dollars. Hold contract for warranty deed when mortgage settled; estimated value two thousand two hundred dollars;" and, as property claimed to be exempt by state law, "Books, prints and pictures referred to in Schedule F, 2, one hundred dollars."

The assignee reported, under General Order 19, that he was unable from the schedules of said bankrupts to find or select any property to which said bankrupts, or either of them, have any claim as exempt, either under the laws of the United States or the laws of the state of Michigan. To this report the bankrupts excepted. 1st. Because the assignee aforesaid has not given to said bankrupts the exemption of stock in trade, materials, etc., claimed in Schedule B, 5, attached to their petition in bankruptcy. 2d. Because the said assignee has not in his said report allowed to Frederick G. Gibbs, aforesaid, the homestead and the books and pictures claimed as exempt in Schedule F, 5, attached to his petition filed in said cause with the petition of said firm of Boothroyd & Gibbs.

On the hearing of the exceptions before the register the parties stipulated to admit as facts: 1st. That all the right, if any, to any homestead, was obtained by F. G. Gibbs from a transfer of notes to the amount of two thousand two hundred and fifty dollars to William Perkins, Jr., and that said Gibbs has contracted simply. 2d. That said notes were notes belonging to the firm of Boothroyd & Gibbs, said bankrupts, known as the McCormick notes, and received by them from the sale of their Bay City store about April 1, 1875. 3d. That said notes were applied as above by said Gibbs on the 17th day of April, 1875, three days before the firm of Boothroyd & Gibbs filed their petition in bankruptcy. 4th. That at the time of such application, said Gibbs, who was a member of the said firm, knew that they (the firm) contemplated filing said petition, and that said firm could not then pay its debts in full.

Opinion of the Register:

First. As to the claim to five hundred dollars in value of materials, stock, etc., to enable the bankrupts to carry on their business. This claim is made under the state law, which enacts (Comp. Laws 1871, § 6101): "The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court * * * The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars." The bankrupts claim not only that they are a "person" within the meaning of this section, so that they become entitled to the advantage to be derived from its provisions—an advantage which seems by the statute to be limited to two hundred and fifty dollars in amount—but they seek to enlarge

[1] [Reprinted by permission.]

[2] [Affirmed by circuit court. Case not reported. See statement to Case No. 1,653.]

their privilege by claiming as many sums of two hundred and fifty dollars as there are individuals in the firm in which the ownership of the property was vested. The principle of interpretation which requires a statute to be construed so as to effectuate its purpose gives some plausibility to this claim of two hundred and fifty dollars to each bankrupt, for here the statute expressly declares the object of this exemption to be to enable the person "to carry on the business in which he is wholly or principally engaged." The partnership having been dissolved by the bankruptcy, it is as individuals only that they can be considered as within the purposes of the act. As an artificial person—a description which applies to partnerships as well as corporations—a claim for two hundred and fifty dollars would be met by the objection that such "person" had ceased to exist. This objection is avoided in this case by the claim of two hundred and fifty dollars for each member of the firm; and if the statute intended this, then the gross amount of the exemption can be indefinitely extended at the will of the partnership. It may be inquired, moreover, if this be the right of each individual, ought not the claim to have been so asserted in this case in the schedules? Neither Boothroyd nor Gibbs set up any such claim in their individual schedules; probably because it was seen that the property out of which the exemption was claimed was not the property of either Boothroyd or Gibbs, but of the artificial "person" of Boothroyd & Gibbs, a totally distinct ownership, and so set forth in the schedules; and the practical question, therefore, is whether, under the form of a designation of exempt property, the powers of this court can be employed to take the property of Boothroyd & Gibbs in value to the amount of five hundred dollars, and disregarding the rights of these partners, inter sese, or rather assuming without proof that they are equal in respect to their ownership, or interests in the specified amount of stock, etc., grant two hundred and fifty dollars of it in value to Boothroyd and two hundred and fifty dollars of it to Gibbs, which must be the effect of the action of the court if the exceptions be sustained, except upon the theory that the partnership of the bankrupts for this purpose still continues, which probably will not be claimed. The court is asked in fact to change a title to property; and the question is whether section 5054 of the Revised Statutes confers upon this court any such power. In seeking an answer to this question it seems pertinent to observe that exemption laws, that is, laws to prevent the forced sale of property on execution, never confer a right of property. Their sole function is to leave the property, which might otherwise be subject to a forced sale, untouched, with every right of ownership intact. Section 5054, the section which declares the effect of the instrument by which the property of the bankrupt passes to the assignee, declares that there shall be excepted from the operation of the provisions of this section * * * such * * * property * * * as is exempted from levy and sale upon execution or other process, or order of any court by the laws of any state in which the bankrupt has his domicile, etc., and provides "that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to the assignees; and in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by the provisions of this act." It seems to me that it was the intention of the act of congress to leave the excepted property in exactly the same condition, as to ownership, that it would be if the bankrupt act had not been passed, or as it would be if the person whose rights and interests are in question had never become in any way subject to the provisions of the act. The duties of the assignee are simply to ascertain, to designate excepted property and let it alone. It is not possible for him to confer any new right, or to create a property interest which did not before exist. I am therefore of opinion that he was right in refusing to designate any of the partnership property to the individual use of the bankrupts, and that this exception should be overruled.

Second. As to the claim of the bankrupt Gibbs to the exemption of a homestead. The property claimed is described in the individual schedule of the bankrupt as of the estimated value of two thousand two hundred dollars, subject to a mortgage of five hundred dollars, for which the bankrupt "holds contract for warranty deed when the mortgage is settled;" and the stipulation of facts admits that all the right to the property was obtained by Gibbs by a transfer of promissory notes amounting to two thousand two hundred and fifty dollars, which were received by the firm of Boothroyd & Gibbs, about April 1, 1875, for the sale of their store in Bay City; that the notes were thus appropriated by Gibbs on the 17th day of April, three days before the filing of the petition in this case, and, at that time, Gibbs knew that the firm could not pay their debts in full, and contemplated filing a petition to be adjudged bankrupts. That an appropriation of the partnership property of an insolvent firm by one of its members to his individual use would in equity be held void as against creditors, I suppose may be confidently assumed; that the creditors in a proper case would be entitled to pursue such property and recover it from any party having knowledge of the facts; and that no change in the form of the property would prevent the creditors from insisting that, whatever interest remained in the partner who thus appropriated the firm property, equity would decree as held in trust for the creditors of the firm, may also be assumed. The equitable title to these notes, then, if in the hands of a

party with notice, was, at the date of the bankruptcy, in the firm of Boothroyd & Gibbs. If Perkins, the transferee, took them without notice, or if for any reason he may hold them as a valid payment on his contract with Gibbs, the property for which the notes have been exchanged is none the less the property of the firm of Boothroyd & Gibbs; and the question is, whether one partner can be assigned a homestead out of the partnership estate; for I presume it will not be doubted that the same circumstances which would render a transfer of partnership property to a third person void, would render void a transfer of partnership property by the firm to one of its members. It is true, that the facts conceded for the purpose of the hearing do not show any consent by Boothroyd to the appropriation of the McCormick notes by his partner; but, even if such consent were shown, it would not, in my judgment, in view of the insolvent condition of the firm, and the bankruptcy then contemplated, make the transfer of the notes so far valid as that they or the proceeds of them should become the individual property of Gibbs; and in the absence of this effect, no homestead claim can be maintained by Gibbs under the statutes of Michigan. The homestead laws of Michigan require ownership in and occupancy of the property claimed to justify its exemption. This ownership may be in the fee of the land on which the dwelling occupied is situated, or it may be derived under a contract for the purchase of it. But that ownership and occupancy must concur in the claimant has been uniformly held by the supreme court of Michigan for more than twenty years. See Wisner v. Farnham, 2 Mich. 472; Beecher v. Baldy, 7 Mich. 488; McKee v. Wilcox, 11 Mich. 358; Dyson v. Sheley, Id. 527; and Coolidge v. Wells, 20 Mich. 79. It seems unnecessary to cite the provisions of the bankrupt act to show that the appropriation by Gibbs of the McCormick notes was fraudulent, within the meaning of that act. Assuming that the transaction was known to and approved by Boothroyd, then it is apparent that it was a transfer in contemplation of the bankruptcy (by Boothroyd & Gibbs) to Gibbs, who, of course, knew that it was made in contemplation of bankruptcy, with a view to prevent the property from coming to the assignee in bankruptcy, and, therefore, void, under the provisions of section 5129 of the Revised Statutes; and certainly this court will not hold that partners as between themselves may make valid transfers of their property under circumstances which would render such transfers void as between them and third persons. And if Boothroyd did not consent to the transaction, that circumstance surely will not commend it, either upon moral or legal grounds, to the favorable consideration of the court. I am therefore of opinion that the assignee was right in refusing to designate the property as an exemption to which the bankrupt Gibbs is entitled.

Third. As to the "books and pictures" claimed as exempt. The statute under which this claim is asserted (Comp. Laws Mich. 1871, § 6101) specifically exempts "the library and school-books of every individual and family, not exceeding one hundred and fifty dollars, and all family pictures." If the value of the property claimed in this item be correctly stated, the books, I think, are clearly exempt; for the books and pictures together do not amount in value to the sum specifically exempted. If the pictures had been set forth as "family" pictures, they also would be exempted, irrespective of their value; but if not "family" pictures, it is still within the power of the assignee, under the general authority given to him, to designate them as exempt; and the neglect to do so I am more inclined to regard as an inadvertence on his part than as a deliberate purpose. At any rate, I think that they should be designated as exempt, and therefore that to this extent the exceptions of the bankrupt Gibbs to the report of the assignee should be sustained.

Hovey K. Clarke, Register in Bankruptcy.

Atkinson & Atkinson, for bankrupts.
F. G. Russell, assignee, in pro. per.

BROWN, District Judge. The question whether a member of a partnership, dissolved by bankruptcy, may have an exemption from the stock in trade of the firm, has been discussed in many states and in several of the district courts, under the bankrupt law, and the opinions seem to be in direct conflict. The technical argument of the register in this case, that the firm is dissolved by the bankruptcy, and that it is not a "person" within the meaning of the exemption laws, because it has ceased as an entity, and that no member of the firm is entitled to an exemption, because he has no individual property from which an exemption can be claimed, is a very strong one, and I am not sure that it is not unanswerable. At the same time, in several cases the courts have gone so far in applying the maxim that exemption laws should be liberally construed, as to hold that the individual members of a firm are entitled to exemption from the property of the firm. Were this a new question, I should give the subject a much more labored research and careful consideration than I deem necessary at present. But I consider the law in this district as put to rest by the decision of my learned predecessor in Re Blodgett [Case No. 1,555], where the very question at issue here was decided adversely to the exemption. Nearly all the cases decided up to that time are cited in the opinion, and the learned judge evidently bestowed upon the matter his usual careful consideration. A different

view has lately been taken by Judge Treat, of Missouri, in Re Richardson [Id. 11,776]; but as this was a mere reiteration of the rule laid down in the Case of Young [Id. 18,148], previously decided by him, I think it adds nothing to the weight of authority against the position taken by Judge Longyear. My intention is to follow the prior decisions of this court, unless I am well satisfied in my own mind they are wrong, or until reversed by a higher court. In this case I have no hesitation in following the opinion in Re Blodgett, and in affirming the action of the register. I am further confirmed in this view of the law by the recent opinion of Judge Dillon in the case of Handlin v. Venney [Id. 6,018], by Judge Welker in Re Tonne [Id. 14,095], and by Judge Erskine in Re Stewart [Id. 13,420], where the precise question was passed upon.

In relation to the homestead, it was conceded that all his right to it was obtained by Gibbs from a transfer of notes, to the amount of two thousand two hundred and fifty dollars, to William Perkins; that these notes belonged to the firm, were known as the McCormick notes, and received by them from the sale of their Bay City store, about April 1st, 1875; that the notes were applied in purchase of a homestead by Gibbs, on the 17th of April, 1875, three days before the firm of Boothroyd & Gibbs filed their petition in bankruptcy; and that at the time of such application, Gibbs was a member of the firm, and knew that the firm contemplated filing such petition, and that it could not pay its debts in full. I fully concur in the opinion of the register upon this point, that the transfer of the McCormick notes was not less a fraud upon the act because they were transferred to one partner instead of to a third person, the intent being to prevent their coming into the hands of creditors. Indeed, if the facts of this case called for it, I think I should be prepared to go much further, and to hold that a debtor, knowing himself to be insolvent, has no right, upon the eve of bankruptcy, to take his property and invest it in a homestead. Such was apparently the view taken by the courts in the case of Brackett v. Watkins, 21 Wend. 68, and Grimes v. Bryne, 2 Minn. 89 [Gil. 72], and in the Matter of George C. Wright [Case No. 18,067]. I am aware that it was held by the supreme court of this state, in the case of O'Donnell v. Segar, 25 Mich. 367, that the disposing of property subject to execution, for the purpose of investing the proceeds in or converting them into exempt property, would not deprive the party of an exemption, so long as his property is really such as the statute requires, and that such conversion would not constitute a legal fraud. Similar views were apparently entertained by the court in the Case of Henkel [Cases Nos. 6,361 and 6,362], in construing the statute of California, following and approving the case of Randall v. Buffington, 10 Cal. 491. A similar rule apparently obtains in the state of Texas.

Whether the supreme court will apply the same principle of law to the case of a homestead which was applied to the exemption of personal property, in O'Donnell v. Segar, I doubt. But I cannot believe it possible for a court to hold that the conversion of a stock in trade of a firm into a homestead, upon the eve of bankruptcy, with full knowledge of its insolvent condition, would not be a legal fraud of which the court could take notice. It is by no means necessary to say, as was argued by the court in Re Henkel [Case No. 6,362], that every purchase of a homestead must be held void as against all existing creditors at the time of the purchase. This does not follow as an inference from the position assumed. All I intend to say is this: that the purchase by an insolvent trader of a homestead, upon the eve of bankruptcy, with knowledge of his insolvent condition, and for the purpose of placing the property beyond the reach of process, is a legal fraud which no court should hesitate to hold void as to creditors. The magnitude of such a fraud would be more apparent in states where the law exempts a farm or lot of land wholly irrespective of its value, and where a party might, on the eve of bankruptcy, invest a large fortune in a homestead; but the principle is the same everywhere. As the register decided in favor of the exemption of books and pictures, and no question is made as to the correctness of his ruling upon this point, his report must be confirmed.

[NOTE. On appeal to the circuit court this decree was affirmed (case not reported). Subsequently Gibbs gave a mortgage on this homestead to his attorneys for $250 for services rendered in contesting his claim. The assignee petitioned for an order demanding the surrender of the premises and the release of the mortgage, whereupon the court entered a decree for the petitioner. See In re Boothroyd, Case No. 1,653, following.]

Case No. 1,653.

In re BOOTHROYD et al.

[15 N. B. R. 368;[1] 2 Cin. Law Bul. 139.]

District Court, E. D. Michigan. April Term, 1877.

BANKRUPTCY—EXEMPTIONS—RIGHT OF WIFE—SUMMARY RELIEF.

1. A wife acquires no separate rights in a homestead which her husband has purchased in his own name in fraud of his creditors.

2. A person taking a mortgage upon a lot claimed as a homestead, after a decree declaring the same not to be exempt as such, may be ordered summarily to release his security. No plenary suit at law or in equity is necessary.

[Cited in Re McKenna, 9 Fed. 29.]

[1] [Reprinted from 15 N. B. R. 368, by permission.]

In bankruptcy. On petition of assignee [of William H. Boothroyd and Frederick G. Gibbs] for an order directing Gibbs to vacate a certain lot heretofore claimed by him as a homestead, and certain mortgagees to discharge a mortgage given by him. [Granted.]

The petition sets forth that in 1875 Gibbs appropriated certain money belonging to the firm of Boothroyd & Gibbs for the purchase of a homestead, in fraud of the rights of the partnership creditors, and claimed the same as exempt under the laws of this state. His claim was disallowed by this court [Case No. 1,652] and upon appeal to the circuit court the decree was affirmed [unreported]. That after the decision disallowing his claim to the homestead, his attorneys, Messrs. Atkinson, procured from Gibbs a mortgage upon the same for the sum of two hundred and fifty dollars for their services in contesting his claim. That petitioner has demanded the surrender of the premises by Gibbs, and the release of this mortgage, which has been refused, and he therefore asks the interposition of the court. Respondent Gibbs claims, in substance, that he is a married man, has a wife and family, who, with himself, occupy the premises; that his wife refuses to execute any conveyance or deed to the assignee, or to join with him in any conveyance or assignment. Messrs. Atkinson admit receiving the mortgage as stated; allege that Gibbs is a married man and resides on the land with his family; that his wife, who claims the lot as a homestead, united with him in executing the mortgage; they insist that the rights of the wife have never been determined and never can be litigated by summary proceedings; that until her rights are destroyed the lot must be regarded as a homestead; that such rights can only be determined by a regular suit at law or in equity; that the claim of the mortgagees cannot be set aside except by suit, and they deny the jurisdiction of the court to determine the matter in this way.

Mr. Holbrook, for assignees.

Atkinson & Atkinson, for respondents.

BROWN, District Judge. By Comp. Laws [1871, vol. 2, p. 1749], § 6137, "a homestead . . . owned and occupied by any resident of this state shall not be subject to a forced sale on execution." Respondents rely upon the decision of the supreme court of this state in McKee v. Wilcox, 11 Mich. 368, as sustaining their position that Gibbs and his family cannot be ousted from the possession of the lot in question, until the rights of his wife thereto have been passed upon by a plenary suit. The only question in that case was, whether a homestead could be claimed in land of which the party was in possession under a contract to purchase. It was held that such lands were subject to homestead rights, and that where a married man, in possession under a contract to purchase, surrendered his contract without the assent of his wife, the surrender was invalid, and his wife might file a bill in equity in her own name and have a specific performance. The existence of the homestead having been established, the inability of the husband to surrender it without the assent of his wife followed as a matter of course. The case obviously has no bearing upon the question under consideration. A moment's reflection will show that the wife of the bankrupt has no interest in the lot in question, although occupied by her. She never owned it, and had no interest in it, except in subordination to her husband's title; this title having been adjudged invalid her claim vested, with that of her husband, in the assignee. Herschfeldt v. George, 6 Mich. 456. Though the act provides that the homestead shall not be alienated without the consent of the wife, there must be an actual, legal homestead to make the act operative.

The title of the mortgagees is no better than that of their mortgagors; they are privies in estate with him, and taking the mortgages as they did, after the decree in this court adjudging Gibbs' claim invalid, they are bound by the decree and no suit is necessary to set aside their security. Had they, instead of taking a mortgage, received an absolute deed of the premises and gone into possession, they might have been ousted by the marshal under the order of this court, requiring possession to be surrendered to the assignee. See Crock. Sher. § 558; Freem. Judgm. § 171; Jackson v. Hawley, 11 Wend. 182; Noe v. Gibson, 7 Paige, 513; Jackson v. Tuttle, 9 Cow. 233. An order will be issued requiring Gibbs to vacate the lot in question, and the mortgagees to discharge their security.

BOOZE, Ex parte. See Case No. 12,096.

Case No. 1,654.

In re BORDEN et al.

[5 Ben. 228;[1] 5 N. B. R. 128.]

District Court, S. D. New York. June 16, 1871.

BANKRUPTCY—DISCHARGE—FIFTY PER CENT. CLAUSE—VALUE.

An appraisement of the stock of goods of the bankrupts, made a few days after the filing of their voluntary petition, fixed its value at a certain sum, but they were sold by the assignee for much less. There was no proof that the goods depreciated in value before their sale.

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

Taking the value at the amount realized by the assignee, the assets of the bankrupts were not equal to fifty per cent. of the claims proved against their estate, on which they were liable as principal debtors: *Held*, that the appraisement was exaggerated, and the amount realized by the assignee was the only safe guide as to the value of the assets, and as the bankrupts had not filed the assent in writing of a majority in number and value of their creditors, discharges must be refused them.

[Cited in Re Waggoner, 5 Fed. 917.]

[In bankruptcy. Petition for discharge by Wiliam W. Borden and Horace P. Geary, bankrupts. Denied.]

Cheney & Dixon, for bankrupts.

C. A. Seward and J. B. Fogerty, for opposing creditors.

BLATCHFORD, District Judge. In this case, the debts proved, on which the bankrupts are liable as principal debtors, are, at the minimum amount, $10,766.24. Fifty per cent. of this sum is $5,383.12. In view of the testimony as to the condition of the stock of goods turned over by the bankrupts when they filed their voluntary petition in bankruptcy, July 21st, 1869, I must reject the appraisement of such stock made at $4,606.64, July 27th, 1869. That appraisement was, on the proofs, very much exaggerated. How much it is impossible to say. There is no safe guide but the amount realized for the goods by the assignee. There is no satisfactory evidence that the goods suffered any depreciation in value between July 21st, 1869, and the time when the assignee sold them, whether before or after they came into the assignee's hands, or that the bankrupts are entitled to have any larger sum taken as the value of such goods, in determining the amount of their assets under section 33 of the act [of 1867, 14 Stat. 533], as amended by the act of July 27th, 1868, § 1 (15 Stat. 227), than the sum realized by the assignee. This same view, on the evidence, applies to all the property of the bankrupts. The assignee certifies that the proceeds, in his hands, of property sold and of debts collected, and the debts uncollected but in his opinion good and collectible, amount to $4,933.14. This amount does not include the expenses of selling the property, but such expenses were only about $250, and the $4,933.14 is less than the $5,383.12 by $449.98. The proceedings having been commenced after January 1st, 1869, and the debtors not having shown that their assets are equal, or have been, at any time since they filed their petition, equal to fifty per cent. of the claims proved against their estate, upon which they are or were liable as principal debtors, and not having filed the assent in writing of a majority in number and value of their creditors to whom they are or have become liable as principal debtors, and who have proved their claims, discharges are refused.

Case No. 1,655.

BORDEN v. HIERN et al.

[1 Blatchf. & H. 293.][1]

District Court, S. D. New York. March Term, 1832.

ADMIRALTY—JURISDICTION — JOINDER OF CAUSES OF ACTION—SEAMEN—DESERTION—COSTS.

1. Parties may join, in one libel, causes of action arising ex contractu, and those arising ex delicto, where the causes of action are so united that the same evidence will apply to all—for example, in a suit in personam, a claim for wages, and a claim for damages for an assault and battery committed on the same voyage.

2. Semble, that parties may join, in a suit in personam, causes of action arising ex delicto against two respondents, with those arising ex contractu against one of them, where the same evidence will apply to all—for example, a claim against a master and a mate, for damages for an assault and battery, and a claim against the master for wages earned on the same voyage.

3. Joinder of causes of action in admiralty, considered.

4. Whether admiralty has jurisdiction over a personal tort committed on board a vessel in a harbor where the tide ebbs and flows, quere.

[Cited in Thomas v. Gray, Case No. 13,898.]

5. A temporary and open absence from his vessel, by a seaman, without objection from the master, in an intermediate port, while the vessel is discharging or taking in her cargo, is not a desertion.

6. Where a libellant joined, in an action in personam, a claim for wages with one for damages for an assault and battery, and recovered his wages, but failed to prove the tort, and the respondent used his evidence regarding the assault and battery to resist the claim for wages: *Held*, that the respondent should recover no costs, and that the libellant should recover costs, deducting the costs of taking his evidence to prove the assault and battery.

In admiralty. This was a libel in personam [by Thomas Borden] against [Charles A.] Hiern, the master, and [Thomas] Harvey, the mate, of the ship Ajax. [Decree for libellant.]

The libel alleged that, on the arrival of the ship at Liverpool, from New-York, the master ordered the libellant on shore, and refused to pay him his wages, or to allow him to return to New-York in the ship, and left him at Liverpool, carrying away his chest and clothes, with a large sum of money; and that both of the respondents committed various assaults and batteries upon him, with great severity and cruelty within the port of New-York, and at sea during the course of the voyage. The libellant claimed to recover against the master his wages and the value of his chest and clothes, and to recover against both defendants damages for the several assaults and batteries. The answer excepted to the joinder of the various causes of action in the libel. It also set up, in defence to the claim for wages and for the value of the chest and clothes, that the libellant wilfully deserted the ship at Liverpool, was duly logged as absent, without leave, for

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

more than forty-eight hours, and never returned, and that the chest left on board was examined and found to contain nothing of any value. It also justified the alleged assaults and batteries, as moderate corrections, necessary to subdue the mutinous spirit of the libellant and maintain the discipline of the ship.

Washington Q. Morton and J. D. Delacey, for libellant.

Abel T. Anderson and Samuel G. Raymond, for respondents.

BETTS, District Judge. This is a compound action against a master and a mate. It seeks a recovery of wages, and of the value of a chest of wearing apparel, against the master, and damages for alleged assaults and batteries committed by the respondents jointly, upon the libellant, in this harbor, and at sea during the course of the voyage stated in the pleadings. The answer replies, with great minuteness, to the allegations of the libel; and the proceedings in the case are diffuse, and crowded with matters not essentially connected with the merits of the action. There are not, in the multifarious proofs, any special features which require discussion. The facts proved are, in substance, that the libellant was taken on board the ship at this port partially intoxicated, and was disorderly and disobedient in his conduct, and that the master and mate forced him on board. But it is not proved that they employed a greater degree of violence than was necessary to enforce subordination. Whatever violence, however, was applied, and whatever wrong, if any, was done, took place at the wharf, in this port, where the ship lay. Only a single case of personal chastisement at sea is proved. That was inflicted by the mate with a small rope's end, by the orders of the master, because of the flagrant inattention to duty and disobedience of orders by the libellant, whilst he was at the helm of the vessel, and was no more in degree than was justified by the circumstances. That portion of the charge is accordingly dismissed as to both of the respondents.

The master fails to sustain his answer in respect to the desertion charged against the libellant, while the libellant does not prove that he was put on shore by the respondents, or refused a passage home, but establishes the fact that he offered himself to the ship the day of her departure from Liverpool, and was told by the mate that he was not wanted, and that his place was supplied by another man. One was in fact shipped and came home in the vessel, and the libellant procured a passage for himself in another ship. On his arrival in New-York, he found the Ajax in port, and demanded his wages and his chest and wearing apparel, but obtained neither. On these facts, the questions presented are: 1. Whether these diverse matters may be embraced in a single action; 2. Whether the court has jurisdiction of the tort committed within this harbor; and 3. To what compensation, if any, the libellant is entitled.

1. With regard to the joinder of causes of action, the division and nomenclature of actions at common law afford no rule of decision for admiralty courts; because, as a general rule, the remedy under the civil law is commensurate with the right established by the pleadings and proofs in a cause, and is not made dependent upon the specialties of form which embarrass a suit at common law. Wood, Civ. Law, b. 4, c. 3, § 3 et seq. I speak now of that advanced state and condition of the civil law, from which the doctrines and usages of the English equity and ecclesiastical courts were drawn, and do not regard, as applicable to the inquiry, the formed actions and other niceties which at one time entered into its jurisprudence and entangled its remedies. There is an obscurity in respect to the right of a libellant to unite distinct causes of action in an admiralty suit, which is essentially owing, I apprehend, to the propensity of the bar and courts, in modern times, to identify the pleadings of this court with those of common law tribunals. I do not discuss the utility of the proposed transmutation, or inquire when it may have been countenanced in our own maritime courts, or in the English admiralty. The course of procedure in this country must be essentially at the discretion of each individual court, until a permanent direction shall be given to it by the paramount authority of the supreme court. No formula of pleading, in this respect, has as yet been prescribed by that high authority; but it has pointedly implied, in its adjudications, that a libel may embrace causes of action arising ex contractu, and those arising ex delitco. See The Amiable Nancy, 3 Wheat. [16 U. S.] 546; s. c. [Case No. 331]. And I think there is ground to question the propriety of restraining admiralty suits to single causes of action. The reason which sustains that practice at law, very slightly, if at all, applies to the pleadings in admiralty, where no regard is paid to the names or forms of actions, or to modes of complaint or defence, and where it is never made a point of pleading whether the case rests upon contract or tort. Laying out of view the uniting of the mate with the master, in a suit for wages, this case illustrates what I regard as the spirit of the admiralty practice, and its advantages on this very head. The testimony to support and resist the claims to wages and to damages is essentially the same, because the inquiry, whether or not the conduct of the libellant on the voyage was wrongful, goes directly to the merits of the claim and defence, as to both causes of action. The expense and delay of taking the evidence at large in two suits, and of having two distinct trials on the same facts,

must be incurred at common law, whilst this court hears all the proofs and disposes of the rights of both parties in one action. The union of the mate with the master, as a joint trespasser, was allowable; and, no claim being made against the former for wages, the insertion in the libel of charges against the master for that cause, in no way prejudices the mate, or embarrasses the determination of the case. It is not necessary to speculate, in this instance, upon the admissibility of the form of pleading in that respect, because no case is made against the mate by the proofs, and he stands discharged of the action, on the merits.

2. The next consideration is as to the jurisdiction of the court over the claim to damages for the assault and battery alleged to have been committed in this port. The libellant having failed to support this portion of his case against either respondent, the court will not conclude itself by any present speculation on the question of its jurisdiction. The line of discrimination, if there be one, between a federal jurisdiction and a municipal jurisdiction over torts committed on board of vessels within this harbor, where the tide ebbs and flows, is not one easy to be defined or discerned. There are persuasive reasons for excluding from the cognizance of the federal courts transactions specially appertaining to the supervision of police and municipal powers. Yet, there are several authorities which seem to consider the admiralty jurisdiction as one and the same over torts committed within tide-water harbors, and over torts committed at sea, although the torts be not specifically maritime trespasses, or of a maritime character otherwise than as to their locality. Serg. Const. Law, 202; De Lovio v. Boit [Case No. 3,776]. I am not, however, required to examine the question, in this instance, and shall leave the point open for fuller consideration, when it may come up as the one controlling the decision of the court. In my judgment, the libellant has established no right of recovery against either of the respondents on account of the alleged personal wrongs, even if there were no question of jurisdiction that could interfere with his action, and the libel must be dismissed as to the respondent, Harvey, with full costs to be taxed.

3. The master does not, in my judgment, support his answer charging the libellant with desertion at Liverpool. It does not appear that the libellant left the vessel clandestinely, or with intent to abandon her. He might have been called back at any time, had the master or his officers desired his services. It is obvious, upon the proofs, that their purpose was to leave him in Liverpool, and that they seized upon his temporary absence as a means of exculpating themselves. On the whole evidence, I do not find that the libellant was absent from the ship for forty-eight hours at any one time, without either direct or implied leave. The men necessarily boarded and lodged on shore, and shore laborers are generally employed at the docks to discharge and load ships. When the crew are put to that service, the usage is, to apprise them distinctly, on the arrival of the ship, that the work is to be done by them. It would be springing a trap upon them, if a master might stand silently by, and allow heedless and thoughtless sailors to wander about the docks or the city whilst a cargo was being unladen or taken on board, and might, without personal orders or notice to them to remain with the vessel, cause them to be logged as deserters, and leave them behind destitute. The master has failed to justify his conduct on this occasion, or to show reasonable cause for abandoning the libellant in Liverpool and denying him his wages. I shall, therefore, decree to the libellant his full wages for the voyage out and back, with an additional allowance of ten days' wages for the time employed by him in Liverpool in obtaining a passage home. He is also entitled to full compensation for the value of his chest and effects brought away in the ship, and not restored to him. I shall not examine into their value, but refer that question to the clerk, to take further proofs on both sides, and ascertain and report thereon to the court. The expense incurred by the libellant in taking testimony in support of his claim to damages for assault and battery, must be borne by him. The defence to that charge is complete. No costs, however, are decreed to the respondent, Hiern, against the libellant, because he took and used his proofs in respect to the alleged assaults and batteries, to disprove the libellant's right to wages; and, on that, the main gravamen of the suit, the decision of the court is in favor of the libellant, who, on the coming in and confirmation of the clerk's report, will receive his costs, after making the deduction indicated, together with the amount of his wages, and of his damages from the loss of his property on board of the ship. Decree accordingly.

Case No. 1,656.

BORDEN v. MANCHESTER.

[4 Mason, 112.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

GRANT OF HIGHWAYS BY PROPRIETORS.

The grant of the proprietors of land to a town of all the proprietors' ways, called highways, conveys only such ways as are in existence at the time, and not such as the proprietors reserved a right to lay out, but never laid out.

At law. Trespass quare clausum fregit, and cutting trees, &c. [by Thomas Borden

[1] [Reported by William P. Mason, Esq.]

against Benjamin Manchester]. Plea as to force and arms and part of trees, not guilty: 2. As to the residue, that the locus in quo was a highway reserved by proprietors of Pocasset, and granted by them to the town of Tiverton, and the trees on the same were sold by order of the town, &c. Replication de sua injuria, &c. [A verdict was given for plaintiff.]

At the trial a vote of the proprietors of Pocasset, in 1681, was produced, authorizing certain highways to be laid out; and a return of a committee laying out certain highways. The proprietors, in 1773, passed the following vote: "The proprietors of Pocasset Purchase surrender up all their right and title to all said proprietors' ways, called highways, to the town of Tiverton, and for the good of the public, that is to say, within the limits of the town of Tiverton." It did not appear from the records, that any highway had ever been laid out, by the proprietors, over the land in controversy, although the land had been reserved originally for that purpose. There had been, however, a way de facto, for many years existing through the land so reserved, but it did not pass over the land now in controversy, but to the south of it. The way had been latterly altered and straightened, and in such alteration was made to pass over the plaintiff's land; but the alteration had not been made by any legal authority. Upon these facts

Pearce & Searle, for plaintiff, contended, that the facts were not made out.

Bridgham & Hazard, for defendant, contended contra.

STORY, Circuit Justice. I am of opinion that the plaintiff is entitled to a verdict. The proprietors' vote, in 1773, applied only to highways then in existence, and not to such as were in posse, under the vote in 1681; the right to lay out which was reserved by the proprietors, but which were never in fact laid out. The evidence of long use of a particular way might perhaps be sufficient to authorize a presumption, that the way so used was afterwards laid out, although no record of it can be found. But the main difficulty will still remain, for the locus in quo is not within the limits of that way, which has been altered, and a new way laid over the plaintiff's land without authority. Verdict for plaintiff.

BORDEN (SICKELS v.). See Cases Nos. 12,832 and 12,833.

BORDEN (UNITED STATES v.). See Case No. 14,625.

BORDEN, The HOLDER. See Case No. 6,600.

BORDENTOWN, The. See Case No. 12,180.

Case No. 1,657.

BORDMAN et al. v. ELIZABETH.

[1 Pet. Adm. 128.][1]

District Court, D. Pennsylvania. 1798.

SEAMEN—WAGES — CAPTURE OF VESSEL — DESERTION — REFUSAL TO REJOIN THE VESSEL — CONDEMNATION.

1. The seamen of a vessel sent in for adjudication, were carried off by the capturing frigate, and afterwards liberated, when they might have rejoined their vessel which was acquitted, and earned her freight. Wages allowed to the time the seamen might have rejoined their vessel.

[Cited in Pitman v. Hooper, Case No. 11,186.]

2. Wantonly neglecting or refusing to rejoin amounts to desertion.

3. Positions ruled, in sundry cases, of vessels carried in for adjudication. Seamen bound to remain with the ship. Voluntary abandonment of this duty, a forfeiture. But not where prevented from remaining on board.

4. While they remain, they are entitled to wages, &c. They may be permitted to return home, without prejudice to their claims.

5. Bound to wait for the first adjudication, and not longer. Claim for wages suspended until the fate of the ship is decided. If restored, wages for the voyage must be paid.

6. Condemnation does not defeat the claim of wages for a former part of the voyage.

[7. Disapproved in Bronde v. Haven, Case No. 1,924, in respect to the doctrine that seamen are entitled to wages for half the time that a vessel remains in a foreign port after discharge of cargo.]

In admiralty. This was a case. in which several seamen [Bordman, Wilson, and others], of an American ship[2] [the brig Elizabeth], carried into a port of a belligerent captor for adjudication, claimed their wages for the whole voyage. They were forcibly taken out of the Elizabeth, and put on board the capturing frigate. They were carried into another port of the captor, and there liberated. It appeared in evidence, that the seamen were informed of the place in which their vessel lay, and that it was in their power to rejoin her. She was finally acquitted, proceeded on her voyage, and earned her freight. Wages, pro tanto, to the time the seamen were liberated, were decreed. As to the residue claimed for the voyage, the libel was dismissed.

[Before PETERS, District Judge.]

It was held that the sailors, not being in fault until they neglected, when liberated, to re-enter the ship, should be paid to that time. Full wages were given in a similar case, where a mariner had it not in his power to re-enter on board his ship. Hart v. The Littlejohn [Case No. 6,153]. The port, in which some of the mariners were landed, was at some distance from that in which the ship lay. There appeared some ground for

[1] [Reported by Hon. Richard Peters, District Judge.]

[2] "Ship," in the maritime laws and language, is a generic term, including all vessels; without attention to specific description.

the seamen to entertain an opinion, that their ship would depart, before they could travel to the port in which she then was. This, in the opinion of the judge, repelled the charge of unlawful intent. If they had wantonly, and without any reasonable excuse, or merely with a view to other employment, neglected or refused to rejoin the ship, it would have amounted to desertion, and forfeiture of all claim to wages. The mariner is bound to rejoin the ship, whenever it is in his power; and the master is under an obligation to receive him. If, on either side, there have been laches, in this respect, decrees have, in sundry instances, been given against the master, or mariner, as the one, or the other, was in fault.

The judge said, that he had, on summary examinations, under the act of congress, in many cases, established the following positions:

First. That seamen are bound to remain with a neutral ship, carried by a belligerent party, into a port of the captors for adjudication.

Second. That a voluntary abandonment of their duty in this respect, amounts to desertion and forfeiture of wages.

Third. But where they are prevented from remaining on board, either by the captors, or the master, or have not provisions, or accommodations, and are without money, or means of subsistence, they are not chargeable with any consequences.

Fourth. That while they remain to assist in preserving the ship, and ready to proceed on the voyage, they are entitled to their wages, and the master, or owner, is bound to furnish them with provisions, or money, for subsistence. Yet, if the master chooses to permit their return home, they may so return, without prejudice to any claims they legally have, depending on the fate of the ship.

Fifth. That seamen are not bound to remain with, or near, the ship, after an unfavourable adjudication in the lower court of admiralty of the captors, though an appeal may be entered, and the vessel remain in custody and unsold. But they are bound to wait, if required, for this adjudication; not only to take care of the ship, and her cargo, if permitted so to do, but to afford their testimony in the cause, when required to be used on the trial, in the first instance, and transmitted among the apostella, in case of appeal.

Sixth. That where a vessel is carried in for adjudication, condemned in the lower court of admiralty, and an appeal is entered, the claim for wages must be suspended, until the event of that appeal is known. If the owner recover freight, or damages in lieu thereof, or the ship be restored, the wages are due, and must be paid, when, and not before, he receives compensation, or recovers the ship.

Seventh. The carrying in a neutral ship for adjudication, or even if she be legal prize, does not in any event, interrupt or defeat the claim of the seamen to wages, for a former part of the voyage, in which freight has been earned. The seamen must recover wages to the last port of delivery, and for half the time the vessel staid there. The period of stay, at such last port, being thus divided, on a supposition that the one half thereof, is taken up in discharging her cargo, and the latter half in re-loading the ship. This latter half of that period, is accounted a portion of another part of the voyage, and the wages accruing therefore, share the fate of the ship, in the voyage interrupted by the capture.

BORDMAN (FORRESTIER v.). See Case No. 4,945.

Case No. 1,658.

BOREAL v. The GOLDEN ROSE.

[Bee, 131.] [1]

District Court, D. South Carolina. 1798.

POWER OF MASTER TO HYPOTHECATE VESSEL.

Captain of a vessel not permitted to hypothecate her for money taken up in a foreign port, if his owners have a representative or correspondent there, who will advance what is necessary, or if the same may be procured by other means.

[Cited in The William & Emmeline, Case No. 17,687; The Bridgewater, Id. 1,865; Leland v. The Medora, Id. 8,237; Joy v. Allen, Id. 7,552; Greely v. Smith, Id. 5,750; Cunningham v. Hall, Id. 3,481.]

In admiralty. From the evidence in this case it appears that the ship Golden Rose is a foreign vessel chartered by Tunno & Cox, merchants of this place; where the owners of the ship have also a correspondent. That the captain, a foreigner, has been supplied by the actor with various articles, and some money, amounting together to about one hundred and fifty dollars. That the captain has been supplied, by Tunno & Cox, with money at different times, to the amount of about four hundred dollars. That these gentlemen had never refused payment of his orders, except in the present and one other instance, in both which the orders did not appear to them to be for the use of the ship. It was proved that they even offered to discharge the present demand by a note at sixty days. This was refused, and the present suit brought.

[Before BEE, District Judge.]

The question before me is of considerable importance to commerce in general; it must be decided, therefore, on general principles, and according to the course of the civil law. All the cases quoted upon this occasion were determined in courts of common law, but upon the principles of the civil law. They lay down this position, which is unques-

[1] [Reported by Hon. Thomas Bee, District Judge.]

tionably correct: that a person who supplies a vessel with necessaries has a triple remedy, 1st, against the owners; 2d, against the vessel; 3d, against the captain. Such person has the security of the ship by lien, if she continues in his possession; and by hypothecation duly made, whether she is in his possession, or not. His security against the owners exists only in the port where they reside; and suit must be in the courts of common law, not of admiralty. The captain is personally liable, if he has made himself so by an act of his own. While he remains in the port where his owners reside, and before commencement of the voyage, he must be proceeded against at common law. In foreign ports he may be sued there, or in the admiralty, by suit in personam.

In the present case, I am to inquire whether the vessel has been so hypothecated by deed or implication, as to make her liable. The power vested in a master to impawn his owner's ship or goods for necessaries furnished in a foreign port, is a legal indulgence founded on the urgency of the case, and intended for the general benefit of commerce. "There are few rules of law," says a late writer on the subject, "more strictly defined than this; and none in which the reason and intention of the law are more manifest." The books are full and consistent upon this point of necessity. "Where money," says Lord Raymond, "is borrowed on a ship before the voyage is begun, she is not answerable in the admiralty." 1 Ld. Raym. 578; 2 Ld. Raym. 982. The law means to favour the completion, not the commencement of a voyage. Before the voyage is begun, and in ports where the owners reside, the necessity in question cannot exist. In foreign ports, great distress might arise from circumstances of invincible necessity, and the want of personal credit; of these alone will courts of admiralty take notice; otherwise, the power of the master to take up money might be ruinous to his owners, without promoting the general interests of commerce. In 1 Magens, 329, a case is reported of a suit in the admiralty on a bottomry bond, which concludes with this important remark: "Persons in seaports may learn from this case not to believe, or trust too easily, a captain whom they do not know; and, when they are applied to for money on bottomry, under cover of distress, they ought to see that the distress really exists, and that the money is duly applied to the purposes alleged."

In the case before me, the vessel is in a foreign port, but the owners have a correspondent here, the ship is under charter, and the captain has been supplied by the chartering merchants with money for necessaries, whenever he applied. The actor here may complain of hardship in losing his remedy against the ship, having already lost that against the captain, who is gone away. But courts of justice must proceed upon general principles. In declaring the law upon this occasion, I am not only supported by the foregoing decisions, but by a case determined by my predecessor here and by four cases reported by Judge Hopkinson,—see his Rep. 163 et seq. [Liebart v. The Emperor, Case No. 8,340; Turnbull v. The Enterprize, Id. 14,242; Forbes v. The Hannah, Id. 4,925; Canizares v. The Santissima Trinidad, Id. 2,383],—from the most important of which there was an appeal to the court of last resort; where his decree was affirmed for the reason laid down in page 170 of his Reports [Liebart v. The Emperor, supra]. The law, therefore, must be considered as fixed. I decree that the vessel is not liable for this demand, and that this suit be dismissed.

Case No. 1,659.

BORK v. NORTON.

[2 McLean, 422.] [1]

Circuit Court, D. Illinois. June Term, 1841.

WITNESS—COMPETENCY—RIGHT TO FREIGHT AT INTERMEDIATE PORT—DELAYS.

1. To render a witness incompetent he must be interested in the event of the suit.

2. He is incompetent if the verdict can be evidence either for or against him.

3. Consignee of goods, who has delivered them over, without the payment of freight, is a competent witness in a suit, by the master of the vessel, against the owner of the goods.

4. Where a vessel is unable to reach the destined port, and the owner of the cargo receives it, at an intermediate port, freight, pro rata itineris, may be recovered.

5. The master, who is driven to an intermediate port by stress of weather, and his vessel is unable to proceed, is bound to repair his vessel, in convenient time, or procure another vessel to convey the goods. And if he fail in this, he is not entitled to freight.

6. Where the owner of the cargo is the cause why it is not transported to the port designated, full freight may be demanded.

[Cited in Weston v. Minot, Case No. 17,453; Hart v. Shaw, Id. 6,155.]

7. A permanent embargo excuses the master from the performance of his contract. If the obstruction be temporary it suspends it.

8. A contract for the transportation of goods on our lakes, may not, in every respect, be subject to the maritime rule, which applies to the high seas. If there be an obstruction on the lake, a land conveyance may be resorted to. This is preferable to a delay of several months.

At law.

Mr. Morris, for plaintiff.

Mr. Arnold, for defendant.

OPINION OF THE COURT. The plaintiff being master of the brig Illinois has brought this action for the freight of certain merchandise from Buffalo to Chicago. The amount claimed, fourteen hundred dollars. A written agreement between the defendant and the agent of the American Transportation Company, by which the company bound

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

themselves to deliver the goods at Chicago, &c., at a certain sum per hundred, was given in evidence. The deposition of Hubbard, who was the consignee of the cargo, and to whom a part of it was delivered, was offered in evidence, which was objected to on the ground that he was an interested witness. In his deposition Hubbard being asked the question as to his interest, stated that he had none, whatever, in the event of the suit. But it is insisted that having received a part of the goods and delivered them without the payment of freight, he is liable to the plaintiff for the amount, and that his evidence, which may establish the right of the plaintiff against the defendant, will go to discharge himself. This witness states that he delivered the goods to the defendant who, at the same time deposited with him five hundred dollars in scrip, which was to be subject to the order of the defendant, and was not to be applied in payment of the freight except by his direction.

There can be no doubt that the freight is recoverable in the name of the master of the vessel. Abbott, pt. 3, c. 2; 4 Cow. 475. And it is equally clear that he may recover it from the consignee of the goods, or the owner, if they have been delivered to him and the freight has not been paid. The master had a lien upon the goods, and was not bound to deliver them until his transportation charge was paid. And so the consignee, who is liable for the freight, may refuse to deliver the goods to the owner until the freight shall be paid. But if, in the one case or the other, the goods are delivered without payment of the freight, an action may be maintained for it. And it is optional with the master, when the goods have gone into the hands of the owner, whether he will sue the consignee or the owner. He has, in this case, sued the owner and the question is, whether the consignee is a competent witness to prove the delivery of the goods.

Is Hubbard interested in the event of this suit? Can the verdict be used either for or against him as evidence? These are believed to be the true questions; for if he is not interested directly in the event of the suit, and the verdict cannot be used as evidence against or for him—if he have any interest it must be an interest in the question which does not exclude him. Although the plaintiff has a demand against the consignee and the owner for the freight, it is not a just demand. A recovery, without satisfaction, against the owner of the goods, cannot be pleaded in bar to a suit against the consignee. And it is very clear that the verdict which the plaintiff may obtain in this suit can be no evidence either for or against the consignee in an action against him for the freight. Then how can he be an incompetent witness? In the case of Bent v. Baker, 3 Term R. 27, after an elaborate argument and consideration of the question, the court held that a person who had been employed as a broker, by the plaintiff, in procuring the policy to be subscribed by the defendant, and afterwards had himself subscribed as assurer, was a competent witness for the defendant. In a replevin against one of two brokers, partners, who took the goods, the partner not sued was held competent for the defendant. Duncan v. Meikleham, 3 Car. & P. 172. So, where process was issued against three joint trespassers and two only served, the other trespasser never having appeared or pleaded, he was held to be an admissible witness for the defendants; and the court said, "the incompetency of a witness, on the ground of interest, must be confined to a legal fixed interest in the event of the suit." Stockham v. Jones, 10 Johns. 21. The rule is general that one cotrespasser, or, indeed, any joint wrongdoer not sued, is a good witness for another. Humphreys v. Miller, 4 Car. & P. 7. Where the plaintiff, being indebted to the witness, promised him an order on the fund in question when recovered, this was held not to render him incompetent. Ten Eyck v. Bill, 5 Wend. 55. An interest in the suit pending can alone affect the competency of a witness. Owings v. Speed, 5 Wheat. [18 U. S.] 420. In general the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question and does not exclude him. Evans v. Eaton, 7 Wheat. [20 U. S.] 356.

The deposition of Hubbard was admitted, and, with many others, was read in evidence. These proved that the vessel was detained at Buffalo several days, by the order of the defendant, until the reception of all his goods at that place. That after her cargo was on board high and adverse winds prevented her leaving the port; and that having left before the storm ceased she encountered much peril, and was driven back to Buffalo. She left that port so soon as the state of the weather permitted, late in October or the beginning of November, and passing Detroit, on her way to Chicago, she encountered high winds and floating masses of ice in Lake Huron, which placed her in imminent peril, and forced her back to Detroit, where her cargo, having been much exposed and somewhat injured, was unladened. During the winter the defendant had the greater part of his goods conveyed to Chicago, by land, at a heavy expense. So soon as the navigation opened in the spring, the vessel, with that part of the cargo which remained at Detroit, sailed for Chicago and delivered it to Hubbard, the consignee, as above stated. Under this state of facts the plaintiff contends that he is entitled to full freight. That the delays in the voyage were not attributable, in any degree, to his default, and that he performed the contract, by running the vessel to Chicago so soon as it was practicable to do so, and that a prop-

er construction of his contract can require nothing more from him than this. And, in the second place, it is insisted that under the most unfavorable view which can be given to his case, he is entitled to freight pro rata itineris. On the other side the defendant's counsel insists, that the plaintiff, having failed to perform his contract, can recover no compensation.

Marine contracts, and this is in the nature of a marine contract, are not of frequent cognizance in our courts of the west; but the rules by which they are governed, which emanate from the civil and maritime law, are founded in good sense and the great principles of justice, and are not dissimilar, in most respects, to the settled principles of the common law. As a general principle freight on goods is not payable till delivery at the port for which they are shipped. Hawland v. The Lavinia [Case No. 6,797]. And it is an admitted principle that where the owner of the cargo is himself the cause of defeating the voyage, freight is recoverable the same as if the voyage had been performed. If a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. The Saratoga [Case No. 12,355]. If a freighted ship becomes disabled on its voyage accidentally, and without any fault of the master, he has his option either to refit it, in convenient time, or to procure another ship to carry the goods. If the freighter disagrees to this, and will not suffer it, the master shall yet be entitled to his whole freight as of the full voyage. 2 Burrows, 887. And this is conformable to the Laws of Oleron, art. 4 (2 Brown, Civ. & Adm. Law, 191). But in the event of another vessel being employed, the master could recover only under the first charter party. He would not be entitled to any increased freight agreed to be paid by the new contract. Still the goods would be bound under the new contract, and any increased sum which the owners might be compelled to pay would be chargeable, perhaps, to the insurers. It is insisted that on the above principle the plaintiff is entitled to recover full freight. That the taking away of the greater part of the goods from Detroit, was the act of defendant, in his own wrong, and cannot prejudice the plaintiff. That he was ready to perform, and did perform, his part of the contract, by completing the voyage so soon as the upper lakes were navigable. And the cases in 4 Johns. Ch. 218; 16 Johns. 36, 364, and 356; 10 East, 556; 2 Johns. 325; 9 Johns. 210,—are relied on in support of this claim.

It may well be a matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of the present case may test this principle. The defendant is a merchant, and the cargo, in question, consisted of merchandize. It was important that his goods should be conveyed to Chicago expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the delivery of his goods? The vessel arrived at Chicago some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor any reasonable construction which can be given to the contract.

In the case of Hadley v. Clarke, 8 Term R. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the further orders of council; it was held that such embargo only suspended, but did not dissolve the contract between the parties; and that, even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff, in damages, for the nonperformance of their contract. The court well remarked, that that was a case of great hardship; both parties being innocent, one must suffer. Lord Kenyon put the case on the ground that a temporary interruption of a voyage, by an embargo, does not put an end to the contract. And, he adds—if this contract were put an end to, it might equally be said, that interruptions to a voyage from other causes would, also, have put an end to it—as a ship being driven out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the northwest parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark where they have been obliged to winter. A distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risk are numerous, and, being well understood, may, to some extent, at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is, the transportation by sea is the only means of conveyance in the one case, while, in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted. And the contract is made in reference to this fact, either express or implied. It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months, that the owner of the goods should be bound to wait this period for their delivery. In the decision cited above, the plaintiff recovered only £297.18, which sum he paid for insurance and other charges.

But it is not material to decide this point.

The greater part of the goods were received by the defendant at Detroit, and there is no complaint that the residue of the cargo was not duly delivered, by the vessel, at Chicago, in the spring. Now, there is nothing in the evidence which goes to show that the goods, received by the defendant, were not voluntarily delivered to him by the agents of the plaintiff, or of the transportation company in whose service he was employed. This being the fact, it must be considered a modification of the contract by the parties. And it is upon this ground that a pro rata freight may be recovered. In the case of Sompays v. Sater [Case No. 12,277], the court say, a pro rata freight can be demanded only upon the ground that there is a voluntary receipt of the goods, at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther. Where the cargo is compulsorily received by the owner, no freight is earned. Hustin v. Union Ins. Co. [Case No. 6,942]. In Cook v. Jennings, 7 Term R. 382, where the defendant agreed to pay so much for freight for goods delivered at A, it was held, freight could not be recovered, pro rata itineris, if the ship be wrecked at B before her arrival at A, though the defendant accept his goods at B. 1 Bos. & P. 634, 240; 1 East. 628; 4 East. 45; 1 Taunt. 300. There can be no doubt that to entitle the master to a pro rata freight, where the voyage has only in part been performed, the acceptance of the goods by the owner or his agent must be voluntary. If the master, without sufficient cause, refuse to repair his ship, at the intermediate port, and send on the goods, or procure another vessel for that purpose, he can recover no freight. Welch v. Hicks, 6 Cow. 504. In the case of Mitchell v. Darthez, 2 Bing. (N. C.) 555, which was decided in 1835, where defendants chartered plaintiff's ship from London to Buenos Ayres, there to deliver her cargo, reload, and proceed to a port between Gibraltar and Antwerp; freight for voyage out and home £1,300, if delivered at Gibraltar, in Spain, London, or Liverpool; £200 to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo. The ship proceeded to Buenos Ayres, delivered her cargo there, and sailed again with a cargo of hides, which defendants consigned to Gibraltar. At Fayal the ship and about one third of the hides were lost. The vice-consul of Fayal, acting on behalf of the defendants, at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to defendants' consignees at Gibraltar, where they were accepted, and the freight from Fayal to Gibraltar paid by defendants. Held, that the plaintiff was not entitled to the £1,300, freight; that he was not entitled to pro rata itineris for freight to Buenos Ayres, or from Fayal to Gibraltar, but that he was entitled to freight, pro rata, from Buenos Ayres to Fayal. Had the vessel been lost at Buenos Ayres nothing more than the £200 could have been claimed, and that sum was paid on the departure of the vessel.

On an examination of the authorities, we think the rule is well settled, that where, through any cause, not within the control of the master, the voyage is terminated at an intermediate port, where the cargo is voluntarily received by the owner, that freight pro rata itineris may be demanded. And in this case they so instructed the jury. And they, also, instructed the jury that the deposit of the five hundred dollars in scrip, by the defendant, with Hubbard, the consignee, being special, could not be applied as a payment for freight, unless a special direction to that effect was subsequently given by the defendant. For the goods delivered at Chicago the plaintiff is entitled to full freight under the contract. And whether any part of this freight has been paid, it will be for the jury to determine from the evidence. The jury found for the plaintiff.

Case No. 1,660.

BORLAND v. DEAN.

[4 Mason, 174.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

CONFISCATION—ACT MASS. APRIL 3, 1779.

Where the estate of a tenant in fee tail male was confiscated to the commonwealth, under the statute of Massachusetts of 3d April, 1779, providing for the confiscation of the estates of absentees, *held*, that the estate of the remainder-man was not thereby divested, but that the commonwealth took only, by virtue of the confiscation, such an estate as the absentee had in the premises; also *held*, that the tenant in possession of the premises, under a defective title from the commonwealth after the termination of their estate, was entitled to the value of his improvements.

[Cited in U. S. v. Athens Armory, Case No. 14,473.]

At law. This was a writ of formedon in remainder. There were several pleas in the case: 1. The general issue, ne done pas: 2. A special plea, setting forth, in substance, that the estate had been confiscated by a judgment at law, under the revolutionary confiscation acts of Massachusetts, as the estate of the prior tenant in tail, John Lindall Borland. There was a demurrer to this plea and a joinder in demurrer. There was also a claim for improvements, under the act of Massachusetts of 1807, c. 75.

At the trial under the general issue, it appeared that Timothy Lindall, the ancestor of the demandant, by his will on the 7th of July, 1760, devised the demanded premises to John Borland, the grandson of the said Timothy, for the natural life of the said John Borland, and after his death remainder to John Lindall Borland and the heirs male of his body issuing; and if the said John Lindall Borland should die without heirs male

[1] [Reported by William P. Mason, Esq.]

of his body issuing, then to Francis Borland, the brother of the said John Lindall Borland, and the heirs male of his body issuing. Timothy Lindall died seised. John Borland entered into possession, and died seised of his life estate; and after his death John L. Borland entered into possession, and was seised of the demanded premises, until the same were confiscated by a judgment against him under the confiscation act of Massachusetts, at September term of the C. C. P. for Bristol county, A. D. 1780, and a writ of seisin in favor of the commonwealth was executed thereon. John L. Borland died without issue in 1825. Francis Borland died in November, 1824, leaving the demandant [Joseph S. Borland], his eldest son and heir male. At the trial some question was made, whether the heirship, as stated in the writ, was necessary to be proved by the demandant. The court strongly inclined to think, that it was not necessary under the general issue; but should have been put in issue by a special plea; that ne done pas put in issue only the fact of the gift, as stated in the declaration, and not the heirship of the demandant. But the demandant being prepared with evidence to prove his pedigree, and having actually proved it, the point was not further moved. The tenant [Levi Dean] claimed under a deed of the premises by the commonwealth, granting the fee simple thereof, with warranty; and Shaw and D. Davis, for the tenant, insisted on his right to the claim for improvement made thereon, under the act of 1807, c. 78, if the title was not good in fee simple.

Webster and Prescott, for the demandant, denied that it was a case within the intent of the statute. Here the tenant did not "hold by virtue of a possession and improvement," but was in under a title, good for the life of John Lindall Borland, and that title was extinguished only by lapse of time and his death without issue. It was therefore a case of possession and improvements under title, not a defective title, but a good title, though defensible in the events which have occurred. The statute never intended to apply to such a case. They cited Knox v. Hook, 12 Mass. 329; Newhall v. Saddler, 17 Mass. 350.

Shaw and Davis contended, e contra, that here the tenant held under a title in fee simple from the commonwealth. If the demandant is right in his view of the case, the title of the tenant is a defective title; and it matters not, whether the defect extends to the whole title, or to a part of it, to the whole time or estate, or to a part only. Each case is equally within the reach of the statute; and so have been the adjudications. Bacon v. Callender, 6 Mass. 303, is in point.

STORY, Circuit Justice. If this question were entirely new and unaffected by authority, I own that I should think there was much reason to go the whole length of the argument of the demandant's counsel. The statute of 1807, c. 75, may be considered a remedial statute; but it is one, which goes in direct derogation of rights well established at the common law. The statute does not purport to adjust rights founded upon mere equities. It makes no discrimination between an innocent possessor or purchaser, and a trespasser knowing his own want of title, and acting openly in defiance of the rights of the legal owner. It being then a statute in subversion of legal rights, protected by the common law, it is certainly the duty of courts of law not to enlarge its operation beyond the fair and legal interpretation of its terms. There is no ground for construing it by an enlarged and liberal equity. Indeed, the class of cases, for which this section of the act was originally introduced, is well known to the profession at large, and especially to those who, like myself, were in the legislature at the time of its passage. But independently of any recollection of this sort, there is much apparent ground for arguing, that the true reading of the statute is, that the tenant, entitled to the value of his improvements, must be one, who has no title but by a possession and improvement. The words are, "that where any action has been, or may hereafter be commenced against any person for the recovery of any lands and tenements, which such person now holds by virtue of a possession and improvement, and which the tenant, or person under whom he claims, has had in actual possession for the term of six years or more," &c. Now, the argument is, that a person, who holds under a title, cannot be accurately said to be in by virtue of a possession and improvement, whether that title be defective or not. And a fortiori he cannot be said to hold by a possession and improvement, when he holds under a title good for life, or for any larger estate short of a fee simple. That there are cases quite as much entitled, as cases of this sort, to legislative protection, and cases indeed of greater hardship, as where an innocent purchaser is in under a defective title, and makes improvements, is (it is said) no ground for extending the meaning of the statute. The exposition must be, not of what the legislature ought to have done, but of what they have done.

But my opinion is, that this question was completely decided by the state court in Bacon v. Callender, 6 Mass. 303, soon after the enactment of the statute. The court there said, that "the statute, in its true construction, must, in our opinion, extend to all cases, where the tenant, or those under whom he claims, has been in possession six years or more before the commencement of the suit, by any title whatever, if the demandant has a better title." These words appear to me to express the opinion of the court, that wherever the tenant is in by a

title, which turns out to be defective, so far as respects the demandants, he is entitled to the value of his improvements. They were used in a case where the tenant claimed a title by deed, which, as to a moiety, turned out defective. It can make no difference, in my judgment, whether the defect be in the quantity of the land, or in the quantity or the quality of the estate conveyed. Pro tanto the title is defective. Deeming this the settled law of Massachusetts, I feel myself entirely bound by it. It is not fit here to attempt to introduce any rule of construing local statutes, which has been denied by the solemn adjudications of the state tribunals; and especially by a court of such great ability and learning as the supreme court of Massachusetts. And there is very strong reason to believe, that this construction has, in practice, been found wholesome and productive of public good. I shall admit the evidence.

Upon this decision, the counsel for the demandant proposed to take an exception to the opinion of the court, for the purpose of revising it; and by consent of the parties the cause was taken from the jury, with a view to a future trial upon the value of the improvements, if the point should be ultimately settled in favour of the tenant. The cause then came on to be argued upon the merits of the special plea, and was argued by Webster and Prescott for the demandants, and by L. Shaw and D. Davis for the tenants, at great length. For the demandants were cited 1 Hale, P. C. 240; 3 Inst. 19; Stamf. Pl. C. 187; Plowd. 354; Co. Litt. 130; 3 Bac. Abr. "Forfeiture," C; 13 Vin. Abr. "Forfeiture," C, p. 439; 2 Bl. Comm. 286; 3 Coke, 10, 14; Fost. Cr. Law, 95, 102; 4 Com. Dig. "Forfeiture," B; Jenk. Cent. pp. 250, 286, pl. 21; 2 Ander. 139; 2 Johns. 263; 8 Johns. 521; Latch. 24; 2 Lev. 170; Shepp. Touch. 224. For the tenant were cited 1 Mass. 347; 4 Mass. 304; 15 Mass. 44; 2 Bl. Comm. 167, 168, 248; 2 Mass. St. 1800, Append. 1055.

STORY, Circuit Justice. The question presented by this special plea depends upon the exposition of the act of the legislature of Massachusetts, of 30th of April, 1779, entitled "an act for confiscating the estates of certain persons, commonly called absentees." The general scope and object of that act are sufficiently commented on and explained in Martin v. Com., in 1 Mass. 347. The act declares, that each absentee, within the purview of it, "shall be held, taken, deemed, and adjudged to have freely renounced all civil and political relation to each and every of the said United States, and be considered as an alien." It then proceeds to declare, "that all the goods and chattels, rights and credits, lands, tenements, hereditaments of every kind, of which any of the persons hereinbefore described were seised or possessed, or were entitled to possess, hold, enjoy, or demand, in their own right, or which any other person stood or doth stand seised or possessed of, or are or were entitled to have or demand to or for their use, benefit, or behoof, shall escheat, enure, and accrue, to the sole use and benefit of the government and people of this state, and are accordingly hereby declared so to escheat, enure, and accrue." It then proceeds to point out the process, by which a judgment, in the nature of an office of entitling and instruction, may be obtained against the absentee's estate. The proper proceedings were in this case had, according to the act, against John Lindall Borland, as an absentee seised and possessed of the demanded premises, and in September, 1780, a judgment was recovered for the same in favor of the commonwealth, upon which a writ of habere facias possessionem issued, and was duly executed. In point of fact, John Lindall Borland was, at the time of this judgment, seised of the premises as tenant in tail male.

It is not disputed, that, by the act, the estate of J. L. Borland was legally vested in the court under this proceeding and judgment. It is however argued, that the estate was so vested only for the life of J. L. Borland, and that upon his death, if he had left issue male, the latter would have taken the estate per formam doni. And many authorities have been cited to prove, that under words equally general with the words of the act of 1779, where confiscation and forfeitures have been by statute inflicted in England, a like construction has been adopted. If the case turned upon this point, it would be the duty of the court to give to these authorities a very close examination, and to the argument itself, which is cogent and striking, a very deliberate consideration. But as J. L. Borland died without any issue male, it is wholly immaterial in this case, whether the estate passed for the life of J. L. Borland, or during the existence of the estate tail. The real point of inquiry here is, whether the confiscation of the estate of J. L. Borland was a destruction of the remainder in Francis Borland in fee tail male. It is said to have this effect, because the destruction of the prior estate tail destroys the estate in contingency in remainder; and because, as a power existed in the tenant in tail to bar the remainder, therefore the judgment of confiscation shall be considered as an equivalent, and as a due execution of the power by the commonwealth. It appears to me very clear, that neither proposition can be maintained in point of law; and that there is no principle, by which the demandant's right of recovery is shown to be barred. In the first place, the remainder of Francis was in no legal sense a contingent remainder. It was an absolute vested estate, to take place upon the regular determination of the prior estate tail in J. L. Borland. It was no more a contingent es-

tate, than an estate for life in A, with a remainder to B in fee or fee tail. The time when the latter is to take effect in possession is uncertain; but the interest itself is not uncertain, or dependent upon any contingency; but is vested and absolute.

In the next place, the judgment against J. L. Borland was no extinguishment of his estate in the premises, but an appropriation of it to the use of the commonwealth. The act of 1779 did not intend to destroy the estates of absentees in lands, but to vest them, whatever they might be, by forfeiture or escheat in the commonwealth. The object was not to declare, that a life estate, or fee tail or fee simple of an absentee in the lands, should cease and be extinguished; but that he was no longer capable of holding the same; and, as in a case of alienage, the commonwealth had a right, in virtue of its sovereignty, to take the same to its own use. It would be most unjust and absurd to suppose, that the legislature meant to confiscate the estate of B for the offence or alienage of A; to take one man's property for another man's offence or act. Unless the terms of an act were positive, direct, and absolute, no such construction ought, out of a decent respect for the legislature, to be adopted by any court of law. There is no pretence for such a construction of the present act. Francis Borland has had no judgment against him, as an absentee, within the purview of the statute; and it cannot be presumed, that the legislature meant to subject his estate to confiscation. The notion, indeed, that the escheat or confiscation of an estate tail destroys a subsequent remainder, is entirely at war with the adjudged cases. The very point occurred in the case of a forfeiture for high treason in the rebellion of 1745. In the case of John Gordon, in the house of lords, reported by that accurate and admirable judge, Sir Michael Foster (Fost. Cr. Law, 95), it was expressly decided that, a forfeiture of the estate by a tenant in tail, for high treason, did not destroy a subsequent remainder in tail; but the estate was appropriated to the crown only during the existence of the prior tenancy in tail. This, it should be remembered, was the case of an attainder for high treason, which is far stronger, than a case like the present, of escheat for alienage. It has never been supposed, that the escheat of an alien's estate for life, or in tail, carried with it the extinction of all subsequent vested estates of remainder-men, who were citizens. The law, as stated by Sir Michael Foster, was not new; but stands confirmed by the century cases of Jenkins. Jenk. Cent. p. 250, case 41; Id. p. 286, case 21. See, also, Brook, Abr. Nosme. 1; 13 Vin. Abr. "Forfeiture," C, p. 439; Dalrymple, Feuds, p. 188, c. 4.

As to the other point, it is very difficult to rest it on any legal foundation. The right of a tenant in tail to suffer a common recovery is certainly not equivalent to the actual exercise of this right. While it remains unexercised, the estate tail continues; and a fee simple can be acquired only by the docking of the entail by the common recovery actually suffered. If the existence of such a power had been sufficient, on an escheat or forfeiture for an attainder, to destroy the remainder, there would be an end of the remainder in all cases of attainder of the tenant in tail. Such a doctrine has never been established; and the cases in Jenkins are an authority the other way. So also is the case in Brook, Abr. Nosme. 1, which cites 37 Hen. VIII. The power of barring the entail was personal to the tenant in tail. It would not pass to the commonwealth under words as general as those in the act of 1779 (see Latch. 24; 2 Lev. 170; 13 Vin. Abr. 439; 3 Inst. 19;) and it was not, in fact, exercised by any one during the existence of the estate tail of J. L. Borland.

It is farther suggested, that by the judgment of confiscation the commonwealth, in fact, took a fee simple. But upon what legal ground can this position stand? The libel for confiscation did not itself, as it is set forth in the plea, state any particular estate of which J. L. Borland was seised and possessed. It stands perfectly equivocal on the face of the libel, whether it was a fee simple, a fee tail, or an estate for life. The judgment itself, therefore, does not purport to give a fee simple. And if it did, it is clear, that it could not rightfully pass any estate except what the absentee was seised and possessed of. Then, again, admitting, as the argument in the defence does admit, that the confiscation act proceeds to appropriate the estates of absentees not for offences, but for alienage, it is plain that, in ordinary cases of alienage, the commonwealth could take only such estate as the alien himself possessed, without disturbing any estate in other persons connected with it. Upon this analogy, there could be no reason for adopting an interpretation of the act beyond the appropriation of J. L. Borland's rightful estate. Indeed, the whole argument in the defence turns upon the other points already discussed, and this can be maintained only as a conclusion from them. So far from the judgment's being an extinguishment of the absentee's estate in the land, it rests upon the ground, that the commonwealth is the lawful haeres factus of it, and that it succeeds to the inheritance in the plight and extent, in which he held it. My judgment accordingly is, that the plea in bar is bad, and that the demurrer is well taken. Judgment accordingly.

Case No. 1,661.

BORLAND et al. v. PHILLIPS et al.

[2 Dill. 383.][1]

Circuit Court, D. Kansas. 1873.

BANKRUPT ACT OF 1867—SECTION 35 CONSTRUED.

The defendants, private bankers, received from the bankrupts, who were also private bankers, after the latter had closed their doors for general business, a draft on New York "for collection," and on being advised by their correspondents in New York of its payment there, then paid the full amount thereof to one of the bankrupts: *Held*, if this payment to the bankrupts was made in good faith, without reasonable cause on the part of the defendants to believe that the bankrupts intended to make therewith any fraudulent payments or preferences, that the defendants were not liable to the assignee in bankruptcy under the 35th section of the bankrupt act [of 1867, 14 Stat. 534].

In bankruptcy. The plaintiffs [Borland and Manlove] are assignees in bankruptcy of Van Fossen & Britton, who were private bankers in Fort Scott. Defendants [Phillips and Scovill] were also private bankers in the same place. This action is brought to recover $3,000, the amount of a draft or bill of exchange on New York, which the bankrupts, a few days after their suspension, left with the defendants "for collection." The defendants forwarded the draft to their correspondent in New York for collection, and on being advised of its payment there paid the full amount thereof to one of the bankrupts. This draft was received by the defendants for collection after the bankrupts had closed their doors for general business, but within four months of the bankruptcy. On these facts the plaintiffs sought to recover under the second clause of section 35 of the bankrupt act. On the trial the defendants testified that they received and forwarded the said draft for payment only, and in good faith paid the full amount of the proceeds thereof to the bankrupts. The defendants, although they admitted that they knew the bankrupts had suspended, also testified that they had no knowledge of any intention on the part of the bankrupts to make any improper use of the money thus paid over to them; and it not appearing that the defendants had reasonable ground to suspect that any fraud was contemplated by the bankrupts, the court gave judgment for the defendants. A motion for a new trial was made by the plaintiffs upon the ground of the newly-discovered evidence of Mrs. Bailey. This motion was denied for the reasons stated in the opinion of the court.

A. A. Harris, for plaintiffs.

McComas & McKeighan, for defendants.

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

DILLON, Circuit Judge. If the defendants paid over the proceeds of the draft in good faith, not knowing or having reasonable cause to believe that bankrupts intended to make therewith fraudulent preferences or payments, I still think, as was decided at the trial, that they are not liable to the assignee. Such is the principle on which Darby v. Lucas [Case No. 3,573] was decided, and that case has recently been affirmed by the United States supreme court. A motion is made by the plaintiffs for a new trial on the ground of newly-discovered evidence to show that this payment was not made in good faith, but with knowledge that the bankrupts intended to make a fraudulent preference to Mrs. Bailey. Her affidavit is produced, which, unexplained, tends strongly to throw doubts upon the defendants' bona fides. But the circumstances mentioned in her affidavit are fully explained by the affidavits of the defendants; and, taking the facts stated in both affidavits together, and assuming that the same facts would be testified to on the new trial, should one be granted, the result would be the same as before. Motion denied.

NOTE [from original report]. See, as to suspension of payment by bankers and illegal preferences, Markson v. Hobson [Case No. 9,099].

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

Case No. 1,662.

BORNIO v. STOCKDALE.

[13 Int. Rev. Rec. 20.]

District Court, D. Louisiana. Jan. 10, 1871.

INJUNCTION—DISTRESS TO COLLECT PENALTY FOR NONPAYMENT OF TAX ON LOTTERY BUSINESS.

[The penalty provided for selling lottery tickets without having paid the special tax (Act June 30, 1864, amended July 13, 1866) is in no sense a tax, and a proceeding to collect the same by distress may be enjoined.]

In equity. This was a bill filed by D. Bornio against Stockdale, collector, etc., for an injunction to restrain the collector from proceeding by distress to collect a tax of $150, assessed against the petitioner as lottery ticket dealer; also to restrain him from attempting in like manner to collect a fine or penalty which the United States assessor had assumed to assess against petitioner, in the sum of $1,000, for failure to pay special tax as such dealer. [Injunction granted.]

By a provision of the internal revenue law [Act June 30, 1864 (13 Stat. 279), amended July 13, 1866 (14 Stat. 116)], he who sells lottery tickets without having paid the special tax, is subject to a penalty of $1,000, and imprisonment not exceeding one year, in the discretion of the court. That law, it would seem, in hundreds of instances, imposes penalties and imprisonment for violation of its enactments; but in this instance only does it convert the assessor into both a court and jury, authorizing him in the absence of the accused, and without his knowledge, even to pass upon the question of his guilt or innocence, find him guilty, and on such finding

assess the penalty of $1,000, to be collected as though it were a tax. On the hearing, counsel for the petitioner argued, with much force, that this extraordinary feature of the law was in violation of several provisions of the federal constitution, and therefore void. They insisted that congress could no more make the assessor a court to impose such a penalty as this than it could to determine and order the imprisonment, also prescribed by the statute. Quite a number of provisions of the constitution were quoted as protecting the citizen against any such secret and summary proceedings.

The cause was originally brought in a state court, and removed to the United States circuit court at the instance of the collector. After its removal to the latter court, Messrs. Case & Rouse, then first employed for the petitioner, advised him to pay the tax under protest, and contest only the penalty in this proceeding; which was done.

Beckwith, U. S. Dist. Atty., for the collector.

Case & Rouse, for Mr. Bornio.

DURELL, District Judge, in delivering his opinion, mentioned the remarkable provision of the law above noticed, but did not deem it necessary to pass upon the constitutional questions raised, inasmuch as the injunction could be granted on another point made by the counsel for petitioner, viz., that this penalty could not in any sense be called a tax, and therefore the law which prescribes that "no suit to restrain the collection of a tax shall be maintained in any court" did not apply to such a suit as this. His honor therefore granted the injunction as prayed.

Case No. 1,663.

BORO et al. v. PHILLIPS COUNTY.

[4 Dill. 216;[1] 6 Cent. Law J. 409.]

Circuit Court, E. D. Arkansas. Feb., 1878.

CONSTITUTIONAL LAW—SPECIAL ASSESSMENT—LIABILITIES OF COUNTIES AND DISTRICTS — LEVEE TAX—LEVEE BONDS.

1. A state may impose special assessments on districts for the purpose of building levees, etc., by virtue of its police power; such an assessment is not in conflict with the constitutional provision requiring equal and uniform valuation of all property for purposes of taxation.

2. The general rule of law that "where one takes a benefit from the result of another's labor, he is bound to pay for the same," does not, as against the county, apply to cases where the benefit of the work is immediately to the adjacent property, and only incidental to the county at large.

3. When the county court merely acts as an agent for a district, and by law it is made the duty of the county court to assess a tax on the lands of the levee district to pay for the work, upon a failure or refusal on the part of the county court to discharge its duty in the premises, mandamus is the proper remedy, but such failure or refusal will not make the county liable to a general judgment for the obligations of the district.

[Cited in Aylesworth v. Gratiot Co., 43 Fed. 352.]

4. The county being divided into several levee districts, each of which is to pay its own obligations for work done within the district, the obligations, although made payable by the levee treasurer of the county, are payable only out of the funds of the district in which the work was done, and cannot be made the foundation of an action against the county for a money judgment.

[Cited in Aylesworth v. Gratiot Co., 43 Fed. 352.]

At law. An act of the general assembly of this state, approved February 16th, 1859 [Laws Ark. p. 154, § 1], provided, among other things: That the county courts of the counties of Desha and Phillips should divide the overflowed lands in each of said counties into not less than four nor more than seven levee districts; that it should appoint for each levee district three freeholders, residents of the district for which they were appointed, whose duty it was to report to the county clerk a list of all lands in their districts, respectively, subject to overflow. For each levee district one levee inspector was, in the first instance, to be appointed by the county court, and afterwards to be elected by the qualified voters of the district, who was required to give bond to the state of Arkansas, for the use and benefit of the levee district for which he was appointed. The levee inspector for each district assessed the lands therein for levee purposes, the act fixing the minimum value of the land for this purpose at $10 per acre, and returned his assessment roll to the county clerk, whose duty it was to enter the same on the tax book, and to extend the levee tax against the same at the rate fixed by the county court, which could not be less than one-fourth of one nor more than two per cent annually. The sheriff of the county collected the taxes thus assessed and levied, and paid the same over to the "levee treasurer of the county," who, in the first instance, was appointed by the county court, and afterwards elected by the qualified voters of the levee districts, whose duty it was to receive and safely keep the levee funds of each levee district, and pay the same out on the order or warrant of the levee inspectors, drawn against the levee fund of their districts respectively. The levee inspector for each district was invested with large powers, and authorized to make contracts for building and repairing the levees in his district, and payment for such work belonging to his district was to be made out of the fund arising from the levee tax assessed and collected for such district in the manner indicated, and the inspector was authorized, when money was due for levee work in his district, to draw his war-

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

rant upon the treasurer for the amount, which the act declared "might be in the following terms, to-wit:

"State of Arkansas, County of ——: The levee treasurer of —— county will pay to —— or order the sum of —— dollars, out of any money in the treasury belonging to levee district No —, this —— day of ——, 18—. A. B. C., Levee Inspector of Levee District No. —."

By an act approved January 15th, 1861 [Laws Ark. p. 221], the first act was amended in several respects, not material to notice, and the following provisions were enacted relating to the levee warrants or scrip theretofore issued by the levee inspectors of the several districts: "Sec. 19. That all the levee bonds, scrip, or drafts issued by the several levee inspectors of said counties prior to the taking effect of this act, shall be presented to the county clerk of the county in which such bonds, scrip, or drafts were issued on or before the 1st day of January, 1862, whose duty it shall be to issue to the holders thereof the same amount of bonds, scrip, or drafts, bearing the same rate of interest, which interest shall run from the date the scrip, bond, or draft bears interest before renewal, and each bond, scrip, or draft shall be confined to the county and district in which it was issued and out of the fund of which the same is to be paid." It was further provided that the county clerk shall keep a register of the scrip presented to him for renewal, showing the date, number, amount, to whom payable, what inspector issued the same, and the number of the district out of the fund of which the same is payable, and shall file the same in his office for the inspection of the county court; and it was provided that levee scrip should be received in payment of levee taxes in the levee district out of the funds of which the same is made payable, and that no lands in the county shall be taxed for levee purposes that were not taxable for that purpose under the first act, i. e., lands subject to overflow, and included in a levee district. Under the provisions of section 19 of the last act, above quoted, the holders presented to the county clerk of the county levee orders or warrants, previously issued by the levee inspectors of the several levee districts in the county, and for each bond, scrip, or draft so presented the clerk issued a renewal bond or draft. A further act, approved April 8th, 1869 [Laws Ark.], gives to the holders of levee scrip or bonds, issued under the previous acts, one year in which to present the same to the county court for payment, filed and numbered, in order to enable the court to estimate the necessary amount to be levied each year upon the land situated in each levee district, as laid off and designated by each of said county courts, and it was made the duty of the county court to levy an annual tax upon all the lands in each of the districts to pay the levee bonds and scrip of said district respectively. The levee bonds or scrip in suit were presented to the county court and filed and registered as required by this act. The county court refused or neglected to levy a tax on the lands in the levee districts to pay scrip or bonds, as required by the act of 1869, and no such tax has been assessed or collected since 1862, and no moneys arising from such a tax are now or ever have been in the county treasury or used or appropriated by the county for general county purposes, but all moneys arising from the levee tax on lands, in these districts, were paid out by the levee treasurer on levee bonds, or scrip issued for building and repairing levees in the several districts. The acts of February 16th, 1859, and January 15th, 1861, were repealed by the act of March 23d, 1871 [Laws Ark. p. 89, § 14]. The plaintiffs are holders of a large amount of the renewal bonds issued by the county clerk, under section 19 of the act of January 15th, 1861, and seek by this action to recover a general judgment against the county thereon.

W. H. Hiddell, for plaintiff.

Tappan & Horner and Palmer & Nichols, for defendant.

CALDWELL, District Judge. In seasons of high water, a considerable portion of the finest cotton lands of the south, bordering on the Misssissippi and its tributaries, are subject to overflow. The protection of these lands from inundation by the construction of levees was early found to be practicable and necessary to the growth and prosperity of the rich alluvial districts of the southern states. Coeval with organized governments in these states, laws were passed looking to the reclamation of these lands by the construction of levees, and providing a mode in which the money should be raised to pay the same. The usual mode adopted for this purpose was to divide the overflowed lands into convenient districts, appoint local officers therefor, to determine the location of levees, and to contract, on behalf of the district, for their construction and repair, and providing for a special assessment on the lands benefited by the construction of the levees to pay the cost of the same.

The authority of the state to impose a special assessment for this purpose, on the lands benefited, is found in the police power. A special assessment for such a purpose is not a tax, in the strict legal sense of that word, and hence it has been uniformly held that the usual constitutional provisions requiring the burdens of taxation to be equally distributed, and requiring an equal and uniform valuation of all property for purposes of taxation, have relation to taxation for general state and county purposes, and are not limitations on the exercise of the police power, and do not inhibit special local assessments, when the fund raised is expended for the improvement of the property tax-

ed. McGehee v. Mathis, 21 Ark. 40; Cooley, Tax'n, pp. 401, 402, 427, and authorities cited.

The policy of imposing the cost of the construction and repairs of the levees on the lands benefited thereby, was adopted by the legislature in reference to the levees in Desha and Phillips counties. The acts are explicit on that subject. By their terms these lands subject to overflow are divided into districts. Each district has its own officers to contract on behalf of the district for the construction of levees. Provision is made for raising a fund to pay for all levee work by an assessment on the lands benefited, and it is expressly provided that other lands and property in the county shall not be assessed or taxed for this purpose.

The acts in question adopted a scheme for the construction of levees and raising a fund to pay therefor quite independent of the action of the county proper in its corporate capacity. The contracts for levee work were to be made by the levee inspector of the district, and the work was to be paid for out of the levee fund arising from the assessment made on the lands in the levee district. The warrant or order for such payment was drawn by the levee inspector of the district on the levee treasurer of the county, an officer elected by the qualified voters of the levee districts of the county, and not by the qualified voters of the whole county, and was payable out of money in his hands belonging to the levee district in which the work was done. The levees that might be built were for the exclusive benefit and advantage of the land reclaimed from overflow, and for this reason the acts in question made provision for the whole cost of the construction upon the lands thus benefited. If this scheme proved inadequate for raising the funds, that does not make the county liable. The act does not provide that the county shall be liable in such an event, or in any event, and the general rule "that when one takes a benefit from the result of another's labor, he is bound to pay for the same," does not apply to cases of this kind, where the benefit arising from the work or improvement is immediately to the adjacent property and only incidentally to the county at large. Argenti v. San Francisco, 16 Cal. 255, opinion by Field, C. J. The acts impose no liability on the county. Neither the county court nor any officer of the county had any authority or power to enter into a contract, or make or create an obligation binding on the county in relation to the work. It was suggested in the argument that a sufficient authority for the county court to bind the county in such case was found in section 9, art. 6, of the constitution of 1836, in force at the date of the transaction, which declares "the county court shall have jurisdiction in every other case necessary to the internal improvements and local concerns of the county."

In 1857 an act was passed providing for the construction of levees in Chicot county, identical in many of its provisions with the acts here in question, and in McGehee v. Mathis, supra, the supreme court say: "Nor are the levees provided for by act of January 7th, 1857 [Laws Ark.], an 'internal improvement and local concern,' within the meaning of that clause of the constitution above cited. These terms, as there employed, relate to public internal improvements, and local concerns for general county purposes, which appertain to the county at large as a body politic, and not to improvements for special local purposes, where the funds expended in making the improvements are raised by assessments imposed only on the particular property improved." But in this case the county court has not attempted to make the cost of these levees a charge upon the county, and, if it had done so, its act would have been a nullity. By the terms of these acts, there were but two parties to the contracts to build the contemplated levees—the levee inspector of the district, acting for and in behalf of his district, and the contractor.

The act pointed out specifically the source from whence the fund was to be obtained to pay for such work, and limited the payment to that fund, and the parties must be presumed to have contracted in reference to these provisions of the act. The county was no party to the contract, and no contract or obligation entered into by a district levee inspector could bind the county. What the county court had to do in the premises was to levy such rate of tax within the limits fixed by the act, on the lands in each district as listed, assessed, and reported by the levee inspector thereof, as might appear to be necessary to meet the obligations of the district. The county court was merely resorted to as a convenient and suitable agent for these purposes. If the county court failed or refused to discharge its duty, it might have been compelled by mandamus, or other appropriate proceedings at the suit of an aggrieved party, to perform its duty, but the failure of the county court to discharge any or all of the duties imposed on it by these acts would not render the county liable for the debts of the levee districts. If the money arising from the local assessments to pay the debts of the levee districts had gone into the county treasury and been used or appropriated by her for general county purposes, a different question would be presented; but the fact is conceded to be otherwise. The bonds or certificates sued on were issued by the county clerk, and were intended, doubtless, to conform to the requirements of section 19 of the act of January 15th, 1861; if not issued by authority of that section, they are of no validity, because no other authority for their issue can be found.

There is an obvious error in the preamble to these renewal bonds, the clerk reciting

that they are issued under and by virtue of section 11 of the act of February 16th, 1859, when it is apparent that they must have been issued under section 19 of the act of January 15th, 1861. That section expressly provides that each renewal draft issued by the clerk "should be confined to the county and district in which it was issued, and out of the fund of which the same is (to be) paid." They were intended to be, and declared to be, "renewals" of the drafts drawn by the levee inspectors of the several levee districts, and, like them, they were made payable in terms out of money in the treasury belonging to the levee district in which the work was done. The bonds in suit declare the "levee treasurer" will pay the sum named therein "in part payment of work done according to contract within and for levee district No. —." They are not in terms payable out of the funds of any particular district, though the district in which the work was done, on account of which the bond is issued, is mentioned, and inasmuch as the act provides the work done in a district shall be paid for out of the funds of that district, it is probable the legal effect of these bonds is the same as if they had been made payable in terms out of the funds of the district liable for their payment. If this is not so, then the bonds on their face are void for non-compliance with the law, and the levee treasurer, though in possession of funds to do so, would not be authorized to pay them. Martin v. San Francisco, 16 Cal. 285; Bayerque v. San Francisco [Case No. 1,137]. And if they are treated as valid instruments, properly issued under the law, then they are payable only out of the funds of the levee district in which the work was done, and cannot be made the foundation of an action against the county. Dill. Mun. Corp. § 413; Lake v. Trustees of Williamsburgh, 4 Denio, 520; McCullough v. Mayor, etc., of Brooklyn, 23 Wend. 458; Pettis Co. v. Kingsbury, 17 Mo. 479; Campbell v. Polk Co., 49 Mo. 214.

This act of 1869 removed or postponed the bar of the statute of limitations, changed the mode of assessing the lands in the levee districts for levee purposes, and re-enacted with some emphasis the provisions of the act of 1859, relating to the duty of the county court to levy the required tax on the lands in the several levee districts to pay the debts of those districts respectively. This act is not repugnant to the constitution in any of its provisions, but it does not impose the liabilities of the levee district on the county. Judgment for defendant.

BOROUGH OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the boroughs.]

BORS (BAETJER v.). See Case No. 724.

Case No. 1,664.

Ex parte BORST.

[The case reported under above title in 1 Gaz. 18, is the same as Case No. 1,665.]

Case No. 1,665.

In re BORST.

[2 N. B. R. (1868) 171 (Quarto, 62);[1] 1 Gaz. 18.]

District Court, S. D. New York.

BANKRUPTCY—EFFECT OF ADJUDICATION.

A bankrupt cannot be held in the custody of the sheriff of the county on account of a judgment obtained against him for costs in an action in a state court.

[Cited in Re Wright, Case No. 18,065.]

In bankruptcy. John B. Borst was held in custody of the sheriff of the county, on account of a judgment obtained against him for costs, in an action in a state court. Counsel asked his discharge from custody on the ground that there was no authority for holding him for the debt, as he had been declared a bankrupt in the United States courts. THE COURT granted the motion.

Case No. 1,666.

In re BORST.

[11 N. B. R. (1875) 96.][1]

District Court, S. D. New York.

BANKRUPTCY—DISCHARGE—OPPOSITION.

1. A creditor, who has proved his debt after the time for the hearing of the application for discharge has expired, cannot be heard in opposition to such discharge, nor can his debt be counted among the claims proved, so as to affect the discharge.

[Cited in Re Read, Case No. 11,600; Re Ketchum, 1 Fed. 840; Re Read, 5 Fed. 722.]

2. The hearing of the case on the specification of the grounds of opposition mentioned in general order No. 24, is a different thing from the hearing of the application for discharge mentioned in section 33 of the bankrupt act [of 1867 (14 Stat. 533)].

[In bankruptcy. Application for discharge by John B. Borst.]

R. P. Lee, for creditors.

S. B. M. Stokes, for bankrupt.

BLATCHFORD, District Judge. The time of the hearing of the application for discharge, in the sense of the 33d section, for the purpose of filing the assent of creditors to the discharge, ended on the 27th of January. As the debt of Markert was proved after that, it cannot be counted among the claims proved which are to be taken into account. But I do not see how it makes any difference. With Markert's debt there are

[1] [Reprinted from 2 N. B. R. 171 (Quarto, 62), by permission.]

[1] [Reprinted by permission.]

five, and three assent without him, and there is a majority in value assenting in any event. The hearing of the case on the specification of the grounds of opposition, mentioned in general order No. 24, is a different thing from the hearing of the application for discharge mentioned in section 33. The latter is the return day of the order to show cause, whether the original day or the adjourned. On that day, the creditors are, by general order No. 24, required to enter appearances in opposition to the discharge if they desire to oppose it. At or before that day, the assent in writing to the discharge, if such assent is necessary, must and may be filed. Of course, by that day, all debts to be taken into account in computing the assent, must be proved. Then, within ten days after that day, specifications of the grounds of opposition to the discharge may, by general order No. 24, be filed. This case will stand for hearing on the specifications filed by Bond & O'Neill. Either party may take further testimony thereon.

BOSMAN (SCHULTZ v.). See Case No. 12,488.

BOSQUET (COPLAND v.). See Case No. 3,212.

BOSS v. The GENERAL JACKSON. See Case No. 5,314.

BOSS (KNOWLTON v.). See Case No. 7,901.

Case No. 1,667.

BOSSEAU v. O'BRIEN.

[4 Biss. 395.][1]

Circuit Court, N. D. Illinois. July Term, 1869.

STATUTE OF FRAUDS — AUTHORITY TO SELL REAL ESTATE—EARNEST MONEY—RATIFICATION—CONSTRUCTION OF AUTHORITY.

1. Authority to an agent to sell real estate must be clear and distinct, of such a character that a fair and candid person must see without hesitation that the authority was given.

2. An answer to a letter from a real estate agent asking for authority to sell lands, "I will sell" on terms specified, does not confer the authority on the agent to make a contract of sale.

3. Correspondence between the real estate agent and the owner, concerning the lands and the price and the terms of sale, do not constitute authority to the agent to make a contract of sale, even on the terms specified by the owner.

4. The receipt of earnest money by the assumed agent does not bind the principal as a part performance.

5. Ratification, to be effectual, must be unequivocal, and with full knowledge of all the facts.

6. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification.

7. An authority to sell must be strictly construed, and the purchaser must show that the contract complies fully and entirely with the authority.

8. An agent making a contract of sale should forward a copy of the contract to the principal.

In equity. This was a bill filed by Peter Bosseau for the specific performance of an alleged contract of sale made by the defendant [Cornelius O'Brien] with the complainant in August, 1864, for the S. ½, Sec. 25, 32 N., R. 12 E., in Kankakee county. [Bill dismissed.]

John Woodbridge, Jr., for complainant.
I. N. Stiles, for defendant.

DRUMMOND, District Judge. The question is whether there was a contract of sale made at that time of such a character that the plaintiff is entitled to have the contract performed. The defendant was at that time the owner of the land. The bill sets forth that a contract was made, and the answer denies it, and insists upon the statute of frauds. The plaintiff seeks to make out the existence of the contract through a sale by James McGrew as the agent of the defendant, and the testimony consists mainly of the letters and correspondence between Mr. McGrew and the defendant, and the deposition of Mr. McGrew himself.

It is proper, in the first place, to look at the written evidence, about which, of course, there can be no mistake. The first is a letter from Mr. McGrew to the defendant, dated December 28, 1863. It should be observed that McGrew resided at Kankakee city and the defendant at Lawrenceburg, Indiana. In that letter Mr. McGrew informed the defendant what the amount of taxes upon his land was, and stated to him a willingness on his part to pay the same, also asked him whether the lands were for sale and at what price, and informed him he was a real estate agent and willing to serve him. The defendant, on the 29th of January, 1864, acknowledged the receipt of this letter, and stated to Mr. McGrew that Mr. A. B. True had done business for him and attended to his taxes. He asks whether the lands in his neighborhood are salable, and at what price, and he makes this remark at the end of his letter: "Should I make up my mind to sell the whole or a part of my land, I may take occasion to avail myself of your services." Mr. McGrew answers this letter on the 5th of February, in which he says, "There is beginning to be some sale for real estate in this country," telling him that he should think his lands ought to sell for five to eight dollars an acre; that there is a great deal of unimproved land offered for sale, and that it is difficult to realize on that kind of land. On the 22nd of March McGrew writes to the defendant and asks him at what price he will sell two or three of his quarter sections of land; tells him if he could get ten dollars an acre on what was called canal terms, being one-fourth down,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the balance in one, two, and three years, with six per cent. interest annually, in advance, that it would be a good sale. The language is "would be a big sale." On the 14th of May the defendant replies to this letter, saying that he would not like to take ten dollars an acre for the land referred to by Mr. McGrew; but he says, "I have two quarter sections near Manteno (the land in controversy,) which I will take ten dollars per acre for on the time and terms you propose."

It appears by the testimony of McGrew that when he received this letter he advertised the land for sale. On the 20th of May, Mr. McGrew answers this letter, and gives him a description of the land which he, the writer, understood the defendant owned, and among which tracts are the S. E. and S. W. ¼, Sec. 25, and says that he thought he could sell those tracts and another one, being the ones near Manteno, at ten dollars an acre, but he had been so long in getting an answer that the parties to whom he thought he might sell might have bought elsewhere. He says, "Please answer, and state if you still own the lands as above described. If so, shall I sell the three first-named tracts at ten dollars per acre if I have an opportunity?" two of which tracts were the south half of section 25; so that there was a distinct question put by Mr. McGrew to the defendant whether he should sell this tract of land. This letter does not seem to have been answered by the defendant until the 2nd of July, when he says, "I will sell the two quarter sections in section 25, 32 north, range 12 east, at ten dollars per acre on the terms stated in your former letter. These tracts are those next to Manteno."

It is to be observed that the question had been distinctly put, "Shall I sell?" The defendant does not tell him he may sell, but he says, "I will sell" these tracts of land. This is all there was of a written character, up to the time that the transaction took place between McGrew and plaintiff—indeed only authority, oral or written, upon which it could be said Mr. McGrew had a right, as representing the plaintiff, to dispose of this land. The question is whether, upon this evidence, as it stands, there was any written authority to sell the land. It seems to me clear that there was not. He had asked for the authority. The authority had not been given, but he had said, "I will sell the land," I do not authorize you to sell it, but "I will sell" it on the terms that you name.

On the 11th of August, 1864, a bargain was made between the plaintiff and Mr. McGrew of which this writing is the evidence:

"Received of Peter Bosseau one hundred dollars to apply as part of the first payment on the south half section 25, 32, R. 12 E. sold to him this day at ten dollars per acre, on canal terms, balance of first payment to be made as soon as contract is made which will be within thirty days, payments to be as follows: one-fourth down, balance in one, two and three years, with interest at six per cent. annually, in advance. Cornelius O'Brien, by James McGrew, Agent."

And on the same day McGrew wrote to the defendant stating that he had sold the tract of land at ten dollars an acre on canal terms as he, the defendant, "had instructed him" with the request that the defendant would send a warranty deed properly executed, and that he would return the notes and mortgage for the deferred and the cash payment. On the next day, August 12th, he wrote to the defendant, stating that he had forgotten to name the party to whom the deed should be made and with whom the transaction had taken place; and in this letter he names the plaintiff Peter Bosseau and the consideration money—three thousand two hundred dollars. To these letters he received no reply from the defendant, and it is to be remarked that he did not tell him the whole of the arrangement that had been made between him and the plaintiff; in other words, he did not send him a copy of the receipt which he had given, as the agent of the defendant, to the plaintiff. One quarter of the cash had not been paid, but only one hundred dollars.

Not having received any reply to these letters of August 11th and 12th, he wrote again on the 12th of September to the defendant, in which he recapitulated that he had on the 11th of August sold for him the south half section 25, at ten dollars an acre on canal terms as he had been "instructed to do" by the defendant. He repeats that he had sent for a warranty deed, and refers to the fact that he had not given the name of the purchaser and that might be the reason why the deed had not been sent, and in this he reiterates the request that a deed should be forwarded, at his earliest convenience, and says that he will then send the cash payment and notes and mortgage. On the 9th of November he writes again to the defendant, stating that he had expected to see him before that time. Between the date of these last two letters he had seen the defendant. He had gone to Lawrenceburg and had an interview with the defendant. That was in October, and he says, "I called the defendant's attention to the matter of making the deed to Bosseau of said lands. He stated that he and his wife would be at Chicago within the next two or three weeks, and that he would then come down to Kankakee, execute the deed, and have the mortgage and notes executed to them and the matter closed up." The statement of the defendant in relation to what took place at that time is, that he distinctly and emphatically disavowed any connection whatever with this act of McGrew as his agent.

On the 1st of December, the defendant wrote McGrew a letter in which he says, among other things, "As soon as I feel better I will come out; until which time I will

postpone further action as to making a deed, etc. If you can inform the parties who intended to purchase," etc. Nothing being done, the defendant not having been to Kankakee nor seen McGrew, on the 30th of January, 1865, the latter again writes to the defendant, introducing Mr. Comstock, who now first comes upon the scene, to whom he had intrusted the notes and mortgage and the cash payment that had been made, with a request that he would hand the whole over to the defendant, and in this letter he reiterates the expression so often used in this correspondence, "This is the land I sold for you last summer at ten dollars per acre, on canal terms, as you authorized." Comstock's deposition has been taken, and he states that he went to Lawrenceburg, and that he tendered the money and notes and mortgage to the defendant, and that they were declined; and defendant says that he distinctly refused to have anything to do with it in any way, denying all authority on the part of McGrew to make sale of his land. The money, notes and mortgage thus being refused by the defendant, were returned to Mr. McGrew, and were produced from his possession when his deposition was taken. The deed, notes and mortgage are added as exhibits to his deposition. The money, the one hundred dollars which was paid on the 11th of August, still remains with Mr. McGrew. The remainder of the cash payment was not received by Mr. McGrew, and of course remains with the plaintiff.

There are three notes which, as now written, bear date August 11, 1864, payable one, two and three years after date, respectively for eight hundred and ninety-six dollars, eight hundred and forty-eight dollars, and eight hundred dollars, signed by Peter Bosseau. The testimony of McGrew is that these notes and the cash, were tendered within thirty days. The date of the notes was originally January, 1865. That is admitted by Mr. McGrew in his testimony, and it is manifest, upon an inspection of the notes, that such was the fact. The original date is erased, and August 11, 1864, written over the erasure; what day in January the notes bore date is not perhaps very clear, but it is certain that the original date was January, 1865; in fact, it must have been January 30 or 31, 1865, because the mark of the "3" is very distinct in all the notes. The same is true of the date of the mortgage.

The only serious question that I can see in the case is, whether the defendant ever ratified this act of McGrew as his agent. McGrew did make the sale; that is, he made the contract. Was it ratified by the defendant? I do not think that it was; neither do I think that the terms upon which the defendant said he would sell the land, even if we can suppose that there was an implied authority to sell, were complied with in the contract. A quarter cash was not paid at the time that the contract was made. If the plaintiff relies upon the contract as binding, he must show that the contract was made in conformity with the instructions of defendant; and if it was a complete contract, then those instructions must have been complied with fully and entirely; and it cannot be pretended, I think, even if we concede that he was instructed to sell in this ambiguous sort of a way, that the instructions were complied with. He clearly was informed that McGrew had sold the land for him but, as I have said, he was not told the precise terms of the contract. He was not told, in other words, that only one hundred dollars earnest money had been paid, and that the remainder was to be left until the deed was obtained. A copy of the receipt was not forwarded to him as it ought to have been. No answer was made to these letters. That did not look like ratification. The deed was not forwarded. That certainly did not look like ratification. The defendant did not manifest any desire to receive the cash payment. The only doubtful circumstance is a paragraph in the letter of December 1, 1864, but, fairly construed, can that be treated as a ratification of this act of McGrew? Does it look as though the defendant understood there was a certain contract binding upon him, with which he had anything more to do than simply to carry out its terms as agreed upon between McGrew and the plaintiff? I think not. He says, "I will postpone further action as to making the deed." of which you can inform parties "who intend to purchase." Not "who have purchased," but "who intend to purchase." He clearly does not treat it or regard it as a contract complete and finished, and in relation to which all he had to do was to make a deed and receive the money, notes and mortgage.

The fair interpretation of this whole arrangement, I think, is this, that McGrew, being a land agent, was very anxious to sell all he could, as by sales he obtained his commission and his living. The very moment he was told defendant was willing to sell this land, he advertised it, claims that he had authority to sell, repeats again and again that he was authorized to sell, and sells, presuming that the defendant would ratify the act, and it being understood, that there was a certain something to be done by the defendant in which he was to have the power of choice and determine as to the nature and character of the transaction.

Independent of the writings there is nothing but the testimony of Mr. McGrew and whatever would have a bearing upon the contract made with the plaintiff, of course it would be affected by the statute of frauds. All that the plaintiff can rely upon is his written contract. There is no pretence that there was or could be, an oral contract with such payment and part performance as will take it out of the statute of frauds. Whatever possession there was, was unknown at

the time; and so far as the evidence shows, not authorized by the defendant. The defendant never received any portion of the money, and there was not, therefore, what could be properly called part payment and the possession of the land. I say it must have been the understanding of the parties that there was some action to be done on the part of the defendant; that it was incomplete and unfinished because of the testimony relating to the notes and the mortgage. They were not executed until January, 1865—nearly six months after the transaction had taken place. The explanation given by Mr. Comstock of the alteration in the date of these notes, which McGrew admits he made, was that the defendant ought to have interest from the date of the contract; but while that may be true, and a sufficient explanation of the erasure and the new date to the notes, still it also demonstrates that the transaction was unfinished on the 11th of August, 1864.

It is nothing more than fair that we should take Mr. McGrew's explanation of his own conduct. From this it will appear that although he said he was authorized to make this sale, yet that it was an inference of his. He nowhere says in his deposition that he was authorized, but he presumed or supposed that he was authorized. He is asked whether he was authorized by O'Brien to receive the one hundred dollars. "A. I considered myself so. Q. Give your reason for considering yourself authorized by Mr. O'Brien to receive that payment of one hundred dollars. A. From my correspondence with Mr. O'Brien, the fact that he knew I was acting as real estate agent, and that I had written him once that I had an offer for some of his lands, which he declined but in reply stated that he would take ten dollars per acre for this on the terms that I had specified as connected with the other offers." That is his explanation. Compare it with the facts. O'Brien had told him he would take ten dollars an acre for this half section of land. After he had told him so he had asked him, "Shall I sell for you" on such terms? No reply. He at the time did not consider it authority to sell, but he asked for authority. That the authority was given, was an inference of Mr. McGrew, not warranted, as I think, by the facts.

It is sought now to make out a ratification. I think the facts do not warrant the conclusion that there was a ratification of this unauthorized act of Mr. McGrew. This concerns real estate by which the defendant is to be deprived of his title to the land. The evidence should be clear and distinct, and of such a character that there could not be any hesitation in the mind of a fair and candid person, when scanning it, in coming to the conclusion that the authority was either given or that the act which was done by the party was ratified as the act of the principal. It will be observed that McGrew, after being subjected to a pretty rigid cross-examination, when asked when the notes and mortgages were tendered to him, says that they were tendered immediately after their execution. That must have been the latter part of January or the first of February 1865. I have thus gone through with all the evidence that bears upon the question, and have come to the conclusion that there was no authority given to McGrew by the defendant to sell this land, neither has there been any ratification by the defendant of the contract made by McGrew on the 11th of August, 1864.

I have thus far said nothing of the interest which Mr. Comstock had in this property, or of the circumstances of the alleged inadequate price for which the property was sold. Mr. Comstock was equally interested with the plaintiff in this contract, advanced some of the purchase money, and even one-half of the hundred dollars that were originally paid, and helped to make up the tender that was offered to the defendant by Comstock in February, 1865; but I lay no particular stress on these additional facts. They might become material under another aspect of the case. The bill will be dismissed.

NOTE [from original report]. For a full discussion of the question, what is sufficient to constitute an agency, see McConnell v. Brillhart, 17 Ill. 360, where, on full review of the authorities, it is laid down as the rule that no form of language is necessary, and that notes and memoranda indicating such intent are sufficient. Fry, Spec. Perf. § 353 et seq. The contract need not be on one piece of paper nor entered into at one time, but several papers may be connected. Esmay v. Gorton, 18 Ill. 483. The English cases hold that a contract may be made out from correspondence. Stratford v. Bosworth, 2 Ves. & B. 341; Huddleston v. Briscoe, 11 Ves. 583; Western v. Russell, 3 Ves. & B. 187. Ratification will be presumed on slight grounds, and will take a case out of the statute of frauds. Story, Ag. §§ 244, 445; MacLean v. Dunn, 4 Bing. 722. But must be with full knowledge of all material facts. Owings v. Hull, 9 Pet. [34 U. S.] 608; Hays v. Stone, 7 Hill, 128.

If a party places his refusal to execute a contract on a different ground, he cannot afterwards deny the agent's authority. Harding v. Parshall, 56 Ill. 219. A party rescinding a contract must return or tender whatever he has received under it. Peoria, M. & F. Ins. Co. v. Botto, 47 Ill. 516, affirming Smith v. Doty, 24 Ill. 165; and Buchenau v. Horney, 12 Ill. 336; Bowen v. Schuler, 41 Ill. 193; Murphy v. Lockwood, 21 Ill. 619. The party against whom a rescission is sought must be placed in statu quo. 1 Hil. Vend. 33 et seq.; 1 Sugd. Vend. 306; Johnson v. Jackson, 27 Miss. 498; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Kinney v. Kiernan, 49 N. Y. 164, affirming Wheaton v. Baker, 14 Barb. 594. See, also, Masson v. Bovet, 1 Denio, 74; Moyer v. Shoemaker, 5 Barb. 322. 323 citing many authorities; also, Voorhees v. Earl, 2 Hill, 292, 293; Coolidge v. Brigham, 1 Metc. [Mass.] 550; Longworth v. Taylor [Case No. 8,490]. This is true though the article received was of inconsiderable value. Conner v. Henderson 15 Mass. 321; Ayers v. Hewett, 19 Me. 281; Boston v. Nichols, 47 Ill. 356. Or even the note of the other contracting party. Kimball v. Cunningham, 4 Mass. 502. Authority to an agent is to be construed to include all necessary or usual means of executing it with effect. Paley Ag. 189;

1 Pars. Cont. 57; Story, Ag. § 58. As to what is sufficient authority to an agent to make a valid contract for the sale of real estate, consult Bissell v. Terry, Sup. Ct. Ill. Sept. term, 1873, opinion filed Jan. 30, 1875 [69 Ill. 184].

BOSSIEUX (MUTUAL BLDG. FUND SOC. v.). See Case No. 9,977.

Case No. 1,668.

The BOSTON.

[Cited in The Henry Ewbank, Case No. 6,376. Nowhere reported. Opinion not now accessible. See Case No. 1,673.]

Case No. 1,669.

The BOSTON.

[1 Blatchf. & H. 309.][1]

District Court, S. D. New York. Oct. 19, 1832.

PARTIES—ADMINISTRATOR—OBJECTION — SHIPPING —APPOINTMENT OF MASTER —BOTTOMRY—LIENS —PRIORITY.

1. An objection to the competency of an administrator to appear as claimant in a suit in rem, must be taken on his appearance, and before sale of the property and payment of the proceeds into court.

2. An administrator appointed in another state, who has not taken out letters within the jursidiction of this court, may intervene in behalf of his intestate, in a suit in rem in this court against a vessel which was the property of the intestate at his death.

3. In this country, no formalities are necessary to the due appointment of a shipmaster The registry acts of the United States in regard to vessels and their masters, are only designed for the protection of the revenue, and do not affect the validity of a master's authority.

4. Where, upon the death of the master and sole owner of a ship during a voyage, the mate took command, and his name was substituted in the ship's register for that of the former master, and he navigated her for a year, without objection, and with the knowledge of the widow and children and agent of the former master: *Held*, that his acts done in the capacity of master were valid as against the representative of the deceased owner.

[Cited in Seaver v. The Thales, Case No. 12,594.]

5. The lender upon bottomry is bound to ascertain that the money is necessary for the particular voyage, as well as that the master has no other resources on hand.

6. It seems that the lien of a material man is assignable.

[Distinguished in The Champion, Case No. 2,583; The R. W. Skillinger, Id. 12,181. Cited in The Sarah J. Weed, Id. 12,350.]

7. Ordinarily, the lien of a material man will not be upheld beyond the termination of the voyage for which the supplies are furnished.

[Cited in Marsh v. The Minnie, Case No. 9,117; The H. B. Foster, Id. 6,291; The Wexford, 7 Fed. 681; The J. W. Tucker, 20 Fed. 133; The Young America, 30 Fed. 792.]

8. Parties who could not sustain an original action in rem, may, sometimes, on petition, be paid out of a surplus remaining in court.

9. This is usually done in cases where the fund would otherwise be paid over to a foreign owner and domestic creditors would be left to a merely personal remedy, against such owner, before a foreign tribunal.

10. Freighters, whose goods are disposed of at a foreign port to raise money for necessary repairs, have a lien upon the vessel for the value of the goods at the port of destination.

[Cited in Dupont de Nemours v. Vance, 19 How. (60 U. S.) 170; Janney v. The Belle Lee, Case No. 7,211.]

[11. Cited in The Champion, Case No. 2,583, to the point that want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien itself.]

[12. Cited in The Rapid Transit, 11 Fed. 335, to the point that, as between claimants of the same class, the last furnisher of supplies may sometimes be preferred to the first.]

In admiralty. The first libel in this case was filed, in rem, by William Morrison, to enforce a bottomry bond executed to him in Glasgow, in Scotland, on the 3d of November, 1831, by Henry Upton, as master of the ship Boston, an American vessel. In February, 1831, Oliver P. Finlay, at that time master and sole owner of the Boston, died while his ship was on a voyage from Greenock, in Scotland, to Charleston, in South Carolina, and Henry Upton, then chief mate, took command, and carried the vessel into the latter port. He there gave her up to the confidential agent of Finlay, who was also consignee, and was continued by him in command. Upton's name was entered as master in the ship's register, and he was sent back with her to Greenock. The family of Finlay were, at that time, in Greenock, though his domicil, at the time of his death, was at Alexandria, in the District of Columbia. Finlay's family made no objection to the appointment of Upton, as master, and returned with him in the vessel to this country. On the 3d of October, 1831, William D. Nutt, the claimant in these actions, was appointed, at Alexandria, administrator of Finlay, but took out letters of administration at no other place. On the 3d of November, 1831, the Boston being then at Greenock, Upton bottomed her to Morrison, the libellant, as security for a sum of money advanced by him. Morrison, who knew the circumstances under which Upton got possession of the ship, and was advised by counsel that his power to bottom her was clear, purchased the claims of McLelland & Co., creditors of the vessel, for debts incurred by her upon her previous voyage, and for which those creditors threatened to arrest her. None of those debts were incurred for the necessities of the ship for the voyage to which the bottomry referred. One of them was for materials furnished for the necessary equipment of the vessel upon her preceding voyage. To this libel two defences were interposed. The first was the claim and answer of Nutt, as administrator of Finlay, denying the authority of Upton, as master of the Boston, to execute a bottomry bond. The other was

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

the answer of Dixon & Co. and others, the libellants in the second suit, asserting the authority of Upton as master, but denying the validity of the bond executed by him to Morrison. The second libel was filed by Dixon & Co., Mitchell & Co. and Pattison & Duncan, merchants and owners of parts of the cargo of the Boston, which were sold by Upton, in Charleston, for the necessary repairs of the vessel. It appeared that, on the 7th of November, 1831, the Boston sailed from Greenock for New-York, but was compelled to put into Charleston for repairs, and that, in order to raise there the necessary money, the master was obliged to sell part of the cargo, being goods, the property of the libellants, who claimed $3,819.18, which was the value at New-York of the goods thus sold. To this libel the other parties interposed claims and answers. The Boston arrived in New-York on the 14th of February, 1832, and, in the following month, the above libels were filed. The vessel was subsequently sold, and the proceeds brought into court to await the determination of the claims.

David B. Ogden and Richard M. Blatchford, for Morrison.

Daniel Lord, Jr., for Pattison & Duncan.

John Duer, for Dixon & Co. and Mitchell & Co.

Seth P. Staples, for Nutt.

BETTS, District Judge. The right of Nutt, the claimant, to intervene, is contested by the libellants in both causes, because he received his appointment as administrator from a foreign jurisdiction, and did not acquire thereby a persona standi in this court. It might be sufficient to say, in answer to this objection, that the suits being in rem, and the vessel having been sold and the proceeds brought into court, the libellants must satisfy the court affirmatively of their right to withdraw the funds, before they will be decreed in satisfaction of the suits, whatever may be the legal rights of the claimant thereto. Had the objection been raised when the claimant first entered an appearance, the court would have been bound to determine his competency to contest the suits. If that decision had been adverse to him, the only consequence would have been a change of parties to the record, or a decree of condemnation and sale of the vessel as by default, and the deposit of the proceeds in court; and, when the libellants sought satisfaction out of the proceeds, the court would, at the mere suggestion of any party showing a slight color of interest, have required evidence of their title, beyond the defaults, before the moneys would have been paid to them. If, then, the foreign administration with which the claimant is clothed, is not deemed sufficient authority for him to interfere with and control the progress of the suits, it would entitle him to intervene as a petitioner, praying that the funds in court may be reserved for the legal representatives of the owner of the vessel, and to put in question the right of the libellants to receive them. The court would feel no difficulty in allowing an administrator, who received his appointment at the place of the owner's domicil, to interfere thus far with respect to proceedings against a vessel not arrested at her home port, and in granting all necessary indulgence to enable the estate to become formally represented in the action. But I am not aware of any benefit a new arrangement of parties would afford. The objection is merely technical, and, if sustained, the only consequence will be an order to reform the pleadings, by substituting an administrator with a New-York appointment. The case is now fully before the court, and a longer delay does not promise advantage to any party. I am disposed to admit the intervention of the foreign administrator to have been proper, at least in so far as his acts may be regarded as invoking the court to retain the funds until the libellants give full evidence of their right to them.

There is less reason to notice objections to the capacity of the administrator to make himself a party to the suits, because, it being yet doubtful whether the fund in court is adequate to the demands of both suits, the libellants stand as antagonist suitors with respect to each other, as well as to the administrator. They have not only impliedly waived their right to object to the claimant's making himself a party, by admitting him to appear and answer, and propounding to him interrogatories and reading his replies; but each interposes a claim and defence in opposition to the particular demand of the other, as respects its right to priority. The court must accordingly, on these issues, determine the rights of the libellants in both suits to a lien on the ship, even if no intervention is made on the part of Captain Finlay's estate, and it may, therefore, be of no immediate moment in the cause, whether the cumulative objections of the administrator are admitted or not. But the question may become one of moment in the practice of admiralty courts, which are largely concerned in disposing of vessels and their proceeds, on demands arising, as in the present cases, beyond their local jurisdiction, prosecuted by foreign creditors, and where the vessels and their proceeds are claimed by owners resident abroad. And, as, from the magnitude of the present demands, the judgment of higher tribunals will probably be invoked in these cases, I think it proper to decide the point, and suggest some of the considerations upon which the decision is founded, in order that an authoritative rule on the subject may be declared by the courts of appeal.

Courts proceeding according to the course of the common law in this country and in

England, disregard, as a general principle, letters of administration emanating from foreign tribunals, and require the representative of a deceased party, so authorized, to procure letters within the jurisdiction where the court sits. Goodwin v. Jones, 3 Mass. 514. There are exceptions to this rule in the practice of particular states. McCullough v. Young, 1 Bin. 63; Glassell's Adm'rs v. Wilson's Adm'rs [Case No. 5,477]; Childress v. Emory, 8 Wheat. [21 U. S.] 642. But it is not important, on this occasion, to investigate the extent of the diversity, or the grounds upon which it rests.

Two principles, it is believed, are common to the jurisprudence of all common law courts—that the administrator has the legal title to the personal assets of his intestate, until final distribution of them is made (Bac. Abr. "Executors & Administrators," H 1; 2 Bl. Comm. 494; Toll. Ex'rs, 80; 2 Griff. Law Reg. 352); and that the ownership and distribution conform to the law of the domicil of the deceased, without regard to the law of the place of his death, or the situs of his property (Toll. Ex'rs, 133; Com. Dig. "Adm." B 11; Harvey v. Richards [Case No. 6,184]). This title is not an absolute property in the administrator, but it clothes him with the right of possession and control of the property, until the satisfaction of debts and legacies, as completely as if he were its proprietor. Slack v. Walcott [Id. 12,932]. Under that title, he may undoubtedly take possession of assets in a foreign country, when not prevented by the local law (Com. v. Griffith, 2 Pick. 11, 14); and a voluntary payment of a debt to him, by a foreign debtor, seems to be an acquittance of such foreign debtor (Doolittle v. Lewis, 7 Johns. Ch. 49; Stevens v. Gaylord, 11 Mass. 256). See Dawes v. Head, 3 Pick. 128; Davis v. Estey, 8 Pick. 475. The impediment to the exercise of the full powers of an administrator, in a jurisdiction foreign to that granting him letters of administration, seems, then, to be the technical objection of the law courts, to his reception on the record as a party. That the incapacity is essentially technical and formal, is manifest, because, the party clothed with administration at the place where the intestate died, is admitted, of course, to administration, where the property of the decedent is found. The latter administration is not even claimed to be an original authorization of representation, but is regarded as only ancillary to that. Harvey v. Richards [supra]; Stevens v. Gaylord, 11 Mass. 256; Davis v. Estey, 8 Pick. 475. A cardinal principle, in which the practice of admiralty courts differs from that of courts of common law, is, that parties prosecute and defend, in the civil law tribunals, upon their rights as existing at the institution of the action, without regard to the state of parties when the right of action or defence accrued, rights of action, or choses in action, as they are termed at law, vesting in their assignee, when properly transferred, all the privileges and remedies possessed by their assignor. Accordingly, the party in whom a debt is legally vested, sues for it in his own name, the same as if it were a chattel. The ordinary course of practice would, therefore, well admit a foreign administrator to represent the interest of his intestate in an admiralty court, without the aid of an ancillary commission from the local authorities; and, had the present action been in progress, in personam, against the decedent, I should not feel required to hold his representative, commissioned at the place of his domicil, as disqualified from intervening under his Virginia appointment, answering the libels and contesting the suits in that capacity, when such suits might, in their result, operate as a charge on the assets of the estate. The present proceedings are in rem, and, for the time being, hold the vessel in arrest, and in effect appropriate it to the demands in suit. The fruit of the actions is, to sequester the effects of the intestate, and place them at the disposal of the court. They cannot, therefore, be withdrawn from that custody by the creditors, or by any other party, until the court is satisfied they are applied conformably to the rights of all parties interested in them. The very purpose sought to be attained by the law courts, in requiring an administrator to sue within the jurisdiction which has conferred his authority upon him, is answered in an admiralty court by its established course of procedure; for, notice of the widest notoriety is given, by arrest of the property, to all persons concerned, to make their claims against it, and the property is retained in the custody of the law until the relative rights of creditors are made known and adjusted, which is all, if not more, than can be attained, in courts of law, by force of an administration bond. It is not to be supposed that an administrator could be made liable upon his bond to one class of creditors, for assets allotted to other creditors by the decree of a court of admiralty proceeding against the property in a suit within its jurisdiction. The claimant is thus, manifestly, the real party in interest in this controversy, the law vesting in him the title to the ship, and imposing upon him the duty of protecting it for the benefit of the estate he represents. Accordingly, he is to be directly affected by the decision of the litigation, in whatever way that interest may be represented in court; and I am disposed to allow him to come into court directly, under the capacity and right imparted to him by his letters of administration, without requiring him to subrogate another functionary to perform the same offices, and to the same end. As the law of a decedent's domicil is looked to, to ascertain who succeeds him in the enjoyment and possession of his property, there seems to be a marked propriety in equally noticing who, by the same law, would be the appropriate party to dis-

pose of or reclaim such property. And, particularly, claims in relation to vessels employed in navigation, which, in their normal state of transition, can scarcely be regarded as having any situs, within the acceptation of the law, other than, figuratively, that of the residence of their owners, should, in admiralty and maritime courts, which are, in a great degree, governed by the lex gentium, be pursued or defended in the names of the persons who, by their domicil, have title to the vessels.

I think, then, that on general principles, the claimant has an adequate persona standi in judicio, to intervene in these causes, for the protection of his intestate's estate, and to contest both the validity of the demands brought against the ship, and all claims upon the proceeds in court. Independently of the objection, that the libellants are too late in taking exception to the competency of the claimant, I overrule the exception, on the ground that a foreign administrator is admissible in proceedings in rem, in admiralty, upon his legal title in the property, to contest any suit against it.

The interposition of the administrator varies the issues between the libellants in only one particular of importance. The libellants in each action, in their answer to the rival suit of the others, admit full authority in Upton, as master of the ship, to do the acts set up as constituting the respective liens articled upon, other than that Mitchell & Co. deny that the instrument set up by Morrison is a bottomry bond, entitled to priority of satisfaction over their demand. The administrator, on the contrary, denies that Upton was lawful master of the ship, and that either debt is so created as to become chargeable upon the vessel.

The questions, then, which are raised by the pleadings, are, whether the bottomry bond sought to be enforced in the first action, and the demands set up in the second, are liens upon the vessel; and, if both are so, which has priority of privilege. It is necessary, in the first place, to ascertain what authority Upton possessed, as master, either to bottom the ship, or to sell part of the cargo. For either of these acts, two things must be shown—a valid appointment as master, and that the act was within the scope of the authority conferred.

In some maritime countries on the continent, the mode of a master's appointment is prescribed by law. Jac. Sea Laws, 83, 85, 87. In this country and in England, the law does not interfere in relation to the qualifications or mode of appointment of a master, further than as regards his national character. He is, pro hac vice, the agent of the owner; and any mode of authorization competent to give power to one man to act for and bind another, is sufficient to constitute him master of a ship. The registry act of the United States requires that the name of the master shall be inserted in the register of the vessel (Act Dec. 31, 1792, § 9; 1 Stat. 291); that, on a change of ownership, a new register shall be taken out (Id. 294, § 14); and that, when the master is changed, the register shall be produced to the collector, and a report be made to him, by the owner, or the new master, of such change, whereupon the collector shall endorse a memorandum of the change on the register, and subscribe his name thereto. Id. 295, § 15. None of these provisions, however, whether complied with or not, affect the validity of the master's authority. They are only designed to secure the revenue against the allowance, to foreign vessels, of privileges which only vessels belonging to citizens of the United States are entitled to enjoy. The provision, that a change of master may be reported to the collector by the new master alone, abundantly shows, that congress did not intend that the collector should make any inquiry into the legality or sufficiency of the master's authority. His legal appointment is assumed, upon his producing the ship's register, and he is, accordingly, registered as the master.

In the case before the court, the collector and naval officer of Charleston, on the 14th of March, 1831, endorsed on the ship's register the substitution of Upton, as master, in place of the late master, Finlay. That the authority of Upton, as master, was complete as to all persons dealing with him without notice of the manner in which he acquired command of the vessel, can scarcely admit of argument. He sailed the vessel between the United States and Europe, from March, 1831, to February, 1832, performing all the offices, and exercising openly the powers of master; and, although the manner in which he continued in the command of the vessel, after her arrival in the United States, was peculiar, and without the direct authorization of a legal owner, yet, as such possession continued openly and notoriously for six or eight months, and the vessel made repeated voyages, earning large sums of money from freights and passengers, which were disbursed by Upton, in this country, with the knowledge of those most directly interested in the vessel, it is too late for them now to disavow and repudiate his acts, because of the want of a regular appointment. They must be held to have acquiesced in the authority he assumed, and, by such ratification, to have given to it all the validity it would have derived from the most direct and formal appointment. The Alexander, 1 Dod. 278. At least, it would be most hazardous to trade, and unjust towards all persons putting confidence in a state of things conformable, in all respects, to ordinary usage, to hold that foreign creditors were bound to run the hazard, in their dealings with Upton, of proving that he originally acquired command of the vessel from the legal owner, and by positive appointment. It is enough for them to show that he was in possession

of her, under such circumstances as fairly proved that her owners must know the fact; and the necessary authority for his acts, as master, will then be implied by law.

These considerations establish the right of the libellants in the second suit to look to the vessel or her owners for the performance of the contract of affreightment made with them by Upton. It is contended, however, that, since Morrison knew how Upton came into possession of the vessel, he was bound to acquaint himself with the manner in which he obtained the authority of master, which he subsequently assumed to exercise. There can be no question of the bona fides of dealing with a master of a ship, in a foreign port, in the usual course of business, under circumstances like those which existed in this case; nor can the legal competency of such a master to hypothecate the vessel to a bona fide creditor be doubted. The Alexander, 1 Dod. 278; The Tartar, 1 Hagg. Adm. 1. Even if Morrison is to be presumed to have been cognizant of all the facts connected with Upton's possession of the vessel, I should feel no hesitation in declaring that such possession was rightful, and that all parties interested in the vessel or her cargo were bound by the acts of Upton, in the capacity of master, as long as he was not regularly displaced by the legal owner. He took command on the death of the former master, at sea. The law devolved it upon him as chief mate. The Favorite, 2 W. Rob. Adm. 255. On the arrival of the vessel at her port of discharge, she and her cargo were placed in charge of the consignee and confidential agent of the former master, who supplied her with freight, and, continuing Upton in command, despatched her to Greenock, having had Upton's name entered in the register as master. His authority to appoint a master in case of necessity is fully supported by the authorities. The Alexander, 1 Dod. 278; The Tartar, 1 Hagg. Adm. 1. Finlay was sole owner of the Boston, and, as she was an American vessel, the law of the District of Columbia, the place of his domicil, would, at home and abroad, determine the right of succession after his death. 2 Kent, Comm. 429. The law of Virginia prevails at Alexandria, his place of residence, and is substantially the same as that of England with regard to the distribution of intestates' estates—one-third to the widow and two-thirds to the children. 2 Griff. Law Reg. 352. Although foreign creditors were bound to notice the law of this country, by which the property in the vessel vested, in the first instance, in the administrator of Finlay, yet they are also to have the benefit of the further notice, that such administration belonged, of right, to the widow, and that, whenever she assumed it, she thereby became so fully clothed with power in relation to the vessel as to be able to ratify any antecedent dealings in respect to it. Foreign creditors might thus be regarded as having transacted business with Upton with her sanction, under the persuasion that she would assume the character of administratrix on arriving in the United States, and thus qualify herself to carry out fully what the law left at her own option to do. She did not, in fact, exercise her right, but allowed the claimant to take out letters of administration. He was duly appointed on the 3d of October, 1831, one month previous to the sailing of the ship on her last voyage, and there is no evidence that he at any time interfered with the authority of Upton, to disavow or control it. As, by the ancient civil law, the heir is considered as being substituted in place of the deceased, and as taking all his rights and responsibilities in such manner as to maintain a perpetuity and entirety, without succession, with respect to the estate, so the administrator is regarded as continuing in himself all the rights and powers of the owner, until his trust is fulfilled by the satisfaction of all debts and a final distribution of the assets. The foreign creditor had a right to presume, either that the right of property was in the widow, in the capacity of administratrix, by intendment of law, so that her acquiescence in the command of Upton would amount to a competent ratification of it, or that the law had supplied a sufficient representative in her place; or he might be authorized to infer a distribution of the estate to the widow and children, so that the confirmation of Upton's authority might be implied from their permitting it to continue. The bona fides of the transaction is further shown by the fact, that advice was taken of counsel. Under all these circumstances, I can feel no hesitation in declaring the competency of the master to hypothecate the vessel in a case justifying a bottomry loan.

But it is contended, that the giving of a bottomry bond was not authorized by the circumstances of the case. An objection applying to the whole claim included in the bond is, that no part of it was advanced to the ship in aid of the voyage she was about to perform. The libellant was bound to ascertain, before he accepted a hypothecation, whether the necessities of the ship demanded the advances for her equipment for the particular voyage, and whether or not the master had other resources, in the port where the vessel then was, for supplying those necessities. 3 Kent, Comm. 171. Neither of these essential facts being made to appear, I am bound to declare the bottomry unauthorized and void at law. Id. 171, 172; Abb. Shipp. (Ed. 1829) 124, note. The bottomry holder doubtless acted in good faith, and made the loan under the persuasion that a threatened arrest of the ship for prior debts would uphold the bond equally as if the loan had been made to relieve her from actual seizure. This, however, is not the law. The pre-eminent security of bottomry, with its high privileges, is sanctioned only when a

ship is under positive arrest, and cannot take effect when the money is advanced only to avert a menaced arrest. The Aurora, 1 Wheat. [14 U. S.] 105. I attach no importance to the fact that insurance was effected by the bottomry holder on the vessel, as he might, perhaps, be considered as having obtained that for the benefit of the owner, and not for his own security.

The question now arises, whether Morrison has, as assignee, the privilege of a material man, for that portion of the debt which arose from advances made for repairs and necessaries furnished to the vessel on her preceding voyage, so that he can enforce that privilege in the admiralty courts of this country. If the right of lien was a continuing one in his assignors, McLelland & Co., I perceive no objection to its continuance in the libellant, who took an assignment of the debt for a full consideration, at the express instance of the master, and would accordingly be entitled to the legal remedies for its recovery which were possessed by the original creditors. It is unimportant whether the general rule of maritime law obtains in Scotland, that repairs and necessaries form a lien on the ship herself, so that the material men could have enforced their claims against the foreign vessel, by an attachment of her there, because, the remedy will be afforded in conformity to the law of this country, and not to that of the country where the debt accrued. The question is, whether McLelland & Co., the assignors of the libellant, were possessed of a lien. McLelland & Co., having lent money to be employed in the repair of the vessel, and under circumstances reasonably importing that credit was given to the ship in that respect, were, by the rule of the civil law, entitled to a priority of payment out of the ship herself, without any express contract to that effect. Abb. Shipp. (Ed. 1829) 108; American Ins. Co. v. Coster, 3 Paige, 323. Has this right been lost by their having permitted the vessel to leave Scotland, or by lapse of time? By the law of England, the shipwright or material man has a lien on a vessel for necessaries, &c., furnished at home, only so long as she continues in his possession. He may retain possession until he is paid, but, if he parts with possession, or furnishes supplies without taking possession, he cannot enforce a claim upon the vessel herself, as a privileged creditor (Abb. Shipp. 109), the courts of that country regarding a lien only in its meaning and application under the common law. Notwithstanding the opinion of an eminent Scotch writer (1 Bell, Comm. 527) that a vessel would, under such circumstances, be liable to attachment for such debt in Scotland, there is great reason to question the accuracy of that statement. Clearly, she would not have been liable in England, without an express hypothecation of her, and it is plain, from both Abbott and Bell, that the house of lords and the highest courts in Scotland are disposed to maintain the same rule of law in this respect in both countries. The English court of admiralty takes cognizance in rem of the lien, when the debt accrued abroad, only in cases where the vessel is expressly hypothecated to secure it. Abb. Shipp. (Ed. 1829) 108, 116. Probably, the acknowledgment of the demand in the bottomry bond, might be deemed, in England, a sufficient hypothecation of the vessel to bind her, for the satisfaction of the debt, to the libellant, as assignee of the creditors who advanced money for supplies, although that bond may be void as a contract of bottomry, reserving a maritime interest. In our courts, the privilege or remedy acquires no additional force from an express pledge of the vessel. Still, the law recognises the validity of such hypothecation. Id. 125, 126, note; The William & Emmeline [Case No. 17,687]. But these specific liens, when recognized and allowed, are not interminable. The creditor, if not limited to the first opportunity for enforcing his remedy upon them, must pursue that remedy with due diligence. Even a bottomry bond becomes void by an omission to enforce it in a reasonable time. Abb. Shipp. 131; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328. But there is no express limitation of time declared by the law, within which an action on a bottomry bond must be brought (Hall's Emerigon, c. 9, § 3); and, as the implied privilege has all the efficacy of an express one, it would, by analogy, partake of the same properties in respect to the time in which it might be enforced. Still, as the value of the security by hypothecation consists in the priority of right it confers, whatever destroys such priority, would necessarily reduce the subject of demand to the state of ordinary indebtedness. The lien which supplies a foundation for the proceeding in rem being superseded, no other remedy can be afforded by this court than that which could be commanded on any contract of a maritime character. In the opinion of the supreme court, the priority of a bottomry creditor cannot extend further than the voyage upon which the loan was made. Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 332. There is a manifest propriety in holding tacit liens to restrictions no less guarded. American Ins. Co. v. Coster, 3 Paige, 323. This court has not required that they should, in all cases, be set up before the vessel leaves the port of refitment, for that would not unfrequently destroy the whole benefit of the advance. The court would, however, require very strong proof, before it would allow a lien to be upheld beyond the close of the voyage then in progress. The Utility [Case No. 16,806]. Ordinarily, if the vessel were suffered to leave the place of refitment, the presumption would be, that other security than that of the vessel was looked to by the material man, and the lien would not be sustained without evidence counteracting that presumption. Zane v. The President

[Id. 18,201]. Upon that principle, this demand in behalf of McLelland & Co. for advances made to supply and refit the ship, would have lost its right of privilege on the return of the vessel to Greenock, and would not be enforced there against the ship by attachment, nor here afterwards upon its original merits, or by force of the hypothecation made to the libellant at Glasgow. American Ins. Co. v. Coster, 3 Paige. 323.

But, the vessel having been sold, and the proceeds being in court, this demand, which was originally privileged, and is clearly within the cognizance of the court, may, under certain circumstances, and on petition of the party, be satisfied out of the fund in court, though it could not be made the ground of an original suit. Zane v. The President [supra]; The Stephen Allen [Case No. 13,361]; The John, 3 W. Rob. Adm. 170. Having been, to a certain extent, privileged in its inception, it lost the right of being levied upon the vessel itself, by means of an implied waiver of the lien. Still, as against foreign owners, it would have been recognised in the English admiralty as an equity entitled to be satisfied out of the remnants and surplus in the registry, arising from the sale of the vessel for other causes. Id. The courts of this country administer the same relief. Gardner v. The New-Jersey [Case No. 5,233]; Zane v. The President [supra]; The Utility [supra]. This would be done to prevent the funds passing over to a foreign owner, leaving the equitable creditor to a personal action against such owner, before a foreign tribunal. The reasons upon which such relief has been afforded do not, however, apply to this case. Morrison is not seeking to arrest the money in his own country, and prevent its being remitted to foreign debtors, but is pursuing it away from home, in the tribunals of the debtor's country. In such case, the money, if withdrawn from the court, will not go to the original debtor, but to his administrator, in the capacity of general trustee, who must apply it according to the legal and equitable rights of creditors, domestic and foreign. Morrison's claim would have no priority of payment in the course of administration; and there seems to be less equity in permitting it to acquire, by decree of the court acting as trustee of the fund, that preference which it would not obtain with the administrator, the regular trustee designated by law. Still, the principle may be broad enough to cover the case, and admit the privilege of the foreign creditors in relation to this surplus; and I am inclined to detain the money a reasonable time, to allow the libellant to present his petition for its application to the advances made for supplies and necessaries furnished the ship at Greenock. I do not definitely decide the point, upon the pleadings and proofs now before me, because the attention of the counsel has not been drawn to the items composing this portion of the debt claimed by McLelland & Co. If the general doctrine is yielded, some part of the charges may not be allowable. None will be paid but such as were originally a lien on the vessel (Sheppard v. Taylor, 5 Pet. [30 U. S.] 675); and, on a petition claiming the funds on that ground, the parties will be prepared to instruct the court fully as to their relative rights. The testimony now in court can be used by either party on that application, should it be made. The libellant, Morrison, having, then, no right of action against the vessel, either upon the bottomry, or as assignee of McLelland & Co.'s lien, his libel must be dismissed, with costs.

The remaining subject for consideration is, the demand prosecuted in the second action. That rests upon the proposition that the shippers of goods on board a general ship, have a lien on her for their value at the port of destination, if they have been disposed of by the master on the voyage, for necessary repairs and refitments to the vessel. This general doctrine has been heretofore considered by this court in the case of The William & Emmeline [Case No. 17,687], and was explicitly adopted by it in the case of The Gold Hunter [Id. 5,513]. The state courts fully recognize the rule of the maritime law on this subject. American Ins. Co. v. Coster, 3 Paige, 323. The evidence shows that the ship, on her homeward voyage, put into Charleston in distress, and that the master, having no other resources for supplying her necessities, caused the goods of the libellants to be sold, and the proceeds to be applied in refitting her. This he had competent authority to do under the exigencies of the case (Abb. Shipp. 245), and the owner is entitled to recover the value of the goods at the port of destination (Id.; 3 Kent, Comm. 173, 175), and may maintain a suit in admiralty against the vessel therefor (The Packet [Case No. 10,654]; American Ins. Co. v. Coster, 3 Paige, 323; Bulgin v. The Rainbow [Case No. 2,116]). A decree will, accordingly, be entered in conformity to these principles, in behalf of these libellants. They are also entitled to costs. After satisfaction of that decree, the claimant will be allowed his costs out of the fund. Let it be referred to the clerk to ascertain the value of the goods so sold, at the time of the arrival of the vessel at this port, and report with all convenient speed.[2] Decree accordingly.

[2] This case does not appear to have been subsequently moved in court.

Case No. 1,670.

The BOSTON.

[1 Gall. 239.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

NONINTERCOURSE ACT—WHAT CONSTITUTES IMPORTATION.

1. If British goods are put on board a vessel, with intent to import them into the United States, they are forfeited under the act of 1st March, 1809, c. 91 [2 Story's Laws, 1115; 2 Stat. 529, c. 24], whether the owner intended thereby to violate the act or not.

[Cited in The Coquitlam, 57 Fed. 717.]

2. If a vessel voluntarily arrive at her port of destination with a cargo, it constitutes in point of law an importation. See 1 Gall. 206 [The Mary, Case No. 9,183.]

[Distinguished in Waring v. Mayor, etc., 8 Wall. (75 U. S.) 120. Cited in U. S. v. Merriam, Case No. 15,759; The Coquitlam, 57 Fed. 717.]

3. The mere coming into port without breaking bulk, is prima facie evidence of an importation.

4. The act of 22d February, 1805, c. 78 [2 Story's Laws, 962; 2 Stat. 315, c. 18], does not vary the general law, as to what constitutes an importation.

[Appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. The information against the schooner Boston and appurtenances alleged, that certain prohibited goods of foreign growth, &c., were, at the Cape of Good Hope, with the knowledge of the owner and master, put on board the same schooner with intention to import the same into the United States, contrary to the act 1st March, 1809, c. 91 [2 Story's Laws, 1115; 2 Stat. 529, c. 24], and that the same goods were afterwards, in pursuance of the same intention, actually imported into the port of Boston. The information against the cargo contained substantially the same allegations, the former being founded on the 6th section, the latter on the 5th section, of the act. There were special claims in the case, which in general admitted the facts, but denied any intention to violate the laws. It was admitted that the facts were truly stated in the decree of the district court [unreported]. From that decree and the accompanying papers, it appeared, that John D. Williams & Co., the principal claimants and owners of the schooner, in October, 1810, transmitted orders to their agent at the Cape of Good Hope, to purchase 168 casks of wine, constituting the bulk of the cargo. That after the president's proclamation of the 2d of November, 1810, was well known, to wit, on the 10th of December, 1810, the schooner sailed from Boston for the Cape of Good Hope. That the cargo was taken on board at the Cape on the 20th of April, 1811, with an alleged destination, as the clearance expressed, "for Boston." That the schooner with her cargo on board, sailed from the Cape for Boston, and voluntarily and without any necessity arrived at Boston, on Sunday the 24th June, 1811. That on the next morning, as soon as the custom-house was opened, a manifest was presented by the claimants, alleging that the schooner was "bound for Boston and St. Bartholomews," and the claimants asked leave to depart for St. Bartholomews, on giving bonds pursuant to the act 22d February, 1805, c. 78 [2 Story's Laws, 962; 2 Stat. 315, c. 18], which permission the collector refused, and immediately seized the vessel as forfeited. There did not appear to have been any concealment of the facts on the part of the claimants, and they rested their defence upon the strong presumptions arising from their open and fair conduct.

G. Blake, for the United States.
C. Jackson, for claimants.

STORY, Circuit Justice. It has been contended by the counsel for the claimants, the schooner and cargo are not forfeited, because the cargo was not taken on board with an intention to import the same into the United States, contrary to the act of 1st March, 1809; that their whole conduct shows that they never meant to violate the law, but intended the importation should be made into the United States, upon the contingency only that it should by subsequent events become lawful; and that within forty-eight hours after the arrival of the schooner at Boston, they gave an ulterior destination to the property, which was perfectly lawful. There is no evidence in the case, to show that a contingent destination for Boston, was in the original contemplation of the parties. The master voluntarily took on board his cargo for that port, and (for aught that appears in the case) came into port, with the intention to make it his port of discharge. The destination for St. Bartholomews appears to have been an after thought, and in the absence of all contrary evidence, I must take that to have been the real fact.

I cannot admit, that to constitute a forfeiture within the act, it is necessary that the party should have intended a clandestine importation or a fraudulent smuggling traffic. The 4th section of the act declares, that it shall not "be lawful to import into the United States, or the territories thereof, any goods, wares, or merchandise whatever, from any port or place situated in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain," &c. "nor shall it be lawful to import into the United States, or the territories thereof, from any foreign port or place whatever, any goods, wares, or merchandise, being of the growth, produce, or manufacture, &c. of Great Britain or Ireland, or of any of the colonies or dependencies of Great Britain," &c. "or of any

[1] [Reported by John Gallison, Esq.]

place or country in the actual possession of Great Britain." The 5th section then declares, that whenever any article or articles, the importation of which is prohibited by this act, shall be imported into the United States, or the territories thereof, contrary to the true intent and meaning of this act, or shall be put on board of any ship, &c. with intention of importing the same into the United States, or the territories thereof, they shall be forfeited; and the 6th section provides, that if such articles are with such intention put on board, with the knowledge of the owner or master of the ship, such ship also shall be forfeited. By the operation of these sections then, not only the actual importation of prohibited goods into the United States, but the lading of them with an intention of importation into the United States, is made an offence. It is true, that the actual or intended importation must be "contrary to the true intent and meaning of the act;" but this means, not that the party should actually intend at all events to violate the law by fraudulent or collusive conduct, but that the actual or intended importation should be from such ports, and of such goods, as are prohibited by the 4th section of the act. The offence does not depend upon the intention of the party to violate the law, but upon his intention to import the prohibited articles. Where the law prohibits certain acts, it is immaterial whether the party supposes them to be an offence or not. In the language of Sir Wm. Scott (1 C. Rob. Adm. 218), "the intention of the parties might be perfectly innocent, but there is still the fact against them of the actual contravention of the law, which no innocence can do away." Admitting, therefore, for the sake of the argument, that the parties did not mean to violate the law by palpable frauds, yet if they did intend to import the cargo into the United States, it was within the prohibition of the law, and the forfeiture attached. But I think it will be somewhat difficult to sustain the admission of innocence in its full extent. At the time of the departure of the schooner, the president's proclamation was universally known. By that public declaration the act in question was revived, from and after the expiration of three months from the date of the same proclamation, unless Great Britain should within the same three months revoke or modify her edicts, so as that they should cease to violate the neutral commerce of the United States. The revival therefore would be absolute on the 2d March, 1811, unless in the interim the offensive orders were revoked. Now it is undoubtedly true, that a merchant had a right to speculate upon the probability of such an event, and certainly it was no crime for him to entertain hopes of such revocation. But the speculation was at his peril, and although he could not, in the East Indies, know whether the act absolutely took effect or not at the time prescribed, yet he could not but know, that if it did, he would be within its penal influence. But admitting in its whole extent the argument, that there was but a contingent destination for Boston, still I think, that if the destination be consummated by a voluntary arrival at the port, it has a retroactive effect, and must be considered as settling the final character of the transaction.

This leads me to consider another position, which has been assumed by the counsel for the claimants, viz. that the facts do not amount in point of law to an importation into the United States; and the 32d section of the collection act of 2d March, 1799 [1 Stat. 651], and the act of 22d February, 1805, c. 78 [2 Story's Laws, 962; 2 Stat. 315, c. 18], § 2, have been relied on, to show the understanding of the legislature, as to the meaning of the term "importation." And upon the footing of these acts it is argued, that an importation is not complete, until a vessel has actually arrived in port under such circumstances, as render her liable to the payment of duties. It is true, that the act of the 22d February, 1805, permits a vessel, arriving with a cargo from a foreign port, to depart with the same cargo for any foreign port without payment of duties, provided the destination be disclosed in a manifest presented to the collector of the port within forty-eight hours after her arrival. But this by no means implies that the cargo had not been imported into the United States. On the contrary, the legislature use a language which evinces a contrary understanding, for the transaction is called a re-exportation. Independent of this provision of the statute, there can be no doubt that the cargo would have been liable to the payment of duties; and it is too much, to contend that an exception from the generality of a law disproves a construction, upon which alone the law can have its ordinary operation. The acts laying duties levy them upon goods, wares, and merchandise, "brought into the United States from a foreign port or place." Act Aug. 10, 1790, c. 39 [1 Stat. 180]. And such a bringing in, if voluntary, is considered as an importation within the purview of those acts. See Act Aug. 10, 1790, c. 39; Act May 2, 1792, c. 27 [1 Stat. 259]; Act June 7, 1794, c. 54 [1 Stat. 390]; Act Jan. 29, 1795, c. 82, etc. [1 Story's Laws, 376; 1 Stat. 411, c. 17]. In the present case, the voluntary arrival with the cargo, would also be an importation within the true construction of the same acts. But whatever may be the true construction of the term "importation," as applied to articles paying duties, I can have no doubt, that here was an actual importation within the true intent and meaning of the act of 1st March, 1809. I take it to be a well settled rule, that the mere coming into port, though without breaking bulk, is prima facie evidence of an importation. But the presumption may be rebutted by showing that it was occasioned by unavoidable accident or over-ruling necessity. The Eleanor, Edw.

Adm. 135, 160. This was the ground upon which the court decided the case of The Mary [Case No. 9,183] at this term. That case has been cited as applying to the present. But in my judgment, no cases could be more unlike. In the case of The Mary, there was no intention of coming into any port of the United States, unless further orders were received, and the actual arrival was occasioned by stress of weather, against the will and intentions of the parties. The vessel sought a temporary shelter from the irresistible violence of the elements. It was there held, that, to constitute an importation, the cargo must be brought into port voluntarily, and with an intention that the same should be there landed or disposed of. It must not barely arrive within the port, but must arrive there voluntarily, and, as Lord Hale expresses it (Hale, Cust. Harg. Law Tracts, 213), "the goods ought to be imported by way of merchandize." In the case of The Mary, the court did little more than apply a principle, long since settled in the revenue system of Great Britain (Id.; Reeves, Shipp. 196), and founded on solid reasons. The law could never be so far at variance with humanity, as to compel the sufferers by shipwreck, or maritime accidents, to be oppressed under the sanction of the revenue. But I cannot find any case, in which it has been held, that the coming voluntarily into a port, with an intention to make that the port of discharge, unless a future contingent destination shall, after arrival, be given to the property, has been held not to be an importation. Much less can it be admitted, that a vessel can have a right to come into port with goods on board, which are absolutely prohibited from importation, merely with a view to consult on an ulterior disposition of the goods. The cases of The Eleanor, Edw. Adm. 135, and The Paisley, Edw. Adm. Append. 17, in my judgment, authorize a very different conclusion; and if such pretences were allowed, it would be difficult to reach a single case of fraudulent importation, until the property had been removed beyond the grasp of forfeiture. I have no doubt, therefore, that the ship and cargo, in the present case, are forfeited for a contravention of the law. The cargo was taken on board with the intention to be imported, and was actually imported into the United States. I must at the same time admit, that the facts disclose a case entitled to great indulgence; and if I were permitted to consult my feelings instead of my duty, I should be disposed to release the claimants from every penalty. Situated, however, as I am, I must apply the rigid rule of the law, and leave to others, upon whom a more agreeable duty devolves, to apply the proper mitigation or remission of the forfeiture. I reverse the decree of the district court, and adjudge the schooner and cargo to remain forfeited, and that the United States recover their costs. Condemned.

Case No. 1,671.

The BOSTON.

[1 Lowell, 464.] [1]

District Court, D. Massachusetts. Aug. Term, 1870.

BILL OF LADING—PLACE OF DISCHARGE—DAMAGES FOR BREACH.

1. It seems, that the owner of the whole cargo of a vessel may order her discharge at any suitable place within the port.

2. Under the bill of lading now in use in the coal trade, the consignee has a right to choose the place of discharge.

[Cited in O'Rourke v. 221 Tons of Coal, 1 Fed. 620; Devato v. 823 Barrels of Plumbago, 20 Fed. 518.]

3. Where the consignee had indorsed such a bill of lading back to the original shipper, and the master was seasonably notified of the fact, he was bound to take the vessel to the wharf to which he was ordered by the shipper.

[Cited in Devato v. 823 Barrels of Plumbago, 20 Fed. 518.]

4. A master having failed to deliver a cargo of coal according to the terms of his contract, the vessel was libelled in the admiralty, and it appearing that since the libel was brought the shipper had replevied the coal, the assessment of damages was postponed until the replevin suit should be determined.

5. In a libel for not delivering coal according to the terms of a bill of lading, by landing it at a wrong wharf in the port of discharge: *held*, the measure of damages was the value of the coal less the freight and charges, although the freight had not been earned.

[Cited in Oakes v. Richardson, Case No. 10,390; Devato v. 823 Barrels of Plumbago, 20 Fed. 513.]

6. The counsel fees of a replevin suit by the shipper to recover his coal are not to be included in the damages assessed in the action for not delivering.

[7. Cited in Manson v. New York, N. H. & H. R. Co., 31 Fed. 299, construing a demurrage clause to imply that the consignee should have 24 hours, after notice of the vessel's arrival, to select a suitable place for her discharge.]

In admiralty. The libellants, Louis J. Audenried & Company, coal merchants, doing business in Philadelphia and Boston, shipped a cargo of coal on board the schooner Boston at Philadelphia, and received a bill of lading requiring delivery at Boston to Bosworth & Hamlin or their assigns, at a freight of two dollars and twenty-five cents per ton and three cents per ton for each bridge. There was the clause lately introduced by an association of ship-owners into these contracts for carrying coal, and which has been under consideration several times in this court, that twenty-four hours after arrival at the port, and notice thereof to the consignee, the vessel should be discharged at the rate of one hundred tons per day, after which the consignee or assignee should pay demurrage. The libellants had an open contract with Bosworth & Hamlin, the consignees, for a large amount of coal to be delivered from time to time dur-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

ing the season, and intended this cargo for them; but they were unable to receive it, and so notified the libellants, and indorsed the bill of lading to them before the arrival of the vessel. Hearing that the schooner was in the harbor of Boston, Bosworth & Hamlin sent word to the master that he was not to deliver his coal at their wharf; but he came up to the next wharf to theirs, and was again told by one of the firm that they should not take the coal, and that he must report to the libellants, which he did. The libellants thereupon ordered him to discharge at the wharf of Cook, Jordan & Morse, and this he refused to do. They then procured from the original consignees a written order of similar purport, but with no better result. Some negotiation was had between the parties, but nothing came of it, and the master, after some days, landed his cargo at the wharf to which he had first come, to be held subject to the order of the libellants on their paying freight, demurrage, and other charges, if any; and the libellants thereupon proceeded here for non-delivery of the cargo.

D. Thaxter, for libellants.
P. H. Hutchinson, for claimants.

LOWELL, District Judge. The claimants insist that the master might deliver his cargo at any suitable wharf, with notice to the consignee or his assignee, and thus fully meet the requirements of his contract; and that this was such a wharf. It is often said in the books that this is the master's whole duty, but I am of opinion that the proposition has been sometimes understood a good deal too broadly. The dictum of Mr. Justice Buller, in Hyde v. Trent & M. Nav. Co., 5 Term R. 389, 397, is that a delivery on the usual wharf will discharge the carrier. And in Chickering v. Fowler, 4 Pick. 371, the case finds that the cargo was landed at a usual wharf, and it was held that it need not be landed at the wharf of the consignee. There are cases which recognize it to be usual at this port and at others for the master of a general ship to go to a suitable wharf and notify the consignees, who are then bound to take their goods from the wharf: The Tangier [Case No. 12,265]; Cope v. Cordova, 1 Rawle, 203. But these cases have not turned on the question what was a suitable or usual wharf. This would seem to be a question of fact, and one which may be answered very differently in different cases. The law, as I understand it, is, that the master is not in general bound to transport the goods on land, but his contract is fulfilled by delivery from his ship at a proper place within the port. Still, the question is always one of delivery in the particular case, and if he has not delivered to the consignee or shipper personally, he must justify his substituted delivery: Gatliffe v. Bourne, 4 Bing. N. C. 314, 3 Man. & G. 643, 7 Man. & G. 850; Humphreys v. Reed, 6 Whart. 435; Hemphill v. Chenie, 6 Watts & S. 62; Ostrander v. Brown, 15 Johns. 39. This he may do by showing that the delivery was in accordance with the terms of his contract, or with the usual course of trade at the port, or of the course of dealing between the same parties. Here I have not been shown any such usage. There is no evidence of what is usual or suitable in respect to cargoes of coal; but considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case (The E. H. Fittler [Case No. 4,311]), that when there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, at least if he be duly and seasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that a charterer would have to say where the vessel shall discharge, it being, of course, a suitable place and within the limits of the port.

This point is not of vital importance here, because this bill of lading contemplates that the consignee, and not the master, is to choose the place of delivery. I have more than once construed this new demurrage clause to mean that the owner of the coal is to have twenty-four hours after notice of the ship's arrival in which to find a berth for her discharge. This construction has not only been acquiesced in, but insisted on by the ship-owners. So the provision that the freight should be increased by each bridge that the vessel may pass through, cannot mean that the master shall have the right to disregard the shipper's wishes and go to a distant wharf through unnecessary bridges, and thus increase his freight while disobliging the other party; but that so many as the consignee or his assignee requires him to pass through shall be paid for.[2]

It was the duty, then, of the master to deliver at the wharf of Cook, Jordan & Morse, according to the order given him by the libellants within twenty-four hours after notice of his arrival, and indeed, at the very time when, in accordance with his contract, he reported to them his arrival. If he had any doubt whether they were the proper persons to deal with, it was removed by the orders and statements of the original consignees and by the indorsement of the bill of lading. He says, in his answer, that he at one time offered to go to the required wharf if the libellants would pay the towage. This they were not bound to do under the circumstances of this case, because he

[2] I am informed that a similar ruling as to the duty of the master was made in the replevin suit by Brigham, C. J., in the superior court.

should have gone there at once. Again, he says he at one time offered to go if they would pay him, in advance, his freight and demurrage. But they were not bound to pay freight until the goods were delivered, nor could any demurrage be due when the delay was wholly his fault. At the argument, it was urged in addition to these points, that the wharf of Cook, Jordan & Morse is not within the port of Boston. I was asked to limit the bounds of the port to the open harbor below the numerous bridges which surround the peninsula on several sides, and which are said to have changed the character of the navigation and to have imposed new and unusual burdens upon ship-owners. In this case, I need only say on this head that no evidence whatever of usage was introduced; that this is an old and well-known coal wharf within the most ancient limits of the town of Boston, and that the bill of lading provides for going through bridges.

It was said at the bar that since the pleadings were made up the libellants have taken the cargo by a writ of replevin out of the hands of the wharfinger, with whom it was left by the claimant. This being so, I cannot fairly estimate the damages in this case until that suit is in some way disposed of. Interlocutory decree for the libellants. Damages to be assessed.

At a subsequent term the cause was brought on again, and it was proved that the replevin suit had been tried to a jury, and had resulted in a verdict for the libellants with nominal damages, and that judgment had been rendered thereon and had been satisfied. The libellants now moved for damages, and proved that the coal had fallen in value about $1.25 a ton between the day it should have been delivered and the time of the service of the writ of replevin.

D. Thaxter, for the libellants.

It was suggested by the court at the former trial that the measure of damages would be the value of the goods here, deducting freight. If this be so, we can have only nominal damages, because the freight was more than the diminution in value, and as we must give credit for the goods now that we have received them, there will be nothing left to assess. We contend: 1. When a carrier misdelivers goods, or refuses to deliver to the true owner, he has forfeited his freight, and the shipper may have the goods or their full value without deduction. The distinction which reconciles all the cases is this, that mere nonfeasance is not a conversion, but misfeasance is: Sayward v. Stevens, 3 Gray, 107, 8 Gray, 215; Robinson v. Baker, 5 Cush. 137; Bowlin v. Nye, 10 Cush. 416. The case of The Cassius [Case No. 564] is consistent with the above, because there the master had earned his freight, and afterwards converted the goods. 2. The master converted our goods and we have recovered them, and are bound to give credit for the value recovered, less the expenses of the recovery: Williams v. Archer, 5 C. B. 318; Archer v. Williams, 2 Car. & K. 26; Forbes v. Parker, 16 Pick. 466; Woodham v. Gelston, 1 Johns. 134; Rice v. Nickerson, 9 Allen, 478; Add. Torts, 443. This should include counsel fees.

LOWELL, District Judge. The able argument for the libellant has failed to convince me that in an action of contract for not delivering goods in conformity with the bill of lading, the measure of damages is the value at the port of delivery, without deduction. I have used a different rule in two cases in which goods were injured by deviation and delay, namely, the value less the freight. This furnishes an indemnity, as we see in this case; for the libellants had sold the cargo in good faith, and would have realized the price, after paying the freight, if the master's contract had been fulfilled; and the exact loss which they have suffered is the price, deducting the freight. It is urged that the vessel never earned freight, and this is true; but the question here has nothing to do with that. I am not giving freight to the claimants, nor denying it to them, but ascertaining the loss to the libellants. They had the right to take their goods if they could find them, without paying freight, as indeed they have done; and by that means they would and must get more than an indemnity; but in an action for not delivering, they are entitled to an exact indemnity. It was at one time much contested whether the damages in such a case should not be the value at the place of shipment, with interest, but it has been fully settled that it is the value at the port of destination. Some of the cases do not touch the question whether it shall be the gross or the net value, but all which do mention it say it is the net value after deducting expenses; for the reason that those expenses go to make up the value. Thus, in what may be fairly called the leading case of Watkinson v. Laughton, 8 Johns. 213, where goods were embezzled by the crew, it was held that the damages were their net value, deducting freight and other charges, not, of course, as actual charges, but as the true mode of finding the exact loss sustained. This rule has been followed in Gillingham v. Dempsey, 12 Serg. & R. 188; The Cassius [supra]; Nourse v. Snow, 6 Greenl. 208; The Joshua Barker [Case No. 7,547].

A wrong-doer may often be required to give up chattels without any allowance for what has been spent upon them, and a carrier could not, perhaps, set off nor recoup freight which he had never earned; but this is not such a case. The libel is not brought for the recovery of the goods or of their value, but for the breach of a maritime contract to carry and deliver them; and though

the value of the goods is an element in the computation of damages, the real question is, what has the libellant lost? And the true answer is, what he would have had if the contract had been performed. Suppose the voyage had been from a foreign country, and the goods had been subject to duty; in estimating the damages, duties would be deducted from the value in the market here, without any regard to whether the carrier had paid duties or not; because the libellant would have been obliged to pay them to obtain the full market value of his goods, and they really go to make up that value.

It is admitted that the libellants must give credit for the net value of the coal replevied by them, but they contend that in estimating this value they may deduct the reasonable counsel fees of the replevin suit. None of the cases cited came up to this contention, and I am of opinion that they cannot be allowed. Counsel fees are sometimes considered in estimating the damages in salvage cases even since the fee bill has prevented their being taxed as costs, and where one is bound by contract to warrant another's title, and has been duly notified to defend an action on the title and has failed to do so, these fees may be recovered. But here the suits were simply two actions for nearly the same cause, and were adversary, and probably if the claimant had required it, the libellants might have been put to their election which they would maintain. Under these facts there is no more reason for allowing the counsel fees in this case than in the replevin suit itself. The theory of the judgment in that suit was that the taxable costs would indemnify the plaintiffs. They have recovered their coal and their costs, and after giving credit for its value when replevied there is no surplus left to be assessed in this action. As the present defence is in the nature of a plea puis darrein continuance, the libellants are entitled to nominal damages, and costs. Decree for the libellants for $1 and costs.

Case No. 1,672.

The BOSTON.

[Olc. 407.] [1]

District Court, S. D. New York. July Term, 1846.

COLLISION—COMPETING PASSENGER STEAMBOATS—ATTEMPTS TO PASS—COSTS—VINDICTIVE ARREST.

1. In a collision betwen two passenger steamboats, occurring at their place of departure, both starting from the same slip or pier at the same time, they will be mutually held responsible for the exercise of the utmost prudence and precaution.

2. Neither can lawfully press ahead of the other in getting under way, when it is apparent their movements are commenced simultaneously.

3. If they are competitor boats, running the same route, negligence or fault in producing the collision will be imputed equally to each, unless one clearly exculpates herself.

4. The law of this state imposes a penalty on a steamboat for attempting to pass another under way nearer than twenty yards, and the maritime law subjects them to all damages caused by crowding on vessels under way to pass them, or in crossing their bows.

[Cited in The Greenpoint, 31 Fed. 231.]

5. This court will not allow costs on the arrest of a vessel for a small cause of action, when the party has adequate remedy in the lower municipal courts, and especially if the suit is prosecuted vindictively, and with a view to create costs.

[Cited in The David Morris, Case No. 3,596.]

[6. It is want of due prudence and precaution to attempt to run a boat across the track another is known to be intending instantly to take.]

In admiralty. The steamers Frank and Boston, two small passenger boats belonging to this port, lay at or near the same wharf, in this harbor, and were in the act of going out together, their trips being appointed for the same hour. They were competitor boats, making frequent trips daily from Canal-street slip to landing places a few miles up the Hudson river, on the New-Jersey shore. There was great acrimony and vindictiveness of feeling subsisting between the officers of the two boats. In a struggle between the two to have the lead in getting under way on an up trip, they came in collision. The libellant's boat, the Frank, received injuries, which were repaired at the cost of $21.27. This action was brought for the injuries, demanding large damages. [Decree for libellant.]

Geo. W. Stevens, for libellant.

W. Q. Morton, for respondents.

BETTS, District Judge. This case is quite unimportant in a pecuniary point of view. It has, however, been contested with great earnestness, by proofs and arguments on the allegations that interests, important to this class of business conducted by numerous steam craft into and from this harbor, are involved in the controversy. The principal points in litigation are: 1. The relative rights and duties of such steamers in getting under way from their berths, when the hour of their starting is known to each to be the same. 2. Whether the injury in this instance was caused by the fault or negligence of the Frank or Boston, or neither or both. 3. Whether, if blame be imputable to the Boston, the libellant might not, with reasonable care and skill, have avoided the collision, and is not chargeable with fault in omitting to do so. 4. Whether the loss shall not be apportioned between the two vessels, because of the difficulty on the evidence in determining which one was most in the wrong. The zeal of the litigant parties has been so far partaken of by the counsel as to call forth a labored discussion of every fact, and numerous authorities supposed to have a bearing

[1] [Reported by Edward R. Olcott, Esq.]

upon the case. I do not, however, regard it as one which demands of the court an extended exposition of its views upon the subjects debated. The doctrines which obtain in admiralty in collision cases are sufficiently collected, with the authorities supporting them, in the late edition of Abbott on Shipping, just published (part 3, c. 1), and it will be needless to collate and expound the cases applicable to the merits of this issue, there being entire harmony in the general principles affecting this case, with perhaps the exception of the point whether the court can order an apportionment of damages between the two vessels if unable to decide which one was most blameable for the injury sustained. That point will not come within the purview of the present decision.

It is not easy, upon the evidence, to determine which of the two boats, when the hour for starting arrived, first moved its wheels ahead. Both had their engines in action for a considerable time previously, as is the usage in preparing to get under way at a fixed time, working their wheels alternately a turn or two backwards and forwards, to get the positions from which they intended to start on the trip. The witnesses on each boat, who were taking notice of the proceedings, think the boat they were upon began turning its wheels ahead, whilst the wheels of the other one were backing or standing still. Giving credit to them on both sides, the difference is so trivial, that it may be assumed that the two attempted to go forward simultaneously. A person standing on deck might thus, by his sensations from the leverage of the wheels against the water, be conscious that his boat was in the act of getting in motion before one, observing her a short distance off, could discern that her wheels had commenced revolving; or if so, which way they were turning. I do not think that particular of essential importance. The Frank had been lying up beside her wharf slip, with her head towards the shore. She cast off her fastenings and backed out of the slip past the Boston, the latter lying at the end of a pier, with her head down the river. It was perfectly known on board the Boston that the movement by the Frank was for the purpose of getting a position outside the piers for starting on her course up the river. It had been usual for her to start in that manner. So soon as the Frank left her berth, and had cleared the Boston, the latter loosened her fastenings at the end of the pier, and backed into the slip the Frank had left. The direction of the boats towards each other, then, was at right angles, the Boston heading westerly and the Frank northerly, that being the course each was to start upon. Witnesses differ widely in their estimates as to the distance the Frank was from the Boston when the latter commenced moving ahead; some say from one hundred to one hundred and fifty yards, and two pilots, not belonging to either boat, calculated they were sixty or one hundred feet apart when the Boston pushed out of her slip, the stern of the Frank then being about even with the end of the pier to the slip out of which the Boston was moving. In this state of facts it is incumbent on the Boston to prove, beyond all reasonable doubt, that when put in motion to cross the Frank's bows, the latter boat was either backing off in another direction or her wheels were still, so that there would be no hazard of striking her, otherwise she must be responsible for running out when the slightest mistake as to the distance or action of the Frank would almost inevitably cause a collision. But without laying stress on the want of such evidence, I regard the Boston clearly in fault for attempting to pass out of her slip whilst the other boat was manoeuvering in such close proximity to get on her course, and might, in an instant, be under full way on it, and when a false move could hardly fail to bring the two boats against each other. Under any circumstances, it would be deemed a want of due prudence and precaution to attempt to run a boat across the track another was known to be intending instantly to take, although not made certain at the time that she had actually made progress in it; and the blame that would be incurred in ordinary cases for an attempt so hazardous becomes more positive when there is manifestly a keen rivalry between the boats, each struggling to get the lead of the other. The boat first under motion in such cases ought not to be interfered with; and the one delayed in starting should be held to the exercise of every possible caution in following the movement of the other. The competition for the first starting or the earliest arrival might otherwise absorb all considerations for the safety of the vessel or passengers, and put both in imminent peril.

The law of this state prohibits, under a penalty of $250, one steamboat approaching another under way, with intent to pass her, within less than twenty yards (1 Rev. St. 682), and the general principles of maritime law exact in the navigation of vessels, on all occasions, great prudence in attempting to pass each other, or cross the known direction either is taking. I think the evidence it at least equally strong to show that the Frank was moving ahead when the Boston started, as that the wheels of the latter began first to move forward; but which ever way that fact might be, it must have been palpable to the master and pilot of the Boston that they run a bold risk in attempting to pass the bows of the Frank at the moment she must, in her state of preparation, be ready to move forward. They should, in the exercise of the most ordinary precaution, have stopped until that danger was past. The duty of using special caution is cast upon her because she came out of her berth after the other boat was under way,

and so near to her, that if the latter continued her course up the river, the Boston could not probably, by any movement in her power, avoid coming in collision. The attempt, then, to take the lead, was manifestly hazardous; and as it was made deliberately by the Boston, and not two minutes could have been lost to her had she waited till all danger was past, she is justly responsible for the damages occasioned by her precipitancy and want of circumspection. I shall accordingly decree that she be condemned to pay the expenses of the reparation of the Frank, found to be $21.23; but I shall not decree costs to the libellant.

No necessity has been shown in the case, which might have been tried by any magistrate, for instituting an action in rem, and creating the heavy expenses attendant upon attaching the Boston, and conducting the proceedings through this tribunal. It is the habit of the English admiralty in salvage and collision cases, where a recovery is had by a libellant, to deny him costs, if there be any thing unreasonable or oppressive in his proceedings. The Moslem [Case No. 9,876]. I should have gone further and awarded costs to the claimants, had they, after the disaster, tendered all reasonable amends to the Frank. There is too much reason to apprehend, from declarations given in evidence, that both parties have been actuated throughout the proceedings by hostile if not vindictive feelings towards each other. If the libellant is not justly obnoxious to that charge in respect to the action of his boat, he availed himself of the scintilla of right in his favor to urge her ahead, and compel the other to give way to him when a moderate degree of forbearance might have avoided the collision. It is the duty of the court to guard watchfully against encouraging the exaction of rigorous advantages in favor of any party in the navigation of steamboats about the harbor. Life and property may be exposed to serious perils from the temerity or obstinacy of steamboat masters or pilots who may be willing to push a privilege to the most dangerous extremities, if assured they may have the countenance of the law in their recklessness. Although, then, the judgment of the court is, (1.) That it was the right of the Frank, on the occasion, to hold her way, and the duty of the Boston to have stopped hers; (2.) That the blame belongs to the Boston for not keeping out of the course of the Frank, and that she is liable for the whole actual damage caused by her failing to do so, with no equity to an apportionment of damages between herself and the Frank, there being no common fault between them other than their mutual jealousy and ill-temper towards each other; yet, because of the needless resort to the processes of this court by the libellant, I shall award him his outlay for repairs alone, and leave each party to pay his own costs of suit. Decree for libellant for $21.23.

Case No. 1,673.

The BOSTON.

[1 Sumn. 328;[1] 11 Am. Jur. 21.]

Circuit Court, D. Massachusetts. May Term, 1833.

SALVAGE — RIGHT TO — FORFEITURE — EMBEZZLEMENT—AMOUNT—DERELICT—PARTIES — LIBEL—ANSWER—EVIDENCE — APPEAL—WITNESSES—INSURANCE—DEVIATION.

1. In a libel for salvage, all the parties should be inserted and brought before the court.

[Cited in McConnochie v. Kerr, 9 Fed. 60.]

2. Libels in admiralty, especially those for salvage, are usually too loosely framed. They should state the subject matter in articles, with certainty and precision, and with averments admitting of distinct answers.

[Cited in Wells v. The Anne Caroline, Case No. 17,389a; Dupont de Nemours v. Vance, 19 How. (60 U. S.) 175; Card v. Hines, 35 Fed. 600.]

3. The answer should meet each material allegation of the libel with an admission, a denial, or a defence.

[Cited in Dupont de Nemours v. Vance, 19 How. (60 U. S.) 175; Card v. Hines, 35 Fed. 600.]

4. No evidence is admissible, except it be appropriate to some of the allegations in the libel or answer.

[Cited in The Morton, Case No. 9,864; The Sarah E. Kennedy, 29 Fed. 266; In re Hawkins, 147 U. S. 486, 13 Sup. Ct. 512.]

5. In admiralty proceedings, a supplementary libel alleging new matter, and an answer thereto, may be filed after appeal, at the discretion of the court.

[Distinguished in The Mabey v. Atkins, 10 Wall. (77 U. S.) 420. Cited in The Morton, Case No. 9,864. Distinguished in the Saunders, 23 Fed. 304. Cited in The Venezuela, 3 C. C. A. 319, 52 Fed. 875; Re Hawkins, 147 U. S. 486, 13 Sup. Ct. 512.]

6. In case of a supplementary libel being filed after closing the testimony on the original libel in prize causes, the new testimony taken must be applicable merely to the new allegation; but in other causes this rule is much relaxed.

7. Since the act of March, 1803, c. 93 [2 Story's Laws, 905; 2 Stat. 244, c. 40], in admiralty, as well as equity cases, carried up to the supreme court by appeal, all the evidence goes with the case, and it must accordingly be in writing.

8. In a libel in rem, against a vessel or cargo for salvage, the underwriters, not having accepted an abandonment, are not proper parties.

[Cited in The Idaho, Case No. 6,996; The Senator, Id. 12,665.]

9. A stoppage to save the crew of a wrecked and sinking ship, whose lives are in jeopardy, is justifiable, and is not a deviation, that discharges underwriters; but a delay to save property is such a deviation. See The Henry Ewbank [Case No. 6,376].

[Cited in The Emblem, Case No. 4,434; Sturtevant v. The George Nicholaus, Id. 13,578; Peterson v. The Chandos, 4 Fed. 653; The Centurion, Case No. 2,554; Roff v. Wass, Id. 11,999.]

10. Where the master and crew had left their vessel in a sinking condition, and taken to the long boat, and were picked up by another vessel, while yet in sight of the wreck, the vessel and

[1] [Reported by Hon. Charles Sumner.]

cargo, thus left, are considered, in admiralty, as derelict.

[Cited in The John Gilpin, Case No. 7,345; The H. B. Foster, Id. 6,290; Sturtevant v. The George Nicholaus, Id. 13,578. Distinguished in Cromwell v. The Island City, Id. 3,410. Cited in The Georgiana, Id. 5,355; The Ann L. Lockwood, 37 Fed. 237.]

11. On appeal in salvage cases, the court of appeal does not alter the amount of salvage upon slight grounds, or inconsiderable differences of opinion.

[Cited in brief in Lubker v. The A. H. Quinby, Case No. 8,586.]

[12. Cited in The Maggie P., 25 Fed. 206, to the point that a party who does not appeal from a decree cannot question its correctness.]

[13. Cited in Sewell v. Nine Bales of Cotton, Case No. 12,683, and The Henry Ewbank, Id. 6,376, to the point that under ordinary circumstances the owners of the salving vessel are entitled to one third.]

[14. Cited in The John Gilpin, Case No. 7,345, to the point that salvage service may be rendered within the ebb and flow of the tide, without regard to location, whether on the high seas, or inter fauces terrae.]

15. The right of salvage is forfeited by embezzlement on the part of the salvors.

[Cited in The Rising Sun, Case No. 11,858; Williams v. Waterman, Id. 17,745; Cromwell v. The Island City, Id. 3,410; The Mulhouse, Id, 9,910; Harley v. Gawley, Id. 6,069; U. S. v. Stone, 8 Fed. 251; The Albany, 44 Fed. 435.]

[16. Cited in The Mulhouse, Case No. 9,910, to the point that embezzlement by the salvor crew does not work a forfeiture or diminution of the shares of the owner, where there is no fault on his part.]

[17. Cited in The Rising Sun, Case No. 11,858, to the point that embezzlement by a master who is part owner forfeits his rights to salvage both as master and owner.]

18. Embezzlement in port is a forfeiture no less than at sea.

[Cited in Cromwell v. The Island City, Case No. 3,410.]

19. Embezzlement by the salvors, after the property is put into the hands of the marshal, is a forfeiture of salvage; and that, whether the custody of the property be at the time given to the salvors or not.

[Cited in The Missouri, Case No. 9,654; Cromwell v. The Island City, Id. 3,410.]

[20. Cited in The Mulhouse, Case No. 9,910, and Browning v. Baker, Id. 2,041, to the point that, while it is the policy of the law to liberally reward all meritorious salvage service, it will punish every negligence with diminished compensation or forfeiture.]

21. The rules of the common law, as to the competency and incompetency of witnesses, are adopted in the admiralty, in the exercise of its jurisdiction as an instance court.

[Cited in The Neptune, Case No. 10,120; The Peytona, Id. 11,058.]

22. The case of salvage is an exception to the rule, as to the incompetency of witnesses on account of interest. The salvors are, from necessity, witnesses as to facts occurring at the time of the salvage service; but only as to such facts.

[Cited in Bean v. The Grace Brown, Case No. 1,171; The Peytona, Id. 11,058; Roberts v. The St. James, Id. 11,914.]

23. The testimony of persons, who are parties to an admiralty suit, ought to be taken under a special order of the court showing the cause, that the court may in its order limit the inquiries to matters within the exception to the rule, that parties are not witnesses.

24. In a salvage suit in admiralty the salvors, being parties to the suit, are not competent witnesses as to facts occurring in port after the property is brought in.

25. The testimony of interested witnesses weighs little in opposition to that of those disinterested.

[Cited in Bean v. The Grace Brown, Case No. 1,171; Roberts v. The St. James, Id. 11,914.]

[See Andrews v. Hyde, Case No. 377.]

In admiralty.

T. Parsons and W. G. Stearns, for claimants and appellants.

B. Sumner and I. McLellan, Jr., for libellants and appellees.

STORY, Circuit Justice. This is a suit for salvage, brought before the district court by an original proceeding in rem against the schooner Boston, of Eastport, and cargo.[2] The original libellants were the master and owners of the schooner Magnolia of Hallowell, in the state of Maine, asserting a claim as salvors. By a supplemental libel, the crew of the Magnolia were brought before the court as salvors, as in strictness they ought to have been by the original libel, either by name, or by a description of their character. The libel, whether filed by the master, or owners, or both, should have been in behalf of themselves, and the officers and crew of the saving ship. I take this opportunity of adding, that the manner, in which libels of all sorts, and especially of salvage, are usually framed, is quite too loose and general. They should state the matter with all due certainty and precision, (though not indeed with the nicety of the common law proceedings,) in distinct articles, each propounding, or, as the admiralty phrase is, articulating some material allegation, capable of a distinct answer and proof, if controverted; and the answer should accordingly reply to each article by a clear and exact admission, or denial, or defense to the matter of it. In this way we should arrive at that distinct knowledge of the real points of controversy, which is so desirable for the court, and to that just regard to the rules of admiralty pleadings, which is so essential to vindicate its equity, and facilitate its practice. But to return to the case. A claim was interposed by Ezekiel Foster, of Eastport, as owner of the Boston, and by the Suffolk Insurance Company, as underwriters on the vessel, and by other persons as claimants of the cargo. The claims admitted the salvage service; and the question therefore was reduced at the hearing in the district court to

[2] Salvage proceedings may as well be by process in personam as in rem. The Hope, 3 C. Rob. Adm. 215; The Trelawney, 3 C. Rob. Adm. 216, note.

the mere consideration of the amount to be awarded to the salvors. The decree of the district court awarded to them two-fifths of the value of the schooner and cargo; one-third of the salvage was given to the owners of the Magnolia; the residue was divided into ten shares, of which the master was to receive five, the mate two, and the remaining three were distributed equally among the crew, consisting of three persons. No appeal was interposed by the libellants, either as to the amount of salvage, or as to the distribution; and, therefore, as to the latter, there is now no controversy. But an appeal was interposed by the claimants generally; and of course this brings the amount of the salvage regularly in question before the court.

After the appeal, new facts, material to the defence of the claimants, and indeed constituting a new defence as to some of the salvors, having come to the knowledge of the claimants, it became necessary to open the cause, so as to let them in. Nothing is clearer, than that in the then posture of the allegations no proofs were admissible, except to facts put in issue by them; for in all admiralty proceedings the decree must be secundum allegata et probata. It is not sufficient, that there are facts proved, which might have a material bearing, unless there are allegations suited to bring them as matters of plea and controversy before the court. The charge, thus newly brought forward by the claimants, is of a very grave nature, that of a deliberate embezzlement of the salvage property by the master, officers, and crew. And it being clearly established, that the knowledge of the circumstances had not been brought home to the claimants until after the decree of the district court, this court had no difficulty, at a former hearing, in allowing the claimants to file a supplementary answer and defence on this point; for it is the well known usage of admiralty courts, even after an appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs; non allegata allegare, et non probata probare. There is a restriction, too often forgotten in practice, modo non obstet publicatio testium, the effect of which is to exclude new testimony to the old articles, where any has been already offered, and to confine it to the new articles, or to those of which no proof was formerly given. 2 Brown, Civ. & Adm. Law, 500, 501; Id. 436, 437. This restriction is founded upon the same principles as the chancery practice, not to admit, after the publication of the testimony, any new proofs; and was probably derived from a common source, the civil law. Id. In the actual frame of our laws the restriction is in many cases overlooked or abandoned; but it is still retained in prize causes, where further proof stands upon the direct order of the court itself.

The supplemental answer having been filed, and stating (as it properly should) in distinct articles the charges of embezzlement, though not with so much certainty as is desirable, the libellants filed a defensive allegation, repelling the charges throughout. Upon the issue thus framed, new testimony was taken; and by the direction of the court it was taken under commission and reduced to writing. And I beg here to repeat, what was stated at the bar at the time, but seems not to have been generally understood in practice; that since the act of the 3d of March, 1803, c. 93 [2 Story's Laws, 905; 2 Stat. 244, c. 40], in admiralty causes, as well as in equity causes, all the evidence originally taken in the circuit court, in cases capable of appeal, must be transmitted to the supreme court; which cannot be, unless the same is reduced to writing; and no new supplementary evidence can be received in the supreme court, except in admiralty and prize causes; which rule presupposes, that all the old evidence is already in the record.

The cause has now been argued most elaborately upon all the facts touching both points; first, the amount of salvage; and secondly, the charge of embezzlement. If the latter is made out, it is not pretended to go to the whole extent of the salvage; but only to the shares of the guilty parties. And, inasmuch as the seamen have been examined as witnesses by the claimants, upon the implied faith, that their testimony fully given shall not be used to prejudice their claim to salvage, it is understood, that the charge of embezzlement does not extend to them; but is confined to the master, (who is also a part owner,) and the mate.

It is observable, that the Suffolk Insurance Company have asserted a claim in this court, as underwriters upon the schooner Boston. But their claim nowhere alleges, that any abandonment has been made to them; and if it had, unless they had accepted it, they would have had no right in rem. There is, indeed, in a prior interlocutory proceeding upon petition for the delivery of the schooner upon an appraisement, an allegation by the company, that there has been an abandonment made to them, but not accepted. This would not help the deficiency in the averments, if the claim were otherwise sufficient. But of itself, it proclaims the company out of court. Nothing is clearer in the course of admiralty proceedings, than that no person can make himself a party claimant to a proceeding in rem, except he be the actual owner thereof. It is not sufficient, that he may have an interest in the controversy. He must have an interest in the property itself, in a legal and technical sense; otherwise he has no persona standi in judicio. The claim, therefore, so far as respects the Suffolk Insurance Company, must be dismissed, as res inter alios acta, as to which the court can exercise no jurisdiction, and take no notice, in this case.

The claimants have made some suggestions in regard to the distribution of the salvage. But it appears to me, that this is a subject with which they have, strictly speaking, no right to intermeddle. They have an interest to lessen the amount of salvage; but here their interest ceases. How it should be distributed, is matter of consideration for the salvors, and for the court, in the discharge of its own appropriate duties. If, indeed, the charge of embezzlement is made out, the claimants are entitled to withhold salvage from the offenders. But as to the distribution of the salvage actually awarded to others, they have no legal interest or concern.

Having disposed of these preliminary matters, I now come to the consideration of the first point in the cause, the amount of salvage. The facts of the cause upon this point are these.—The schooner Boston, with a cargo of flour and corn, and some bales of feathers on board, being bound on a voyage from Baltimore to Portland, was, on the night of Wednesday, the 25th of September, 1832, run down by a topsail schooner, it being dark and hazy, and the wind blowing heavy from the northwest. The Boston filled with water in about ten minutes, and the schooner, by which she was run down, kept on her way. Finding the Boston in a sinking condition, as was supposed, the master and crew, being seven in number, took to the long boat, and left her as soon as possible. In about an hour after leaving her, and being about two or three miles distant from her, they came across the Magnolia, then on a voyage from New York to Boston, and got aboard of her about one o'clock in the morning. It was then still blowing very hard. The Magnolia had just before been injured by some unknown vessel, which had run afoul of her, and she was leaking badly, so as to require one person at the pump until the weather moderated, when it was found, that the covering plank on her starboard bow was started, and her timberheads were stove in. Capt. Davis (the master of the Magnolia), at the suggestion of the master of the Boston, continued to lie to under a three-reefed mainsail and a foresail, to wait and see the situation of the Boston; and at daybreak, about six or eight miles distant, they descried a vessel from the mast head, (which proved to be the Boston,) and bore away for her, and run down for her about S. E. or S. S. E., and came up with her about six o'clock in the morning. Capt. Davis sent his boat with some men on board. The Boston was then full of water, and the sea breaking over her, the wind still continuing to blow hard. The opinion of the masters of both the vessels at that time was, that the Boston would roll over and sink, and that she was in danger of sinking every hour. It was thought best to strip her of her sails and rigging, and whatever else could be saved, and accordingly Capt. Davis and his crew went on board, and brought back to the Magnolia her foresail, jib, flying jib, and some rigging. The Magnolia continued by the Boston until two or three o'clock in the afternoon of the same day, when the wind began to abate, and Capt. Davis concluded then to hitch the Boston to his own vessel by a chain cable and hawser, and take her in tow into port. She was then about twenty or thirty miles distant from Cape Cod, and from the time she was first seen until taken in tow, she had drifted out to sea about ten miles, and towards Nantucket shoals. She was accordingly taken in tow, and arrived in Boston harbour on Saturday, the 28th of September, about noon, being all this time full of water; and was towed up to the wharf by a steamboat.

Such are the most material facts, as they appear in the evidence, and principally as they are stated by the master and mate of the Boston. And upon this posture of the facts it is difficult to escape from the conclusion, that it is a most meritorious case of salvage. At the time when the salvage service was performed, the Magnolia was herself in a somewhat crippled state, and she and her cargo were of the aggregate value of fifteen thousand dollars. Beyond all question, at least in my opinion, it was the duty of the master of the Magnolia to interrupt his voyage for the purpose of taking on board the crew of the Boston in their suffering state, for the safety of their lives. It was a duty thrown on him by the first principles of natural law, the duty to succour the distressed; and it is enforced by the more positive and imperative commands of Christianity. The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby. But beyond this there was no supervening or imperative duty. The master was under no obligation to lie by in order to save property, or to delay the proper progress of the voyage by gathering up the fragments of shipwreck, or other perils of the sea. Any stoppage for such purposes would of itself amount to a deviation: and any going out of his course for such a purpose, being wholly unauthorized, would discharge the underwriters from all future responsibility. But the maritime law, looking to the general benefit of commerce, upon a large and comprehensive policy, does not prohibit the master, under such circumstances, from deviating to save property in distress, if he deems it fit in a sound exercise of his discretion. As between himself and his owners, the usage of the world has clothed him with this authority; and in return for such extraordinary hazards, it has enabled the owners to partake liberally in the salvage awarded for the meritorious service, when it is successful.

It has been said, that the present is not a case of strict derelict, in the sense of the maritime law. But I rather doubt that position, if the true meaning of derelict in that law be, as I take it to be, a thing found abandoned or deserted on the seas. And it is clear in this case, that the abandonment, though voluntary, was without any intention to return. See Rowe v The Brig [Case No. 12,093]. The case was treated by the master and crew, as one of irretrievable foundering, when they left the vessel in the long boat. The subsequent change of opinion and action under new circumstances cannot affect the nature of the original transaction. The original animus non revertendi was not done away by the new enterprise,. under the auspices of the Magnolia. But the case, in point of merit, is in no degree changed, if it should be deemed not a case technically of derelict. It approaches as near to one, if it be not one, as can well be conceived. It is a case of quasi derelict, where all hope of recovery, for the time being, was entirely abandoned. The vessel was certainly in a situation of extreme danger and distress. She was water-logged and drifting to sea, and, as the testimony states, she was drifting in a direction toward the south shoal of Nantucket, which was at but a short distance; and, unless relief was promptly obtained, there was imminent danger of her being totally lost on that shoal. If the weather had continued boisterous, with any thing like the severity of any of the customary equinoctial gales in September, her fate, as a lost vessel, was inevitably sealed. She was, then, snatched from the very jaws of destruction by the enterprise and prompt assistance of the master and crew of the Magnolia. The circumstances of this case are not at all like those of the Emulous, Simpson, &c., claimants in this court, alluded to at the bar [Case No. 4,480]. There the hazard was not for the moment so imminent, nor the means of other succour so distant, doubtful, or unattainable. If succour had not been given by the Magnolia, there is every reason to suppose, that none could at a subsequent period have been effectual; for every hour of delay was fraught with additional danger, from the nature of the cargo, the situation of the vessel, and the drift of the currents. The rule of the maritime law here is, as in other cases, where public policy points to promptitude and zeal in rendering services, Bis dat, qui cito dat.

In cases of derelict, the well-known and favored rule in ordinary cases is, to allow one half as salvage. Although it is not an inflexible rule, yet it is rarely deviated from, except in cases of very extraordinary value, or of very slight hazard. The value of the Boston and cargo is not so large as to call for any deviation from the common rule on that account; for it does not exceed the sum of nine thousand four hundred dollars; the value of the vessel being $4500, and that of the cargo, $4894.70. The hazards encountered by the salvors were not, indeed, very great, beyond the putting the Magnolia and her cargo at the risk of the owner of the vessel. It is said, that the Boston was so hitched to the Magnolia by the chain cable, that from want of suitable implements to unlock the cable, in case the Boston had gone down, the Magnolia must have shared a common fate. If this were so, it ought not to enhance the measure of the salvage; for the master of the Magnolia ought to have guarded against any such probable danger, and he cannot avail himself of his own negligence to found any additional title to salvage. On the other hand, I should be sorry to lay down any doctrine, by which it should be supposed, that if, in a highly meritorious case of salvage, of derelict, or quasi derelict, there was subsequently no great hazard or labor of an exhausting nature, the salvage was therefore subject to great diminution. I should fear, that such a doctrine would be found as mischievous in practice, as it would be unjust in principle. Upon questions of this nature, a large discretion must of necessity belong to the public tribunals. It is of great importance, as far as it can be done, to avail ourselves of fixed rules and habits in the administration of this delicate duty; and not to deviate from them, except upon urgent occasions. The rule of salvage in cases of derelict usually is, (as has been said,) to give one half; and it has rarely been below two fifths of the value of the property. The learned judge of the district court has adopted this latter proportion, and I am unable to see any solid ground of objection to this exercise of judgment.

There is another rule, which has been repeatedly enforced in this court, and in the supreme court of the United States, in cases of this nature; and that is, not to encourage appeals upon slight grounds of difference in cases or in opinions. Probably no two minds, acting often independently of each other, would always arrive at exactly the same conclusion, as to amount, in cases of discretionary salvage. Yet each might act for itself with the utmost caution, and care, and sagacity. I have endeavoured in all cases to keep this consideration in view; and the decisions of the supreme court admonish me rigidly to adhere to it. Where I cannot perceive a plain and palpable departure from the true principles of salvage, I shall not feel at liberty to reverse a decree upon the mere ground, that I might not originally have awarded the same amount. In the present case, I need not put myself upon this peculiar reason; since I entirely concur in the rate of salvage given by the district court.

We next come to the consideration of the question of embezzlement, a charge of a most serious nature, and deeply affecting the character of the parties implicated. The maritime law demands from all persons engaged

in maritime concerns scrupulous good faith and uprightness of conduct. And it prescribes this most emphatically to salvors, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence. See Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Abb. Shipp. pt. 4, c. 3, § 5, p. 272, note; Spurr v. Pearson [Case No. 13,268]. But in cases of embezzlement the law would fall short of its usual foresight, if it did not inflict a more admonitory punishment. Accordingly, it will be found, I believe, in the maritime jurisprudence of the whole world, that embezzlement by salvors, directly, or by connivance, is punished by a forfeiture of all claim to salvage. In morals, in general justice, in sound policy, it should be so; for what can be more inhuman, or more thoroughly without apology, than to plunder the distressed, or to add the losses of fraud to the unavoidable calamities of shipwreck? In the American and English law the doctrine is fully recognised; and it is applied with an unfaltering firmness, whenever the fact is clearly established. See Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Abb. Shipp. pt. 4, c. 3, § 5, p. 272, note; Spurr v. Pearson [supra].

In the present case the embezzlement is charged to have taken place, not during the voyage, but after the arrival in port; but whether before or after the schooner and cargo were in the custody of the marshal under the admiralty proceedings for salvage, or before, or after, or during the time of the entering of the cargo, is left uncertain in the answer. I say, it is charged to have been in port; not indeed in the supplemental answer, as it ought to have been, (for in this respect the answer is quite too loose, and uncertain, and open to exception,) but in the argument on both sides, and in the evidence adduced to support and repel the charge. Under these circumstances, a question has been made, on the part of the libellants, whether, supposing the embezzlement to be established in proof, after the cargo was in the custody of the marshal, it amounts to anything more than mere theft, punishable in a criminal proceeding, but not touching in any manner the right to salvage. The argument is, that the embezzlement, to work a forfeiture, must be perpetrated by the salvors during the voyage, or at least during their possession of the salvage property; and that it cannot apply after the property is in the custody of the law. And great reliance is placed on the reasoning in the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, as confirming this distinction. It is a sufficient answer to that case to say, that no decision was had upon this point. The argument was indeed pressed by the counsel; but the court, without in the slightest degree countenancing the validity of the distinction, held, that it did not apply to the case; for, whether the asserted embezzlement took place at sea or in port, it occurred before the salvors had parted with the possession of the vessel or cargo.

I take it to be very clear, according to the course of admiralty proceedings, that no person can come into that court and ask its assistance, unless he can ex aequo et bono make out a case fit for its interposition. A court of admiralty is to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in other courts of equity, that the party, who asks aid, must come with clean hands. In cases of salvage, the party founds himself upon a meritorious service, and upon the implied understanding, that he brings before the court, for its final award, all the property saved with entire good faith; and he asks a compensation for the restitution of it uninjured, and unembezzled by him. The merit is not in saving the property alone; but it is in saving and restoring it to the owners. However meritorious the act of saving may have been, if the property is subsequently lost, and never reaches the owner, no compensation can be claimed or decreed. The proceeding need not indeed be in rem; for if the thing has come to the possession or use or benefit of the owner, a compensation may be equally decreed upon a libel in personam. So is the doctrine in The Hope, 3 C. Rob. Adm. 215, and The Trelawney, Id. 216, note; and it is founded in the very nature of the admiralty jurisdiction, which primarily acted in personam; and now acts in rem, only as auxiliary to its general authority. The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors. What claim could be more extraordinary than an annunciation by a salvor in a court of justice, that he had saved the property, and had afterwards perpetrated a gross fraud or theft upon the owner, for the purpose of withdrawing the property from him; and then to ask, in the same breath, for a compensation for his labor, notwithstanding his iniquity? Such a claim, it seems to me, would be at war with the first principles of justice, and certainly with those of all maritime jurisprudence. I hold, that every act of misconduct of the salvors, as to the property, fraudulently or wantonly done to the injury of the owners, at any time before the salvage is decreed, is to be treated in the same way, as if it had occurred, while the property was in their exclusive possession. They are not responsible indeed for embezzlement or fraud committed by strangers after the property has passed into the custody of the marshal; nor indeed before, unless it has been occasioned by their own gross negligence.

But it is not quite correct in point of fact to say, that the possession of the salvors was in this case absolutely devested by the cus-

tody of the marshal, under the process. His possession is not adverse to that of the salvors; but the property is deemed in the possession of the law for the benefit of all concerned. It is notorious, that in practice the marshal is accustomed to allow the salvors to have free access to the property, (at his own peril indeed,) and to place great confidence in them. In the present case, the master and mate of the Magnolia superintended the delivery under the direction of the marshal; and the master is stated in the evidence to have watched over it during the night. He was confided in by all parties for this purpose, and if he has abused that confidence, I should hope, that the law was strong enough to deal out to him a due measure of retribution. Suppose, by a connivance between the under officers of the marshal and the salvors, embezzlement should take place after the property is in the custody of the law, what answer will it be, that they were criminally liable for the theft, but that they stood civiliter blameless? For myself, I cannot entertain a doubt, that salvors are responsible civiliter for their conduct in relation to the salvage property, so long as it is subject to the decree of the court. It is a wholesome doctrine, and it makes it the interest, as well as the duty of salvors, to act with good faith, and never to sleep on their posts, or to make a merit of their frauds.

There is another point raised at the argument, which is necessary to be discussed before we proceed to the examination of the facts respecting the asserted embezzlement. The testimony of the master and the mate, (both of whom are libellants,) has been taken as evidence in the case, not simply to the facts occurring at the time of the salvage service; but to all the other facts in the case touching the embezzlement. Their testimony is objected to as incompetent; and its competency must now be determined on by the court. In general, it may be said, that the rules, as to competency and incompetency of witnesses, known to the common law, are adopted in the court of admiralty in the exercise of its jurisdiction, as an instance court. The proceedings on the prize side of the court are of a peculiar nature, and are governed by a peculiar mode of practice. See 2 Wheat. [15 U. S.] Append. 25, 26; The Drie Gebroeders, 5 C. Rob. Adm. 343; The Amitie, Id. 344, note, 6 C. Rob. Adm. 269, note; Robinett v. The Exeter, 2 C. Rob. Adm. 267. Generally speaking, in instance cases, the court of admiralty deems a person incompetent as a witness, who is a party to the cause, or has an interest in the event of it. The civil law has the same rule,—Nullus idoneus testis in re suâ intelligitur. Dig. Lib. 22, tit. 5, l. 10; Dom. Civ. Law, book 3, tit. 6, § 3, arts. 6, 8. See, also, The Hope [Case No. 6,678]. It has accordingly been held by some judges, that seamen are not witnesses for each other in cases, where an embezzlement is charged upon all of them, to which they must contribute. This would seem to be correct, where all are parties to the suit; but if not parties, then it is a several suit, and the decree in one case has no legal bearing on that in another. In such a case the objection goes to the credit, (as an interest in the question,) and not strictly to the competency. See Hoyt v. Wildfire, 3 Johns. 518; Lewis v. Davis, 3 Johns. 17; Spurr v. Pearson [Case No. 13,268]. The rule is not only regularly true in the admiralty, that a person is incompetent, as a witness, on account of interest; but it is sometimes pressed beyond the rule of the common law. Thus, where a joint capture is set up on account of the party's being in sight at the time of capture, the testimony of witnesses of the ship, asserted to be a joint captor, is not sufficient, per se, to found the claim, although they are releasing witnesses. See, also, La Belle Coquette, 1 Dod. 18; The John, Id. 363; The Galen, 2 Dod. 19; The Arthur, 1 Dod. 423, 428. But there are some exceptions to the rule, as to interest, founded upon necessity; such as in cases of salvage, where the facts must often come in a great measure, if not exclusively, from the salvors themselves. What, for instance, could otherwise be done in cases of naked derelict, unaccompanied by any possibility of getting information from the crew of the deserted ship? The constant course of practice has been in salvage cases, to allow the testimony of the salvors to be taken, as to the facts occurring at the time of the salvage service, and especially where these are exclusively within their knowledge. See the case of The Charlotte Caroline, 1 Dod. 192. Of course, the evidence, being of interested persons, is in the nature of semi-plenary evidence only, and will weigh little, unless corroborated by other circumstances. It will be of less weight, where it leaves behind it disinterested testimony, which might be taken; and it will be greatly abated in force by opposing testimony from persons belonging to the crew of the saved ship. Cases furnishing a like analogy may be found in the prize court. The Galen, 2 Dod. 19. But I am not aware, that the rules of evidence have been relaxed beyond this point. Salvors have not been admitted, as far as I know, to give testimony to other facts, capable of distinct and independent proof; but are admitted, ex necessitate, to such matters only as found the original claim. Indeed, in strictness, the testimony of persons, whether salvors or others, who are parties to the suit, ought not to be taken, except under a special order of the court for this purpose, showing a cause, as is done in the ordinary course of chancery proceedings. In the looseness of our practice, it is often done without such an order. But it is irregular; and it would be well, that the irregularity were corrected, as the court might in its order limit the inquiries

to matters properly within the scope of the exception. Upon the whole, my opinion is, that the testimony of the master and the mate of the Magnolia, not being to the res gestae of the salvage service, but offered as general evidence to all matters touching the embezzlement, is inadmissible in point of law, and must be suppressed. It is incompetent upon the general principle, because it is from parties, who are interested. It is within no known exception to that principle, for it is not ex necessitate. It might have furnished matter fit for a special replication to the charge of embezzlement; and, if thus put in upon oath, it might have been in the nature of an expurgatory reply. It can now be deemed of no more efficiency in the cause, than a proffer of a personal examination, and denial of the charge upon oath, which has not been accepted on the other side; and which, therefore, relieves the cause from the suggestion of any voluntary concealment by the parties implicated of their own knowledge of the facts.

But, if the testimony were admissible, it could avail but little against the opposing testimony of persons not similarly situated. If releasing witnesses in the case of a common interest are heard with so much reluctance and so much distrust by courts of admiralty, that no decree will ordinarily be pronounced upon their uncorroborated evidence; how much more forcible must the objection be to persons, who testify under the strong sense of a present, deep, personal interest, and who stand, as it were, in vinculis, to disprove a charge made against them of deliberate fraud and embezzlement? The law, indeed, with the most entire justice, as well as humanity, presumes them innocent of such a charge, until it is established by credible evidence. But if it is so established, it is difficult to perceive, upon what legal ground the court could admit the mere denial of the parties, however solemn, to outweigh what, it is bound to believe, is satisfactory proof. I do not know, indeed, whether under all the circumstances of the present case, my judgment is materially affected by the consideration, that the testimony of the master and mate is in, or out of the record. I have gone at large into the subject, more from a regard to the principles of evidence, than from any great importance, which the testimony bears in the cause, taken under all its aspects.

The charge is, that the master and mate of the Magnolia have embezzled a number of barrels and half-barrels of flour of the cargo of the Boston, of the value of $100; and a part of the rigging, furniture, and appurtenances of the vessel itself, of the value of $200. Of course, the burden of proof of such a charge is upon the claimants; and the question is, whether it is sufficiently made out in the evidence beyond a reasonable doubt. If it is not, the court is bound to dismiss it from its consideration; if it is made out, it is equally the duty of the court, however painful to itself, or disagreeable to the parties accused, to pronounce the proper sentence.

Each of these items of charge will require a separate and independent consideration. And first, as to the flour. It appears by the bills of lading of the Boston's cargo, that she took on board, at New York, six hundred and seventy-four barrels and ninety-eight half-barrels of flour. When the unloading of the cargo took place at Boston, the hatches were found undisturbed; and after the unlading was completed, the marshal received and sold at auction six hundred and fifty-two whole barrels and eighty-six half-barrels only of the flour. So, that there was a deficit of twenty-two whole barrels, and twelve half-barrels of the cargo. How is this accounted for? The master of the Magnolia admits, that he attended to the discharge of the cargo, until it was finished, and watched it after the unlading during the nights, until it was sold. It has been said at the argument, that there might have been some mistake as to the quantity of flour originally shipped in the Boston. But this, to say the least of it, is very improbable, and is wholly unsupported by any evidence. But that, which is mainly relied on, is the allegation of the master, that on discharging the cargo a good many barrels of flour were found stove and wasted between the corn and the water. And he asserts, that the manner, in which the cargo was stowed, was in successive tiers of barrels, with corn put in between each tier to fill the scantlings; that the hold was full; that when the hatches were opened, the barrels were jammed so tight under the beams, from the swelling of the corn, that it was impossible to get them out without staving a barrel to get room, so as to use a crow-bar. Now, taking this representation either as evidence or as argument, is it fully supported by the other testimony in the case? I think I may say, that it certainly is not. It is true, that a witness, John Davis, a wood-corder and truckman, who assisted in taking care of the schooner, and in unloading the cargo, asserts, "that the flour on top was a good deal stove; many of the barrels broken. As to the rest, some were so much swollen, that the heads came out in unloading." And he adds, "I got the cooper to get three empty barrels, and we put into them the flour, that had been spilt in unloading. I think that there were three barrels. The top tier of barrels was knocked about so, that a great many of the barrels were stove to pieces, and the flour was out. I mean by that, one head was out;—some of the barrels had two heads out." This is a strong statement. He concludes by affirming, that they "found the barrels of flour more or less stove, from the top to the bottom of the cargo." But, let us see,

how far this statement agrees with the testimony of the cooper himself, a man admitted to be of credit, and disinterested, who was employed in the cooperage during the whole time of the delivery. He says, that the principal part of the coopering was done while the barrels were on the wharf. "They were piled up in tiers, and some of the heads or pieces of them came out. The flour generally came out of the vessel in good order." In answer to a question, whether any of the barrels were stove to pieces, he says, "I saw none, to my recollection;—not a barrel." He adds, that he thinks, if any had been stove, he should have seen them; and from the manner of stowing the flour with corn, he should not, under the circumstances, have expected to find any flour stove; and he concludes in answer to a question, whether he recollected any flour being gathered up, that came out of the barrels on board of the Boston, and put into other barrels, which were afterwards coopered, by saying, "I saw none." Now, it cannot be disguised, that this evidence is essentially at variance with that of John Davis. Then, there is the testimony of the deputy marshal, in whose custody the vessel and cargo were, and under whose direction the cargo was delivered. He says, "There were a number of barrels of flour stove," (meaning, as he says, by "stove," that the heads were partially stove in, and one or two of them were lying on the wharf with their heads out, but the barrels were otherwise entire;) "there were between forty and fifty repaired by the cooper, some barrels and some half-barrels. I did not notice any, that were wholly stove to pieces;—they were in bad condition, and the worst were coopered; the flour not out of some of them;—the water had mixed and made a paste of some of them." In answer to a question, whether there could have been as many barrels as eight or ten in staves, or stove to pieces, lying about or on the decks, without his seeing it, while in charge of the vessel, he answers, "No; there was no such thing to my knowledge;—I did not see them. I should certainly have seen it; if there had been any thing of the kind, I should have seen it." He says, that he was down to the vessel two or three times a day, and stayed, sometimes one hour, sometimes three or four hours, and sometimes all the forenoon. He did not see any empty barrels, except among the dunnage, after the cargo was discharged. He does not recollect, whether there was any flour at all spilled among the corn; the barrels, whose heads were out, were nearly full of flour; he should say, they were full barrels. He adds, (what is denied by John Davis, the witness,) that there was a communication open between the cabin, and steerage, and hold, through which barrels of flour could have been taken into the cabin.

Now, upon this state of the evidence, it seems to me difficult to escape the conclusion, that Davis the witness's account of the state of the flour upon the delivery is a gross exaggeration. It is impossible for the court to believe, that the deficit of twenty-two barrels of flour, and twelve half-barrels, can be accounted for by any breakage of the barrels and spilling of the flour, ascertained upon the unlivery. If the loss had been of three or four barrels only, it might be accounted for in this way; at least, the court would have presumed in favor of it, rather than for such a trifling amount have pressed home an imputation of gross negligence or fraud. The present deficit cannot be accounted for, except upon the presumption of gross negligence or embezzlement, on the part of some persons intrusted with the unlivery, or having confidential access to the property.

But the case does not stop here. In point of fact, ten barrels of flour of the Boston's cargo, were actually conveyed in the Magnolia from Boston to Hallowell, and there sold by the master of the Magnolia, as his own property. This is admitted by the master himself, and is established beyond controversy in the evidence. The sale of the Boston's cargo by the marshal was on the sixth day of October, 1832. The Magnolia sailed from Boston for Hallowell on or about the 25th of the same month. In the manifest of her cargo, sworn to by the master at the custom-house on his departure, there is no item of flour. But in that manifest there is this item: "Forty-six barrels sundries, marked 'J. P. Jr.,' shipper, John Page, Jr., Hallowell." Now, whatever these barrels of sundries were, they were not flour of Page's shipment, or purchase, at Boston. There is no proof of any flour being purchased in Boston for Page, and shipped on board the Magnolia. There were thirty-four barrels of flour purchased by Capt. Davis at New York. There is the testimony of a Hallowell witness, Nathan W. Butler, (not of the crew,) who says, that he was in Boston in the autumn of 1832, when the Boston was lying on the south side of Long-wharf, having been a few days before brought in by the Magnolia. While the Boston was lying there, he saw some barrels of flour taken from her, and rolled across the wharf, and put on board the Magnolia. How many barrels he cannot say; but Capt. Davis, of the Magnolia, told him, that he was going to bring his part of the flour, that was found on board of the Boston, to Hallowell. The corn, he said, he should not bring from Boston, but let it be sold at auction, as that was some damaged. This conversation was had, while the flour was discharging from the Boston. Now, in point of fact, Capt. Davis was not a purchaser of any of the flour of the Boston at the auction, as appears by the auctioneer's account, now before the court, and no satisfactory explana-

tion whatever is given of this conversation. Capt. Davis admits the possession of ten barrels, part of the Boston's cargo, and that he carried them to Hallowell in the Magnolia, (though there is no specification of them in his manifest,) and sold them there; and he asserts, that he purchased them of a person in Boston by the name of Ricketson, whom he never saw before, from whom he took a bill and receipt, on paying him for the flour; and that he has never seen him since. He apeared to be a merchant of respectability, and very much of a gentleman. Now, on inspection of the auctioneer's account, no person of the name of Ricketson appears as a purchaser; and it is admitted at the bar, on both sides, that, after a diligent search, no person by that name, or any other name, can be found in Boston, to whom the purchase or sale of these ten barrels can be traced. It seems to me, that these circumstances are abundantly fruitful of well founded suspicion against the bona fides of the title to these ten barrels of flour. Nor does the testimony of John Davis, the witness, by any means relieve the case from the just weight of these suspicions. In support of the master's case, he states, "I was at work on Long-wharf, while the schooner Boston was discharged. I went up to Capt. Davis, who was talking with a gentleman. I was going to ask him, what I should do with the basket, with which I had been discharging the Boston's corn. I heard the gentleman say, 'You had better take fifty barrels.' Capt. Davis said, he was short of money, and had been at considerable expense; you may send me down ten barrels, as soon as you are a mind to. The gentleman asked, 'Where does your vessel lay?' he says, 'Right opposite here, on the back side of the wharf,' and turned round and pointed towards where the vessel lay." Now, without stopping to consider, whether, as mere hearsay, the objection made to this testimony is not well founded, but admitting its full force, it presents a very extraordinary state of facts. That a gentleman, unknown to all parties, should be trafficking with the master for fifty barrels of flour, without any known place or store, where he or they were to be found; that this flour, or any part of it, should be of the Boston's cargo; that the master should purchase the ten barrels, without further inquiry; and that no trace can now be found of the gentleman, or of any purchase of any of the Boston's cargo by him; these are circumstances somewhat startling, and cast an air of improbability over the asserted transaction. When we connect it with Butler's testimony, which is left wholly unexplained and unrepelled, that improbability is certainly a good deal enhanced. The court cannot but feel, that the master is bound to give some more satisfactory account of his purchase. Why was not this flour stated in the manifest at Boston, when all the rest of the cargo was? Even the learned counsel, who has argued with so much zeal and ability for the master, has been compelled to admit, that this part of the case is not beyond suspicion. He says, that Ricketson may have become subpurchaser after the sale, although it cannot be traced; or, that he may have been a thief, and have been credulously bargained with by the master. But, how should the flour have been stolen, if the master at or before the unlading had exerted the vigilance, which he has so strongly asserted? A theft after the sale cannot be pretended; for no purchaser has attempted to set up any deficit in his own purchase or delivery; and none is now relied on.

But the master admits that he took a bill and receipt for the purchase from Ricketson. Where is that paper? The counsel for the master are obliged to contend, that it has never been produced. We shall presently see, if this be correct. If not produced, why is it withheld? The very suppression of it is calculated to aggravate every suspicion. If produced, it might enable us to trace the verity of the transaction; for handwriting often affords a satisfactory clue. Does not its non-production, then, imply, that it will not bear scrutiny? that it will not mitigate the imputation of guilt, but deepen it? But, in point of fact, how stands the case, as to the bill and receipt? It is proved in the case, that the counsel for Capt. Davis produced, and delivered to the counsel for the claimants, an original paper, purporting to be the very bill and receipt, and with no intimation of any doubt of its genuineness, or of their not intending to use it, as evidence in the case. On the contrary, it is an irresistible inference, that it was relied upon as genuine, and if so, as most important evidence in the case. That paper, after an exact and literal copy was taken, (which is now in court,) was re-delivered to the counsel of the master; and has been since traced home to the hands of the master. Nay, after its existence and production had become a most material point in controversy in the case, and when the person, in whose hands it was, was about to be examined as a witness, to produce and annex it to his testimony, Capt. Davis deliberately received it from the witness, and destroyed it. No explanation has been given, or attempted, of this act; and it, therefore, stands in the case, as a deliberate suppression of a paper of singular importance in the cause; if genuine, to the interest of the master; if otherwise, of much strength of presumption of fraudulent misconduct. But it has been said, that there is no evidence, that the paper originally came from, or was accepted as genuine by, Capt. Davis. It may be far more correctly said, that there is no evidence, that he has ever repudiated it, or disavowed it. It is found in possession of his counsel, as a document in or for the cause. How it was obtained by them is not satisfac-

torily shown. As far as any evidence goes, it is probably traced through and from his attorney at New York. Nay, to this very hour, Capt. Davis does not pretend, that he ever disavowed its genuineness to his counsel, or that it did not come to them by his direction or consent. The claimants could not examine them to this point. Capt. Davis was at liberty so to do; and has not chosen to do it. Nay; looking to the evidence in the case of the existence of the paper, and its destruction by Capt. Davis, his very silence is as expressive, as the most positive declaration, that he had not treated it as a spurious document. It has been said, that it might have been forged by persons in the adverse interest at New York, to give a complexion to the cause. Surely, the court cannot be expected to act upon such a naked conjecture, without even the shadow of any proof in its favor, positively or negatively. The bill and receipt must then be considered, through the instrumentality of the copy, to be clearly in the case, offered as a genuine voucher by Capt. Davis. It is in the following words: "Boston, November 14th, 1832. Capt. Davis, Dr. To F. Ricthrson, for ten barrels Flour, partly damaged, at four dollars and three quarters per barrel, $47.50. Received payment, F. Ricthson." Now, it seems difficult to escape the impression, that the paper itself is a spurious contrivance by some person. The supposed name of the seller is spelt in one place "Ricthrson," and in another "Ricthson." The date is the 14th day of November, 1832; the sale of the Boston's cargo was more than a month before (on the 6th of October); the Magnolia cleared out from Boston for Hallowell on the 25th of October; and the master has testified, that he was in Hallowell on the 14th of November. Yet if the representations of the master or mate are to be credited, the bill and receipt were given on board of the Magnolia, while she lay in Boston. If, under these circumstances, the court would come to the conclusion, that Capt. Davis had established a bona fide purchase of these ten barrels of flour, it would be by an exercise of compassionate credulity beyond any to be found in judicial annals. With whatever reluctance, the court is compelled to say, that there is a total failure to establish it.

Hitherto, the case has been considered upon the evidence arising aliunde the ship's crew; and, on the part of the claimants, at least, upon evidence entirely free from the suggestion of any discredit. But the positive evidence of the three seamen of the Magnolia, (Hanson, Thorn, and Clarke,) goes directly to establish a studied embezzlement by the master, with the connivance and aid of the mate, of the rigging and other ship's furniture, charged by the claimants. If it stopped here, (although the full consideration of the bearing of this evidence properly belongs to another part of the cause,) it would go far to support the embezzlement of the flour also; for the maxim may here properly apply, under such circumstances, Falsus in uno, falsus in omnibus; he, who would embezzle the former, would not hesitate as to the latter. But the witnesses speak to the flour also. Hanson says, that one morning, just at break of day,—the morning when the Boston was discharged,—he saw a dray coming from Long-wharf to the T-wharf, (where the Magnolia lay,) with ten barrels of flour; they were carried opposite the Magnolia, and the mate of the Magnolia gave orders to strike them directly into the hold. He assisted in doing so. He knew they were part of the Boston's cargo, because they were wet, and corn and feathers were sticking to them. The mate said, they were part of the Boston's cargo. Thorn is still more direct and particular on the same point. Clarke is equally positive and direct. Now, if these witnesses are to be believed, there is on this point an end of the case. The embezzlement is established beyond controversy. Some attempt has been made to discredit the testimony of these witnesses; but not, I think, with success. They are materially confirmed in some circumstances, as to the rigging, &c., by Mr. Bergen, who is a New York broker, and was employed to examine into this very matter of the embezzlement, when the Magnolia at a subsequent period, (in December, 1832,) was again at New York. He then went on board of the Magnolia, in company with Thorn and Hanson, and Carpenter, a seaman of the Boston, and found Clarke on board, and the mate Kateng. He says, that Carpenter there pointed out, then on board of the Magnolia, the boom-tackle and watch-tackle of the Boston; and the mate admitted the fact. Carpenter also pointed out a wood-saw, hand-pump, draw-bucket, an axe, and some rigging, belonging to her. He adds, that the mate, after some hesitation, admitted the facts; and also admitted, that some of the Boston's flour, (ten or eleven barrels,) was taken on board of the Magnolia; and endeavoured to excuse himself. Now, the mate stoutly denies the whole of this evidence; and certainly, so far as it is founded in hearsay, it cannot affect Capt. Davis; but as to the mate, it bears directly upon his own claim. Mr. Bergen's testimony is assailed, as incredible in itself, and as contradicted by other testimony. He certainly is contradicted by Kateng, the mate, and by Theodore Blackburn, a boy then belonging to the Magnolia. The testimony of the former is already disposed of. The testimony of the latter is open to attack, as disingenuous and suppressive of proper answers to some of the interrogatories; and has been assailed on other grounds. It is wholly unnecessary to consider these objections, because my judgment is, that Bergen's testimony is credible in itself, and is amply corroborated from other sources.

Upon the whole, without going farther into

this part of the case, my judgment is, that the case of embezzlement of the flour is fully made out; and it equally affects the claim of master and the mate. As to the embezzlement of the anchor, and rigging, and other furniture of the Boston, I shall be very brief. It is admitted, that many of the articles were taken on board of the Magnolia, and carried to Hallowell. And the defence asserted is, that it was a case of sheer mistake, and corrected as soon as discovered. This is true to some extent; and it is quite possible, that the change of the anchor of the Boston for that of the Magnolia may have been by mere mistake. But it was not returned; and as to the boom-tackle, and watch-tackle, and other articles, found at New York, on board of the Magnolia, the defence is not completely established. It is manifest, that a good deal of the appropriate equipments and furniture of the Boston disappeared after her disaster. If the testimony of the three seamen is to be believed, there is (as has been already stated) unequivocal evidence of a meditated embezzlement of many of these articles. If the other part of the transaction had been free from all doubt, there might have been some scope for an indulgent consideration of this part of the case, upon the ground of negligence, or ignorance, or mistake. As the actual posture of the case is, it seems to me, that the taint of embezzlement has infected the whole transaction to an extent fatal to the claim of salvage. I regret that I am compelled to arrive at this painful conclusion; but looking to all the circumstances, I am unable to escape from it.

My judgment accordingly is, that the decree of the district court, as to the amount of the salvage, ought to be affirmed. As to the distribution of the salvage, there being no appeal, whatever might otherwise be my opinion, I do not feel at liberty to disturb it. But, I do decree, that the shares of Capt. Davis, both as part owner and as master, in the salvage, be decreed forfeit to the owners of the Boston and cargo; and also, that the share of the mate, Kateng, be in like manner decreed forfeit. In all other respects, the decree of the district court is to be affirmed; and, under all the circumstances of the case, I shall direct the costs of all parties, libellants and claimants, in this court, to be a charge upon the property saved, and to be deducted therefrom accordingly. Each party here has prevailed to a certain extent, and therefore may well claim some indemnity; and the master and mate have been sufficiently punished by the forfeiture of salvage, without attempting to press upon them any separable item of the costs. I shall refer it to the clerk, to ascertain and report what sums are due to the salvors respectively, according to the principles of this decree, and the amount of the shares of the master and mate, which are decreed to be forfeited. Decree accordingly.

BOSTON (BOWDITCH v.). See Cases Nos. 1,718 and 1,719.

BOSTON (BURRILL v.). See Case No. 2,198.

BOSTON (RICHARDSON v.). See Case No. No, 11,780.

BOSTON BELTING CO. (DAY v.). See Cases Nos. 3,673 and 3,674.

Case No. 1,674.

BOSTON BELTING CO. v. JUDSON.

[N. Y. Times, July 2, 1852.]

Circuit Court, S. D. New York. July 1, 1852.

REMOVAL OF CAUSES — CONFORMATION OF PLEADINGS TO FEDERAL PRACTICE — PLEADING — DEMURRER.

[1. The pleadings in a case removed from a state court to the United States circuit court must conform to the federal rules and practice.]

[2. A complaint in an action removed from a state court, which does not conform, as a bill in equity, to the rules of the supreme court governing federal practice, and is bad in form and substance as a declaration at law, is demurrable.]

[At law. Action by William Judson against the Boston Belting Company. Defendant's demurrer to the complaint sustained.]

Before NELSON, Circuit Justice, and BETTS, District Judge.

Demurrer to declaration. This action was commenced in a state court against the defendants, a foreign corporation, and was by them removed to this court. The complaint filed in the state court was brought up with the case, and was served by the attorney of the plaintiff on the attorney of the defendants in this court. A general and special demurrer was put in to it. The court decided: (1) That the pleadings of the plaintiff here must conform to the rules and practice of this court. (2) If this be a prosecution on the equity side of the court, the complaint is insufficient and bad, in not being drawn conformably to the rules of the supreme court of the United States governing the practice here. (3) If it be intended as a prosecution at law, the complaint is bad in form and substance, as a declaration. (4) Query, whether this court has jurisdiction in this case, the defendants being a substantial party and a corporation within another state? Judgment for the demurrant, with leave to the plaintiff to file a bill in equity, or declaration at law, as he may be advised.

BOSTON DIATITE CO. (FLORENCE MANUF'G CO. v.). See Case No. 4,882.

BOSTON ELASTIC FABRIC CO. (CAREW v.). See Cases Nos. 2,397 and 2,398.

Case No. 1,675.

BOSTON ELASTIC FABRICS CO. v. EAST HAMPTON RUBBER-THREAD CO.

[2 Ban. & A. 268;[1] 9 O. G. 745.]

Circuit Court, D. Massachusetts. April Term, 1876.

PATENTS—INVENTION—PRIOR PUBLIC USE.

1. The reissued patent for an improvement in cutting sheets of rubber into threads, number 5,903, dated June 2, 1874, granted to the complainants as assignees of Liveras Hull, *held* invalid for want of novelty in the invention.

2. A patent may be defeated by showing that the thing secured by the patent had been invented and put into actual public use prior to the discovery of the patentee, however limited such use (other than experimental) of the prior discovery may have been.

In equity.

James E. Maynadier, for complainants.

George Gifford and Hillard, Hyde & Dickenson, for defendants.

SHEPLEY, Circuit Judge. A former suit between these parties, commenced for alleged infringement of letters patent granted to Liveras Hull, dated January 20, 1863, for an improvement in cutting sheets of rubber into threads, was dismissed upon the ground that the patent, as it then stood, was for a machine, and that the machine used by Hull was substantially the same machine as one of prior date, known to manufacturers of rubber thread as "the bottle-machine." 1 Ban. & A. 222 [Boston Elastic Fabrics Co. v. East Hampton Rubber-Thread Co., Case No. 1,676].

Since the decision in that cause, the patent has been reissued to the complainants, as assignees of Liveras Hull, by reissue 5,903, dated June 2, 1874, as a patent for an art or process, the claim being for "the improved mode of manufacture above described, consisting in cutting the sheet into a series of threads by a continuous cut of one cutter," as described in the specification.

At the hearing of the former cause it clearly appeared that Liveras Hull, without any knowledge of any prior machine, or of any prior use of an art of cutting rubber threads in the mode described in his specification, had invented both the machine and the mode of manufacture. But it also appeared, as clearly, that there was proof of a machine of an earlier date than his invention, although it was unknown to him. It did not quite satisfactorily appear, from the evidence in the former case, that the process or mode of manufacture described by Hull, and now, but not then, claimed, had been practised on the anticipating machine, although that mode of manufacture could have been practised on that machine, or at least on one differing from it only in the enlarged size of the drum on which the sheet rubber is wound. There was no conclusive evidence in that case that Hull was not the first, as he undoubtedly was in one sense an original, inventor of his mode of manufacture. But this issue was not directly involved in that case, the patent, as it then stood, being for the machine, and not for the art or process. Evidence has now been introduced, much of it coming from witnesses who were not examined before, which seems to prove satisfactorily that a machine was constructed by one Helm during the fall of the year 1860, and completed before the 1st of January, 1861; that a sheet of rubber many yards in length was wound round upon the drum of said machine; that the machine had a single circular cutter, which was pushed up to the drum through the rubber at one end of the cylinder; that the drum was then caused to rotate slowly, and the circular cutter to rotate rapidly, and at the same time to traverse slowly along the face of the drum until it reached the other end of the drum, by which operation the sheet of rubber was cut into a series of threads by a continuous cut of one cutter.

That this was the same process claimed and described in complainants' patent is too clear to admit of dispute. Complainants contend that the process was only imperfectly carried on, that the thread made was imperfect, and that the use of the Helm machine was merely experimental, and the experiment was abandoned before Hull made his invention. The law upon this subject is too well settled to require the citation of any authorities. A patent may be defeated by showing that the thing secured by the patent had been invented and put into actual public use prior to the discovery of the patentee, however limited such use (other than experimental) or knowledge of the prior discovery may have been.

Seven witnesses, who are unimpeached and uncontradicted, testify to the public and practical, not merely experimental, use of the patented process, in New Brunswick, on the Helm machine, prior to the time of the alleged invention by the patentee. They prove that the threads cut by that machine were good, marketable threads, well cut, and publicly made and used in large quantities in the manufacture of both shirred goods and suspenders, and that the fabric made from them was a good, salable fabric, and regularly sold in the market. There is some conflict in the testimony as to the subsequent history of the Helm machine on which this was first cut by the patented process. That history is not material to this inquiry. We are dealing with the mode of manufacture of the thread. The evidence shows that mode of manufacture to have been practised, not for experiment, but in the regular course of business, openly, successfully, and practically within the knowledge of a large num-

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

ber of persons at a time prior to the date of the alleged invention. Bill dismissed.

Case No. 1,676.

BOSTON ELASTIC FABRICS CO. v. EAST HAMPTON RUBBER-THREAD CO.

[1 Holmes, 372; 1 Ban. & A. 222; 5 O. G. 696; Merw. Pat. Inv. 345.][1]

Circuit Court, D. Massachusetts. May 8, 1874.

PATENTS—INVENTION—ANTICIPATION.

Where the invention described and claimed in a patent is of a machine of specified construction, it is anticipated by a prior machine of substantially the same construction; although a new, and perhaps patentable, use of the machine is suggested in the specification of the patent.

In equity.

J. E. Maynadier, for complainant.

George Gifford and Hillard, Hyde & Dickinson, for defendant.

Before SHEPLEY, Circuit Judge, and BLATCHFORD, District Judge.

SHEPLEY, Circuit Judge. Letters patent of the United States, dated Jan. 23, 1863, were issued to Liveras Hull for an "improved machine for cutting caoutchouc." On the tenth day of March, in the same year, Hull assigned to the complainant all his title and interest under said letters patent. The bill in this case charges the defendant corporation with infringement, in that it has "unlawfully made, used, and sold said patented invention, and manufactured and sold large quantities of rubber thread cut by machines substantially the same as described in said letters patent."

The answer of the defendants admits "that they have used machines for cutting threads which they are advised are covered by the claim of said patent, and they insist and submit that they have a just and lawful right so to do." The defendants' answer denies that Hull was the first and original inventor of the invention or thing patented by said letters patent, and alleges prior knowledge and use by Robert C. Helm and others named, at New Brunswick, N. J., by the Nashawannuck Company and others named, at East Hampton, Mass.; by Henry G. Hubbard and others at Middletown, Conn.; and also that, prior to the date of Hull's invention, it was described by Thomas Hancock in a book printed in London in 1857, entitled "A Personal Narrative of the Origin and Progress of the Caoutchouc or India-Rubber Manufacture in England."

The patent in this case is for a machine, not for a process. If it were possible to give to this patent a construction which would secure to the patentee the benefit of that invention which is suggested perhaps, though not distinctly stated or claimed in the patent itself, but is relied upon in the argument as the invention of Hull (namely, his process of cutting a rubber sheet into threads, whereby a series of parallel threads are cut from a single sheet by a single cut of a single knife), the court would feel disposed to do so; but the language of the patent itself is so clear, that it seems to us necessarily to exclude such a construction. The patent is for "an improved machine for cutting caoutchouc;" the claim is as follows: "I claim my improved caoutchouc cutting-machine, having its several parts constructed and arranged in manner and so as to operate substantially as described, such machine not only having a single drum or cylinder to support, and a revolving knife to cut, a sheet of caoutchouc, as explained, but having machinery for traversing the rotary knife, with reference to the drum, and also having machinery for moving such knife toward and away from the drum, as specified." It is true the patentee says that his invention "has reference to the separating of a sheet of caoutchouc into narrow filaments or strips," and this language, taken alone, might favor the construction contended for,—that the invention claimed was an art or process;—but the language immediately following is: "And I do declare the same to be fully described in the following specification, and represented in the accompanying drawings, making part thereof of the said drawings."

The drawings represent and the specification describes a machine. No question is made in this case that the Middletown machine, represented by "Exhibit Middletown," was known and used long prior to Hull's invention. Complainant does not dispute that it contains all the elements of the Hull machine, except the drum. He admits the Middletown machine has a drum, but insists that there is a material and substantial difference between the drum in the Middletown and the drum in the Hull machine. The patentee does not describe or confine himself in his specification to a drum of any particular size. The complainant undertakes to prove by its witnesses that rubber thread could not be practically cut on the drum in the Middletown machine; but this is met and fully overcome by the testimony on that point introduced by the defendants, and by the production in court, as an exhibit in the case, of a series of rubber threads, cut by a single cut on a machine having a drum no larger than those used prior to the invention of Hull. There can be no doubt that if the Middletown machine were not older than the Hull machine, it would be a clear infringement.

Before Hull cut a series of threads by a single cut of a single knife, it does not ap-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission. Merw. Pat. Inv. 345, contains only a partial report.]

pear to have been done by any one on the machines then in existence. The mode of cutting on the Middletown and other machines, called sometimes bottle-machines, was to construct a bottle or a tube of rubber upon a cylindrical drum, or a drum which was a frustum of a cone; the revolving circular knife cut a strip of rubber from this tube or bottle; the knife, as it traversed along the drum, cutting one continuous strip, which was afterward, in another machine, cut into narrower filaments or strips. But if a thin sheet of rubber, several times longer than the circumference of the drum, be wound about the drum, "in a spiral or watch-mainspring curve," and the knife or rotary cutter be forced into the strip, so as to cut at once through all the layers of the caoutchouc, although the path cut by the rotary cutter will be a helix extending around the main drum, from end to end, it will be found, on removal of the piece of caoutchouc from the drum, that such piece of caoutchouc will be cut lengthwise from end to end of it in a series of parallel strips. This Hull discovered. He invented no new machine, but he operated an old machine in a different manner, and produced a new and different result. That he did not make a patentable invention we are not disposed to decide; but the discovery of a new mode of operating an old machine to produce a new result does not give to him the right to a monopoly of the old machine. Broadly as courts are disposed to construe patents for the sake of upholding a meritorious invention, yet when it is too clear to admit of a doubt that the patent is for a machine, the court cannot change it into a patent for an art. Upon any construction we are able to give to this patent, the defendant is not guilty of infringement, and the bill must be dismissed.

[NOTE. For subsequent litigation between the same parties involving the same patent, see Case No. 1,675.]

BOSTON GASLIGHT CO. (THACHER v.). See Case No. 13,850.

Case No. 1,677.

In re BOSTON, H. & E. R. CO.

[9 Blatchf. 101; 6 N. B. R. 209; 6 Am. Law Rev. 365.] [1]

Circuit Court, D. Connecticut. Sept. 19, 1871.[2]

BANKRUPTCY — PETITION FOR — WHO MAY INTERVENE—JURISDICTION OF DISTRICT COURT — PRIORITY OF ACQUISITION.

1. The Boston, Hartford and Erie Railroad Company was a corporation, chartered by the state of Connecticut. It afterwards received a grant of corporate privileges, and was declared a corporation, by an act of the legislature of the state of Massachusetts, in which state it had an office, and carried on business. In October, 1870, a petition was filed by A., in the district court for Massachusetts, in bankruptcy, upon which the corporation was, on the 2d of March, 1871, adjudged bankrupt. In December, 1870, J. filed a petition in the district court for Connecticut, praying that the corporation be adjudged a bankrupt by that court. Pending this latter petition, A. petitioned the district court for Connecticut, and set forth, in his petition, and in a supplemental petition, his proceedings in Massachusetts, and the adjudication there made, averring, also, that the proceedings in Connecticut were collusive between the corporation and J., and would prejudice the creditors of the corporation, create expense and conflict, and embarrass the settlement of the estate, and praying that he, A., might be allowed to appear and defend against the petition of J. The district court for Connecticut dismissed such petition of A., and proceeded to an adjudication of bankruptcy against the corporation, and issued a warrant: *Held*, that, A. being, in fact, a creditor of the corporation, his petition to the district court for Connecticut should have been entertained, and that the facts set forth therein warranted his intervention.

[Followed in Re Boston, H. & E. R. Co., Case No. 1,678; Re Derby, Id. 3,815. Approved in Re Bergeron, Id. 1,342; Re Jack, Id. 7,119. Cited in Re Hatje, Id. 6,215; Re Scrafford, Id. 12,557; Re Jonas, Id. 7,442; Re Austin, Id. 662; Re Donnelly, 5 Fed. 786.]

2. That, whether the bankrupt was to be regarded as a single corporation, or as two corporations, united in interest, having one and the same corporators, and common property, rights, and franchises, and owing the same creditors, the district court for Massachusetts should be permitted to exercise the jurisdiction it had acquired over the bankrupt and the estate, and carry the proceedings in bankruptcy to their final conclusion, without the interference of the district court for Connecticut, and that all proceedings in that court should be stayed.

[Followed in Re Boston, H. & E. R. Co., Case No. 1,678.]

[Petition to review the decision of the district court of the United States for the district of Connecticut.]

In bankruptcy. On the 20th of December, 1870, a petition was filed in the district court, by James Alden, an alleged creditor of the Boston, Hartford and Erie Railroad Company, alleging the insolvency of the corporation, and the commission of an act of bankruptcy, and praying an adjudication declaring it bankrupt. To this petition, another alleged creditor, the Adams Express Company, by leave of the court, became a party, as co-petitioner. Pending the proceedings, Seth Adams presented a petition to the district court, and afterwards filed a supplemental petition, by which it appeared, that, before the filing of the petition of Alden in this district, he (Adams) had, on the 21st of October, 1870, filed, in the district court for the district of Massachusetts, his petition against the same corporation, alleging insolvency and an act or acts of bankruptcy, and that such proceedings were thereupon had, upon due notice, that, on

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 6 Am. Law Rev. 365, contains only a partial report.]

[2] [Reversing an unreported case in the district court.]

the 2d of March, 1871, the corporation was adjudged bankrupt. The petitioner also averred, that the proceedings in the district court for Connecticut were collusive, and intended to, and would, prejudice the rights of the petitioner and other creditors; that various defences existed thereto, which the company would not interpose; and that, if the proceeding was further prosecuted in Connecticut, it would lead to great embarrassment, expense, conflict of title and jurisdiction, and consequent litigation, to the prejudice of the creditors, and the reduction of the assets. The petitioner, therefore, prayed, that he, as a creditor, upon whose application the company had been decreed bankrupt, in the district of Massachusetts, might be permitted to appear and defend against the petition of Alden in this district, and for other and further relief.

The district court held these petitions of Adams to be insufficient, on their face, to warrant his admission as a co-defendant, for the purpose of resisting that of Alden, and dismissed them. To reverse this decision, Adams brought the present petition of review, before the circuit court. In this petition, he set forth the facts already recited, and averred that the district court, after dismissing his petitions, adjudged the company bankrupt, and directed that a warrant issue to take possession of its estate, and that a meeting of the creditors had been called to choose assignees. He also averred, that the alleged bankrupt was chartered, under the name of the Boston, Hartford and Erie Railroad Company, by the state of Connecticut, in 1863, with the right to purchase, from any persons or corporations interested, the franchises and property of any and all railroad companies located, in whole or in part, in the state of Connecticut, whose routes, or any part thereof, were on the railway lines running from the harbor of Boston, in Massachusetts, to Willimantic, in Connecticut, and from Providence, in Rhode Island, through Willimantic, to Waterbury, in Connecticut, and thence to Fishkill, in the state of New York, together with the right to make joint stock with any of said other railroad companies, located or having routes upon said railway lines; that said company was duly organized, under that act; that afterwards, and before the year 1868, the state of Massachusetts granted permission to certain railroad companies in that state to sell and transfer their franchises and property to the said Boston, Hartford and Erie Railroad Company, and declared the latter a corporation within that state, vested with all the franchises and powers pertaining to such corporations; and that, thereupon, under and by virtue of an act of Massachusetts, approved April 29th, 1868, the said Boston, Hartford and Erie Railroad Company became and was incorporated and established a corporation in the last-named state. He also averred, that that corporation owned and operated a railroad in the states of Massachusetts, Rhode Island, and Connecticut, owning other property, also, in those states, and had its principal office, place of business, and domicil, in the city of Boston, in Massachusetts, where the same were, for more than six months before the petitioner filed his petition against the bankrupt in the district court for the district of Massachusetts; that the petitioner was, in fact, a creditor; and that the said company had committed an act of bankruptcy, which was set forth. [Reversed.]

Simeon E. Baldwin, for Adams.

WOODRUFF, Circuit Judge. The petition of review presented by Seth Adams, a creditor of the bankrupt corporation, was brought to a hearing upon an order to show cause, which was duly served upon the bankrupt, and upon the petitioning creditors prosecuting the proceeding in the district court. No party appeared to oppose the application for a review and reversal of the order of the district court, or to deny the allegations in the petition presented for that purpose. They are, therefore, for the purposes of such review, to be taken as admitted. The question, therefore, is—Ought Adams, upon the facts alleged by him, and not denied, to have been permitted to intervene, in the district court for Connecticut, for the protection of the interest he had in the estate of the bankrupt corporation, and to take part either in arresting or controlling the proceedings in this district?

This may now depend upon two questions: First, whether a creditor of an alleged bankrupt is, in any case, entitled to be heard in the district court, touching any order which that court may be asked to make by the bankrupt, or by a creditor petitioning that the debtor be adjudged a bankrupt, or, is such a proceeding so strictly inter partes, that no other creditor can intervene, for any purpose, prior to the adjudication; and second, whether the present petitioner presented a case in which intervention was necessary or proper, for the protection of the estate, or his interest therein.

It has been said, that no creditor is entitled to be heard until he has proven his debt in due form, so as to entitle him to share in the assets of the estate. This may, perhaps, be true when the object of such intervention is simply to interfere with the distribution of the assets, though I am not willing to hold even so broadly as to say, that no proof short of that of the formal and technical character contemplated by the forms of procedure will be sufficient to justify the court in entertaining an application by an actual creditor. In Re Troy Woolen Co. [Case No. 14,201], on review, I affirmed an order of the district court [Case No. 14,200], setting aside a sale of real estate by the assignee, on the applica-

tion of creditors of the bankrupt, although such formal proof had not been made, and their claim was, in fact, contested. I cannot admit that a creditor of the bankrupt can have no standing in court to be heard touching the proceeding, in any case, prior to the adjudication, if he show, by proofs, satisfactory to the court, that he is in fact a creditor, and that his interests will be affected by the adjudication. Formal proof of the debt, under the proceeding instituted, is, in some sense, a submission to the jurisdiction of the court, and an apparent admission, if not a claim, that the adjudication should be made, and the estate administered, upon the petition then and there pending.

At first view, it is natural and agreeable to our ordinary ideas upon this subject, to assume that a petition by an alleged creditor against his debtor, to compel a submission of his estate to the bankruptcy court, is a contest between two parties, with which a third person may not meddle. But this is by no means a complete view of the scope and effect of the proceeding. It is not a mere suit inter partes. It rather partakes of the nature of a proceeding in rem, in which every actual creditor has a direct interest. The proceeding is summary, and, in a high degree, informal, and it should be free from technical embarrassment. It is true, that no one is entitled to be heard therein who has no interest to protect; but, it seems to me, that, if the applicant does, in fact, show that he is a creditor, and has an interest to protect, it is not in accordance with the spirit of the proceeding to compel him first to file that formal proof of his debt which would import a recognition of the jurisdiction of the court over the question of adjudication, and the administration of the assets, which, by his application, he seeks to contest. It is, also, true, that, to justify such intervention, the object or purpose disclosed must be one which, in a legal sense, is meritorious, and not purely officious. Therefore, the facts alleged as grounds of intervention must be such as entitle the applicant to consideration. The court must be able to see that the intervention may serve some useful purpose, either in protecting the rights of the applicant, or those of the creditors at large. On this subject, the case of Brewster v. Shelton, 24 Conn. 140, furnishes no remote analogy. There, a creditor made application to the proper court to compel the appointment of trustees of the estate of his alleged debtor under the insolvent law of Connecticut. By that law, the appointment of trustees operated to defeat liens acquired by prior attachment of the debtor's property. Certain creditors, who had made the attachments, intervened for the protection of their liens, and were successful in defeating the application. The objection that they were not parties, and that they were not entitled to be heard, was urged; but the supreme court of errors overruled this objection, and fully established their right to thus intervene. If it be suggested that the parties intervening in that case had acquired a specific lien, which was distinctly involved in the matter before the court, such suggestion brings into view the precise relation of Adams, the present petitioner, to the matter pending in this case before the district court for Connecticut.

Leaving then, the general question, in what cases and for what purposes a creditor is entitled to be heard pending the proceeding—one of which is provided for in the 31st section of the bankrupt act, under which the courts have repeatedly held, that a creditor has a right to be heard in opposition to the discharge of the bankrupt, whether he has made formal proof of his debt or not (Bump's Bankrupt Law, 4th Ed. p. 433, and cases there cited)—it is sufficient for us now to deal with the precise case presented by this petitioner. He is the petitioning creditor in the district of Massachusetts, and has there obtained an adjudication declaring the debtor bankrupt. He has thereby acquired a clear legal right to have its property applied to the payment of its debts, and, in a proper sense, has obtained an equitable lien on all the property and estate of the bankrupt, (assuming, of course, for the purposes of this question, that the proceeding in Massachusetts is legal and operative,) and has an interest in protecting it from embarrassment, complication, and waste, or withdrawal from the control of that court, and, especially, in preventing the administration of any part of the assets from being transferred, under the forms of law, by collusion between the debtor and other creditors, to another and distant forum. But, nevertheless, as already observed, no intervention should be permitted, unless the case made by the petitioner shows that he is seeking a proper object, and presents the facts necessary to warrant the relief for which he asks. This leads to the consideration of the second question, and that is, whether the petitioner has shown a case which entitles him to intervene for the protection of his interest in this estate.

In determining this point, it is not necessary that I should express any opinion on the question whether the Boston, Hartford and Erie Railroad Company is, under the laws of Connecticut and Massachusetts, one corporation, or two corporations having a common stock, a common property, common powers, and identical corporators. Nor is it necessary to enquire here, whether railroad corporations are amenable to the bankrupt act, as bankrupt debtors. For the purposes of this case, I might rest that point on the opinion of the learned justice of the supreme court, (Mr. Justice Clifford,) by which the jurisdiction of the bankrupt courts over such corporations was affirmed, in the case against this

company in the district of Massachusetts (Sweat v. Boston, H. & E. R. Co. [Case No. 13,684]), but the question is not material for the disposition of the case now before me. If such jurisdiction exists, then this case is to be considered in other aspects. If it does not exist, then, surely, that fact should be no obstacle to an intervention to stay its assumption and exercise.

The petition shows, that the debtor is either a single corporation, exercising corporate powers by authority of Massachusetts, having its principal office and place of business in Boston, in the district of Massachusetts, and, therefore, within the jurisdiction of the bankrupt court there; or, two corporations united, owning all their property in common, conducting their business for the joint benefit, exercising like powers, having in all respects a common interest, performing all their functions to compass one object, for the benefit of the same corporators and stockholders, and having one set of creditors. In this aspect, they may be something more than partners; but they are so united that they are plainly within the section (§ 36) of the bankrupt act relating to partnerships, as well as within that relating to joint stock companies (§ 37), and are, therefore, liable to be proceeded against in the district of Massachusetts. It is no less true, that, in either view of the character of the company, it was equally liable to be proceeded against in the district of Connecticut. The district courts of both districts had jurisdiction over the debtor, as a bankrupt.

In this state of the law, if no express rule were prescribed, no doubt would, I think, exist as to the proper practice, where the jurisdiction of both courts, to adjudge the debtor bankrupt and administer its estate, was invoked. The familiar practice of courts of equity, acting under the same general jurisdiction, would require them, when their jurisdiction should be invoked for the distribution of the same fund, by different complainants, to permit the court first obtaining jurisdiction of the fund, by the institution of a suit, to proceed therewith to its full and complete disposal. For, it will be observed, that such a case is not analogous to that of two suits proceeding at the same time in different states, under different laws. Both the district courts here are federal tribunals, acting under federal laws, constituting a single system, operating alike in both jurisdictions, and necessarily governed by the same rules, and proceeding to the same identical result. It would be a mere act of comity for a state tribunal to stay its own proceedings, on the ground that a suit was pending in a court of another state, both suits being for the administration of the same fund; as, for example, in a case for the construction of a will, and the proper distribution of the estate under it. Here, there can be but one administration, there is but one bankrupt law, the authority and jurisdiction of the courts are derived from one source, and the reasons for confining the administration of the estate to a single tribunal are of great fitness and force.

I am, therefore, of opinion, that, in the absence of any express provision, it would be the duty of the other district courts to yield the control and direction of the entire proceeding to that one whose jurisdiction was first invoked, and whose power is ample to accomplish all the purposes of the law, and protect the rights of all parties interested, under the authority of the same act which governs each of them. See the principle and some analogies in Smith v. M'Iver, 9 Wheat. [22 U. S.] 532; Ex parte Robinson [Case No. 11,935]; Shelby v. Bacon, 10 How. [51 U. S.] 56, 68; Peale v. Phipps, 14 How. [55 U. S.] 368, 374. Without this, it is difficult to see how the law can be safely, uniformly, and legally administered. On the appointment of an assignee, all the property of the bankrupt is, by express terms, vested in him, by the assignment made, and such assignment relates back to the commencement of the proceedings. When, therefore, one court, having jurisdiction, has adjudged a debtor a bankrupt, appointed an assignee, and executed the assignment, nothing of the property of the bankrupt remains in him to be taken or administered by another tribunal. All is vested in the assignee appointed by the other, as of the time when the first petition was filed. If, on a second petition, filed in another court, the latter were to proceed to appoint an assignee, it is difficult to perceive that the title of the latter would not be completely overridden. To use, for illustration, the present case. The petition to put this debtor into bankruptcy was first filed in the district court of Massachusetts, which clearly had jurisdiction, and that court had adjudged it bankrupt before any such adjudication had taken place in Connecticut. If, then, as the statute expressly provides, the appointment of the assignee, and the assignment to him, relate back to the commencement of the proceedings, how can any assignee appointed in Connecticut, under proceedings commenced subsequent to the beginning of those in Massachusetts, acquire any title or right to intermeddle with the administration, as against the assignee appointed in the latter district, and, by relation, if not by prior appointment, having prior and exclusive title?

The law, however, contains other provisions bearing on the subject, and the general orders of the supreme court, made by express authority of the act, shed further light for our guidance. In the case of copartnerships, when the co-partners reside in different districts, and, therefore, more than one court has jurisdiction, it is provided, that the court in which the petition is first filed shall retain exclusive jurisdiction over the case. (§ 36.) This provision is to prevent the complication which might arise if both

courts were to attempt to administer the same estate, and furnishes an apt analogy, if not a rule, for this precise case. It is possible, that the same assignee might be chosen and approved [appointed][3] in each jurisdiction; but it is also possible, that different ones might be chosen. And, if the same were chosen in both, there is no fitness nor propriety that there should be a double accounting, or a double series of orders, with double services and costs. The act authorizes proceedings against a single debtor, either in the district in which he resides, or that in which he carries on business. Proceedings might, therefore, be commenced against him in both; and I find, in the terms of the act, no express declaration as to which court shall have priority of jurisdiction. The implication, however, resulting from the vesting in the assignee the title to all the property of the bankrupt by relation back to the commencement of the proceedings, seems necessarily to involve the same rule as that expressly prescribed in the case of co-partnerships.

But, the supreme court, whose orders, in cases not otherwise provided for, or, at least, so far as they are consistent with what is provided by the act, are conclusive, by general order number sixteen, have directed, that, "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil; * * * and, in case of two or more petitions against the same firm in different courts, * * * the petition first filed shall be first heard; * * * and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard, and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed." Upon the facts stated in this petition of review, if the bankrupt be regarded as a single corporation and having a domicil, within the meaning of this order of the supreme court, that domicil is as truly in Massachusetts as in Connecticut, the bankrupt having been incorporated by both states. If, however, it is to be regarded as composed of joint parties, and in the nature of a co-partnership, then the petition filed in Massachusetts was entitled to be first heard, and then, as in the other case, provision was made for staying the proceedings in Connecticut; and the court in Massachusetts, having made the first adjudication of bankruptcy, retained jurisdiction over all proceedings therein until the same shall be closed. But, if the character of the debtor here is anomalous, not precisely answering either description, then the law and the order of the supreme court prescribe a rule, which, from its obvious fitness and propriety, should be the guide of the court in these proceedings, in order to avoid the complication, embarrassment and expense, if not inevitable conflict, resulting from an endeavor to administer the same fund in two districts.

It may not follow, that the court in which the latest petition is filed, must, or ought to, dismiss the proceeding lawfully and regularly instituted; but it should, at least, in my opinion, on a proper application, stay the proceedings, until some adjudication touching the bankruptcy be had in the tribunal in which the petition was first filed; or, if the debtor has been already adjudged bankrupt there, abstain from an apparent interference with the title of the assignee to the estate.

If these views are correct, then there was ground for the application to the court in Connecticut to stay proceedings, and yield to the already acquired and exclusive jurisdiction of the court in Massachusetts. This ground was fully shown by the petitioner in his application to the district court, and it was further alleged that the debtor was in collusion with the petitioning creditors here, and would make no resistance to their petition. Who, then, was authorized to present these facts to the district court in this state, and assert the prior and exclusive jurisdiction of the court in Massachusetts? The debtor would not. The petitioning creditors would not. If they were acting in collusion, their purpose could only be to complicate and embarrass the proceedings, to the prejudice of the creditors, and to produce conflict and litigation. I feel no hesitation in saying, that the petitioning creditor in Massachusetts was eminently the proper party to bring the state of this case to the attention of the court, and ask to be heard in resistance to further proceedings which tended to his prejudice, as the prosecuting creditor, and which, if permitted to have any operation, tended to defeat the rights he had acquired, and the effect of the adjudication, in Massachusetts. Unless this be so, then the neglect of the debtor to resist the later proceedings defeats the express provision giving exclusive jurisdiction to the court in which a petition is first filed, or that which gives to the court making the first adjudication exclusive jurisdiction; or it leaves the court to proceed to an idle and useless form of adjudication and administration, after its jurisdiction has been, for the time at least, defeated, and when the property of the bankrupt is divested, so as to leave nothing for the court to administer. I think, therefore, that the petition of Adams should have been entertained, and, if the facts therein alleged were not controverted, or were found true, the proceedings in the court below should have been stayed.

Since the argument of this petition of review, the creditors, proceeding under the adjudication of bankruptcy in the district court, have chosen the same assignees who were chosen by the creditors under the proceed-

[3] [From 6 N. B. R. 209.]

ings in Massachusetts, and they have been approved by both courts.

I find nothing whatever in the case to warrant the conclusion that the adjudication of bankruptcy in this state was an improper decree. Surely, the petitioning creditor, who himself sought a like decree in Massachusetts, cannot deny that the debtor was bankrupt, and could be properly so adjudged. And, as to the assignees, they are duly appointed by the court in Massachusetts, and the further sanction of an appointment in Connecticut can by no possibility prejudice the petitioner. There is, therefore, in the present condition of the matter, no occasion for disturbing what has been done. All that can be said is, that, according to the views which I have here expressed, the petitioner was entitled to have the proceeding earlier stayed, to avoid a possible result that cannot now happen. It may be suggested, that these subsequent occurrences are not regularly before me on this review. In technical strictness, that is true; but I have ample power to permit them to be brought before me. Such supervision as is conferred on this court in these cases, summary in its nature, is not to be so hampered by technical rules, as to prevent my dealing with the case as it now exists. It seems to me, therefore, that, unless the petitioner desires to deny that those subsequent proceedings took place as I have stated, all that is necessary now is, to stay the proceedings in the district court. It is not easy to see that there can ever be occasion to move further therein; but, if the jurisdiction of the court in Massachusetts should in any way be defeated, or the proceedings therein be reversed, or dismissed, upon any grounds not also applicable to those pending in this district, it may be of the utmost importance to all the creditors, and especially to the petitioner himself, that those proceedings be resumed and continued to the final close of the administration of this bankrupt estate.

[NOTE. For proceedings in Massachusetts, see Cases Nos. 47, 152, and 13,684. For proceedings in New York, see Id. 1,678–1,680.]

Case No. 1,678.

In re BOSTON, H. & E. R. CO.

[9 Blatchf. 409;[1] 6 N. B. R. 222; 6 Am. Law Rev. 582.]

Circuit Court, S. D. New York. Feb. Term, 1872.[2]

BANKRUPTCY—JURISDICTION OF DISTRICT COURT—PRIOR ADJUDICATION—EFFECT OF.

1. The principles decided in Re Boston, H. & E. R. Co. [Case No. 1,677], affirmed.

2. Under the bankruptcy act of March 2d, 1867 (14 Stat. 517), where petitions for adjudication are filed in two or more district courts, each having jurisdiction, the court in which the petition is first filed ought to be accorded exclusive jurisdiction over the case.

[See Ex parte Greenfield, Case No. 5,771; Ex parte Leland, Id. 8,228.]

3. An adjudication in bankruptcy was signed by the district judge in New York, on March 1st, but was not made known, or promulgated, or filed, until March 3d. On March 2d, the district court for Massachusetts made a decree adjudging the same debtor a bankrupt: *Held*, that the adjudication in Massachusetts was the prior adjudication.

[Cited historically in Graham v. Boston, H. & E. R. Co., 118 U. S. 168, 6 Sup. Ct. 1,013.]

[Petition for review of the decision of the district court of the United States for the southern district of New York.

[Application for adjudication of bankruptcy. The district court denied the application of Seth Adams for leave to intervene and oppose the application. Case No. 1,679. Reversed.]

Joseph H. Choate, for Adams.

Clarence A. Seward and Charles M. Da Costa, for Alden and the Adams Express Company.

J. Langdon Ward, for bankrupt.

WOODRUFF, Circuit Judge. On the 21st of October, 1870, Seth Adams, a creditor of the Boston, Hartford and Erie Railroad Company, filed his petition in the district court for the district of Massachusetts, alleging that the said company had committed an act of bankruptcy, and praying that it be adjudged a bankrupt, &c. On the 20th of December, 1870, James Alden, also a creditor, presented his petition, with a like allegation and prayer, to the district court for the district of Connecticut. On the 31st of December, 1870, the said James Alden presented his like petition to the district court for the southern district of New York. To these several petitions the company appeared and answered, resisting the application for such adjudication. Pending the petitions, Seth Adams, the petitioning creditor in Massachusetts, applied, both in New York and Connecticut, for leave to intervene and oppose the said applications there made. On the 28th of February, 1871, the company withdrew its answer in each of the said districts, and on the 2d of March, 1871, the district court for Massachusetts adjudged the company bankrupt, by a formal decree of the said court, and issued its warrant to the marshal of that district, in accordance with the statute.

This decree was shown to the district court for Connecticut, by the supplementary petition of the said Adams [the petitioning creditor in Massachusetts];[3] but, notwithstanding such decree, the district court for Connecticut refused leave to Adams to appear to resist the proceeding in that court,

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

[2] [Reversing Case No. 1,679.]

[3] [From 6 N. B. R. 222.]

and dismissed his petition, and thereupon proceeded to adjudge, and did adjudge, the company bankrupt. On a petition of review, presented by Adams to the circuit court, it was held in Re Boston, H. & E. R. Co. [Case No. 1,677], in September, 1871, that he was entitled to be heard in the district court, and that his petition ought not to have been dismissed. The circuit court thereupon proceeded, upon the facts alleged in his petitions, which were not controverted, to direct that all further proceedings in the district court for Connecticut be stayed, in order that the district court for Massachusetts might thereafter exercise exclusive jurisdiction, for the closing of the estate and distributing the same among the creditors of the corporation.

The like petition of Adams was brought to a hearing in the district court for the southern district of New York, on the 25th of February, 1871, and the district court decided, on the 27th of February, 1871 [Case No. 1,679], that Adams had no standing in court, in that stage of the proceeding, prior to an adjudication of bankruptcy, and that he ought not to be permitted to intervene to resist or stay the proceedings pending in this district; and an order denying his motion was made. But, on the 2d of March, on the application of the counsel for Adams, the court allowed a re-argument, and such re-argument was had on the 3d of March. On the re-argument, and in further support of his claim of title to intervene, the counsel for Adams produced and read in evidence the decree of the district court for Massachusetts, adjudging the company a bankrupt. At the close of the re-argument, the court refused to permit such intervention, and then the following facts appeared, namely, that, after the withdrawal (on the 28th of February) by the railroad company of its answer to the petition of Alden, [4] praying that the company be adjudged a bankrupt, an order or decree adjudging such bankruptcy was drawn and delivered to the district judge; that, on the 1st of March, he signed the same, but retained it in his personal keeping until after the said re-argument, without any notice to either of the parties, or their attorneys or counsel, or to the clerk of the court, of the fact of such signing, and that he [the district judge] [5] endorsed upon such order or decree the words, "Filed, March 1st, 1871. S. B." On denying the application of Adams, after such re-argument, the district judge announced these facts in open court, and delivered the said order or decree, adjudging the company a bankrupt, to the counsel for Alden, the petitioning creditor, and the same was by him delivered to the clerk of the court, to be entered in the minutes and records of the court. Adams thereupon presented his petition to this court, praying a review and reversal of the said proceedings of the district court, and that all proceedings in bankruptcy against the said company, in the said court, might be stayed, and for other or further relief. Though not material to the questions considered on the review, it is proper to state that the Adams Express Company had, by leave of the district court, become a co-petitioner with Alden, and the proceedings of Adams had, by supplemental petition, been made to apply to the proceedings of both of such petitioning creditors.

It is unnecessary, in disposing of this review, to repeat the observations which were made on deciding the very similar review of the proceedings between the same parties in the circuit court for the district of Connecticut. [Case No. 1,677.] Considerations were then suggested, tending to show the embarrassment, inconvenience and unsuitableness of an endeavor to administer the estate of the Boston, Hartford and Erie Railroad Company, as a bankrupt, and bring the same to a close by collecting and disposing of its assets and distributing its effects among its creditors, by proceedings in several district courts, and, as the case may be, through the instrumentality of different assignees, appointed by these courts; the impracticability of bringing the fund together for one general distribution; the possible, not to say probable, conflict of title between the assignees, the title of each of whom, if valid, must be recognized in all courts; the possible different results of contests in the several jurisdictions respecting debts offered to be proved by creditors whose claims may be disputed; the useless and vexatious trouble and annoyance to creditors, if they be required to go into each jurisdiction and prove their claims; the useless and extraordinary expense and waste of the estate, by subjecting its administration to such multiplied proceedings; [these and other reasons showing] [6] the unfitness and unreasonableness of continuing proceedings in more than one district, and that the case is eminently proper for the application of the general rule, in courts of equity, among courts of co-ordinate jurisdiction, that, when one has first obtained jurisdiction of the subject matter and of the parties, other courts should stay their hand and permit such court to carry the proceeding to a consummation and final disposition of the matter in question—all these and, perhaps, other like considerations, were suggested in the opinion delivered on the review had in Connecticut. Nothing is, I think, more certain, than that congress, in enacting the bankrupt law, did not contemplate any such complication, and, I deem it equally certain, that nothing in its provisions produces any such necessary result. The several district courts of the United States are not acting under

[4] [6 N. B. R. 222, gives Adams.]

[5] [From 6 N. B. R. 222.]

[6] [From 6 N. B. R. 222.]

authority derived from separate sovereignties; they are not administering separate systems of laws; they are not charged with a duty to afford special protection to the residents within their local jurisdiction — all which circumstances sometimes lead to conflict of jurisdiction between tribunals of different states, and operate to secure unequal results among parties interested, but residing in different states, domestic or foreign. The district courts act by one authority; they execute the same law; each, in the administration of the estate of a bankrupt, will do precisely what each other district court will do, governed by the same rules and to the same end.

In the opinion referred to, the bankrupt law was examined, and the general orders in bankruptcy, made by the supreme court, were considered, to ascertain, first, whether such proceedings must necessarily, if begun, be continued in more than one district court; if not, then, which district court should be deemed to have priority of jurisdiction and be permitted to go on and complete the administration; and, finally, if the bankrupt, with a view to hinder and embarrass the winding up of the affairs, should lie by silently, or, colluding with one or more of the parties, to produce such embarrassment, would not take any measures to prevent the action of either court, nor call to the attention of either the fact that prior proceedings were pending in another district, whether a creditor could bring the matter to the attention of the court, and ask that the proceedings subsequently commenced, be stayed, in order to avoid the expense, embarrassment and litigation about to arise to the prejudice of creditors, and to the waste of the fund which creditors have a right to share.

The court did not affirm the broad proposition, that, whenever a creditor filed a petition against his debtor, for a decree declaring such debtor a bankrupt, any other creditor was at liberty, and as of course, to appear and claim a right to oppose such adjudication; but it was held, that the court was not hindered from entertaining the application for leave to oppose, by rigid technical rules, governing actions at law inter partes, and that cases might exist in which a creditor should be heard, and, on sufficient grounds, his intervention might properly be effective. It was, accordingly, held, that, it appearing to the district court in Connecticut, on the petition of Adams, that he was the petitioning creditor in the district court in Massachusetts, that his petition was there filed on the 21st of October, 1870, that the petition in Connecticut was filed on the 20th of December, 1870, and that the district court for the district of Massachusetts had. on the 2d of March, 1871, decreed the company a bankrupt, and issued its warrant to the marshal, as required by the act of congress, the district court for Connecticut ought to have received the petition of Adams and stayed its further proceedings. Subsequent reflection, aided by the argument of the review here pending, has deepened the conviction, that the order made in Connecticut was right and proper. The only question, therefore, which is open here, is, whether the district court for Massachusetts should be accorded, either as matter of strict right, or in conformity to the practice of courts of equity having co-ordinate jurisdiction, above adverted to, the same priority of jurisdiction over the district court for the southern district of New York, which was yielded by the court for Connecticut.

In partial review of some of the reasons for the former decision, it is suggested, that there is no express provision of the bankrupt law assigning to either court priority, when two or more petitions are filed against a corporation debtor; and that the sixteenth of the general orders [of the supreme court] [1] in bankruptcy does not apply to corporations at all, but only to individual natural persons, and co-partnership firms composed of individuals. If this were conceded, it would not prevent the conclusion which was there reached, for three reasons: first, all the considerations which should dispose the court to accord to the tribunal which first obtained jurisdiction of the subject matter and of the parties, the continuance of the proceeding to its close, would require, that the district court for Massachusetts, in which the petition against this bankrupt was first filed, should be permitted to have the exclusive administration, without the interference of any other district court; second, by the express provision of the bankrupt law (section 14) the appointment of an assignee, and the transfer of the assets to him, relate back to the commencement of the proceedings, that is, to the filing of the petition, and, thus, the filing of the petition operates not only to render acts done at an earlier period—within six months preceding (section 39)—grounds of adjudication, which would not avail in the other courts, but it also enables the assignee to impeach earlier transactions—within six or four months (sections 14, 35, 39,)—as preferences to creditors, seizures on attachment, executions, &c., and other conveyances, which could not be impeached under later proceedings, and, consequently, the estate to be divided to creditors may be very greatly less, or even swept beyond their reach, if the court in which the petition is first filed be not permitted to administer the estate; and, third, in the only instance in which the act of congress itself appears to contemplate the possibility of proceedings being begun in two different district courts (section 36)—where proceedings are instituted in different districts against co-partners residing in such different districts—it directs, unqualifiedly, that the court in which the petition is first

[1] [From 6 N. B. R. 222.]

filed shall retain exclusive jurisdiction over the case. It would, in the absence of express provision, be altogether fitting to regard this as a proper rule, by analogy, whenever petitions are filed in two or more district courts, each having jurisdiction.

It was insisted, on behalf of Adams, that the sixteenth of the general orders in bankruptcy does apply to a corporation, and to this corporation, either as if it were an individual natural person, or as a joint debtor in the nature of a firm, it being incorporated in several states, and yet having a common stock, common property, common interests, and owing the same debts, by force of the same obligations; but, that the bankrupt was not a corporation, by the laws of the state of New York, and the district court here could have no jurisdiction to proceed against the bankrupt, except on the ground that it carried on business in this state, having its residence or domicil in the state or states by which it was incorporated.

The bankrupt, by an act of the legislature of the state of New York, passed April 25th, 1864 (Sess. Laws N. Y. c. 385), was authorized to purchase the franchise and property of certain corporations organized under the general railroad laws of the state of New York, to construct a railroad in this state, from the town of Fishkill to the boundary of Connecticut, and the act declared that the sale and conveyance should be effectual in law to pass title to the franchise and property sold, and that, on the filing and record of the certificate of sale and conveyance, the said Boston, Hartford and Erie Railroad Company should become possessed of the rights of charter and property sold, conveyed and described, and might have, hold and use the same, in their own right, as a portion of their railway line and property, and have all the rights the corporation making the sale and conveyance had, at the time of such conveyance, to construct and operate a railway within the terminal points designated in the charter of the company making the conveyance, and subject to the laws of this state, passed, or that may be passed, concerning railroad corporations. The purchase and conveyance contemplated by this act were made, and the certificate of conveyance appears to have been filed, and the respondent is alleged to have carried on business in this state in pursuance of the said act.

If the case of such a corporation is not provided for, either in the terms of the act, or by the general orders in bankruptcy, the propriety of giving to the court in which the petition is first filed the administration of the estate, has been sufficiently indicated. If the sixteenth of the general orders in bankruptcy should be construed to apply, then also, so far as the proceedings here proceed upon the carrying on of business in this state, as the ground of jurisdiction, the rule requires, that the first hearing shall be had in the district in which the debtor has his domicil; and, if the peculiar fact of incorporation in more than one state creates an analogy to a firm or copartnership, then, also, the petition first filed must be first heard. In either aspect of the case, neither the general orders in bankruptcy, nor the general principles governing like subjects, nor the fitness or propriety of the thing, requires or permits the continuance of two distinct proceedings and the consequent double administration of the bankrupt's estate. And, once more, if, instead of regarding the act of the legislature of the state of New York as a permission given to a corporation created by the states of Massachusetts and Connecticut to construct, maintain and operate a railroad in this state, it be held that the act and the conveyance in pursuance thereof operated to make the Boston, Hartford and Erie Railroad Company a corporation in New York, and liable to be treated as a corporation created by the laws of New York, then the case now under review is the same in these respects as the case which was under review in the circuit court for Connecticut, for, the company was, in the very terms of the acts of the legislatures of Connecticut and Massachusetts, a corporation in each of those states.

There remains, therefore, no ground for withdrawing the case under review from the operation of the case already decided, unless what took place in the district court in the southern district of New York, prior to the 2d of March, 1871, gives to the district court last named priority and precedence of the district court for Massachusetts, by which, on that day, the respondent was adjudged a bankrupt. Without here enquiring, in view of all that has been suggested in this or the former opinion, whether, if it be regarded as amounting to an earlier adjudication of bankruptcy, it should have the effect last above mentioned, it may be sufficient to consider the prior question: Was it an adjudication of bankruptcy, in any legal sense, which gives such priority?

My conclusion upon this branch of the subject is, that it was not an adjudication prior, in legal effect and operation, to the adjudication in Massachusetts, if that were the sole test by which this review must be decided. This conclusion rests upon two grounds: first, that it had no legal operation or effect until after the adjudication in Massachusetts; and, second, that, if it could be deemed of any significance that the district judge had set his signature to a decree, retaining it within his sole knowledge, possession and control, that significance was wholly suspended and rendered inoperative by the granting of a re-argument of the application of the petitioner herein, for leave to appear and oppose any adjudication in the district court.

1. In the progress of proceedings in bank-

ruptcy, and in proceedings in formal suits, both at law and in equity, it is a common practice for the judge to receive the papers on a motion or on a final hearing, for consideration. It is not to be held, that if, on such consideration, he should, in the first instance, in the privacy of his chambers, or in his library, set his hand to the form of an order or decree, his power over the subject is ipso facto gone, and that act is final. On the contrary, he may—beyond all question, judges often do—prolong his consideration; and, if he find reason to conclude that his first impression was erroneous, he may make the final decision conform to the result of his most full and deliberate examination and reflection. This alone, if correct, shows, that such mere subscription is not, per se, an adjudication of the matter. Nor can it be sustained as an adjudication, by the suggestion, that it is an adjudication which, if he does not change his conclusion, operates, by relation, back to the date of the signing, or, in other words, that it may be regarded as a provisional adjudication, to stand, if no sufficient reason occurs to the judge for changing it. Some observations pertinent to this question, in both aspects, may be found in the opinion in American Wood Paper Co. v. Glen's Falls Paper Co. [Case No. 321], in which an attempt was made to give a precedent effect to a judicial determination by the acting commissioner of patents, because, as he testified, he had made up his mind and endorsed and signed a decision, which he retained to abide the result of further consideration, if a further opposing argument should be presented. A fair and just test of the question may be suggested, by enquiring —when does the time to appeal begin to run, where it is limited to a specific period after the order or decree? If the adjudication were to be deemed operative from the signing by the judge, and while all knowledge thereof was confined to the breast of the judge himself, the whole time to appeal might elapse while he held the order or decree in his own possession, and the right of appeal be thereby wholly defeated. I have no hesitation in saying, that the draft of an order, though signed, remaining in the sole possession and knowledge of the judge, whether for the purpose of further consideration, or for any other reason, is subject to his control; it is not final, so as to conclude him; and, until it is, in some manner, notified to the clerk of the court, or to one of the parties, in such wise that his decision can properly be said to be promulgated or announced, it concludes no one. Decisions of court, announced in open court, are often and properly held to affect parties charged thereby, although the formal order or decree has not been entered; but decisions lying in the breasts of the judges can have no such effect, and the mere fact that the latter have been set down on paper ought to give them no different operation. This is not to be taken to import that all orders must be announced formally in open court, or that orders which may be made out of court must be formally proclaimed, but there must be something tatamount to promulgation or delivery, something of which the parties to be affected can have or can obtain knowledge, before their rights can be said to have received adjudication, something which completes and authenticates the judicial act.

2. The practical construction given by the district court to this act of signing the order, given while the order remained within the sole knowledge and possession of the judge, was in conformity with the view last above suggested. A re-argument of the application of this petitioner was ordered. This can have but one meaning. The application of the petitioner was for leave to appear and oppose the proceeding of the district court to any adjudication touching the bankruptcy of the company. Now, whether he had or had not sufficient grounds for his application, the re-argument proceeded wholly on the idea that, as yet, no such adjudication had been made.

3. The rehearing operated to take away any possible significancy, in this respect, from such private signing of an order. Even when a final decree has been promulgated and entered, a rehearing was held, in Brockett v. Brockett, 2 How. [43 U. S.] 238, to suspend its operation, and an appeal taken within ten days after the refusal, on the rehearing, to open such decree, was, on that ground, held to operate as a supersedeas. In a court of equity, the granting of a rehearing operates to open the decree for further examination, in whole or in part, according to the nature and extent of the grounds for rehearing. Consequa v. Fanning, 3 Johns. Ch. 587, 594, 595; White v. Carpenter, 2 Paige, 217, 262, 263; Ferguson v. Kimball, 3 Barb. Ch. 616.

The result is, that there is nothing in the case presented upon this review which withdraws it from the operation of the decision heretofore made, as above stated, in the district of Connecticut. In that district it was not deemed necessary to reverse the adjudication of bankruptcy which had been made. The same assignees who had been chosen and approved in Massachusetts had also been chosen and approved in Connecticut, and such double sanction could work no prejudice to any party in interest. It was deemed sufficient to stay any further proceedings. Here, as I am informed, an additional assignee was appointed. That appointment does not appear by the papers before me. But that appointment would, of course, fall with a reversal of the adjudication in bankruptcy. I have no doubt of the power of the court to make such order herein as may best secure all interests, and, if the facts occurring are not admitted, to make a proper enquiry to ascertain them. It will be sufficient to reverse all proceedings subsequent to or founded upon the adjudication

of bankruptcy, and stay all further proceedings in the district court.

[NOTE. For the proceedings in Massachusetts, see Cases Nos. 47, 152, and 13,684; in Connecticut, Case No. 1,677. As to the question of appointment of assignees, see Case No. 1,680.]

Case No. 1,679.

In re BOSTON, H. & E. R. CO.

[5 N. B. R. 232.][1]

District Court, S. D. New York. Feb. 27, 1871.[2]

BANKRUPTCY—CREDITOR NOT PETITIONING CANNOT INTERFERE.

A motion on the part of a creditor who is not a party to the petition, that the proceedings on the petitions for adjudication be dismissed, must be denied on the ground that the denials of bankruptcy by debtors are questions solely between the petitioning creditors and the debtors, with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtors, can be permitted to interfere.

[Cited in Re Bush, Case No. 2,222. Disapproved in Re Bergeron, Id. 1,342; Re Donnelly, 5 Fed. 785. Distinguished in Re Mendelsohn, Case No. 9,420.]

In bankruptcy.

J. H. Choate, for the motions.

C. A. Kevan and W. E. Curtis, opposed.

BLATCHFORD, District Judge. The motion on the part of Seth Adams, claiming to be a creditor of the above named debtors, that he may be allowed to defend in this court against petitions filed in this court by James Aiden and the Adams Express Company who also claim to be creditors of said debtors, to have such debtors adjudged bankrupt is denied. If the debtors have any defence against such petitions, it is for them to make it out against the petitioning creditors. Mr. Adams can have no concern in the matter certainly before adjudication. His motion that the proceedings on the said two petitions for adjudication in this court, and all proceedings in bankruptcy in this court in the matter of said debtors may be perpetually stayed, or that said petitions and proceedings may be dismissed, is also denied, without considering any of the merits discussed on the motion, on the ground that at this stage of the proceedings such a motion cannot be made by Mr. Adams. The questions at issue now on the petitions for adjudication in this court, and the denials of bankruptcy by the debtors, are questions solely between such petitioning creditors and the debtors, with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtors, can be permitted to interfere. No question of jurisdiction is involved. This court has full jurisdiction of the petitions for adjudication, notwithstanding anything alleged on these motions. If the debtors shall be adjudged bankrupt by any other court before they are adjudged bankrupt by this court, a different state of things and different questions will arise.

[NOTE. For other proceedings in Massachusetts, see Cases Nos. 47,152 and 13,684; in New York, see Case No. 1,680; in Connecticut, Case No. 1,677.]

[1] [Reprinted by permission.]

[2] [Reversed in Case No. 1,678.]

Case No. 1,680.

In re BOSTON, H. & E. R. CO.

[5 N. B. R. 233.][1]

District Court, S. D. New York. April 10, 1871.

BANKRUPTCY—PROPERTY IN SEVERAL STATES—APPOINTMENT OF ASSIGNEES.

Where a corporation, holding property and carrying on business in three several states, is adjudicated bankrupt and assignees are appointed who are respectively citizens of two states in which proceedings in bankruptcy are pending, but none is appointed in the third state in which proceedings in bankruptcy are also pending, *held*, that as three assignees were to be chosen, and proceedings were pending in three different districts, it ought to have been so arranged that each of the districts could have an assignee within it a resident thereof. The court in the district in which no assignee has been selected, therefore declines to approve of the election of the assignee.

[On certificate of register in bankruptcy.]

I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the proceedings, and was stated by the counsel for the opposing parties, to wit, DaCosta, who appeared for one creditor, and Mr. James H. Clark, who appeared for other creditors of the bankrupt. The assignees chosen are residents respectively of the states of Massachusetts, Rhode Island and Connecticut, and not of the state of New York, or of the southern district of New York, and the fact that they have already been appointed assignees in the proceedings in bankruptcy pending against the same bankrupt in the United States district courts in Massachusetts and Connecticut, respectively, is no reason why this objection should be disregarded; each of those courts having an assignee or assignees within its own jurisdiction. So the former. The latter answering that nothing in the act forbids it, and that convenience may justify the allowance of it in this case. In the opinion of the register, as three assignees were to be chosen, and proceedings were pending in three different districts of the United States, it ought to have been so arranged that each of the districts could have an assignee within it, a resident thereof. And in accordance with decisions upon the point already made, he considers the objection well taken.

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BLATCHFORD, District Judge. I concur in the views of the register, and decline to approve the election of assignees.

[NOTE. For proceedings in Massachusetts, see Cases Nos. 47, 152, and 13,684; in New York, see Cases Nos. 1,678 and 1,679; in Connecticut, Case No. 1,677.]

BOSTON, H. & E. R. CO. (ADAMS v.). See Case No. 47.

BOSTON, H. & E. R. CO. (ALDEN v.). See Case No. 152.

BOSTON, H. & E. R. CO. (SWEATT v.). See Case No. 13,684.

BOSTON MACH. CO. (TUFTS v.). See Case No. 14,231.

Case No. 1,681.

BOSTON MANUF'G CO. v. FISKE et al.

[2 Mason, 119;[1] 1 Robb, Pat. Cas. 320.]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

PATENTS—INFRINGEMENT—DAMAGES.

The jury may, if they see fit, in a case for infringing a patent, give the plaintiff as part of his "actual damage," such expenses for counsel fees, &c. as have been necessarily incurred in vindicating the plaintiff's right by a suit, and which are not taxable in the bill of costs.

[Cited in Allen v. Blunt, Case No. 217; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 108, 13 Sup. Ct. 263. Disapproved in Stimpson v. The Railroads, Case No. 13,456.]

Case [against Jonathan Fisk and another] for infringing a patent for "a new and useful improvement of a spinning frame for spinning cotton," invented by Paul Moody, and assigned by him to the plaintiff. The patent was dated the 17th of January, 1818, and the assignment the 14th of January, 1819. The cause was tried upon the general issue, and the principal question was, whether the patentee was the original inventor, it being contended that machines, of substantially the like structure, were known and used before the plaintiff's supposed invention; and the defendants' counsel cited Rees' Cyclopaedia, vol. 40, pt. 1, art. "Dressing Machine." A question, however, of law arose at the trial, whether the jury might include in the damages, if their verdict was for the plaintiff, counsel fees and other necessary expenses incurred at the trial, which were not within the taxable costs.

Gorham and Webster, for plaintiff.

G. Sullivan, for defendants.

STORY, Circuit Justice. In one of the earliest cases which came before me, after my advancement to the bench, this very question arose, and at the trial I decided that counsel fees and other necessary expenses, not included in the taxable costs, were proper to be allowed by the jury, if they saw fit, as part of the "actual damage" of the plaintiff, within the contemplation of the patent act. But upon a motion for a new trial, the circuit court felt itself constrained upon the authority of Arcambel v. Wiseman, 3 Dall. [3 U. S.] 306, very much against its own judgment, to declare the contrary doctrine. Whittemore v. Cutter [Case No. 17,600]. Since that period, I have not been able upon inquiry, to learn that any of my brethren hold to so rigid a rule; or have felt themselves bound to limit the discretion of the jury, as to an allowance of items of this nature. Nor can I now deem Arcambel v. Wiseman, an authority on which one ought to repose, in a case of this sort, without very serious doubts. The case appears to have been decided on this point, without much argument, and is very imperfectly reported. I have examined the original record. It was a libel filed by the Spanish consul for restitution of a Spanish vessel, captured by an armed French vessel on the high seas. The district court dismissed the libel, and awarded damages for the delay, &c. to the captors. The circuit court affirmed the decree, and it was afterwards on error affirmed by the supreme court; but a charge of $1,600, for counsel fees, appearing on the record to have been allowed as part of the damages, the supreme court disallowed this item, declaring the general practice of the United States to be in opposition to it, and if that practice were not strictly correct in principle, it ought to be respected until changed by statute. It is to be observed, that this was an admiralty or prize suit. In cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it. In prize causes it is the usual course to allow the captors their costs and expenses upon restitution being decreed, where the original capture is justifiable, or farther proof is required. It can hardly be presumed, that the court alluded to cases of this nature—to cases of admiralty and prize jurisdiction, for it is scarcely possible, that any general uniform practice had been adopted in the United States, at so early a period; and if it had been, it must have been founded on a want of accurate knowledge of the principles and doctrines of courts of admiralty on this subject. Courts of admiralty allow such items, not technically as costs, but upon the same principles, as they are often allowed damages in cases of torts, by courts of common law, as a recompense for injuries sustained, as exemplary damages, or as a remuneration for expences incurred, or losses sustained, by the misconduct of the other party. The court in the remarks imputed to them by the reporter, must have referred only to the general practice in the courts of common law in the United States, not to tax

[1] [Reported by Hon. Wm. P. Mason.]

counsel fees in the bill of costs; a practice of the propriety of which, as a general rule, no doubt could be entertained. And in the case then before them, the court may very properly have disallowed the charge, for reasons applicable to the particular predicament of that case. In any other view, it would be impossible to reconcile the case of Arcambel v. Wiseman, with the general doctrines of admiralty courts, or with the more recent and well established practice of the supreme court in cases of marine torts and prize. The Amiable Nancy, 3 Wheat. [16 U. S.] 559; The Mary, 9 Cranch [13 U. S.] 126, 151; The Venus, 5 Wheat. [18 U. S.] 127, 131; The London Packet, Id. 132, 143. I feel myself bound, therefore, to declare, that as the authority of Arcambel v. Wiseman is shaken so far as it can be considered as containing any general doctrine, governing cases of this nature, I return to what I originally considered the true doctrine; and that is, that the jury are at liberty, if they see fit, to allow the plaintiff as part of his "actual damage," any expenditure for counsel fees, or other charges, which were necessarily incurred to vindicate the rights derived under his patent, and are not taxable in the bill of costs. Verdict for plaintiff $630, single damages.

A motion was afterwards made for a new trial, for misdirection on this point, which was refused by the court, and judgment given for the plaintiff for the treble damages.

[NOTE. This patent was granted to P. Moody, April 3, 1819. For another case involving same, see Moody v. Fiske, Case No. 9,745.]

BOSTON & A. R. CO. (LIGHTNER v.). See Case No. 8,343.

BOSTON & A. R. CO. (WILLIAMS v.). See Case No. 17,716.

BOSTON & F. IRON WORKS (CHILD v.). See Cases Nos. 2,674 and 2,675.

BOSTON & L. R. CO. (ASHCROFT v.). See Case No. 577.

BOSTON & L. R. CO. (SALEM & L. R. CO. v.). See Case No. 12,249.

BOSTON & P. R. CO. (WINANS v.). See Case No. 17,858.

BOSTWICK (CARTWRIGHT v.). See Case No. 2,481.

Case No. 1,682.

BOSTWICK v. FOSTER.

[14 Blatchf. 436;[1] 18 N. B. R. 123.]

Circuit Court, D. Vermont. April 19, 1878.

BANKRUPTCY—MORTGAGE BY BANKRUPT—LIEN—VALIDITY.

L. executed a mortgage to A., his brother, in Vermont, to secure a pre-existing debt, more than two months before a petition in bankruptcy was filed against L. The mortgage was not recorded until within two months before such petition was filed: *Held*, that the mortgage was not fully made, under the laws of Vermont, as against the assignee in bankruptcy of L., until it was recorded.

[Cited in Re Oliver, Case No. 10,492.]

[In equity. Bill by J. Hoyt Bostwick, assignee in bankruptcy, to set aside a mortgage by the bankrupt to defendant, Addi M. Foster. Decree for complainant.]

Fifield, Pitkin & Porter, for orator.

Wilder L. Burnap, for defendant.

WHEELER, District Judge. This is a bill in equity brought by the orator, as assignee in bankruptcy of the estate of Lemuel P. Foster, to set aside a mortgage executed by the bankrupt to the defendant, his brother, on the 6th day of July, 1876, and recorded on the 1st day of August, 1876, made to secure pre-existing debts. The petition in bankruptcy was involuntary, and was filed September 8th, 1876, more than two months after the making, but within two months of the recording of the mortgage. No question is made but that the bankrupt was insolvent at the time of making the mortgage and continued to be so afterwards. The proof shows there were other debts of which the defendant knew, and that he must have known, if he considered the facts before him, that the mortgage was made to give him a preference over other creditors, and, so, that it was made in fraud of the provisions of the bankrupt law, intended for the equal distribution of the property of bankrupts among their creditors, and that he had reasonable cause to believe that the bankrupt was insolvent. Upon these facts, if this mortgage was made within two months of the filing of the petition in bankruptcy, within the meaning of the bankrupt law, under the laws of the state, it is void and should be set aside; if not, it is valid, and should be upheld.

Under the laws of the state the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only," without being recorded. Gen. St. p. 448, § 7. Under this statute, the mortgage could not be made effectual against any one but the bankrupt and his heirs, without including recording it, as a substantial part of the evidence. If the assignee is a mere representative of the bankrupt, and has only his rights, the instrument is as effectual against him as against the bankrupt, without recording. But, under the bankrupt law, the assignee, in some senses, represents the creditors as well as the bankrupt, and has some rights, under some circumstances, in their favor, that the bankrupt himself could not have. The assignment by the judge or register to the assignee conveys not only "all the estate, real and personal, of the bankrupt," subject

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

to the exemptions, but, "all property conveyed by the bankrupt in fraud of his creditors" is at once vested in the assignee. Rev. St. §§ 5044, 5046. Under the laws of the state, the bankrupt did not represent his creditors, so that the mortgage, because it was valid against him, would be against them, without registration. Hart v. Farmers' Bank, 33 Vt. 252.

If a conveyance by a debtor, upon a new and valuable consideration, might be good against a mere creditor advancing no new consideration, without the registry or any notice of the conveyance, on account of the superior equity of the purchaser, as might appear from the remarks of the learned chief justice, in the case mentioned, that could not avail the defendant here, for he advanced no new consideration whatever, and, according to his own testimony, did not even seek the security, and can have no superior equity to stand upon.

So, under the law of the state, registration of the mortgage was necessary to make it operative for the purpose here sought for it by the defendant. Under the bankrupt law, it was not fraudulent as to creditors, so it would always be void against them. But, by the express provisions of the act, it would become so upon the institution of bankruptcy proceedings within two months from the time it was made, and the property, as against the assignee, would be vested in him.

In this view, this mortgage was not fully made, as against the assignee, until it was recorded, and, as that was within two months of the filing of the petition, it was void, or became so when the petition was filed, as against him.

In Exchange Bank v. Harris [Case No. 6,119] it was found, that an intended security was kept from the registry by agreement, from before till within the prescribed time, and that, under those circumstances, it was not made until registration. In this case it does not appear that there was any express agreement that the mortgage should not be left for record, but, whether there was or not, it was kept from the record by the failure of the defendant, through the intentional or unintentional neglect of the bankrupt, to whom he intrusted it, to leave it for record, and it was the fault of no one else, and the effect upon the creditors, as to notice of the mortgage, was the same as if it had been purposely done by express agreement. The lack of notice, which the registry would have given, was the result of his own neglect, or that of his brother acting for him, and the consequences should fall upon him, the same as if he had designedly connived at the lack.

Let a decree be entered that the mortgage be set aside as to the orator, as assignee, and that the defendant be restrained from setting up any claim against the orator, as assignee, under it, with costs to the orator.

Case No. 1,683.

BOSWELL v. DICKERSON et al.

[4 McLean, 262.][1]

Circuit Court, D. Ohio. July Term, 1847.[2]

STATUTES—CONSTRUCTION — DEROGATION OF COMMON LAW—EJECTMENT—PROCEEDINGS IN—PROPERTY AFFECTED—NOTICE—PUBLICATION.

1. A statutory proceeding, which is not according to the course of the common law, must be strictly pursued.

2. A proceeding in rem, can only affect the property attached or named in the bill.

3. By a statute of Ohio, a proceeding in chancery against a non-resident is authorized, by publishing notice, where the title or boundaries of land is in question, or to compel a specific execution of such a contract, or the rescission of a contract for the conveyance of land. This, at most, can only affect land against which the proceeding is instituted, by being named in the bill. Any proceeding against land, not so named, will be void.

[Cited in Nations v. Johnson, 24 How. (65 U. S.) 203; Baldwin v. Hale, 1 Wall. (68 U. S.) 233; Galpin v. Page, Case No. 5,205; Ray v. Norseworthy, 23 Wall. (90 U. S.) 128.]

4. So far as regards such property, the owner can have neither actual nor constructive notice.

[Cited in The Globe, Case No. 5,483.]

5. A decree for money on such a bill, if such decree be within the power of the court, can not be made to affect the property of the defendant generally, or render it liable for the satisfaction of the decree.

[See Warren Manuf'g Co. v. Etna Ins. Co., Case No. 17,206; Lincoln v. Tower, Id. 8,355; Westerwelt v. Lewis, Id. 17,446; Thompson v. Emmert, Id. 13,953.]

[Action of ejectment by the lessee of Thomas E. Boswell against Rodolphus Dickinson and others. The judges were divided in opinion, and the case was certified to the supreme court. See note at end of case.]

Ewing & Wilson, for plaintiff.

Mr. Lane, for defendant.

OPINION OF THE COURT. This is an action of ejectment, brought to recover lot No. 7, in the United States reservation, at Lower Sandusky, in this state. A patent from the United States, dated 2nd September, 1831, to the lessor of the plaintiff, which includes the premises in controversy, was given in evidence. The defendants were admitted to be in possession. The defendants, to show title in themselves, offered in evidence the record of a decree in 1826, of chancery, in the common pleas of Sandusky county, on which three executions were issued, the last one being dated in November, 1831, was levied on the lot in controversy, and sold, and the sheriff's deed to the purchaser was dated the 19th of May, 1832. This record was objected to on the ground, that it was a proceeding against non-residents of the state, and the decree was in personam

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

[2] [Certified to supreme court on division of opinion. See note at end of case.]

for the payment of a sum of money, which decree was to have the effect of a judgment, and on which an execution was authorized against the lands of the defendants; though they had received no personal notice, and that consequently the decree was void. To this objection it was replied, that in the case of Boswell v. Sharp, 15 Ohio, 447, in which that court held that the court of common pleas of Sandusky, had jurisdiction in the chancery proceedings, and that the validity of that proceeding could not be questioned collaterally.

It appears that in 1816, Boswell, of the state of Kentucky, Reed, Owings and Hawkins, agreed to build a saw-mill on the public land in Sandusky, with the view of purchasing the land when it should be sold by the government. Boswell, Reed and Owings, were partners in the saw-mill, and were to pay the expenses. At the public sales, lot No. 9, in the Sandusky reservation, or a large part of it, was purchased by the above persons. Hawkins was to have one-fourth of the interest of the saw-mill, was to be the active partner, and superintendent of the building, and his share to be paid by labor. At the public sale, Boswell and Owings advanced a part of the money. But it seems, at Wooster, in Ohio, where the sales took place, Reed and Owings abandoned the contract; and it was then agreed between Boswell, Barry, of Kentucky, Whittimore, of Boston, and Hawkins, to purchase lot No. 9, on which the building of the mill had been commenced. It was so purchased, and it was also agreed that Hawkins's share of the expense should be paid in labor on the mill, and in improvements on the land. The above facts were substantially represented by Hawkins in his bill, and that in the construction of the mill, he expended five thousand dollars, of which he advanced two thousand six hundred dollars, besides his own time; that Boswell, Barry and Whittimore, against whom the bill was filed, have failed to convey to him one-fourth of the premises under the contract, or any part of them, they having acquired a title to two-thirds; nor have they accounted to him for the moneys he expended. And the complainant prays a decree for one-fourth part of the land, for which the defendants have a title, and also that they may account, etc.

Under the chancery act of 1824 [22 Ohio Laws, 78], this bill was filed in the common pleas. By the 12th section of that act, jurisdiction is given over the rights of absent defendants, on the publication of notice, "in all cases properly cognizable by courts of equity, where either the title to, or boundaries of land may come in question, or where a suit in chancery becomes necessary, in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract." That the jurisdiction assumed under this statute is limited, will not be controverted. It is strictly a proceeding in rem. And it is only authorized in three cases. 1. Where the title or boundaries of land comes in question. This does not apply to the proceeding under consideration. 2. The rescission of a contract for the conveyance of land; or, 3. To compel a specific execution of such contract. There is no pretense that the bill could be sustained under the second ground. No rescission of a contract was asked. It was for the specific execution of the contract stated by Hawkins in his bill, that the bill was filed, and it is only upon that ground that it can be sustained, if indeed, it be sustainable. Jurisdiction can only be acquired in two modes—one in personam, the other against the property. And it is immaterial whether the proceeding against the property be by attachment or in chancery, it is limited to the thing attached by the writ, or specified in the bill. The argument that jurisdiction being acquired in chancery for one purpose, may be exercised over all matters in controversy, relating to the same subject, between the parties, need scarcely be answered. The doctrine is a doctrine of chancery, but it can have no application in the present case. No man's rights can be affected without notice, actual or constructive. The statute under which these proceedings were had, required notice, and had not this notice been strictly given, the whole proceedings would have been a nullity. Whether it was given or not, is not important, in regard to the question now before us, to examine. The right to lot No. 7, is the only right before us, and in looking into the bill it will not be found that it refers to that lot, or gives notice to any one of a procedure against it. The title then under the decree must stand upon that part of it which ordered the payment of money, on which an execution was issued, and by virtue of which lot No. 7 was sold. It is true the court in their decree, declared that all the lands in the county should be subject to be levied on by execution, to satisfy the decree. But what power had the court to make this order? How did they acquire jurisdiction over the lot? There was no proceeding against it. Its owners could have had no constructive notice that it was to be made liable for the decree. Chancery may decree the payment of money in many cases, and it may direct an execution to issue the same as on a judgment at law. But that is in a case where the court has jurisdiction over the person. Surely a precedent can scarcely be found where this has been done, where there is no pretense of notice, actual or constructive; and yet that is the case, as regards lot No. 7, now before us. The procedure of the court of common pleas, so far as relates to this lot, is void. They acquired no jurisdiction over it, and consequently, the sheriff's deed conveyed no title.

The decision of the supreme court of Ohio, does not stand in the way of this view. The supreme courts of the states fix the construction of the statutes of the states, and the courts of the United States will follow the established construction. But the decision named is not one of the character alluded to. It does not establish the construction of the statute. The question as to this procedure came collaterally before the supreme court of the state, and in that form only has the question been considered by that court. And that can not be called the construction of the statute. The court held, in the manner in which the record came before it, the decree could not be treated as a nullity. There was no judgment given, that a part of the proceedings were not void. But suppose the supreme court had decided that the property of an individual, under the statute, without notice actual or constructive, was liable to be sold, I should have felt bound to hold the decision as void. The legislature required notice. But should the legislature assume the power to dispose of the property of non-residents without notice, would their act be regarded? Such a procedure would be opposed to the immutable principles of justice. And under the doctrine of the supreme court of the Union, the law would be held void. Fletcher v. Peck [6 Cranch (10 U. S.) 87].

NOTE [from original report]. As the views of the court seemed to excite surprise in the counsel for the defense, and as the question was important, it was suggested by the court, and assented to by plaintiff's counsel, that a division of the judges, pro forma, on certain points, should be certified to the supreme court, as that was the only form in which the case could be taken before that tribunal. The points certified, were—1. "Whether or not the proceedings and decree of the said court of common pleas of Sandusky county, set forth in the record above stated, are coram non judice?" 2. "Admitting said proceedings and decree to be valid, so far as relates to the land specifically described in the said bill in chancery, whether or not said proceedings and decree are coram non judice and void, as relates to lot number seven, in controversy in this case, and which is not described in said bill in chancery; or in other words, whether said proceedings and decree are not in rem, and so void, and without effect as to other lands sold under said decree."

The answer of the supreme court was, "that the proceedings and decree of the court of common pleas of Sandusky county, as set forth in the record, are coram non judice and void, as relates to lot number seven." The other point was not answered. [Boswell v. Otis, 9 How. (50 U. S.) 336.]

Case No. 1,683a.

BOSWELL v. NEWTON.

[Hempst. 264.] [1]

Superior Court of Arkansas. Jan., 1835.

COURTS—STATUTORY CHANGE OF TIMES OF HOLDING—EFFECT.

1. If the legislature changes the time of holding the courts, it does not affect the business therein, although no provision is made as to the decision of causes.

2. It does not produce a discontinuance of any cause or matter.

3. If a new jurisdiction had been created, a provision continuing the business might be necessary; but otherwise not.

Appeal from Independence circuit court.

[This appeal was presented by James Boswell, administrator of Hartwell Boswell, against Myric D. Newton, appellee.]

Before LACY and CROSS, Judges.

OPINION OF THE COURT. The only question made in this cause is, whether the court below erred in dismissing it on the defendant's motion. The suit was commenced in the circuit court of Independence county in December, 1833, and the process made returnable to the ensuing May term, at which time the defendant appeared by his attorney and plead to the action, and whereupon the cause was continued until November term, 1834, when the judgment of dismissal was given. At the time the suit was commenced, the circuit court of Independence county was required to be held on the second Mondays of May and November. Acts 1829, p. 22. By an act of the legislature approved November 5, 1833, the time was changed to the third Mondays of May and November, but this act did not take effect until the first of November, 1834. In changing the time of holding the circuit courts, it seems that the legislature omitted to insert a provision, that all causes then pending should be returnable, have day, and be decided, as though the change had not been made. The omission, upon principles of either law or reason, could not, as we think, amount to a discontinuance of any matter pending in the court, the time of holding which was changed. If the court had ceased to exist by the act of the legislature; and a new jurisdiction had been created, then such a provision would doubtless have been necessary. But this is not the case, and it will be found upon examination that no such clause has ever been inserted in any act of the legislature, where the time only of holding the court has been changed. Judgment reversed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 1,684.

BOSWELL v. WASHINGTON.

[2 Cranch, C. C. 18.] [1]

Circuit Court, District of Columbia. Dec. Term, 1810.

WAIVER OF PENALTY.

The receipt of a dog-tax, after suit brought, is a waiver of the penalty.

Appeal from the judgment of a justice of the peace, rendered for the penalty of ten dollars for non-payment of a dog-tax, on the

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

1st of January, according to the by-law of November 4, 1807, § 2. It appeared in evidence, that the tax had been received by the proper officer after the suit brought.

THE COURT (nem. com.) decided that the receipt of the tax by the treasurer was a waiver of the penalty; and said, that upon payment of the costs before the justice, the judgment should be reversed; the parties to pay their own own costs on the appeal.

BOTELOR (GREENWELL v.). See Case No. 5,791.

Case No. 1,685.

BOTELOR v. WASHINGTON.

[2 Cranch, C. C. 676.] [1]

Circuit Court, District of Columbia. May Term, 1826.

FORESTALLING—DEFINITION—"PROVISION"—"ARTICLE OF FOOD"—"COMING TO MARKET."

1. Rye-chop is not "provision, nor an article of food" within the meaning of the by-law of October 6, 1802, which makes it unlawful for any person "to buy up any provision or article of food coming to market."

2. To constitute the offense it is not necessary that there should be a market actually holding at the time of the purchase.

[3. "Coming to market," in the by-law, means on the way to the market place, with intent to be there offered for sale in market hours.]

Appeal from the judgment of a justice of the peace against the appellant for forestalling rye-chop coming to market, contrary to the by-law of the 6th of October, 1802.

The by-law provides "that no person shall buy any provision or article of food in the market, and during the market hours aforesaid, for the purpose of selling the same again in the said market or in any part of the city; nor shall any person out of the market buy up any provision or article of food coming to said market, under the penalty of six dollars for every offence."

THE COURT (MORSELL, Circuit Judge, absent) decided that rye-chop (which was food for horses) was not "provision" nor an "article of food" within the meaning of the by-law. Burch, Dig. p. 119, art. 9. And that "coming to market" meant, on its way to the market place, with intent to be there offered for sale, in market hours; and that it was not necessary that there should be a market actually holding at the time of the purchase, in order to constitute the offence.

BOTHIN (TAYLOR v.). See Case No. 13,780.

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

Case No. 1,686.

The BOTHNEA.

The JANSTOFF.

[2 Gall. 78.] [1]

Circuit Court, D. Massachusetts. May Term, 1814.[2]

PRIZE—COLLUSIVE CAPTURE—PROOF REQUIRED—DUTY OF CAPTORS.

1. Case of collusive capture. Farther proof denied to the captors, and condemnation to the United States subject to the rights of the seizing officer.

[See The George, Case No. 5,327, affirmed 2 Wheat. (15 U. S.) 278.]

[See note at end of case.]

2. In what cases farther proof allowed or not.

[See The George, Case No. 5,327; The Betsey, Id. 1,364; The Short Staple v. U. S., 9 Cranch (13 U. S.) 55.]

3. It is the duty of captors to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication.

[See The George, Case No. 5,327; The Jane Campbell, Id. 7,205; The Arabella, Id. 501; The Flying Fish, Id. 4,892; The Julia, Id. 7,576; The Eleanor, 2 Wheat. (15 U. S.) 345; The Shark, Case No. 12,708.]

[Appeal from the district court of the United States for the district of Massachusetts.

[Proceedings to condemn the foreign vessels Bothnea and Janstoff as prizes. Decree of condemnation. See note at end of case.]

W. Prescott and Otis, for captors.

Blake and Dexter, for claimants.

STORY, Circuit Justice. These cases come before the court under very unusual and embarrassing circumstances. From the documents and testimony in the preparatory evidence it appears, that the Bothnea and the Janstoff are foreign vessels, having on board, as is confessed on all sides, false and simulated Swedish papers. They both sailed from Halifax, in Nova Scotia, about the 24th of November, 1813, laden with cargoes of English goods, destined for the United States; and, on the same day, were captured near the Ragged Islands, either really or collusively, by the privateer Washington, of 24 30-95 tons, one gun and fifteen men; belonging to Portland, and commanded by William Malcomb. They were captured in sight of each other, the Janstoff first, within about three hours, and the Bothnea within about nine hours, after leaving Halifax. At the time of the capture, there were on board of the brig seven persons and on board of the schooner five persons, composing their respective crews, and one American passenger in each vessel. The whole of the crews were taken from each vessel, and landed at the Ragged Islands; the American passengers were retained on board, and under the superintendence of prize masters and crews;

[1] [Reported by John Gallison, Esq.]

[2] [Reversed in 2 Wheat. (15 U. S.) 169.]

the Bothnea was conducted into Salem, and the Janstoff into Plymouth, in the district of Massachusetts. Immediately upon their arrival, they were seized by the collectors of those ports for an alleged fraudulent violation of the non-importation act. Proceedings were also had by the captors against both vessels, as prize of war, before the district court of Massachusetts. The passengers, viz. Isaac Miller and Nathaniel Whittemore, were examined on the standing interrogatories, and the ship's papers were deposited in court by the prize masters. The papers, found on board of the Bothnea, were certain Swedish simulated ship's papers, two bills of lading of the cargo, dated the 23d of November, 1813, purporting that the whole cargo was shipped by John Moody and Co. merchants at Halifax, for New London, consigned to order; a clearance from Halifax dated on the same day, a British license from Sir John Sherbrooke, dated at Halifax on the 9th of November, 1813, authorizing John Moody and others to export, in any vessel not belonging to France, to any port in the United States, any British goods on British or American account, which license was to continue in force for two months, and two letters dated at Halifax on the 23d of November, 1813, one purporting to be addressed to the consignee of the cargo, the other to be addressed to the captain of the Bothnea. These letters are as follows:

"Halifax, November 23d, 1813. Dear Sir: We now only inclose you bill of lading of the cargo shipped on our joint account per the Bothnea, agreeable to the memorandum left with us by Vanderbut, when last here. The invoices we forwarded in duplicate, one by P. Jones, and the other by Schonenburg, which you will have received before this. Z. has our particular instructions how to proceed, when in with the Squad. We have settled for A.'s share of the compensation. B. 2 will pay his. We have fixed on two hundred dollars, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed. At the same time, request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting with an American cruiser, to destroy all! We are, &c. J. Moody & Co."

"Halifax, November 23d, 1813. Capt. I. K.—Schooner Bothnea. Sir: We hand you herewith sundry enclosures respecting the cargo of the Bothnea, to your most particular care. You will perceive the necessity of using every possible caution. We are only apprehensive of shaving mills. You will of course secrete every thing respecting this transaction. In case of British interruption, we must recommend your being well assured, that there is no deception, as you must be aware of the facility, with which American cruisers may pass for English. The invoices of these goods are already forwarded. You will make the best of your way to N. When in with any of the B. B. squadrons, come forward with your Ex. Li. which will safely pass you, and then nothing will remain, but activity and despatch in getting the goods on shore. We should not have embarked ourselves so largely in this concern, but from the ease with which dry goods can be smuggled into those places, if properly managed. The bill of lading is to order. You will, therefore, receive instructions from our friends A. 1 and B. 2. We expect your best plan will be to lay off under the protection of H. M. ships, and deliver the cargo in boats and lighters, without proceeding farther, and as our friends are already advised on the subject, no doubt every necessary step will be taken. Should, however, any unexpected casualty happen, we recommend your getting out of the way, as we would rather the whole should be sacrificed, than any mischief happen to ——; but above all things keep out of sight your Ex. Li. clearance, and this letter. Do not confide too much. If you have any suspicion, destroy all at once, and after committing this to memory, be sure to put it perfectly out of danger. As to the return cargo, we need not say any thing on the subject, having the fullest confidence, that a voyage to St. Bart's may be profitably effected with certain articles; flour out of the question, unless rye. B. No. 2 will pay you the compensation agreed, exclusive of the freight we have allowed. A.'s proportion we will settle with our own. If it is possible to obtain convoy, we will, but it is doubtful. We are, &c. Jno. Moody & Co. P. S. Do not write for fear of accidents. Let your communication be verbal."

The papers on board of the Janstoff were, certain Swedish simulated ship's papers, a British license and clearance of the same date and purport, as in the case of the Bothnea, two bills of lading of the cargo dated on the 23d of November, 1813, on the same account, destination and consignment, as in the case of the Bothnea, and two letters dated at Halifax on the same day, one addressed to Messrs. B. 2 and A. 1, New London; the other to the master of the Janstoff. The last of these letters is an exact copy of that addressed to the consignee of the Bothnea, except in the direction; the other is as follows:

"Halifax, Nova Scotia, November 23d, 1813. Capt. P. S. Z.—Brig Janstoff. Sir: We now wish you to proceed as immediately as possible with the cargo, agreeable to our verbal directions. We are fearful of entering too fully into particulars, but as this cargo is altogether B. manufactures, you will have more difficulty to contend with; however, we trust to good luck. Secrete, with every possible caution, certain documents, and do not be too easily satisfied by appearances. You know how easy an imposition

may take place; but as we calculate on convoy both for you and the Bothnea, we do not apprehend any danger, till you are well near your port. The risk is, that even your colors would not be sufficient in case of meeting an A—— cruiser. When you get in with the Bri. men of war, you may safely produce your Ex. and under their protection get all out in boats and lighters. You will bear in mind, that the concern is the same with the Bothnea. We have forwarded the particular invoices to our friend A. No. 1, who will pay you the compensation fixed both on our own account, and of the other parties. As the blockade of the Sound is likely to be rigorous, we leave it to your own calculations whether another trip to St. Bart's can be undertaken. The fact is, flour will not meet the demand calculated, as government stores are well supplied, nor do we think it can be procured with you, to answer the market, for some time. Be careful of committing any of the concern with us or yourself; we indeed think you had better give all up, and get away, rather than expose the business, should you be intercepted; and our greatest danger is from the small travellers in shore, therefore better keep close with John Bull. We are, &c. Jno. Moody & Co."

At the hearing, a claim was interposed by the district attorney, in behalf of the United States and of the collectors, praying a condemnation to them, upon the ground of a collusive capture, and fraud upon the non-importation act. An application was also made by the captors for an order for further proof, to prove that the vessels and cargoes were in fact the sole property of British subjects, which was rejected; and on the first day of February, 1814, the district court dismissed the libel of the captors, and condemned both vessels and their cargoes to the United States. From this decree an appeal has been interposed to this court, and here the application has been renewed for further proof. The propriety or impropriety of allowing such an order depending upon the nature of the case disclosed upon the original evidence, I directed the cause to be argued, and it has accordingly been argued upon that evidence, and it now remains for me to pronounce a decision.

Before I enter on the discussion of the merits of the particular cases, now before the court, I will advert to some considerations touching the nature of further proof. And I conceive, that in no case whatever is the court absolutely concluded by the original evidence. It is at liberty to entertain doubts extrinsic of such evidence, and to be satisfied of the verity of the transaction by proofs drawn beyond the mere formal papers and attestations of the parties. It will not however exercise its discretion in cases liable to no just suspicion; but will content itself with an adherence to its ordinary course, unless there arise some doubt upon the original papers, or some stringent evidence from an extrinsic source. The Sarah, 3 C. Rob. Adm. 330; The Romeo, 6 C. Rob. Adm. 351. In cases of reasonable doubt it will admit the claimant to further proof, where his conduct appears fair, and is not tainted with illegality. It is more sparing in its indulgence to the captors from an anxious solicitude to avoid complex proceedings and collateral inquiries. It therefore rarely allows it to the captors, where the transaction appears unsuspicious upon the preparatory evidence. The Sarah, 3 C. Rob. Adm. 330; The Haabet, 6 C. Rob. Adm. 54. It will however yield to such an application, where strong circumstances or obvious equity require it. But in all such cases, it is admissible only under the special direction of the court. The Jonge Jacobus, Baumann, 1 C. Rob. Adm. 243; The Adriana, Id. 314; The Maria, Id. 340. And such direction can never be obtained, where there has been gross misconduct or fraud, or the case does not admit of a fair explanation, on behalf of the captors. The French law as to prize differs in this respect; for the evidence of the captors is not only admissible, but constitutes an essential ingredient upon the original hearing. Valin, Des. Prises, c. 13, p. 193; 2 Valin, Comm. 324, Ordin. Louis 14, lib. 3, tit. 9, art. 24.

Upon examining the facts of the cases before the court, it seems difficult, upon the first blush, not to entertain some doubts, whether the coloring is not artificial. Perhaps, when once awakened, the mind becomes too ready to indulge in vague and indistinct suspicions. The very simplicity of a transaction, and the face of honesty, which it wears, may, under such circumstances, attract a weight of jealousy, more formidable than the most complicated tissue ever woven by the ingenuity of fraud. Every appeal to the understanding then comes attended with the grave warning, nimium ne crede colori. It becomes necessary, therefore, to sift the various circumstances of suspicion combined in these cases, and to ascertain their value. I do not say, that each is to be separately weighed, as if it stood alone. The absolute force of a single fact may not be great, but combined with a mass of strange occurrences, it may acquire an adscititious, and perhaps decisive preponderance. One of the most striking characteristics of the present cases is the extraordinary nature of the equipment and voyage. Here were two vessels, under spurious neutral flags, loaded with extremely valuable cargoes of British merchandise on British or American account, destined for the United States, and beyond all question upon an illegal traffic. The crews of the vessels consisted apparently of foreigners; but the fraudulent simulation of the neutral papers was so obvious, that it could not deceive the most negligent cruiser. The British license and clearance, and the docu-

ments, which respected the cargo, if produced, would afford such incontrovertible evidence of illicit trade and British interests as would ensure condemnation of both vessels and cargoes. The same result would unavoidably flow from a suppression of those papers. The case would, therefore, under every aspect, be pregnant with insurmountable difficulties. Under such circumstances, if the voyage were really intended for New London, it would be natural to suppose, that the vessels would be equipped with arms, at least to defend themselves against small American cruisers. The neutral disguise was so thin, that a want of armament would hardly be apologized for by the innocuous garb of neutrality. Yet there is not the slightest pretence of any armament. It may be said, that the letters found on board point to the existence of convoy for the voyage, and thereby rendered any armament unnecessary. If a British convoy were really expected, how happened it, that no such convoy was found, although the vessel sailed on the very next day after these letters were written? If by convoy was meant the convoy of the Washington privateer, it would afford a more ready solution of the difficulty.

In the next place, on a real destination to New London in a smuggling trade, how happened it that one American passenger was put on board of each vessel, and each of them engaged and employed by Messrs. Moody and Co. with such notoriety, that each knew the whole object of the voyage? It is asserted, and very gravely, by the passengers, that they are utter strangers to the whole adventure, and that they have no interest therein. If this be true, I should be glad to know, what recommended them to Messrs. Moody and Co. for such a service. As Americans of honor and integrity they would feel an interest to disclose on their arrival so gross a fraud on our laws. If they were not therefore actors in the drama, they might be unfortunate marplots. It is utterly incredible, that mere strangers should be trusted with such important secrets. They must have had some character, which has not been avowed, and that character could have been little short of the confidential agency of the parties. I confess, that I should have been glad to have learned a little more of the history of these gentlemen, upon what occasions and in what manner they found their way to Halifax. There is a perfect silence in their answers on this head; and one of them only states, as if by accident, that he had a parole, as a prisoner of war. If the captures were collusive, I can readily conceive a good reason for these gentlemen being on board, even without the character of confidential agency; if the captures were bona fide, I am yet to learn, how this circumstance can be reasonably explained.

In the next place, the circumstances of the capture are somewhat extraordinary. The vessels had hardly been out of port three hours, before, in the very mouth of British territory, they were met by the privateer, and both captured without the slightest resistance or attempt to escape. It is said, that the privateer was mistaken for a British cruiser. Now, though in the Bothnea (which was last captured) the passenger answers, that the master showed to the captain of the privateer the ship's papers, "believing him to be a British cruiser," there is no evidence in the Janstoff to show a similar mistake. The omission may not be material; and in all probability the privateer did board under British colors. Now, admitting this fact, why were not the papers concealed from the cruiser? It is said, that supposing her to be British, there was no danger in the disclosure. But let us look at the letters on board. In the letter to the master of the Janstoff he is expressly warned to "secrete with every possible caution certain documents, and not to be too easily satisfied by appearances."—"You know how easy an imposition may take place."—"Our greatest danger is from the small travellers in shore, therefore better keep close with John Bull."—To the master of the Bothnea the language is equally explicit.—"We are only apprehensive of shaving mills; you will of course secrete everything respecting this transaction. In case of British interruption, we must recommend your being well assured, that there is no deception, as you must be aware of the facility with which American cruisers may pass for English." "Do not confide too much. If you have any suspicion, destroy all at once, and be sure to put it perfectly out of danger."—Nothing can be more strong, than this language, as to the conduct to be observed in case of being searched by any armed ship. Yet not a single paper was suppressed or destroyed. All was produced, and upon the mere pretence, that the privateer assumed herself to be British. The place of capture too was immediately within reach of British ports. Under such circumstances, would not a master, entrusted with so valuable a cargo, with such pointed instructions, have used more caution? Would he not have insisted on being carried into Halifax for adjudication, or on having a British commission and documents shown him, or in some other way have tested the sincerity of the character of the captors, before he would have put the whole property into such imminent hazard? In fact, if the capture were collusive, every thing should have happened just as it did. If it were bona fide, there seems to have been unusual negligence or stupidity on the part of the captured. It is strange, too, that the Bothnea took no alarm. She saw the capture of the Janstoff, and must have deemed it at least a questionable case; still, however, she kept on her regular course undisturbed by the dangers, which were thick-

ening about her, and blind to the sinister omens.

Another extraordinary circumstance attending the captures was, that the whole crews were taken out and landed at the Ragged Islands, and the American passengers kept on board, as the solitary witnesses to the transactions. It will be recollected, that this was nearly eighteen months after the declaration of war, and when there was scarcely a pretence for ignorance of the manner, in which prizes were to be conducted into port. The privateer's crew consisted also (as both parties agree) almost altogether of masters and mates of vessels, who were also the owners of the privateer. There was also a bounty paid by the government for prisoners of war. Under such circumstances therefore there was scarcely an apology for omitting to bring in the captured crews. Yet a greater irregularity than the omission so to do could hardly have occurred. It is the duty of the captors to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication. This duty is not only enjoined by the prize act, but is enforced by the express instructions of the president, which are delivered to every cruiser with her commission. It is also invariably required by the practice of the admiralty, and its omission is reprehended in the strongest terms by prize courts. The Speculation, C. 2 Rob. Adm. 293. Indeed, unless it be explained, it is considered as almost amounting of itself to evidence of management or tampering or fraud; and the courts have invariably withheld a sentence of condemnation, even in the clearest cases, where this omission has appeared, until a satisfactory explanation has been given. 5 C. Rob. Adm. 385, footnote a. I do not say, that it is such an irregularity, as amounts to a forfeiture of the right of prize; but I adopt the principle of the learned counsel for the claimants, that if the captors have not been prevented by necessity, accident, or excusable error, from producing the captured crew for examination, they are not entitled to any indulgence from the court; and the court will not let them into the benefit of further proof. It will not aid them any more than it is compelled to do; but leave them to reap the fruits of their own misconduct, however bitter or unpalatable they may be.

Upon what pretences then is this irregularity attempted to be justified? It is not asserted, that the captors were in ignorance that any person belonging to the crew was to be brought in. Their conduct as to the American passengers evinces the contrary. Yet why should the passengers have been chosen for this purpose?—If asked, they might have declared their ignorance of the whole transactions, which would not have made them the best of witnesses. It is said, that the whole crews were removed, and the same number of Americans put on board in their stead, with a view to elude capture by the British cruisers, if overhauled, by passing for the original Swedish crew. Now I cannot but think this excuse to be extremely unsatisfactory. How would it have been possible for Americans to pass for Swedes, or other foreigners? Our very accent and dialect would betray us to the most raw and inexperienced of British commanders. If the passengers on board were really confidential agents, (and I beg to know, how the captors had any proof of the negative), would they not have had strong inducements to disclose the facts to a British cruiser?—And if they were mere strangers, what right had the captors to expect an active co-operation in their own particular schemes? It is said also, that it became necessary to remove the crews on account of their number, which nearly equalled that of the privateer. This might account for the removal of some part of the crews, but it is hardly sufficient to meet the difficulty of the removal of the whole. The masters at least might have been retained. A course quite as natural would have been, to put a part in confinement in the privateer, and in company with the prizes to seek the first American port for safety. The landing too of the crews at the Ragged Islands seems a measure peculiarly well calculated to give notice to the enemy of the capture, and to enable him, with ordinary diligence, to attempt a recapture. If all these occurrences took place in perfect good faith from the ignorance or the lenity of the captors, it is extremely unfortunate, for they are precisely such as we should expect in a case of collusive capture.

There are other circumstances in the case, respecting which the ingenuity and eloquence of counsel have been employed to attach, or repel, the imputation of fraud. I forbear to touch them. Some of them are of light and trivial import, and some of a graver cast. But independent of the singularities, which I have before enumerated, I do not think that they can be entitled to much consideration. On the whole, do these cases, taken in connection, for it is quite impossible to separate them, present, under all the circumstances, a fair and natural transaction, or an artificial and well adjusted fraud? If the circumstances are such, as are consistent with good faith, and admit of a reasonable explanation, then further proof may be indulged to the captors. If they appear incapable of such explanation, it ought peremptorily to be denied. It is remarkable, that upon the supposition of a collusive capture by an agreement between British and American subjects engaged in an illegal traffic, the whole conduct of the parties, and the appearances of the documents on board, are consistent. No incongruity has been shown in argument, and, upon further examination, I have not been able to discern any. On the other hand, the conduct of the parties and some expressions in the letters, admit of a more ready solution upon

the same supposition, than if the capture were to be deemed bona fide. These expressions may be considered as containing the real wishes and instructions of the parties concerned, mingled with such disguises, as might cover the fraud from a careless observer. What is said of convoy, of the extreme anxiety of the parties to be kept from exposure in case the enterprise should be intercepted, and of their solicitude to avoid American cruisers, may be deemed of this description. I do not say, that they exclusively point to such an interpretation, but they readily admit it. There is also one expression in each of the letters addressed to the consignees, which I cannot but think, has a meaning, which the passengers perhaps could have explained. It is this, "we have directed Z. in case of meeting with an American cruiser, to destroy all." Who is the person thus designated by the letter Z? It cannot be the master of the Janstoff, who is called Zuilltram, because the same expression occurs in the letter on board of the Bothnea, whose master is called Koan. It is inconceivable, that the authority to destroy should not have been given separately to some person on board of each vessel, as they might separately have encountered an American cruiser. I cannot therefore but believe, that Z. was the mystic name of the confidential agent of the parties on board of each vessel, though I pretend not to point a finger at the personage.

It is possible, that I have attached more weight to the extraordinary circumstances of these cases, than they deserve. Knowing the strong temptations to illicit intercourse in consequence of the high price of British manufactures, I may have indulged in too rank suspicions. I have the consolation however to know, that if in this I commit an error, it can, and it will, be corrected by the wisdom of a superior tribunal. My own judgment however must be my guide, and I am free to declare, that I consider the appearances of collusion to be so marked on this transaction, and so entirely incapable of a fair explanation, that I must reject the application for further proof, and dismiss the libel, so far as it respects the captors. If I had even deemed further proof admissible on the part of the captors, that proof could not have extended beyond the explanation of the facts of the capture. To allow it further, would be to substitute, instead of the regular evidence required by the law, evidence which might be procured after time given to tamper with witnesses, and to enable the parties to mould a history suited to the pressure of the occasion. Such an application I should hardly deem allowable under any circumstances. I do not think it necessary, as these causes must go to the supreme court, to take time to consider, to whom the property ought to be adjudged, whether to the United States alone, or to the United States, subject to the rights of the seizing officers. As at present advised, I am very clear, that it ought to be condemned jure belli, as enemies' property; and I shall accordingly condemn it to the United States, subject to the right of the collectors to share in the proceeds, as seizing officers. Upon the appeal, the question, in case of a condemnation to the United States, must necessarily come in review before that court. I wish it to be understood, lest by any mistake the papers should find a place in the record, that I expressly reject the additional affidavits of the prize masters, which were objected to at the hearing in the district court and in this court. They are admissible only under an order of further proof, which was refused in both courts.

NOTE [from original report]. On appeal to the supreme court, after argument, further proof was directed; and at February term, 1817, upon the hearing of the further proof, the decree below was reversed, and condemnation passed to the captors. 2 Wheat. [15 U. S.] 169.

[NOTE. The reversal by the supreme court was for the reason, as assigned by Johnson, associate justice, that the evidence was insufficient to fasten on the captors a participation in the fraud, and that "the whole may have been, for aught we know, a combination of machinery,—the result of the most consummate art. It is certainly true that, in one view of the case, everything may be attributed to artifice; in another, to natural conduct. Scarcely a feature of it may not be indifferently pronounced the lineament of guilt or innocence. In such a case a court of justice has no alternative. It must pronounce in favor of innocence." The Bothnea and The Jahnstoff, 2 Wheat. (15 U. S.) 169.]

Case No. 1,687.

BOTHWELL v. VESSEL-OWNERS' TOWING ASS'N.

[6 Chi. Leg. News, 256.]
District Court, N. D. Illinois. 1874.

TOWAGE—TUG REQUIRED TO EXERCISE CARE OVER TOW—TUG NOT COMMON CARRIER.

[1. A tug employed to tow a schooner from imminent danger of fire took her to an apparently safe berth, and there left her, with the acquiescence of her master, agreeing to return in case of danger, if not otherwise engaged. The fire spreading, the schooner was lost, although the tug returned, and used reasonable but unsuccessful effort to rescue her. Held, that the towage contract ended when the schooner was left at her berth.]

[2. The promise to return being without consideration, no liability attached to the tug for failing to make the rescue.]

[3. A towage contract does not render a tug liable as a common carrier.]

In admiralty. Case of Bothwell against the Vessel-Owners' Towing Association, brought to recover damages for the loss of the schooner Fontanelle, through the alleged negligence of the officers of the tug Black Ball No. 2 during the great conflagration of October, 1871.

The court remarked that on the night of October 8, 1871, the schooner Fontanelle

was lying at Hough's dock, on the South Side, near Van Buren street bridge. The tug Black Ball No. 2, owned by the Towing Association, was employed to tow her to a place of safety. The tug took hold and towed her to a point south of Polk street bridge, and left her nearly opposite the Salt Company's warehouse. The libel alleges that the undertaking was to tow the schooner to a place of safety, and that the officer in command of the schooner protested against being left at the point in question, but the evidence clearly establishes that he acquiesced in being left there, although some talk was had about the tug returning and towing her further if the place became dangerous. The tug was engaged during the balance of the night in transporting passengers across the river, and towing other vessels. After a time, seeing the fire approaching the Fontanelle, the captain of the tug attempted to rescue her, but just as he was getting his lines out, the salt warehouse burst into flames, which quickly extended across the river to the schooner, and the tug was obliged to leave her to her fate, and she was burned. The owner of the Fontanelle charges that the undertaking on the part of the tug, was to take her to a place of safety, and the result showing that the place in question not to have been safe, this libel was brought. [Libel dismissed.]

BLODGETT, District Judge, held that the tug did not become an insurer by the contract of towing, but was simply bound to perform its contract with ordinary skill and diligence, and as the captain and mate of the tug, and the mate, who was in command of the schooner, thought the berth above Polk street bridge safe from the approaching fire, therefore the contract of towage was executed. No action would, therefore, lie on the alleged promise to return, as that was a promise without consideration, and also was on the condition that the tug should not be otherwise employed. The evidence also showed that when it became apparent that the Fontanelle was in danger, the tug used every reasonable effort to rescue her; consequently the tug was not liable. In support of his views, Judge Blodgett cited [The Webb] 14 Wall. [81 U. S.] 414, in which the court says: "It must be conceded that an engagement to tow does not impose an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. * * * The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." Also, Caton v. Rumney, 13 Wend. 387; Pennsylvania D. & M. S. Nav. Co. v. Dandridge, 8 Gill. & J. 249; Wells v. Steam Nav. Co., 2 Comst. [N. Y.] 204, where it is held that "whenever steamboats are employed in towing they are bound to no more than ordinary care and skill in management; they are not quo ad hoc common carriers, and the law of common carriers is not applicable to them." The libel was then dismissed at the cost of the libelant.

BOTLOR (MAURO v.). See Case No. 9,311.

BOTT (U. S. v.). See Case No. 14,626.

BOTTLES OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of bottles; e. g. "Bottles of Liquors. See Ten Thousand Bottles of Liquors."]

Case No. 1,688.

BOTTOMLEY v. UNITED STATES.

[1 Story, 135.][1]

Circuit Court, D. Massachusetts. May Term, 1840.[2]

EVIDENCE — PRIOR FRAUDULENT TRANSACTIONS — INTENT — KNOWLEDGE — COLLATERAL FACTS — PUBLIC OFFICER—PRESUMPTION OF INNOCENCE—CUSTOMS DUTIES — PERMIT TO LAND GOODS — FORFEITURE—PLEADING — PAROL EVIDENCE TO ESTABLISH FRAUD — VOID AND VOIDABLE CONTRACTS—PLEADING FRAUD—INSTRUCTIONS.

1. Where a party is charged with fraud in a particular transaction, evidence may be offered of similar previous fraudulent transactions between him and third persons. And whenever the intent or guilty knowledge of a party is material to the issue of the case, collateral facts, tending to establish such intent or knowledge, are proper evidence.

[Cited in U. S. v. 146,650 Clapboards, Case No. 15,935; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 599, 6 Sup. Ct. 887.]

[See Alfonso v. U. S., Case No. 188; Castle v. Bullard, 23 How. (64 U. S.) 172; U. S. v. Four Cases of Merinoes, Case No. 15,146; Butler v. Watkins, 13 Wall. (80 U. S.) 456; U. S. v. Quantity of Tobacco, Case No. 16,106; Smith v. Schwed, 9 Fed. 483.]

2. When a public officer is charged with conspiracy or fraud in the discharge of his duties, the presumption of law in favor of his innocence will prevail against circumstances of suspicion; but it may be overcome by proof of previous deliquencies of a similar nature.

3. Where a permit to unlade and deliver goods was obtained by a fraudulent collusion between the claimant and the deputy collector of the port of New York, it was *held*, that such a permit was utterly void; and that the goods landed under it were forfeited.

[Cited in Day v. New England Car Spring Co., Case No. 3,688; The Sarah B. Harris, Id. 12,344.]

4. The forfeiture may be enforced upon a general count under the 50th section of the collection act of 1799, c. 128 [Story's Laws,

[1] [Reported by William W. Story, Esq.]

[2] [Affirming an unreported decision of the district court.]

617; 1 Stat. 665, c. 22], charging that the goods were landed without a permit; for a void permit is no permit.

[Cited in The Sarah B. Harris, Case No. 12,344.]

[See Ogden v. Maxwell, Case No. 10,458.]

5. Parol evidence is admissible in all cases to establish fraud.

6. Whenever a contract or obligation, under seal, is void ab initio, the general plea of non est factum is proper. Where it is merely voidable, a special plea, setting forth the special circumstances is necessary.

[7. It is not reversible error to refuse to give abstract or irrelevant instructions, or those too vague or general to entitle the claimant to have them answered.]

[8. Quoted in Garland v. Davis, 4 How. (45 U. S.) 152, to the effect that the days for such subtleties as technical niceties in legal procedure are in a great measure passed away.]

[Error from the district court of the United States for the district of Massachusetts.]

This is a writ of error to a judgment of condemnation in rem by the district court upon an information of seizure of two cases and one hundred and fourteen pieces of broadcloth seized on land at Boston, as forfeited to the United States, and claimed by James Bottomley, Jr., as owner. The cause was tried by a jury, and a verdict found for the United States, upon the issue on the first count in the information, and upon this verdict the judgment of forfeiture was pronounced by the district judge. A bill of exceptions was filed at the trial, and upon that bill of exceptions the present writ of error was brought by the claimant to reverse the judgment. [Judgment affirmed.]

The information, or, as it is often called, libel of seizure, contained two counts. The first count was founded on the fiftieth section of the revenue collection act of 1799, c. 128 [Story's Laws, 617; 1 Stat. 665, c. 22], and in substance alleged, that the goods were imported from a foreign port or place, to the district attorney unknown, into the port of New York, and were unladen and delivered from the vessel or vessels, in which they had been imported, at the port of New York, without any license or permit whatever, from the collector, naval officer, or other competent officer, contrary to the fiftieth section of the act of 1799, c. 128 [1 Stat. 665, c. 22]. The second count alleged, that the same goods were found concealed in a certain store in Boston, the duties on the same goods not having been paid or secured to be paid, contrary to the form of the statute in such cases made and provided. This last count was in fact founded upon the sixty-eighth section of the act of 1799, c. 128 [1 Stat. 677, c. 22]. The jury found a verdict for the claimant upon the issue on this last count, which may therefore be laid out of the case. Upon the first count the claimant filed a plea alleging, that the goods were not unladen or delivered from any ship or vessel within the United States, without a permit or special license for such unlading and delivering, in manner and form, as in the first count, was alleged; and upon this plea issue was joined, and a verdict was found for the United States, as already stated. The fiftieth section of the revenue collection act of 1799, c. 128 [1 Stat. 665, c. 22], in substance states, that no goods, wares or merchandise, brought in any ship or vessel, from any foreign port, or place, shall be unladen from such ship or vessel, within the United States, but in open day, &c. &c.; nor at any time, without a permit from the collector and naval officer, if any, for such unlading or delivering; and if any goods, wares or merchandise, shall be unladen or delivered from any such ship or vessel, contrary to the direction aforesaid, it is among other things declared, that they shall become forfeited. In point of fact, the goods in the present case were unladen and delivered at the port of New York, upon a permit, regular in form, granted by the deputy collector, to the claimant. But the United States contended, and offered proof, that the permit was obtained by the claimant by a fraudulent conspiracy with and bribery of the deputy collector of the port of New York, and by false and fraudulent invoices produced by the claimant; and the United States contended, that if this state of facts was established in evidence, then the permit was a mere nullity.

The bill of exceptions stated as follows: "Upon the trial, the attorney of the United States offered evidence for the avowed purpose of proving, in connexion with other evidence to be offered, that for a number of months previous to May, 1838, the date of the original seizure of the said goods, the claimant had, by fraudulent conspiracy with, and the bribery and corruption of, one James Campbell, a deputy collector of the port of New York, fraudulently and illegally obtained permits for the landing of large quantities of broadcloths, of a similar character and description to those described in said information, and without having paid the duties prescribed by law thereon, and of which, the said attorney proposed to offer evidence tending to show, that the goods described in said information were a part, and proposed to offer in evidence, twenty-three entries of cloths, made by the said claimant, before the said Campbell, between the fifth day of August, 1837, and the fifteenth day of March, 1838, in each of which entries the said Campbell had designated and selected the packages, set down as of the highest cost, to be sent to the appraiser's office for appraisement. And for the purpose of explaining and showing the said system of fraudulent collusion and bribery, the said attorney of the United States, also having made proof, that the original was lost or in the hands of the said claimant, and of notice to the claimant to produce the same, proposed to offer proof of the contents of a certain entry of broadcloths other than

those set forth in the information, imported in a ship called the Roscoe, by the claimant, and by said claimant entered before or with the said Campbell, on the —— day of ——, 1838, in which said entry said Campbell had in like manner designated and selected the package, set down therein as of the highest cost, to be sent to the appraiser's office for appraisement, and did then and there propose to offer other documents, and the evidence of certain officers of the customs of New York, to show that said package, so designated, was passed and allowed as being correctly entered; and that afterwards, at New York, the whole of said packages contained in said entry, by the Roscoe, upon seizure, and examination and appraisement were, and the cost thereof, with the exception of said package so designated by said Campbell, found to be falsely and fraudulently set down in said entry. To the admission of each and all of which papers and documents and said testimony, the counsel for said claimant objected, as being irrelevant, and, as they contended, offered merely to prove the misconduct of the claimant in the importation of goods, other than those mentioned in the information, and in making fraudulent entries of the same,—whereby the jury might and would be prejudiced as to the goods set forth in the information. But the court overruled the objection, and the said entries, documents and testimony were admitted, and went in evidence to the jury.

"The counsel for the government proposed also to show, that said Campbell did not, in relation to entries made by other individuals, than said claimant, before him, as said deputy collector, usually indicate or select to be sent for appraisement, the package, set down therein, as of the highest cost, and for that purpose offered a certain entry made by a certain Thomas Hunt & Co., dated March 13th, 1838, of goods before and with said Campbell, imported by them in the ship Independence, in which said Campbell had not so indicated and selected the highest cost package, as set forth in said entry. To the admission of this evidence the counsel for the claimant objected, but the court overruled the objection, and said document was read and went in evidence to the jury. The counsel for the government further proposed to show, that certain broadcloths of the same character, cost, and value as those imported by claimant in the Roscoe, were shipped in England at or about the time when said claimant's goods by the Roscoe were shipped; that said goods were shipped by the same persons in Liverpool as had shipped the claimant's goods by the Roscoe, and all the other goods of claimant contained in said twenty-three entries before described; that the marks on the cases containing said goods were identical with the marks on the cases of claimant's goods by the Roscoe; that the numbering on said cases was an exact and progressive continuation of the numbering on the cases containing claimant's said goods by the Roscoe; that said goods arrived by four distinct importations at New York, soon after the seizure of the claimant's goods per Roscoe, and before notice of said seizure could possibly have reached England; that said goods, on their arrival were not entered, but sent to the custom house stores, where they lay several months; but they were eventually entered by one William Bottomley, as being the property of James Bottomley, senior; that the invoices had no exporter's oath at the time of shipment, as is usual, but the same was taken in England several months afterwards, and after a lapse of time fully sufficient for the transmission of intelligence to England, of said seizure of claimant's goods by the Roscoe; that the said invoices and oaths (when thus after the said lapse of time produced) set forth the cost of said goods at a greatly higher rate and sum than said goods so imported by claimant in the Roscoe, and proposed to submit this evidence to the jury as tending to show, that the said goods in fact belonged to the claimant, and that the cost of said goods, as set forth in the invoices and entries thereof, thus eventually made, show that the cost of the goods by the Roscoe, as entered by the claimant, was knowingly and fraudulently set forth in the entry thereof. To all and every part of this evidence the claimant's counsel objected; but the objection was overruled, and the evidence was submitted to the jury.

"The counsel for the claimant requested the court to instruct the jury, that if a permit was actually granted, although obtained by fraud, it would not be void, but good within the fiftieth section of the collection law of 1799. But the court did not so instruct the jury, but did instruct them, that if they should find from the evidence, that the permit given in the case was obtained by fraudulent collusion on the part of the claimant with the deputy collector, in such case the permit should be considered as void, and the information would be maintainable on the first count. The counsel for the claimant also requested the court to instruct the jury, that if a permit obtained by fraudulent collusion on the part of the claimant aforesaid, is by law void, and goods landed under the same, are forfeited within the said fiftieth section of said act; yet that the first count in said information is not sufficient, in point of law, to reach the case of goods thus landed. But the said judge did not so instruct the jury; but did instruct them, that said first count in said information, is, in point of law, sufficient to reach the case of goods purporting to be landed under such permit so obtained."

[For decision as to the fees of the marshal who had custody of the goods, see Bottomley v. U. S., Case No. 1,689.]

Mills, Dist. Atty., and Fletcher and Bartlett, for the United States.

Sprague and Gray (with whom was Miller, of New York), [for claimant].

STORY, Circuit Justice. Upon this bill of exceptions the questions, which have been argued at the bar, are: (1) Whether the evidence, as above stated, was properly admitted at the trial by the learned district judge. (2) Whether the points of law ruled by him, as to the effect of fraud and collusion in obtaining the permit, were correctly ruled.

In respect to the evidence admitted at the trial, assuming that the other points are in favor of the United States, I am clearly of opinion that the whole of it was admissible to substantiate the fraud. It divides itself into four heads: (1) The evidence tending to prove the conspiracy and fraud and collusion of the claimant and the deputy collector, in respect to the twenty-three packages of goods, of which the goods secured were a part. It is scarcely contested, that this was proper evidence. (2) The evidence tending to prove, that the goods, imported in the Roscoe by the claimant, were imported and landed by the perpetration of a similar fraud between the same parties. (3) The evidence tending to prove, that in other cases of the importation of similar goods by other importers, the deputy collector did not select the highest cost packages, as he did in the case of the claimant, and thereby to strengthen the inference of conspiracy and fraud and collusion. (4) The evidence of the importation of other goods of the same character, cost, and value, as those imported by the claimant in the Roscoe, shipped about the same time with those in the Roscoe, marked with the same marks, and numbered in an exact and progressive continuation of the cases of the goods of the claimant in the Roscoe; and, also, evidence, that the same goods arrived in four different shipments soon after the seizure of the claimant's goods in the Roscoe, and before the news of the seizure could have reached England; that the same goods were not then entered at the custom house, but were entered by one William Bottomley, as being the property of James Bottomley, senior, after full knowledge of the seizure must have been known in England; and that they were then entered at a greatly enhanced price and rate beyond those imported in the Roscoe. This last evidence was avowedly offered as tending to establish two important facts: (1) That the claimant was the real owner of these shipments; (2) that the cost of the goods by the Roscoe, as entered by the claimant, was knowingly and fraudulently set forth in the entry.

The objection taken to all these three last portions of the evidence excepted to, is, that it is res inter alios acta, and upon other occasions; and therefore, not properly admissible to establish a fraud in the case of the importation of the goods now before the court. But it appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible; first, to establish the fact, that there is such a conspiracy and fraud; and, secondly, to repel the suggestion, that the acts might be fairly attributed to accident, mistake, or innocent rashness, or negligence. In most cases of conspiracy and fraud, the question of intent, or purpose, or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency, and often occurring, not merely between the same parties, but between the party charged with conspiracy or fraud and third persons. And in all cases, where the guilt of the party depends upon the intent, purpose, or design, with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. Thus, in a prosecution for uttering a bank note, or bill of exchange, or promissory note, with knowledge of its being forged, proof, that the prisoner had uttered other forged notes or bills, whether of the same or of a different kind, or that he had other forged notes or bills in his possession, is clearly admissible as showing, that he knew the note or bill in question to be forged. So the law is laid down in Mr. Phillips and Mr. Amos's excellent treatise on Evidence, in the last edition.[3] The same doctrine is applied in the same work to a prosecution for uttering counterfeit money, where the fact of having in his possession other counterfeit money, or having uttered other counterfeit money, is proper proof against the prisoner to show his guilty knowledge.[4] I have looked into the authorities; and they fully support the statement of the learned writers. King v. Wylie, 1 Bos. & P. [N. R.] 92, is very strong to the purpose; as are also Rex v. Ball, 1 Russ. & R. 132, and Rex v. Balls, 1 Moody, Crown Cas. 470, and Rex v. Hough, 1 Russ. & R. 120. Many other cases may be easily put, involving the same considerations. Thus, upon an indictment for receiving stolen goods, evidence is admissible that the prisoner had received, at various other times, different parcels of goods, which had been stolen from the same persons, in proof of the guilty knowledge of the prisoner.[5] So, in an indictment for a conspiracy to create public discontent and disaffection, proof is admissible against the prisoner, that at another meet-

[3] Phil. & A. Ev. (5th London Ed.) 494.

[4] Phil. & A. Ev. (5th London Ed.) 495.

[5] Rex v. Dunn, 1 Moody, Cr. Cas. 146; Phil. & A. Ev. (8th London Ed.) 497.

ing held for an object professedly similar, and of which the prisoner was chairman, resolutions were passed of a character to create such discontent and disaffection.[6] In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act. Thus, for example, in cases of asserted fraudulent conveyances, procured by imposition and undue influence, or otherwise, it may often be necessary to give evidence of collateral transactions of a similar nature between the parties, or between the criminated party and third persons, to establish the point, although general imputations of an intended or attempted fraud upon third persons in other transactions of a totally different nature, might not be admissible.[7] If the question were, whether a particular voluntary conveyance was made in fraud of creditors, it might afford very strong evidence of the intent, if by like conveyances to other persons, who are mere volunteers, made about the same time, the grantor had parted with all his other property; yet the objection might be there stated, that they were res inter alios acta. The fourth portion of the evidence objected to, stands, as the learned counsel for the plaintiff in error, admits, upon stronger grounds in his favor, than any of the others; and yet, I think, that taking all the circumstances together, it is impossible not to feel, that the jury might well believe, that these last shipments were the property of the claimant, and were shipped for the like purposes of fraud; and that the subsequent entry of them in the name of the father, upon invoices of a much higher valuation of the cost of the goods, was a mere cover to escape seizure, and demonstrated, that the other goods, imported in the other vessels, had been grossly and fraudulently undervalued. I do not say, that the conclusion was inevitable. It is sufficient to establish the admissibility of the evidence, that it might legitimately lead the jury to such a conclusion.

There is a still stronger ground applicable to cases of this sort, which makes it incumbent upon the government to make out strong proof of conspiracy, collusion, and fraud. The charge is against a public officer of such conspiracy, collusion, and fraud, in the discharge of the duties of his office. Now, the ordinary presumption of law is in favor of the innocence of the officer, and, if I may so say, of his general character being elevated above the meanness of perpetrating an official fraud. This presumption will prevail even against circumstances of suspicion.[8] But it is completely overcome by the fact, that you establish beyond controversy similar official delinquencies on his part in other transactions of a similar character, and especially in other transactions between himself and the same party. He, who has the baseness to accept a bribe, or knowingly to connive at a false entry of goods to defraud the public in one case, withdraws from himself all the sanctity of his official character in other cases of a similar nature. And, if the machinery to accomplish the fraud in one case, is exactly the same, to which he resorts in another, the presumption, that he intends the like fraud, becomes highly inflamed, if not positively irresistible. To exclude evidence of the use of such machinery in other cases, shown to be fraudulent, would be to shake all just confidence in the rules of evidence in the administration of public and civil justice.

The other questions, which arise upon the instructions asked and refused, as well as upon those given by the learned judge of the district court, resolve themselves into these two: (1.) Whether, if the permit was obtained by a fraudulent collusion between the claimant and the deputy collector, it was utterly void. (2.) And if so void, whether the goods landed under such a permit so obtained, can be declared forfeited upon the first count, as actually framed; or whether there should have been a special count framed, stating the actual facts of the fraud, and then concluding, that so the permit was void. I say, that these are the only questions; for, upon the actual posture of the case before the court, no other questions properly arose in judgment. And if the instructions, asked by the claimant, and refused by the court, went beyond these, they were properly refused, as being abstract and irrelevant to the actual merits of the controversy, or were too vague and general to entitle the claimant to have them answered. The supreme court of the United States have often held, that it is no error to refuse instructions, asked by a party, which are open to either objection; because they may have a tendency to mislead the jury.

In the first place, then, was the permit in the present case, if obtained by fraud and collusion between the claimant and the deputy collector utterly void, so that it may be treated as a mere nullity, exactly as if there had been no permit at all for the landing of the goods? The point is, as far as I know, new with reference to the 50th section of the act of 1799, c. 128 [1 Stat. 665, c. 22]; and, therefore, it must be disposed of upon general principles and the analogies of the law. Now, the general rule certainly is, that whenever fraud intervenes in any act, contract, deed, conveyance, or other instrument, however solemn it is, it is, as to the party, upon whom the fraud is perpetrated, or whom it is designed to injure, utterly void. If the fraud is concocted for the purpose of cheating third persons, it may bind the immedi-

[6] King v. Hunt, 3 Barn. & Ald. 566, 573.
[7] See Somes v. Skinner, 16 Mass. 348, 360.
[8] See U. S. v. Hayward [Case No. 15,336].

ate parties to it, so as to estop them from setting up the original invalidity of the transaction. But, as to such third persons, the transaction, however solemn it may be, is utterly void; and it may be treated as a nullity, whenever it is asserted in opposition to their rights. But when the fraud is perpetrated by one of the parties to the transaction upon the other, there the transaction, be it what it may, an act in pais, a deed, an authority, a conveyance, or any other instrument, is utterly void. In contemplation of law it never had any existence whatsoever. This is the general rule. It operates universally as between the parties themselves; although there may be exceptions to it in particular cases in favor of third persons, as for example, in cases of negotiable instruments, bank notes, and other currency, where reasons of public policy and the interests of bona fide holders may require exceptions. Such, however, is not the present case; for here the claimant, the concoctor of the very fraud, (if proved,) sets it up to protect himself against the rights of the very party, whom he had defrauded. He says, in effect, I have bribed and corrupted your agent, and have corruptly and illegally obtained from him a permit to land these goods in violation of your rights; and, now I insist, that I have a right by law to shield myself and my property from forfeiture, under the protection of that very permit, as if it were a legal and honest instrument. Now, I know of no case, and of no doctrine, which thus enables a man to set up his own turpitude, dishonesty, and illegal acts, as a defence against the rights of the innocent and injured party.

In the common case of a conveyance to defraud creditors, we all know, that it is valid and obligatory between the parties; because the law will not tolerate the grantor in setting up his own turpitude, to avoid his own solemn act. It leaves him to bear the burden of his own iniquity, and to submit to the loss of the property, of which he intended to cheat others, upon the known maxim, "In pari delicto melior est conditio possidentis." As the party has made his own bed, so he must lie on it, however uneasy may be his posture. But in relation to the creditors, we all know, the same conveyance is treated as an utter nullity, and is not for a moment allowed to intercept their rights. But, take the case, where one party obtains a license, contract, obligation, conveyance, or other instrument, from another by fraud, imposition, or undue influence upon the latter, the transaction is constantly treated as a mere nullity between them. It has, in contemplation of law, no existence whatsoever. Take the case of a deed obtained from a lunatic or a drunkard, while in a state of lunacy or gross intoxication; we all know, that the deed is treated as a nullity, and non est factum is a good plea to it. Yates v. Boen, 2 Strange, 1104; Cole v. Roberts, Bull. N. P. 172;[9] and Somes v. Skinner, 16 Mass. 348, are directly in point, as to a conveyance obtained by fraud, imposition, and undue influence; and Anthony v. Wilson, 14 Pick. 303, as to a license obtained by fraud, to enter a house. This latter case was an action of trespass quare clausum fregit, and the license was set up as a defence by a special plea, and the replication denied the license. At the trial, it was proved, that the license was obtained by fraud; and it was held by the court, that a license obtained by fraud was a mere nullity. Mr. Justice Putnam, in his able opinion delivered for the court on that occasion, took the true distinction, that where the license is merely voidable, the fact, which avoids it, must be specially replied; but where it is void ab initio, there the party may legally deny, that he ever gave any license at all; for it may be considered, as if it never had any existence.

Now, if this doctrine be true between the direct parties, acting in their own right, must it not apply with superior force to the acts of mere agents, and especially to public agents, who are acting under a limited authority prescribed by law? Suppose a private agent should, by fraud and collusion with a purchaser, sell the goods of his principal, in known violation of his orders or duty, might not the principal treat the sale as a nullity, and maintain trover for the conversion? I apprehend, that there is no doubt of that. Suppose, which is closer to the present case, the clerk of a commission merchant, having a lien upon goods for his advances and commissions, should fraudulently deliver up those goods, in connivance with the owner of them; could not the commission merchant treat the transaction as a nullity, and recover back the goods from the owner? Suppose the cashier of a bank should fraudulently and collusively deliver up to the parties any notes or securities discounted for them at the bank, or any property, lodged as a pledge or collateral security, in known violation of his duty; would not the whole proceeding be a mere nullity, and treated as such in law, to all intents and purposes? It seems to me, that no doubt could possibly exist in either of these cases.

At the argument, I put a case to the learned counsel for the claimant, to this effect. The 49th section of the collection act of 1799, c. 128 [1 Stat. 664, c. 22], requires an entry of the goods, and an estimate of the duties due thereon, to be made by the collector; and upon the estimated duties being paid, or secured to be paid, it then, and not before, authorizes the collector to grant a permit to land them. These, therefore, are preliminaries to the grant of the permit. Suppose, there should be no entry, no esti-

[9] See, also, 1 Story, Eq. Jur. § 230, and note; and note to Lambert v. Atkins, 2 Camp. 272, 273.

mate of the duties, and no payment made or security given for the duties; but the collector should, notwithstanding, knowingly and fraudulently, in collusion with the consignee or importer, give a permit to land the goods, and they were accordingly landed; would such a permit, under such circumstances, be a lawful permit, and protect the goods from forfeiture? No answer was given to this case; and, in my judgment, no other satisfactory answer can be given, but that in such a case the permit would be a mere nullity, and not a legal instrument. Now, in no substantial respect whatsoever does that case differ from the present. Here, no true entry, or honest estimate of duties, has ever been made; the duties justly due have never been paid, or secured to be paid. In each case, the transaction is equally a gross and palpable fraud; and the more or less of aggravation in the circumstances cannot change the legal result. It makes no difference in the concoction of the fraud, in legal intendment, whether it defrauds the government of the whole, or of the half, or of the quarter of the legitimate duties. It is still tainted and putrescent throughout. It is in known violation of law; and no act, done in known violation of law, can be admitted to have any legal validity. It would be a contradiction in terms. Upon the whole, I am entirely satisfied, upon full deliberation, that the permit in the present case, if obtained by fraud and collusion between the claimant and the deputy collector, (as the jury have found it was,) was utterly void, and a mere nullity, and never had any legal existence as a permit. The cases of Cutts v. U. S. [Case No. 3,522]; U. S. v. Lyman [Id. 15,647]; and Johnson v. U. S. [Id. 7,419], involved many considerations directly applicable to the present point; and I see no reason to be dissatisfied with those judgments.

In respect to the other point, whether the first count, alleging, that the goods were landed without a permit, can be supported by the proof of a permit granted by fraud and collusion between the claimant and the deputy collector, it does not appear to me to involve any serious difficulty. The argument is, that the special circumstances of fraud ought to have been set forth in the count, and then the conclusion of law stated, that thereby the permit became void. But it does not appear to me, that this argument is well founded. It is a general rule in pleading, that the party may declare upon the case according to its legal effect, and that he need not set forth the particular circumstances, which bring the case within the reach of the general allegations. An action for money had and received is maintainable for money had and received or retained by fraud; and no special count is necessary. So, in the case of Anthony v. Wilson, 14 Pick. 303, already cited, it was held, and in my judgment with entire accuracy, that the party may support an issue of no license, by proof that the license set up in the case was founded in fraud. That is a case directly in point to the present objection. Whelpdale's Case, 5 Coke, 119, has been cited to the contrary; but it does not appear to me to support it, when examined in its just bearing. The true distinction is between deeds, which are void ab initio, and deeds, which are voidable only. In the former case, the plea of non est factum is entirely proper; in the latter, a special non est factum is required. Lord Ellenborough stated the true distinction in Lambert v. Atkins, 2 Camp. 272, 273; and it was affirmed and illustrated by Mr. Justice Putnam, in Anthony v. Wilson.[10] The moment, that it is ascertained, that any act, deed, or instrument is founded in fraud, that act, deed, or instrument must be treated as a nullity, and as if it had no legal existence in relation to the injured party. It seems to me, therefore, that upon the strictest rules of pleading, the present objection is not maintainable, even if, in cases of revenue seizures, one were disposed to import into informations and libels all the niceties of the common law in other cases. In new cases, not governed by antecedent authorities, I should not incline to support mere technical niceties, or to give them a wider range. The days for such subtleties are, as I trust, in a great measure passed away.

It has been suggested, that parol evidence is not, and ought not to be admitted to prove fraud in making entries, or invoices of goods, or in obtaining permits, after the goods have passed from the custom house, and have undergone the regular inspection of the public officers. This is pressed upon the ground of the supposed danger and public inconvenience of such evidence, after the goods can no longer be inspected and examined, so as to justify or to repel the presumption of fraud; and the dangers to subsequent bona fide purchasers of the goods. I cannot admit the argument to be well founded in point of law. I know of no case, where parol evidence is not admissible to establish fraud, even in the most solemn transactions and conveyances. What would become of prosecutions for perjury in swearing to false invoices, if we were to exclude parol evidence to show the true cost, or the actual sworn value of the goods? What should we do in cases of fraudulent conveyances to cheat creditors, or of fraudulent deeds, procured by undue influence, or gross violence, or meditated imposition? What should we do in cases of forgery by alteration of written instruments, or of the utterance of false bank bills? The present bill of exceptions does not, indeed, raise any question of this sort; and, therefore, it is unnecessary to dwell on it. But I desire not to be understood for a single moment to doubt the entire propriety, and even necessity of allowing parol

[10] See, also, Com. Dig. "Pleader," W. 2, 18; 1 Chit. Pl. (3d. Ed.) 479.

evidence in all cases of fraud. Upon the whole, my opinion is, that the judgment of the court below ought to be affirmed with costs.

Case No. 1,689.

BOTTOMLEY v. UNITED STATES.

[1 Story, 153.][1]

Circuit Court, D. Massachusetts. May Term, 1840.

MARSHAL—FEES—ADMIRALTY PRACTICE.

1. The marshal's fees for the custody of goods in cases of seizure, and other proceedings in rem, are not honorary, but are dependent upon the precise regulations of law, or in the absence of such regulations, are to be allowed upon the principles of a quantum meruit, graduated by the ordinary value of similar services, and dependent upon the circumstances of each particular case.

[Cited in Jerman v. Stewart, 12 Fed. 275; The John E. Mulford, 18 Fed. 456.]

2. The practice in the admiralty is to refer disputed cases of this nature to an auditor, to examine the evidence, hear the parties, and report the case to the court for a final decision.

This case having been disposed of upon the merits [Bottomley v. U. S., Case No. 1,688], a question afterwards arose as to the charge in the bill of costs of the marshal for custody fees for keeping the goods. It was briefly spoken to by Gray, for the claimant, and by the marshal pro se.

STORY, Circuit Justice. The question, as to the fees of the marshal for custody of goods in his possession, in cases of seizure and other proceedings in rem, has lately in several cases, and particularly in the case of the ship Nathaniel Hooper, come before this court for consideration. The court has been asked to lay down some general rule, which should apply to all cases, and thus furnish to the marshal, as well as to the other parties in interest, a clear guide to direct their conduct. I have had occasion to state, that it is utterly impracticable for the court, according to my judgment, to lay down any general rule, which would not work with great inequality and injustice in many cases. We might just as well be required to lay down a general rule applicable to all cases of salvage, where the circumstances are almost infinitely various. I am aware, that in another district (New York) certain general rules on this subject have been laid down by the learned district judge; but even in that district, a power is reserved to modify and vary the fees in special cases; so that the subject is necessarily left somewhat afloat in its practical operations. But I confess myself by no means satisfied with the general provisions of those rules. They seem to me purely artificial; and, as far as I can gather, they must produce great inequalities in their bearing upon the mass of cases.

I have also had occasion to state the general doctrine, by which this court is to be governed in all cases of this sort. We have no right to reward the officers of this court for their diligent execution of the duties of their office by what might be deemed a liberal or honorary compensation. Our duty is simply to compensate them pro opera et labore, following the precise regulations of law, where there are any; and in the absence of such regulations, giving such reasonable compensation, as the like labor and services usually receive in the ordinary business of life, and such as they may fairly be deemed to deserve upon the footing of a common quantum meruit in analogous cases. Of course, the marshal is entitled to be repaid the actual disbursements reasonably made by him, for the care and custody of the goods by his under keepers or special agents. Beyond this, he is entitled to receive a compensation for his own superintendence and supervision, as well as for his personal responsibility for the safe custody of the goods, and for the costs and compensation of his under keepers and agents.

What ought that compensation to be, and how shall it be made? It is sometimes said, that it should be a fixed commission upon the value of the property; sometimes, that it should be by a fixed per diem allowance during the time of custody, without any reference to value; and sometimes, that it should be measured by the duration of time and the value. But it seems to me that there are serious objections to adopting any positive rule of either sort. A commission upon the value of the goods seized, or held in custody, might be too small a compensation in cases, where the value was small, and too great, where it was large. A fixed per diem allowance would operate with great inequality in the like cases. It would, in fact, impose the same burden upon goods worth one hundred dollars, which would be imposed upon goods worth one hundred thousand dollars. Besides; the labor and care actually required to be bestowed on the safe custody of different goods, bears no proportion in any case to their value, or the duration of the custody. The care required in the custody of imperishable goods, such as iron, would be very different from that required by perishable articles, or articles liable to deterioration or leakage. A cargo of fruit, of wine, of oil, of pepper, or coffee, or of broadcloths, or other dry goods, would require far more, and far different care, and would, therefore, include far more, and far different responsibility from a cargo of iron, or grindstones, or mahogany. It would be almost absurd to give the same commission upon the value of diamonds and jewelry, and gold and silver coin, the subjects of salvage, which might be placed in the vaults of a bank; and a cargo of half the value, which was liable to daily deterio-

[1] [Reported by William W. Story, Esq.]

ration or injury, and required daily examination and scrupulous watching.

It appears to me, therefore, that there is an intrinsic, and I had almost said an insurmountable difficulty, in establishing any general rule as to compensation, which would not operate inequitably and unequally, and even, in some cases, with harsh injustice. The compensation, it seems to me, must, therefore, in all cases of dispute, be decided by the court with reference to all the circumstances of the particular case. The nature of the goods, whether perishable or imperishable; whether liable by exposure to deterioration, loss, or injury, or not; whether requiring more or little care, and also the value of the goods, and in many cases, the length of time of the custody of the goods, and the degree of responsibility attaching to the officer, and the degree of vigilance required of him;—these, as well as the hazards, which, in peculiar cases, he may be compelled to incur, are all fit ingredients to be taken into consideration by the court in awarding compensation to the marshal for custody. In general, I should deem it my duty to refer such matters in cases of dispute to some proper person, as auditor, to hear the parties and examine the evidence, and report the case to the court for a final decision. This is the ordinary practice in admiralty. On the present occasion I shall do so, if the parties desire it. It will be rare, that in common cases any question of this sort will arise. The court place confidence in their officers, and presume, that they will charge no more than what is a just and reasonable compensation; and that usually is so well understood in practice, that I am quite sure, that there cannot be any substantial difficulty in an amicable adjustment. It is but justice to the present marshal to state, that the court have no reason to believe, from his general fidelity and honorable discharge of his duties, that he entertains the slightest desire to receive any compensation beyond what he is justly entitled to for his labor and services, and responsibility in the present case. Referred to an auditor.

Case No. 1,690.

BOTTS et al. v. CRENSHAW.

[Chase, 224.][1]

Circuit Court, D. Virginia. May Term, 1868

PRINCIPAL AND AGENT — REVOCATION OF AGENCY BY CIVIL WAR — INVESTMENT IN CONFEDERATE BONDS—LIABILITY OF AGENT FOR.

1. The late civil war did not revoke an agency established in one of the southern states before the war, by a citizen of one of the northern states.

[See note at end of case.]

2. An attorney in Virginia collected a claim entrusted to him before the war by a citizen of Kentucky, in Confederate money, during the war, and invested the same in Confederate bonds by order of a Virginia state court. He is liable after the war for the value of the Confederate money, as of the date when he received it.

[Followed in Head v. Starke, Case No. 6,293.]

[See note at end of case.]

3. An order of the hustings court of the city of Richmond, authorizing the attorney to invest funds collected by him for citizens of Kentucky in Confederate bonds, which perished by the result of the war, will not be recognized in this court.

[See note at end of case.]

At law. This was an action brought by plaintiffs [Botts and Darnall], citizens of Kentucky, against the defendant, a citizen of Virginia, to recover the amount of certain claims entrusted to him before the war, as attorney-at-law, for collection. It appeared that one Green owed the plaintiffs money, for which he gave them his negotiable notes, which fell due before the war, and were not paid by Green. The plaintiffs then sent the notes to Crenshaw, a practicing attorney of the courts of Richmond, Virginia, for collection. Green got into pecuniary difficulties after the war commenced, and when it was impossible for Crenshaw to communicate with his clients. Under these circumstances, he compromised the notes at eighty cents on the dollar, and received that sum in Confederate money, and subsequently finding it depreciating on his hands, applied by petition to the hustings court of the city of Richmond, a court of general equity jurisdiction, and which, with other courts of Virginia by an act passed in 1863, had special authority to order fiduciaries on their petition to invest trust funds in bonds of the state, or of the Confederate States, for authority to invest this money thus collected in Confederate bonds—which authority was given, the investment made, and the bonds perished with the power which created them.

CHASE, Circuit Justice. The agency created by the plaintiff in the defendant was not terminated by the status of war. It continued with all its rights, duties, and obligations. It is for the jury to say whether this agency authorized the defendant to compromise this debt under the circumstances, and to recover payment of it in Confederate currency. If they find that defendant had such authority, then they must find the value of such currency, when defendant received it in gold, and render their verdict for the plaintiff for such amount. The order of the hustings court of Richmond, ordering and authorizing defendant to invest the funds of the plaintiffs in his hands, they being citizens of a state adhering to the United States residing there, can not be recognized by this court, because it is an act in derogation of the rights of persons beyond the jurisdiction of the de facto government of Virginia, of

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

which that court was a constituent part, and because it is an act, the tendency and effect of which is to sustain the course of the Confederate government and aid it in its struggle against the United States. Ordinary acts of government relating to marriage contracts, conveyances, wills, &c., done by the de facto government, will be sustained and enforced by the federal courts; but such acts as the one in question can not be.

The jury found for the plaintiff the value of the Confederate currency in gold at the time of its receipt, and the court ordered the judgment to be entered generally for the amount so found.

[NOTE. In time of war, contracts directly or indirectly made with persons within the enemy's territory are void. U. S. v. Lapene, 17 Wall. (84 U. S.) 601; Filor v. U. S., 3 Ct. Cl. 25; Scholefield v. Eichelberger, 7 Pet. (32 U. S.) 586. But a contract made when both parties are within the hostile lines is lawful. Cramer v. U. S., 6 Ct. Cl. 381; Montgomery v. U. S., 15 Wall. (82 U. S.) 395, affirming 5 Ct. Cl. 648; U. S. v. Grossmayer, 9 Wall. (76 U. S.) 72, reversing 4 Ct. Cl. 1. Civil war does not terminate an agency established prior thereto by residents respectively of the hostile sections (Anderson v. Bank, Case No. 354; Douglas v. U. S., 14 Ct. Cl. 1); and the principal may accept the beneficial acts of the agent (Mayer v. U. S., 3 Ct. Cl. 249). See Quigley v. U. S., 13 Ct. Cl. 367. See, also, Stoddart v. U. S., 4 Ct. Cl. 511, to the effect that war suspends the relation.

[An investment of trust funds in Confederate securities, although by order of a court, is illegal, and does not relieve the depositor from liability. Horn v. Lockhart, 17 Wall. (84 U. S.) 570; Head v. Starke, Case No. 6,293; Micon v. Lamar, 1 Fed. 14; Van Epps v. Walsh, Case No. 16,850. The courts of the Confederate States had no jurisdiction to affect the rights of citizens residing in loyal states. Livingston v. Jordan, Id. 8,415; Cuyler v. Ferrill, Id. 3,523; Hickman v. Jones, 9 Wall. (76 U. S.) 197. And see French v. Tumlin, Case No. 5,104; Ketchum v. Buckley, 99 U. S. 188.]

BOUCHER (SIMONTON v.). See Case No. 12,877.

Case No. 1,691.

BOUCICAULT v. FOX et al.

[5 Blatchf. 87.][1]

Circuit Court, S. D. New York. Oct. Term, 1862.

COURTS—POWER TO GRANT NON-SUIT—COPYRIGHT—INFRINGEMENT—EVIDENCE—ASSIGNMENT AND LICENSE—RIGHTS OF LICENSEE—ABANDONMENT—WHAT MAY BE COPYRIGHTED.

1. A court of the United States is not empowered to grant a non-suit, in a case where evidence has been taken.

2. On the trial of an action for the violation of a copyright of a play, it is not competent, for the purpose of showing that the play was dramatized from a certain book, to prove by a witness a part of the contents of the book, or the identity or resemblance between such part and passages in the play, neither the book nor the play being produced in court, nor any reason for their non-production being shown.

3. Nor is it competent, on the production of the book, to ask a witness to take the book and say whether its scenery, incidents, and language are not substantially the same as those of the play, the play not being produced nor its contents proved.

4. A person who agrees to write a play, to be acted at the theatre of another person, and to act in it himself as long as it will run, and receive a share of the profits as a compensation, does not thereby confer upon any one the legal or equitable title to the play, and is entitled to take out a copyright for it, even after it has been acted at such theatre.

5. Nor does the performance of such play in public, or the performance of it at such theatre, with the consent of its author, for a compensation to him, constitute any evidence of his abandonment of the manuscript to the public or to the profession of players.

[Cited in Boucicault v. Hart, Case No. 1,692; Thomas v. Lennon, 14 Fed. 851; Parton v. Prang, Case No. 10,784.]

6. The rule stated for determining whether a copyrighted work is an original one in the sense of the law.

[7. A dramatic composition is entitled to copyright as original, although a reproduction of old materials in a new form and combination.]

[See Greene v. Bishop, Case No. 5,763; Emerson v. Davies, Id. 4,436; Lawrence v. Dana, Id. 8,136.]

[8. Cited in Boucicault v. Hart, Case No. 1,692, to the point that, irrespective of statute, an author has no exclusive right to multiply copies or control subsequent issues after the first publication of his work.]

[9. Cited in Yuengling v. Schile, 12 Fed. 106, to the point that a copyright may be assigned, to be transferred to a person not entitled, under the act, to take out a copyright.]

At law. This was an action to recover damages for the representation, by the defendants [George L. Fox and James W. Lingard], at the New Bowery Theatre, in the city of New York, of a play called "The Octoroon," in violation of the rights of the plaintiff [Dion Boucicault], as the author and owner of the copyright thereof. The plea was the general issue. At the trial, the plaintiff had a verdict for $500 damages. The defendant now moved for a new trial. [Denied.]

Henry A. Cram, for plaintiff.
James R. Whiting, for defendants.

SHIPMAN, District Judge. The plaintiff, who was an actor, and a dramatic author, made an arrangement with one Stuart, then the lessee of the Winter Garden Theater, in the city of New York, by which the former was to become the stage manager, and general director of the theatre. The particulars of this arrangement are of no importance here, as the undisputed proof in the case is, that it was either never definitely settled, in all its terms, or, if it was, that it was abandoned before the production of the play in question. Under that arrangement, however, such as it was, the plaintiff performed

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

the duties of stage manager, for some weeks, during which the theatre was at first successful, but, the receipts falling off, a new arrangement was made, under which "The Octoroon" was written and brought out by the plaintiff. It appears, incidentally, in the evidence, that Stuart had, some time before, assigned his interest, as lessee of the theatre, to one Fields, in trust for the benefit of certain of his creditors, although he continued to direct its operations, with the approbation, and under the control, of his trustee. The agreement under which "The Octoroon" was produced, was, therefore, made with the assent of this trustee, and the assignment is here mentioned only for the purpose of explaining that fact, as it has no bearing on the merits of the controversy. By one of the terms of this agreement, the plaintiff was to write this play, and he and his wife were to perform in it as long as it would run, at the Winter Garden. He wrote it, and it was brought out about the 6th of December, 1859. The plaintiff and his wife took part in performing it until the 13th of the same month, when they withdrew, and the plaintiff declined to continue his own or his wife's services any longer. The play was, however, kept on the stage, at this theatre, for several weeks after, although the plaintiff's connection with the theatre had ceased on the 13th of December. On the 12th of December, the plaintiff took out a copyright for the play. On the 17th of December he commenced a suit in equity, in this court, to restrain Stuart and Fields from any further representations of the piece. The performance of the play continued at the Winter Garden until Saturday evening, the 21st of January, 1860, when it was withdrawn, and, on the Monday evening following, it was brought out by the defendants at the New Bowery Theatre, where it was performed for nine successive nights. It is for these nine performances, at the latter theatre, that this action was brought.

While the performance of the play was proceeding at the Winter Garden, a negotiation was opened between the defendants, through their treasurer and agent, one Tryon and Stuart, for the purchase of whatever right the latter had in the manuscript, and also for the purchase of the scenery by which the performance was illustrated, which resulted in a verbal agreement between them, by which the defendants were to have all the rights of Stuart to the manuscript, and in its representation, for one hundred dollars. A further sum was agreed on for the scenery. The play was then announced for the New Bowery Theatre, by the defendants: in the following card. "To the public. Messrs. Fox and Lingard beg to inform their patrons and the public, that they have purchased of W. Stuart, Esq., the proprietor of the 'Winter Garden,' the successful drama of the 'Octoroon,' with all the scenery, properties, music, machinery, and everything appertaining to the piece, which will be produced in the &c." During the negotiations between the defendants' agent and Stuart, the latter informed him that his right to the play was in suit, then pending, but the agent insisted that the right to the manuscript, and to the performance of the play, was in Stuart, and concluded the alleged purchase and received from Stuart a copy, the original being still in the hands of the plaintiff. This copy had been taken by Stuart, (whether with or without the consent of the plaintiff does not appear,) before the latter withdrew from the Winter Garden, as Stuart says, "for fear of accidents," and it would seem that it was from this copy, whenever reference to it was needed, that the piece was performed at this theatre after the plaintiff withdrew.

On the trial, the plaintiff proved the performance of the piece at the defendants' theatre for nine nights, from the 23d of January to the 1st of February, inclusive. On this point, there was no opposing proof. The plaintiff also proved, from the record of copyrights, in the possession of the clerk of the district court for the southern district of New York, that he obtained a copyright for the play on the 12th of December, 1859. The records of the suit in equity brought by the plaintiff against Stuart and Fields, was also offered in evidence, for the purpose of fixing the dates of the commencement and termination of that suit, to which the defendants objected. The court admitted the evidence only for the purpose for which it was offered, and the defendants excepted. This exception has not been noticed on this argument, on the ground, no doubt, that the subsequent facts proved by the defendants' witness, Stuart, that such a suit was pending, and that he communicated the fact to the agent of the defendants when he proposed to purchase the play, renders the dates proved from this record clearly relevant. This exception requires, therefore, no further notice.

The plaintiff having rested his case, the defendants moved for a non-suit, on the ground that the declaration did not allege that any copyright of the play had ever been taken out by the plaintiff, and on the further ground that the plaintiff had, by his own showing, by performing the piece for hire, dedicated the right to others, and abandoned his right to play the piece and to a copyright, except as regarded the mere right to print and publish the same. The court overruled this motion, on the ground that the courts of the United States are not empowered to grant non-suits, in cases where evidence has been taken; to which the defendants excepted. This exception, too, has not been mentioned on the argument. The ruling of the court was in conformity to well settled authority and long practice. Doe v. Grymes, 1 Pet. [26 U. S.] 469; D'Wolf v. Rabaud, Id. 476, 497.

The defendants then introduced in evidence, among other things, the agreement between Stuart and the defendants, through their agent, for the purchase of the play, which has already been mentioned. They also proved that bills and advertisements announcing the play, at the New Bowery Theatre, stated that it was to be performed there by permission of Stuart, and that the plaintiff saw some of the bills and posters making this announcement, and did not object to or forbid the performance. The defendants also called as a witness John S. Dasalle, who stated that he was one of the editors of the Sunday Times newspaper; that he had seen the performance of "The Octoroon;" that he knew a novel called "The Quadroon," written and published by Mayne Reid; that it was published before "The Octoroon" was heard of; and that he was familiar with its contents. The defendants' counsel then put the following question to this witness: "Can you state whether the incidents contained in "The Quadroon" are the same as those contained in the drama of "The Octoroon?" This question was objected to, on the ground that the book itself was not produced, and the question was excluded, and an exception was taken. The witness was then asked, if he could state, from recollection, any passages contained in "The Quadroon," which were similar to those in "The Octoroon." This question was objected to, and the court excluded it, to which the defendants excepted. The defendants then offered to prove, by the statements of the witness, that the play was dramatized from the book and was not an original play. This evidence, in this form, was objected to and excluded. Finally, the defendants produced the book, and asked the witness to take it and say whether the scenery, incidents, and language were not substantially the same as those of the play. This question, also, was excluded. As these rulings were excepted to, and have been referred to on the argument, we will notice them here. Of all except the last, it needs only to be said, that neither the book nor the play had been produced in court. The book was in print, and could easily have been obtained. To undertake to prove a part of its contents, or to ask the witness whether such part was identical with, or resembled passages in, the play, was wholly inadmissible, under any known rule of evidence. Whenever matter which is in print or in writing is presented to a court or a jury, for the purposes of construction, or to establish proof of identity, resemblance, or dissimilarity, the documents themselves must be presented for the inspection of the triers, or, on proper reason for their non-production being shown, their contents must be proved. The rule is trite, familiar, and imperative. Nor was the difficulty removed by producing the book, prior to the last question put to the witness. The witness was asked to take the book and say whether the scenery, incidents and language were not substantially the same as those of the play. The play had not been produced, nor had its contents been proved; nor was the witness called upon to give any passage from it, for comparison with any part of the book. To take the opinion of the witness, under these circumstances, would be to substitute his judgment for that of the triers, and that, too, in the absence of the evidence upon which his judgment was founded. The rulings of the court, excluding these questions, were, therefore, correct.

At the close of the evidence, the defendants requested the court to charge the jury as follows: 1. That the employment of the plaintiff by Stuart, to write the play, and its production and performance by the plaintiff, for hire, was a dedication to the profession of players, of the right to play the piece. 2. That the writing the play for hire and compensation paid to the author and its delivery to Stuart, gave not only the title to the play, but a right to its use, as a literary composition. 3. That the voluntary public performance of the play, for hire, is such a publication as to amount to a dedication of the play to the use of the public. 4. That it was the duty of the plaintiff, under the circumstances of this case, to have given notice of his dissent to its performance by the defendants, and his failure to do so estops him from alleging a want of assent. This last request was subsequently modified, and the court was asked to charge, that if the jury were satisfied that the plaintiff daily, or, during the time, frequently, saw one of the defendants at the place at which the piece was being performed, and saw the announcement of it, and knew that it was being played there, it was, as matter of law, his duty to express his dissent from the playing; otherwise, the jury have the right, if they think proper, to draw the inference that it was with his assent. The court refused to charge according to the several requests of the defendants, to which refusal they excepted. They also excepted to the charge in the following particulars: 1. That the piece was an original play, and that the plaintiff was the author and entitled to a copyright. 2. That the plaintiff was entitled to the literary property in the play. 3. That the neglect to dissent did not constitute assent. 4. That there was no evidence of the abandonment of the play by the plaintiff. 5. That Stuart had no right that he could sell to the defendants in this suit. The charge of the court will sufficiently appear, as we proceed to examine the following propositions, which condense the points presented in this controversy. The last of these propositions is not strictly in the case, but, by a liberal arrangement of counsel, it is submitted for our examination. These points are: 1. Was this, on the undisputed evidence in the case, an original play, and the production of the plaintiff? 2. Was the literary property in the

composition, and the exclusive right to its representation, in the plaintiff? 3. Is there any evidence that he had abandoned to the public any of his rights? 4. Is there any evidence except that which was submitted to the jury, that he assented to the performance of the play by the defendants? 5. By a careful comparison of the book called "The Quadroon" with this play, is there any evidence disclosed of a want of originality in the latter, which would be sufficient to support a verdict for the defendants, founded upon that evidence?

The first point we have to consider relates to the authorship of the play. On this, the evidence of Stuart, the defendants' witness is clear and decisive, at least sufficiently so to establish a prima facie case, both as to authorship and originality. He states, that the play was written by the plaintiff, under the special arrangement already referred to. It was to be a new play, and, as such, was put on the stage and had a successful run. Its originality does not appear to have been doubted by Stuart, who was familiar with the current dramatic literature of the day. It was virtually conceded, on the trial, that the plaintiff constructed and wrote the play, although it was insisted that he drew his materials from "The Quadroon," to such an extent, and with so little modification, as to destroy his claim to originality. But the evidence offered in support of this latter claim, was, we think, properly ruled out, for the reasons already given. A clear prima facie case on this point having been made out, and nothing having been shown to rebut it, there would have been no error if the charge had assumed the fact as proved. This, however, was not the precise form of the charge. The language used was, that "if it was the original production of the plaintiff, the title was in him." But it is unnecessary to discuss this point at any length. A verdict for the defendants, resting on this feature of the case and on the evidence as it stood, could not be sustained. It would be clearly a verdict against evidence. The question whether or not, in point of fact, the use made of the materials of "The Quadroon," in the construction of the piece, was such as to deny to the latter the claim of originality, will be hereafter considered.

Our next enquiry is—Was the literary property in the composition, and the exclusive right to its representation, in the plaintiff? The questions, under this head, relate to the bearing, on the plaintiff's title, of the fact, that he wrote the drama while in the employ of Stuart and for hire, and also to the proof of his copyright. It is proper here to revert to the agreement under which this play was produced by the author. That agreement was, that he should write this play and, perhaps, some other plays, and that he should contribute his and his wife's services at the Winter Garden Theatre, as long as the plays would run there, and receive half the profits, as a compensation. This cannot be construed into a contract, conferring upon Stuart, or any one else, the legal or equitable title to this drama. The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, subject, at most, to a license or privilege, in favor of Stuart and Fields, to have the piece performed at the Winter Garden. Whether the plaintiff was guilty of a breach of that part of his agreement which bound him to bestow his own and his wife's services, we need not enquire here. Such a breach, if proved, would not vest the proprietors of the theatre with the title to "The Octoroon." A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation. The play was to be produced, so far as Stuart and Fields were concerned, for a special purpose, and their rights are co-extensive only with that special purpose, which was, that the play should be brought out by the plaintiff at the Winter Garden, and be performed as long as it would run. The contract cannot, by the most liberal construction, be expanded beyond this. Under these circumstances, the plaintiff was entitled to the copyright which he obtained. The proof of the obtaining of such copyright made a clear prima facie case, and no countervailing evidence was offered. The evidence in the present case is the same as in the case of Roberts v. Myers [Case No. 11,906].

We come now to the third proposition—Is there any evidence, in the case, that the plaintiff had abandoned his rights to the public? It appears, in the proof, that the play was performed at the Winter Garden, under the agreement, and, of course, with the consent of the plaintiff, for some six nights before the copyright was taken out. This is all the evidence there is of an abandonment to the public. From this the defendants argue, that such a public representation for

profit, prior to the taking out of a copyright, was a dedication, to the public, or, at least, to the theatrical public, including the profession of players, of the right to represent the play on the stage. No printed copy of the play having ever been circulated, it is not seriously contended that the plaintiff deprived himself of the right to print and publish it. This, naturally, brings us to an examination of the statute upon which the plaintiff rests for protection, and upon which his suit is founded. It is the act of August 18th, 1856 (11 Stat. 138), and provides, that "any copyright hereafter granted under the laws of the United States, to the author of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs, or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained." The object of this statute is apparent, at a glance. It is to secure to the author of a copyrighted play the sole right to its performance in any public place, after it is printed. While it is in manuscript he needs no protection. Manuscripts are protected by the common law, as well as by the 9th section of the act of February 3d, 1831, (4 Stat. 438); Wheaton v. Peters, 8 Pet. [33 U. S.] 591, 657; Jones v. Thorne, 1 N. Y. Leg. Obs. 408; Bartlett v. Crittenden [Cases Nos. 1,076, 1,082]. Whether a copyright had been taken out by the plaintiff or not, the defendants would have had no right to the use of his manuscript play; and, although they had obtained a copy without the consent of the plaintiff, a court of equity would have promptly restrained them from any use of such copy, beyond what the plaintiff had authorized. The reading of a manuscript lecture or discourse, or the performance of a manuscript play in public, by the author, does not confer upon the hearer any title to the manuscript, or any right to a copy, or to the unauthorized use of a copy, which may surreptitiously, or accidentally, pass into his hands. The jurisdiction of the courts of the United States is, indeed, confined, by the 9th section of the act of February 3d, 1831 [4 Stat. 438], to cases of threatened or actual printing and publication, and would probably not include the public performance of a manuscript play, unless, indeed, the parties should be citizens of different states. But the jurisdiction of the state courts, in suits to protect the owners of manuscripts, is complete, in all other emergencies. The plaintiff, then, being the original author of this play, his performance of it in public, or the performance of it by the company at the Winter Garden, with his consent, for a compensation to him, cannot be regarded as any evidence of his abandonment of the manuscript to the public or to the profession of players. The copy taken by Stuart, whether with or without the consent of the author, was evidently intended by the latter for no other use than that connected with its performance at the Winter Garden, and Stuart had no right to put it to any other use, and could confer none upon the defendants. The common law protected this play, so long as it was in manuscript, or, at least, it was protected by equitable remedies. Macklin v. Richardson, 2 Amb. 694; Curt. Copyr. 103. The act of February 3d, 1831 [4 Stat. 436, c. 16], protects the right of the author to print and publish it. The act of August 18th, 1856 [11 Stat. 138, c. 169], superadds to the rights of the author, the exclusive right to the public representation of the play, after the copyright for printing and publishing it has been granted. The only effect of this act on the rights of the author, while his production is in manuscript, is, that it gives him a remedy at law against a party, after he has taken out his copyright, when, before, he possibly had only a remedy in equity. There can be no evidence of abandonment to the public or any rights growing out of the authorship of a manuscript, drawn from the mere fact that the manuscript has, by the consent and procurement of the author, been read in public by him, or another, or recited, or represented, by the elaborate performances and showy decorations of the stage. If the reading, recitation, or performance is conducted by his direction, by his agents, for his benefit and profit, with the sanction of the law, how can it be said to be evidence of his intention to abandon his production to the public? Suppose Mrs. Kemble were to read, in her unrivalled manner, a drama of her own production, would the reading be a dedication to the public, and authorize any elocutionist to read it, who could obtain a copy, against the consent of the author? How would it change the matter, if she should, instead of reading the play, have it brought out by a company at Wallack's, or the Winter Garden, with all the embellishments which the stage can lend? The true doctrine is, that the literary property in the manuscript continues in the author, so long as he exercises control over it, or has the right to control it; and, until its publication, no one has a right to its use or that of its contents, without his consent. Therefore, any special use of it by him, in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment. Roberts v. Myers [Case No. 11,906].

As to the fourth proposition, very little need be said. It appeared in proof, that the plaintiff several times passed the theatre of the defendants during the time the play was in progress there, and that it was announced by large bill posters, which he must have seen. Indeed, it is conceded, that while the piece was being played there, the

plaintiff knew it, and did not object, during the nine nights in question. The court was asked to charge the jury, that, as matter of law, he ought to have objected, and that his failure to do so would warrant the jury in inferring his assent to the performance. If the defendants had been ignorant of the plaintiff's right, and had gone on under a misapprehension of the facts, or if they had supposed he assented, they might make this claim with a better grace. But the evidence shows conclusively, that Stuart distinctly informed the defendants' agent, when he went to purchase the play, that his. Stuart's right to it was disputed by the plaintiff, in a suit then pending. It shows further, that, instead of relying on the consent of the plaintiff, they impliedly disclaimed it, by publicly announcing, in their cards and bill posters, that the piece was purchased exclusively from Stuart, and was played with his consent. The plaintiff would be entitled to have a verdict against him on the ground of his assent, if one had been rendered against him on the evidence in this case, promptly set aside. The defendants knew, before their purchase, that the plaintiff was contesting, in a court of equity, Stuart's right to the play, even his right to perform it at the Winter Garden, and, when they purchased it from him with this knowledge, they took, with it, the most solemn form of dissent known to the law, and a notice that, if they played the piece, relying on Stuart's conveyance, it was at their own peril. But the jury were not directed on this point of assent, although it is conceived they might properly have been, on the ground that the proof of dissent was clear. They were instructed, that if the plaintiff assented to the performance by the defendants, then he could not recover; and that, in determining whether he did thus assent or not, they could take into consideration his silence when the piece was being performed at the New Bowery Theatre, in connection with the other evidence. There was no error on this point.

We come now to the last topic in this controversy, which relates to the originality of this drama, when compared with the novel of Mayne Reid, called "The Quadroon." Though, as already remarked, not strictly in the record, yet the question is one little fitted for investigation by a jury, and, for reasons already given, was not submitted to them. The counsel, however, have consented that the court may compare the two works, and, if the play cannot be sustained as an original production, then the verdict is to be set aside and a new trial is to be granted.

It is difficult to lay down any precise rule which can be applied in all cases, as a test of originality. A work may be original in the eye of the law, when it is not in the eye of the critic. Mr. Curtis, in his instructive work on Copyright, well remarks: "A book may also be original, in the sense of the law, although the materials of which it is composed, the hints and sources from which its matter was derived, can all be traced out in former works, provided the author has exercised selection, arrangement, and combination, and has thereby produced anything new." Curt. Copyr. 177. These are just reflections, and a rule fully as liberal as that stated by the writer, must be applied to dramatic compositions, where the materials on which the author works are often old and well known. Many of the plays of Shakspeare are framed out of materials which existed long before his time, and were gathered by him from ancient chronicles, and other dusty receptacles of antiquated literature. But these dry bones of the past the poet combined anew, pouring over them the effulgence of his own genius, until they were quickened with a new life and adorned with a hitherto unknown beauty. Of this, Macbeth is an instance. The original tale, from Hollingshed, whether a fable or a verity, was of very indifferent quality; but Shakspeare, as remarked by Sir Walter Scott, "adorned it with a lustre similar to that with which a level beam of the sun often invests some fragment of glass, which, though shining at a distance with the lustre of a diamond, is, by a near investigation, discovered to be of no worth or estimation."

A thorough comparison of the novel and the play in this case, will clearly show that the latter is an original work, in the sense of the law. It is not a copy of "The Quadroon," nor an abridgement of it. The most that can be said in favor of their similarity is, that the dramatis personae of the play are, a portion of them, at least, suggested by those that figure in the novel. The prominent characters in each have some features in common, and move in and are acted upon by the same social organization; but there are points of marked contrast, both in the fictitious persons sketched, and the vicissitudes they experience. Some of the actors in the drama, are almost wholly dissimilar to their supposed prototypes in the novel; and, were it not for their relation to the central figure, which is a quadroon girl in both the book and the play, their resemblance would hardly have been noticed. The author of "The Quadroon" has no just cause of complaint against this plaintiff. His vested rights have not been invaded by the latter, and the policy of the law is to encourage literary labor, so far as it can be done without infringing upon the rights already granted to others. Plagiarism, and servile imitations are not to be encouraged. Those literary thefts which are committed upon copyrighted works the law promptly suppresses. The mere copyist, or the slavish imitator who reproduces old materials, substantially in their old form, without new combination, is entitled to no protection under the statute. But the law rests upon no code of comparative criticism. It protects

alike the humblest efforts at instruction or amusement, the dull productions of plodding mediocrity, and the most original and imposing displays of intellectual power. This law should be liberally construed in favor of authors, and, leaving their comparative merits to be settled by critics, at the tribunal of public opinion, it should protect and encourage their labors. The fruits of their literary toils should be secured to them by the highest title, for they keep open the springs of thought which feed the intellectual life of the nation.

We are of the opinion that there is no error in the record, and that the validity of the copyright is fully supported by the originality of the play. A new trial is denied.

Case No. 1,692.

BOUCICAULT v. HART.

[13 Blatchf. 47;[1] 4 Am. Law Rec. 726; 8 Chi. Leg. News, 257; 22 Int. Rev. Rec. 150; 23 Pittsb. Leg. J. 161.]

Circuit Court, S. D. New York. June 25, 1875.

COPYRIGHT—INJUNCTION—DEDICATION TO PUBLIC—COMMON LAW RIGHT.

1. In order to secure a copyright of a book or a dramatic composition, under the Revised Statutes, it is necessary not only to deposit with the librarian of congress a printed copy of the title of the work, but the work must be published within a reasonable time after such deposit of the printed copy of the title, and two copies of the work must, within ten days from its publication, be delivered to the librarian.

[See Chase v. Sanborn, Case No. 2,628; Carillo v. Shook, Id. 2,407; Chapman v. Ferry, 18 Fed. 539; Jollie v. Jacques, Case No. 7,437.]

2. Where a printed copy of the title of a dramatic composition was deposited in October, 1874, and a bill was filed in February, 1875, to restrain an infringement of the copyright of the work, but the bill did not allege any publication of the work, or any delivery of copies, or any reason why the same had not been done, it was held, on demurrer, that the bill did not show that a complete copyright had been obtained.

3. The exclusive right to publicly perform a dramatic composition, under section 4966 of the Revised Statutes, is dependent upon the existence of a copyright therefor.

[See Wheaton v. Peters, 8 Pet. (33 U. S.) 591; Clayton v. Stone, Case No. 2,872; Clemens v. Belford, 14 Fed. 728.]

4. Under section 4967 of the Revised Statutes, a person who had printed and published part of a dramatic composition, without the consent of its author, he being a citizen of the United States, and had publicly announced his intention to sell copies of the same, was restrained, by injunction, from printing or publishing the work.

[See Boucicault v. Wood, Case No. 1,693; Shook v. Rankin, Id. 12,804; Martinetti v. Maguire, Id. 9,173.]

5. Where the author of a dramatic composition has not printed it, but has only permitted and procured it to be represented on the stage of a public theatre for his own benefit, and through his selected channels, he has not abandoned it or dedicated it to the public, nor has he published it, within the meaning of the provisions of the Revised Statutes in regard to copyrights.

6. The right of an author of a dramatic composition, to retain and use it for his personal benefit, without publication, is a common law right.

7. This court has no power to administer common law relief in a suit between citizens of the same state.

[In equity. Bill by Dion Boucicault against Joshua Hart. Heard upon demurrer to the bill. Demurrer overruled, with leave to the defendant to answer within 30 days.]

Richard O'Gorman, for plaintiff.
Ambrose H. Purdy, for defendant.

HUNT, Circuit Justice. The facts, as alleged in the bill, are as follows: The complainant, Dion Boucicault, a citizen of the United States, and a resident of the state of New York, before October 26th, 1874, composed and wrote a dramatic composition called the "Shaughraun," of which he is sole proprietor. On the 26th of October, 1874, he mailed to the librarian of congress a printed copy of the title of this play, and received from the said librarian the usual certificate setting forth the said filing of the title of said dramatic composition, "the right whereof he" (said Boucicault) "claims as author and proprietor, in conformity with the laws of the United States respecting copyrights." He complied in all respects with all the provisions of the Revised Statutes of the United States as to copyrights. On the 24th of November, 1874, Boucicault caused said play to be performed before persons licensed by him to witness the same, at Wallack's Theatre, for the especial benefit of said Boucicault, and such performances have continued there for his benefit and profit, and said drama has never been performed otherwise or elsewhere with his consent. Boucicault never printed said play for circulation or publication or sale, and the play is still in manuscript, and has never been published, circulated or sold, or copied, or used, in any way, with the permission of Boucicault, unless in the said performance of said play at Wallack's Theatre, for Boucicault's benefit. The defendant Hart is owner of a theatre on Broadway, called the Theatre Comique. He possessed himself, surreptitiously, without the consent of Boucicault, of the manuscript of the "Shaughraun," thus made himself acquained with its contents, and printed and published the manuscript, or a material part thereof, under the name of the "Skibbeah," a play which professed to be "arranged" by one G. L. Stout. This play has twelve scenes, and eight of them are copied from Boucicault's play of the "Shaughraun." Defendant has printed and published said "Skibbeah," and publicly announced his intention to sell copies of the same, containing these

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

eight scenes of Boucicault's play, without the license or consent of Boucicault. Defendant did also, on the 26th of January, 1875, and continuously since then, up to the granting of an injunction in this suit, publicly represent this "Skibbeah" at his Theatre Comique, on Broadway. Boucicault, at that time, remonstrated with the defendant, in writing, against his representing this play. The "Skibbeah," as far as these eight scenes are concerned, is merely a copy of Boucicault's "Shaughraun." It is, in plot, situation, stage business, language, costumes, scenery, incidents, and series and sequence of events, identical with Boucicault's play of the "Shaughraun." The four scenes which are not taken from the "Shaughraun" are taken from a play of which one Reeve is author, called "Pyke O'Callaghan," and these four scenes are merely introductory and accessory to the other eight scenes, which contain the material part of the said "Skibbeah," and are a mere copy of Boucicault's "Shaughraun." The bill prays for an injunction restraining the defendant from performing and representing the said play, or from printing or publishing any copy of the same, and for other relief.

To this bill the defendant demurs upon the following grounds, viz.: For that it appears, on the face of the bill, that the said drama called "Shaughraun" has been for a greater period than ten days prior to the commencement of this suit, publicly performed, and caused to be publicly performed, by the complainant, upon the stage of a theatre; and it does not appear by said amended bill that two printed copies of said drama, or any copies thereof, were filed in the office of the librarian of congress, or sent by mail to said librarian of congress, at Washington, District of Columbia, within ten days after the public performance thereof, or at any other time; and for that it is alleged, in said amended bill, that the complainant has never published, or caused to be published, the said drama called "Shaughraun;" and for that it does not appear, by said amended bill, that the complainant has ever given any notice that he has complied with the requirements of the acts of congress respecting copyrights; and for that it does not appear, by said amended bill, that the complainant has ever given any notice that the said drama is secured by copyright.

It is admitted, by these pleadings, that the plaintiff is the author of the literary work in question. It is also admitted, that the defendant, without the consent, and against the remonstrance, of the complainant, made use of said work for his own benefit, by performing the same at his theatre, and by printing and publishing copies thereof. The defendant insists, that in so doing, he has violated no law of the land; in other words, that the complainant has not taken the measures necessary to secure to himself the exclusive right to the performance or the publication of the drama called the "Shaughraun." The complainant relies upon the deposit of a printed copy of the title with the librarian of congress, as the act upon which the grant of copyright depends, and, having performed the act, insists that his copyright is complete. The defendant takes the position, that, no copies of the work being filed with the librarian, there is no right to sue; and that, to entitle an author to copyright, the author must deposit the book, as well as the title, with the librarian. This is the first question to be considered.

There is no common law of copyright which can affect this case. Wheaton v. Peters, 8 Pet. [33 U. S.] 657. The rights of the complainant to a copyright, if any he has, are conferred by the constitution and the statutes of the United States. It is there that we must look for them, and, unless there found, they do not exist. If conditions are imposed by statute, as preliminary to the existence of such rights, their performance must be shown. All the conditions clearly imposed by congress are important, and their performance is essential to a perfect title. Wheaton v. Peters, supra. The constitution, in section eight, article one, gives to congress power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The first act of congress upon this subject was passed May 31st, 1790. 1 Stat. 124. The first section of that act secured to the author the sole right of printing, publishing, and vending his map, chart, or book, for the term of fourteen years "from the recording the title thereof in the clerk's office, as is hereinafter directed." The third section provided, that "no person shall be entitled to the benefit of this act," where such book has been already published, "unless he shall first deposit, and, in all other cases, unless he shall before publication deposit, a printed copy of the title * * * in the clerk's office," &c. "And such author * * * shall, within two months, * * * cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks." The fourth section required, that, within six months after the publishing thereof, a copy of the book should be delivered to the secretary of state, to be preserved in his office. The sixth section provided, that any person who shall print or publish any manuscript without the consent of the author &c., shall be liable to damages. By a statute passed April 29th, 1802 (2 Stat. 171), it was enacted, that, in addition to the above requisites, the author should give information by causing a copy of the required record to be inserted in the title page or the page of the book next to the title. This act of 1802 was repealed, and the copyright acts were amended, in 1831. Act of February 3d, 1831 (4 Stat. 436). Section 4 of that act pro-

vided, that no person should be entitled to the benefit of the act, unless he should, before publication, deposit a printed copy of the title of the book, &c., with the clerk of the district court where the author resided. It also provided, that the author or proprietor of such book, &c., should, within three months from the publication of said book, &c., deliver a copy of the same to the clerk. The 5th section of that act provided, that no person should be entitled to the benefit of the act, unless he should give information of copyright being secured, by causing to be inserted, in each copy of each edition published, the words "Entered according to act of congress," &c. In July, 1870, congress passed an act to revise, consolidate and amend the statutes respecting patents and copyrights. 16 Stat. 198. By section 90 of that act, it was provided, "that no person shall be entitled to a copyright, unless he shall, before publication, deposit in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, &c., for which he desires a copyright, addressed to the librarian of congress, and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book or other article, * * * to be addressed to said librarian of congress, as hereinafter to be provided." The librarian is then directed to make a record of the name of such copyright book, in words specifically prescribed, and to give a copy of the same to the proprietor. By section 93, the proprietor of every copyright book is required to mail to the librarian of congress, within ten days after its publication, two complete printed copies thereof, and a copy of every subsequent edition. Section 97 enacts, that no person shall maintain an action for the infringement of his copyright, unless he shall insert a notice thereof on the title page or the page immediately following. The various acts mentioned have been referred to, to show to some extent the history and previous condition of the law on the subject under consideration. They are all superseded by the Revised Statutes of the United States, a work undertaken by authority of a statute passed June 27th, 1866 (14 Stat. 74), and taking effect on the 1st day of December, 1873 (section 5595). Those statutes provide as follows: Section 4952 provides, that the author of any book, map, dramatic composition, &c., on complying with the provisions of the chapter, shall have the sole liberty of publishing and printing the same, and, in the case of a dramatic composition, of publicly representing the same. Section 4953 provides, that copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof in the manner thereinafter directed. Section 4956 provides, that no person shall be entitled to a copyright, unless he shall, before publication, mail to the librarian of congress a printed copy of the title of the book or other article, &c., for which he desires copyright, nor unless, within ten days from publication, he mails two copies of the copyright book or other article to the librarian. Section 4957 provides, that, immediately on receipt of the printed copy of the title of the copyright book or other article, the librarian is forthwith to record the same; and that he shall give a copy of the same when required. Section 4959 requires the delivery to the librarian of congress of two copies of the book, within ten days after publication. Section 4960 provides, that the proprietor of a copyright book or other article, failing to mail printed copies of the book, &c., is to pay a penalty of twenty-five dollars. Section 4964, referring to books, provides, that if any person, after the recording of the title of any book, shall, without the consent of the proprietor of the copyright first had in writing, print or publish any copy of said book, he shall forfeit the copy, and be liable to an action. Section 4965 makes a similar provision as to maps, charts, &c., and protects them from the time of the recording of the title. Section 4966 provides, that any person publicly performing any dramatic composition for which a copyright has been obtained, shall be liable to damages. Section 4967 provides, that any person who shall print or publish any manuscript without the consent of the author, who is a resident of the United States, shall be liable for all damages occasioned by such publication.

In applying these statutes to the question before us, viz., whether a copyright becomes a perfected right upon the filing of the title of the book or composition with the librarian, or whether a deposit of the book is also necessary to complete that right, two points are apparent. The first is, that the letter of the law does not, in any of the statutes cited, former or present, require the book to be filed, to confer a copyright. Under all of the statutes referred to, from that of 1790 to the Revised Statutes, the words of the law refer to filing the title page, and not to the deposit of the book. The second suggestion is, that it seems to be assumed throughout all of the statutes, that a copy of the book will, and must, within a short time after filing the title page, be filed with the librarian of congress. Of this idea, section 4956 of the Revised Statutes affords an illustration. It had been enacted in the previous sections, that a copyright should be secured to authors, designers and composers; and, in this section, a definition is given, in a negative form, of the persons entitled to the benefit of the law. "No person shall be entitled to a copyright, unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail, addressed to the librarian of congress. * * * a printed copy of the title of the book, &c., nor unless he shall, also, within ten days from the publication thereof, deliver, &c., or deposit, &c., addressed to the librarian,

&c., two copies" of the book, &c. Any person shall be entitled to a copyright, who, before publication, first, shall deliver to the librarian a printed copy of the title of the book, and, second, shall, within ten days after the publication thereof, deliver to the librarian two copies of the same. The book may not be printed or published when the title page is filed, and some right, (inchoate perhaps,) seems intended to be secured as of that date, although an actual printing or publication is not then made. But the expression "before publication" is based upon the idea that a printing or publishing will soon occur. This is put into clear meaning by the next clause of the section, that the author shall not be entitled to copyright, unless, "within ten days from the publication" he shall deliver two copies to the librarian. This means, that the author is required to publish his work, and, after he has so published it, and within ten days, he shall deliver two copies to the librarian. It is not a fair interpretation of this section to hold, that the filing of the title entitles to a copyright fully and absolutely, and that this may be defeated by a publication and failure to deliver two copies, but, as long as there is no publication, although it continue indefinitely, there is no lapse of the right. This construction is not permitted either by that idea which secures benefits to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the laws of patents, trade-marks, and copyrights, that an author or inventor must put his claim into the form of a well defined specification, work or composition, and so place it upon record that he cannot alter it to suit circumstances, and so that other authors and inventors may know precisely what it is that has been written or invented. The idea that an inventor may secure a patent for an invention of which he should not be required to file a specification, would not be tolerated. He may file preliminary or precautionary papers until his invention shall be completed, he may amend his specifications, and he may obtain reissues. It was never heard, however, that he could conceal the particulars of his invention, and, by filing a general statement of a discovery or improvement, cut off the rights and claims of others. The principle I conceive to be the same in regard to a copyright, and I hold, that, to secure a copyright of a book or a dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies be delivered to the librarian. These two acts are, by the statute, made necessary to be performed, and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say it of the former.

In examining the rights of parties under the statutes of 1790 and of 1802, the court held, in Wheaton v. Peters, 8 Pet. [33 U. S.] 664, that, to secure a copyright, all the requisites of the statute must be complied with. "The acts required," say the court, "to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and, within six months after the publication of the book, a copy must be deposited in the department of state. A right undoubtedly accrues on the record being made with the clerk and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless. * * * But we are told they are unimportant acts. If they are indeed wholly unimportant, congress acted unwisely in requiring them to be done. But, whether they are important or not, is not for the court to determine, but the legislature. * * * They are acts which the law requires to be done, and may this court dispense with their performance? * * * The notice could not be published until after the entry with the clerk, nor could the book be deposited with the secretary of state until it was published. But these are acts which are not less important than those which are required to be done previously. They form a part of the title, and, until they are performed, the title is not perfect. The deposit of the book in the department of state may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship be asserted."

The language of the Revised Statutes is stronger than that of the act of 1870. By the latter act (16 Stat. 213) it was provided, that no person should be entitled to a copyright unless he should file the title page with the librarian, "and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book," &c. In the Revised Statutes, two negatives are distinctly specified, and, in either case, the defect is fatal. He must file his title page—if he fails in this, he fails in all—but he cannot then have his copyright, "unless he shall also" deliver two copies within ten days from publication. In addition to the first he must also perform the second requirement. See the opinion of Sawyer, Circuit Judge, in Parkinson v. Lasalle [Case No. 10,762]; Ewer v. Coxe [Id. 4,584]; Baker v. Taylor [Id. 782].

In this case, the title page was filed on the 26th of October, 1874. The bill, verified in February, 1875, does not allege any publication of the work, or any delivery of copies, or any reason why the same has not been done.

The complainant also insists that this action can be sustained by virtue of section 4966 of the Revised Statutes. That section provides, that any person publicly perform-

ing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor, shall be liable in damages, as therein stated. If no copyright has been obtained by the complainant for this composition, there has been no violation of a right secured by this section, and he takes nothing under this claim. By the act of August 18th, 1856 (11 Stat. 138), it was enacted, that the granting of a copyright to the author of a dramatic composition should be deemed to confer upon him the sole right to perform and represent the same on any stage, during the period for which the copyright was obtained. The same power is found in section 101 of the Statutes of 1870 (16 Stat. 214). Like the exclusive right to print, the exclusive right to perform, so far as these statutes are concerned, is dependent upon the existence of a copyright.

The bill alleges, also, that the defendant has, without the consent of the complainant, printed and published eight scenes of his play, and has publicly announced his intention to sell copies of the same. This proceeding is in violation of section 4967 of the Revised Statutes, which provides, that every person who shall print or publish any manuscript without the consent of the author, if such author is a citizen of the United States, or resident therein, shall be liable to the author for all damages occasioned by such injury. The demurrer admits this publication, and the defendant must be restrained from printing or publishing the play.

The defendant seeks to avoid the effect of this allegation, by the statement, that the bill does not aver that such publication took place after the recording of the title of the complainant's play. This averment is not expressly made, but it must be taken to be the fact, upon the pleadings. It is averred, that the complainant composed and wrote the play previously to November 14th, 1874; that, in October, he filed a copy of the title page, and the librarian recorded the same in the proper book kept for that purpose; that, on the 14th of November, he caused the same to be performed at Wallack's Theatre; that he has never printed the play for circulation; and that the defendant, by means unknown to him, has obtained a knowledge of the contents of the manuscript, and, without his consent, has printed the same. The fair meaning of this is, that this action of the defendant took place after the title of the play had been deposited and recorded.

In dealing with this case, I have given no effect to the general allegation of the bill, that the "complainant has complied in all respects with the requirements of the Revised Statutes," that were necessary to enable him to copyright his composition. A demurrer admits allegations of fact only, not allegations or inferences of law. That the allegation in question is not one of fact is well illustrated by this case. Does the allegation include an averment that the complainant has deposited with the librarian printed copies of his work as well as of his title page? If such deposit is a requirement of the statute, it does include it. If it is not, it does not include it. We are thus directed at once to the solution of a question of law instead of a point of fact. Instead of averring that he has deposited a copy of his title page, and also two copies of the body of the book, the bill alleges that the complainant has deposited a copy of his title page, and that he has never published his work, and was, therefore, not required by the statute to deposit copies of the work. This is the legal effect of the averment.

I am also of the opinion, that there has never been a publication by the complainant of this work, within the meaning of the statute. The work has not been printed by the author, nor has it been abandoned or dedicated to the public. The author has permitted and procured its representation for his own benefit, and through his selected channels. This does not amount to a publication within the statute, or a dedication to the use of the public. Coleman v. Wathen, 5 Term R. 245; Palmer v. De Witt, 2 Sweeny, 547, 47 N. Y. 532; Bartlette v. Crittenden [Case No. 1,082]; Roberts v. Myers [Id. 11,906]; Keene v. Kimball [16 Gray, 545]. The English decision (Boucicault v. Delafield, 9 Law T. N. S. 709), cited to the contrary, is based upon the peculiar language of the English statute, and is not an authority in this case.

I am of the opinion, however, that the defendant has violated the complainant's common law right of ownership in his dramatic composition. The copyright law is intended to preserve to the complainant his exclusive right to multiply copies, to publish, and, in my judgment, only attaches perfectly where a publication is made. The ownership, however, and the right of an author to retain and use his dramatic works, for his personal benefit, without publication, is a common law right. It is recognized and defined by the statutes cited, but it exists independently of the statutes. In Palmer v. De Witt, 2 Sweeny, 547, the court says: "Whatever may have been the conflict of judicial opinion upon the effect of copyright laws upon the common law rights of authors, it has never been disputed, that, by the common law, an author has, until publication, a property in his literary work, capable of being held and transmitted, and in the exclusive possession and enjoyment of which he and his assignees will be protected." In the opinion of Monell, Justice, in that case, all the authorities are collected and presented. The same case is reported in 47 N. Y. 532. It is there held, that the representation of a play on the stage is not such a publication or dedication to the public as authorizes others to print and publish it without the author's permission. The manuscript and the author's right are still within the protection of the law. The common law rights of authors to their literary

productions, as they existed at common law, are now recognized. The author has the exclusive right to the first publication of his work, but no exclusive right to multiply copies or control the subsequent issues. This latter right is the creation of the statute of the United States. Boucicault v. Fox [Case No. 1,691]; Boucicault v. Wood [Id. 1,693]. Assuming this to be so, the difficulty arises, that this court has no power to administer common law relief in a suit between citizens of the same state. The courts of the state are the proper, and, usually, the exclusive tribunals for the performance of that duty. The United States have jurisdiction of common law questions when the controversy is between citizens of different states. When the controversy is between citizens of the same state, its jurisdiction is limited to questions arising upon or under the laws or authority of the United States.

The result of my examination is, that the portions of the bill based upon alleged violations of the statute respecting copyright cannot be sustained; that the portions thereof based upon the alleged violation of section 4967 of the Revised Statutes are well laid, and the cause of action therein set forth is a good one; and that the common law right of the complainant to a protection in the performance of his play, constitutes a good cause of action, but, by reason of the parties being citizens of the same state, this court has no jurisdiction to enforce the same. The demurrer must, therefore, be overruled, and the defendant is allowed to answer within thirty days after service of a copy of the order overruling the demurrer.

Case No. 1,693.

BOUCICAULT v. WOOD.

[2 Biss. 34;[1] 7 Am. Law Reg. (N. S.) 539.]

Circuit Court, N. D. Illinois. Nov. Term, 1867.

COPYRIGHT—ACTION BEFORE PUBLICATION — FOREIGNER—RESIDENCE — INTENTION — SLIGHT ALTERATIONS — CONSENT — REPRESENTATION NOT PUBLICATION — LITERARY PROPERTY — COMMON-LAW RIGHTS.

1. The right of action at law, as well as in equity, conferred by the copyright law of Feb. 3, 1831 [4 Stat. 438], may accrue before actual publication of the work.

2. The proper filing of the title of a work brings the author within the law, and the 5th section does not deprive him of his action for injury previous to publication.

[Overruled in Centennial Catalogue Co. v. Porter, Case No. 2,546.]

3. The same rule applies to the supplemental act of Aug. 18th, 1856 [11 Stat. 138]; and the author or proprietor of a dramatic work may maintain an action for infringement of his copyright committed after the filing of the title, but before publication.

4. In order to entitle an alien to the benefit of these laws, he must prove himself a resident of the United States. Residence, within the meaning of the statute, is to be determined by his intention, accompanied by his acts, not simply by lapse of time. The fact that he left the country after filing the title does not necessarily deprive him of his rights; the change of intent does not avoid the copyright; but if previous to the filing he had such intention he is not within the protection of the statute.

5. It is not necessary that the play should be identical, word for word; and the alteration of a portion of the language would not deprive the author of his rights.

6. Consent of the author to publication abroad, places him in the position of a foreign author and is an abandonment of his rights under our statute.

7. By publication is meant publication "in print." Representation upon the stage by or with the consent of the author, is not "publication."

8. Common law rights of authors run only to publication. Thereafter their sole protection is the statute.

[Cited in Boucicault v. Hart, Case No. 1,692; The "Iolanthe" Case, 15 Fed. 442.]

9. For infringement on unpublished plays, there is no limit as to damages.

At law. Action [by Dion Boucicault against Joseph H. Wood] for infringement of copyright in three plays composed by plaintiff, "Pauvrette," "The Octoroon" and "Colleen Bawn." [Verdict for plaintiff.]

The plaintiff was a native of England, and was never naturalized. He resided in New York city for several years, and there composed the plays in question, the titles of which he duly filed. He afterwards published "Pauvrette." The "Octoroon" and "Colleen Bawn" were never published in print by or with the consent of the author. The alleged infringement consisted in the representation of these plays at a museum, under the management of defendant. The plaintiff counted under the statute for damages for wrongful representation of the plays, claiming that all had been duly copyrighted by him while a resident of the United States, and he also claimed damages at common law for unlawful use and representation of "The Octoroon," and "Colleen Bawn," which have never been published by him or with his consent.

[2] [He deposited the printed title-page of "Pauvrette" in the clerk's office of the district court of the southern district of New York, in September, 1858, printed the book in October, 1858, and at that time deposited a printed copy of the work, as provided by law, in the same clerk's office. He deposited the title-page of "The Octoroon" with the clerk on December 12th, 1859, and of "The Colleen Bawn" March 23d, 1860, and never printed or published either of these two. Wood, the defendant, in 1864, 1865, and 1866, was proprietor of "Wood's Museum," in Chicago, in which at various times during these years he caused the above three plays to be represented without license from Boucicault. This was an action on the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [From 7 Am. Law Reg. (N. S.) 539.]

case to recover damages for the wrongful representation of these plays. The declaration contained seven counts: 1. A count as to "Pauvrette," alleging the steps taken to secure the copyright, and the infringement. 2. As to "The Octoroon," alleging the deposit of the title-page, and that the play had never been published by plaintiff, or with his consent, and the infringement. 3. As to "The Colleen Bawn," substantially the same as the 2d count. 4. A count at common law, alleging that the plaintiff is the author and proprietor of "The Octoroon," a play never published by him nor with his consent, nor ever generally given to the public by him, but still in manuscript, from the representation of which, by his license, he has derived profit. That the defendant, without having been able to do so from any previous representation of it, nor from memory, nor from its production to any audience, but solely from a manuscript copy of it surreptitiously and wrongfully obtained, represented it at various times at his theater. 5. A count at common law similar to the 4th, as to "The Colleen Bawn." 6. A count at common law as to "The Octoroon," similar to the 4th, with the difference that it alleged that the defendant produced it from a printed copy wrongfully and surreptitiously printed by some one unknown to the plaintiff, and without his consent, and surreptitiously obtained by defendant. 7. A count at common law similar to the 6th, as to "The Colleen Bawn."

[The plea was the general issue, as provided by statute, and the defences made under it, without and with notice, were: 1. That at the time he sought to copyright the plays plaintiff was not a resident of the United States, within the meaning of the act of 1831. 2. That no sufficient steps had been taken by him to secure a copyright. 3. That he had not deposited a printed copy of "The Octoroon" and "The Colleen Bawn," in the clerk's office. 4. That, to secure his copyright on "The Octoroon" and "Colleen Bawn," they must have been printed and published. 5. That Mr. Boucicault has for years allowed these plays to be performed all over the country, and has permitted printed copies of "The Octoroon" and "Colleen Bawn" to be sold by publishers and booksellers without restraining or prosecuting them, and has, therefore, abandoned all his rights to them, if any he had, as well under the statutes of the United States as at common law. 6. That the action (on the case) could not be maintained, the only remedy being in equity.] [3]

Clarkson & Van Schaack, for plaintiff.
Geo. C. Bates, for defendant.

DRUMMOND, District Judge, charged the jury as follows: The act of Feb. 3d, 1831 (4 Stat. 438), protected the author of any book in the right to print and publish such book, provided he was a citizen of the United States, or a resident therein. The fourth section of that act declared how such author should proceed in order to make that protection available to him. It declared that he should not be entitled to the benefit of the act unless, before publication, he deposited a printed copy of the title of the book in the clerk's office of the district court of the district wherein he resided.

The fifth section declared that no person should be entitled to the benefit of the act unless he gave information of the copyright being secured, by causing to be inserted in the copy of each and every edition published, during the term secured, on the title page or the page immediately following it, a notice of the fact of such right being secured to him, and the words by which such notice was to be given were specified in that section.

The sixth section of the act provided for the recovery of certain penalties if any person or persons, after the recording of the title of the book, should publish, import or cause to be printed or imported, any copy of such book without the consent of the person legally entitled to the copyright thereof, first had in writing, and a forfeiture in money could be enforced by an action of debt.

The seventh section made the same provision substantially in relation to certain other works, such as a print, cut or engraving, map, chart, or musical composition.

It is apparent from what has been stated in relation to these various sections of the law of 1831, that there was a right of action before the publication was actually made. The fourth section of the act provided that the author of a book, within three months from the publication, should cause to be delivered a copy of the same to the clerk of the district court; but from what has been already stated, it is clear that a right of action accrued before the deposit of this copy of the book, because the language of the sixth and seventh sections is express, that if any other person or persons, from and after the recording of the title of the book should violate any of the provisions of those sections they were liable to an action for the benefit of the author, so that, under the act of 1831, there can be no doubt that not only a suit in equity, but at law, could be maintained before the publication of the work, for the benefit of any party aggrieved.

Turning then to the act of Aug. 18th, 1856 (11 Stat. 138), and construing it by the light thrown upon the subject by the previous act of 1831, the question is, what rights there are under the more recent statute. The act was declared to be supplemental to the act of 1831, and it set forth that "any copyright hereafter granted under the laws of the United States to the author or pro-

[3] [From 7 Am. Law Reg. (N. S.) 539.]

prietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print or publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained."

It will be observed that this act speaks of a copyright being obtained and granted, but it is clear that it does not necessarily mean that the title of the work shall be deposited with the clerk of the district court, and publication made, because that is not the meaning of the term in the original law, to which this is supplemental, as will be seen from what has been already said. The language of the fifth section of the act of 1831 is, that no person shall be entitled to the benefit of this act, unless he shall give information of the copyright. That section must be construed with the other sections which immediately follow it, the sixth and seventh, and, of course, it is not intended by this language to deprive of his action a party who may be injured between the time of filing his title in the clerk's office and the time of publication.

As I have already said, it in terms gives the right of action in such case. Then this supplemental act does not necessarily mean by the term "copyright being granted," that the book has been published and notice given; otherwise, the author of a book, under the act of 1831, would have a more complete remedy than the author of a play, under the supplemental act of 1856; so that, comparing the two acts together, and construing the latter by the light thrown upon the subject by the various provisions of the prior act, I think we may arrive at a conclusion as to what is the meaning of this clause of the act of 1856, namely: "and any manager, actor, or other person, acting, performing, or representing the said composition, without or against the consent of said author or proprietor, his heirs or assigns, shall be liable for damages, to be sued for and recovered by action on the case, or other equivalent remedy, with costs of suit, in any court of the United States; such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just;" and it is this: that the act of 1831 having given a right of action between the time of filing the title of the book in the clerk's office and the time of publication, the above clause in the supplemental act also gives the right of action.

It seems to me that a little reflection will convince us that that must necessarily be so, and must have been the intention of this supplemental act. It is plain that the reason why the act was passed, was because the prior law did not give sufficient protection to the author of a play. The principal profits derived from plays are their representations on the boards of a theatre. Now, it is apparent if that representation could be made, at any time, without the consent of the author of the work, he would be injured pecuniarily in the profits to be derived from his work, because it is from that source, principally, that the profits are expected to come. The injury, it is apparent, would be just as great, and in most instances it may be presumed, greater, by the representation of his play before its publication than it would after. Take the case of the composition of a dramatic work and notice given, as the law requires, by leaving the title page with the clerk, and after that is done, the obtaining by clandestine or surreptitious means, of a copy of that play, and publicly representing it upon the stage of a theatre. That, of course, would be an injury, pecuniarily, to the author. The question, then, is, whether this law did not intend to protect the author against such use without his consent. I think that it did. I think when it says that any manager, actor or other person who shall represent the composition without the consent of the author shall be liable for damages, to be sued for and recovered by an action on the case, it means as well a representation made before as after publication.

[Undoubtedly the act of 1831 contemplated a publication after the filing and deposit of a printed copy of the title-page of the work in the clerk's office, but it did not specify how soon that publication should be made; and, as in this case, there is evidence of the representation of "The Octoroon" and "Colleen Bawn," in various parts of the country for some time past, yet, as there is also evidence showing that for many representations made, compensation was given to the plaintiff, I am not prepared to say that, under the circumstances of this case, he has lost the right of action merely in consequence of the non-publication by him of these plays. It is conceded that there would be a complete and perfect remedy in a court of equity, and I do not know why there should not be in a court of law. Action on the case means an action brought in a court of law. It is under the words "other equivalent remedy," that the party would have recourse to a court of equity. So that as to the main question of law there is in the case, I think that the action can be maintained. But of course there are other questions that must be decided in favor of the plaintiff before he can recover in this case, independent of these questions of law. As you will have seen, gentlemen of the jury, from what the court has already said, before a party is entitled to the benefits of these acts, you must be satisfied that he has brought himself within

these provisions. A fundamental principle is, that he must be a citizen or a resident of the United States. The first question for you to determine is, whether this plaintiff is within this provision of the law. He was not born in the United States, and has never been naturalized. The only question is, is he a resident, or rather, was he a resident of the United States at the time that he filed in the office of the clerk of the court of the southern district of New York, the titles of the various plays which are in controversy here, namely: "Pauvrette," "The Octoroon," and "Colleen Bawn?" The title of the first was filed on the 2d of September 1858, the second the 12th of December 1859, and the third on the 23d of March 1860. The question is, whether at the time these acts were done by the plaintiff, he was a resident within the meaning of these acts of congress. That is a mixed question of law and of fact.][4]

No person is entitled to the benefit of these acts unless he be at the time of filing the title, a citizen of the United States, or a resident therein. Residence ordinarily means domicil, or the continuance of a man in a place, having his home there. It is not necessary that he should be the occupant of his own house; he may be a boarder or a lodger in the house of another. The main question is, the intention with which he is staying in a particular place. In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home. If he does that, then he is a resident of that place. This question of residence is not to be determined by the length of time that the person may remain in a particular place. [The question, you will see, that is to be determined, is the state of mind, accompanied with acts, of the man at the time that he goes to the place and takes up his abode there.][4] For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind, and within a short time remove. So if a person goes to a place with the intention of remaining for a limited time, although in point of fact he may remain for a year or more, still this does not constitute him a resident [of the town or of the place, because he does not go there and take up his abode with the intention or the purpose which existed in the other case, so that it is not to be determined by the length of time, but by the intention existing in the mind of the person, coupled with acts, which acts and intent are to indicate whether or not he is a resident of the place].[4] So it is his intention accompanied with his acts, and not the lapse of time, which determines the question of residence. [Applying these rules to the case before you, it is for you to determine whether, under the evidence this plaintiff has brought himself within the case which I have supposed as necessary in order to constitute a man a resident of a particular place.][5] The plaintiff came to this country in 1853, and remained, pursuing his profession as an actor and author until 1861. [He went to New York and took up his abode in New York City, and remained there some years. The question for you to determine is, whether, when he was here pursuing his profession, traveling about the country, from 1853 and so on up until the time that he took up what we may call his residence (without meaning by that such a residence as is spoken of in the act of congress) in New York, he came here and continued here and in New York, with the intention of remaining and taking up his abode as one of the people of this country. When he took a house in New York City, as it is claimed there is some evidence to show that he did, did he occupy that house with the intention of remaining in the country? * * * But you must believe from the evidence that the intention existed at the time, and that he did not at that time intend to return to England, but that his intention then was to remain here, and that this idea of returning to England afterwards arose in his mind; although there is no evidence, really, that I know of, of his actual status in England, only that he has been there since 1860 or 1861, managing a theatre. We only know that by the defendant, and perhaps from another party. We do not know what his intention is, further than may be inferred from these acts. So that, gentlemen, it is for you to determine, under the facts of the case, whether, within this description of the term residence, Mr. Boucicault was, at the time these titles were filed in the clerk's office in the southern district of New York, a resident of this country. If he was, then I think he was entitled to the protection of these laws.][5] If at the time of filing the title he had his abode in this country with the intention of remaining permanently, he was a resident within the meaning of the law, even though he afterwards changed his mind and returned to England. If, however, he was a sojourner, a transient person, or at the time of this filing had the intention to return to England, he is not entitled to the protection of these laws. [If he was a resident of the United States, then, being entitled to the protection of the law, his rights are to be determined by the law. In relation to the play of "Pauvrette," or what has been called by some of the witnesses, "The Avalanche, or Under the Snow," there does not seem to be any serious controversy. A copy of that play was deposited in the clerk's office on the 6th day of October, 1858. So that as to that, if

[4] [From 7 Am. Law Reg. (N. S.) 539.]

[5] [From 7 Am. Law Reg. (N. S.) 539.]

he were a resident, Mr. Boucicault complied in all respects with the law. It is not claimed but that he did, so far as obtaining a copyright, as I understand. That has been published, by which we mean it has been printed, under the authority of Mr. Boucicault himself, and the only question would be, whether the conduct of Mr. Boucicault has been such, in relation to this play, as to deprive him of the protection of the act of 1856. As I have already said, he had the right under that act, and the sole right, to print and publish that play. He had also the sole right to act and perform it, or to cause it to be acted, performed, or represented on any stage or public place, and no person could do either one or the other without his consent. The only question, then, in relation to this, is, whether he was a resident, or has consented to the representation of this play of "Pauvrette," or "Avalanche, or Under the Snow," by the defendant. If you are satisfied that he has consented to it, then the defendant would not be liable for the performance of that play. In relation to this, as in relation to the other plays.][7] You must, of course, be satisfied that the plays performed were the identical plays of which Mr. Boucicault was the author, not necessarily identical word for word, but the principle is that another has not the right to use the work of Mr. Boucicault's brain in the construction of a play, without his consent, and the mere alteration of a portion of the language would not deprive Mr. Boucicault of his protection, provided there was a substantial use of the play.

[I think that there ought to be some affirmative evidence introduced on the part of the defendant, that Mr. Boucicault, by word or deed, has consented to the performance of this play by the defendant—"Pauvrette" I mean; because it is perfectly clear that the act of 1856 gave the right to the author not only to perform, but to publish it, and declared that no one should perform it without his consent. The mere fact that it was published did not give others the right to enact it or perform it in a theatre; it must be done with his consent or acquiescence, and there ought to be some evidence that it was so done by the defendant. As to the other plays, the "Colleen Bawn" and the "Octoroon," there is no evidence that these plays were ever published by the plaintiff in this country, and the only question for you to determine would be so far as this country is concerned, whether the use of the manuscripts of these plays by the defendant, was with the consent or acquiescence of the plaintiff. There is evidence tending to show that these two plays were published, that is, printed, and that this publication was made in England. I do not think that would make any difference as to the right of the plaintiff, unless that publication was with the consent of the plaintiff.][8]

[He does not seek, in other words, to follow up the beginning of the protection which our law gave him, but resorts to publication in England, instead of publication in this country, where, if he were a resident, he would have the right and would be protected. So that the question for you to determine is, whether he did make the publication in England, and of that I think there should be some affirmative evidence to satisfy you that such is the fact. This substantially, with one other remark, disposes of the rights of the party under the law in relation to copyright. That law prescribes a particular penalty for the unauthorized performance of a play; in the first instance, not less than $100, and for every subsequent performance $50; leaving a certain discretion with the court upon that subject; "as to the court having cognizance thereof shall appear to be just." In other words, it does not necessarily follow that in all cases the precise penalty fixed to the violation of the law shall be given, but the court is to exercise a certain discretion in relation to the matter.

[There is another branch of the case under which it is claimed the plaintiff is entitled to protection, and that is under what is termed the common-law right, irrespective and independent entirely of the statute, and because there has been no publication of the "Octoroon" and "Colleen Bawn" by Mr. Boucicault, or under his authority. If that be so, then he is entitled to the property in his work, existing in manuscript, and nobody can use it without his consent, and if it is so used, every person so using it is liable to respond in damages to him for such use. You will understand that there is no question raised in this branch of the case in relation to "Pauvrette," because that was published with his consent; and, if he is not protected under the law, he is not protected at all, because, having published it himself, he has given it to the public, and the only shield he has is the law.][8]

The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference, unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist, who had published his plays in his own country; but this consent must be affirmatively proved.

[It is admitted on the part of the plaintiff that if a play is performed upon a public theatre, and there is a representation of the same from the mere fact of hearing the play performed, that does not constitute a violation of the law. How far that may be true,

[7] [From 7 Am. Law Reg. (N. S.) 539.]

[8] [From 7 Am. Law Reg. (N. S.) 539.]

it is not necessary for me to decide, because the evidence seems to show that these plays were performed some times, at any rate, by means of manuscripts. It is, then, necessary that it should be shown to your satisfaction that these were used with the consent or acquiescence of the plaintiff. The question for you to determine on this branch of the case is, whether he has ever published these works, and if he has not, whether the defendant has used them, obtaining them surreptitiously or from any person without his consent. He would have a right to perform his own plays.] [10]

There having been no publication in this country of these two plays by him or under his authority, he is entitled by the common law, independent of the statute, to the property in them existing in manuscript. He may authorize their performance by others, or dispose of his property in them. [The question for you to determine is, if he has not published these works, if he has so disposed of them or acquiesced in the performance of these works by the defendant. I admit, also, that, conceding that he has not published them, he may also act in relation to them, as to, perhaps, deprive himself of the right of calling upon a person to respond in damages for the representation; that is to say, if he has allowed these plays to be represented throughout the community for a long space of time, without license, and without objection, knowing the fact to be so, then I think he may be considered to have abandoned the use of them to the public. But it must be apparent that it has been done with his knowledge and without objection on his part. That is to say, the facts must exist to indicate that he consented or acquiesced in their performance. Otherwise he is not prevented from claiming his property in these plays. I mean, of course, his property at common law, as has been explained to you.] [10] By allowing them to be represented throughout the community for a long period of time without license or objection, he may be considered as having abandoned the use of them to the public, otherwise he has the right to call upon any person using them without his consent to respond in damages. [It simply then comes, if you believe that the defendant is responsible in damages for the representation of these plays, to the question as to the damages which the plaintiff has actually sustained by the use of the plays by the defendant. That is a question of proof to be determined by the evidence in the case, and in relation to which you are to form your own conclusions. These plays were performed, it appears "Colleen Bawn" and the "Octoroon," sixteen times—eight times each—by the defendant in his theatre. It is for you to say, putting the case upon the ground of common law right, if the plaintiff has been damaged, and to what extent he has been damnified by these representations by the defendant of these plays. As I have already said, there is no question in this branch of the case in relation to "Pauvrette," because that was published and his rights then stand upon the statute.] [11] This is his common law right. The published plays he has given to the public, and his only protection is the statute. As to the unpublished plays there is no prescribed limit to the damages,—which are to be determined by the jury from the evidence.

Verdict for plaintiff, $900.

NOTE [from original report]. For a full citation of authorities on question of author's rights under a copyright, see the able brief of S. C. Perkins, Esq., in case of Stowe v. Thomas [Case No. 13,514]. See, also, Keene v. Wheatley [Id. 7,644]; Daly v. Palmer [Id. 3,552]; and Keene v. Clarke, 5 Rob. [N. Y.] 38; Greene v. Bishop [Case No. 5,763]; Boucicault v. Fox [Id. 1,691]. As to copyright of musical works under the statute, see Jollie v. Jaques [Id. 7,437]. As to rights of reporters and their publishers, see Little v. Gould [Cases Nos. 8,394 and 8,395]. As to common law rights of authors, see Crowe v. Aiken [Id. 3,441], and numerous cases there cited. The New York court of appeals have recently discussed the common law rights of authors, holding substantially as in this opinion that an author has at common law the exclusive right to the first publication; that the assignment of an alien author's right is valid, and within the cognizance of a court of equity; that representation of a dramatic composition upon the stage is not such a dedication as will authorize others to print and publish it without the author's consent; but that the manuscript and the author's right therein are still within the protection of the law, the same as if they had never been communicated to the public in any form; and further holding that the state courts have jurisdiction of the common law rights of an author, and will protect an alien friend in the same manner as a citizen of the United States. Palmer v. De Witt, 47 N. Y. 532.

Case No. 1,694.

BOUDEREAU et al. v. MONTGOMERY et al.

[4 Wash. C. C. 186.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1821.

DEPOSITION—EXECUTION OF COMMISSION—RETURN—EVIDENCE — COMPETENCY — EXECUTORS AND ADMINISTRATORS — POWERS — DEPOSITION—WHO MAY USE — EVIDENCE AS TO PEDIGREE — TESTIMONY OF DECEASED WITNESS.

1. A commission, directed to A, to be executed in one county, cannot be executed by him in another. The commissioner ought to state when and where the depositions were taken. He acts under a special authority. Depositions were rejected on the ground of their being obnoxious to those exceptions.

[See Rhoades v. Selin, Case No. 11,740.]

2. A suit in equity by a number of plaintiffs, about one hundred, against A and wife and B; A and B being the administrators of W, and the wife claiming as the sole heir of W. The

[10] [From 7 Am. Law Reg. (N. S.) 539.]

[11] [From 7 Am. Law Reg. (N. S.) 539.]

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

plaintiffs claim to be the heirs. Depositions taken in an ejectment by five of the plaintiffs against A, cannot be read in evidence in this suit, the plaintiffs not being the same.

[See Rutherford v. Geddes, 4 Wall. (71 U. S.) 220.]

3. One administrator may release, or dispose of the estate, without the other.

[See Wintermute v. Redington, Case No. 17,896.]

4. No one can take the benefit of a verdict, or of depositions, who would not have been prejudiced by them had they been otherwise.

[See Humphries v. Tench, Case No. 6,873.]

5. But depositions taken between other parties on the same point, may be read to prove pedigree; as hearsay, or declarations, the witnesses being dead.

[See Stein v. Bowman, 13 Pet. (38 U. S.) 209; Blackburn v. Crawford, 3 Wall. (70 U. S.) 175; Banert v. Day, Case No. 836; Chirac v. Reinecker, 2 Pet. (27 U. S.) 613; Clara v. Ewell, Case No. 2,790. Disapproved in Hall's Deposition, Case No. 5,924.]

In equity. The plaintiffs, about eighty or one hundred in number, assert themselves to be the next of kin, on the paternal side, to Charles White, who died intestate in the city of Philadelphia some time in the month of January in the year 1816. The intestate was one of the numerous French neutrals, as they were called, who were deported from Nova Scotia in the year 1755 by order of the British government. The bill alleges that he was the son of Charles White, who died, leaving two sons, Francis and the intestate, and four brothers and two sisters, the ancestors of the plaintiffs. That the two sons died intestate and without issue, and that the female defendant is the only child of Mrs. Blanchard, the sister of the intestate's mother. The defendants, Mr. Montgomery and Mr. Cross, are the administrators of Charles White, the intestate. The bill claims six-sevenths of the real and personal estate of the intestate. The answer denies that Charles White, the father, had either brothers or sisters, or left any other relations than his two sons aforesaid, and denies that the plaintiffs are in any manner related to the family of the intestate. At the hearing of the cause, the plaintiffs ordered in evidence certain depositions taken under a commission to Louisiana, to be executed by P. in the parish of Assumption. Another commission was directed to A B, to be executed at Iberville, and a third to C D, to be executed in the parish of Ascension, but no return was made to the two last commissions, nor do they appear to have been executed. Under the commission directed to P. sundry depositions were taken by him at Iberville, as appears by his return; but it is not stated when, or at what place, the other depositions were taken. An objection was taken by the defendants to the execution of the whole commission: as to the depositions taken at Iberville, because the commission directed to P. was to be executed by him in the parish of Assumption, and not at Iberville; and to the other depositions taken under the same commission, because the commission has not stated when or where they were taken. Objections were also taken to some parts of the depositions, in case the court should permit them to be read, being answers to leading interrogatories.

WASHINGTON, Circuit Justice. As to the last objections, that would be attended to by the court upon the report of the master, to whom it might be proper to refer the depositions, to inquire whether any, and which of the interrogatories are leading. The objections to the execution of the commission strike at the entire depositions, and being in my opinion well founded, the depositions themselves must be suppressed. The commissioners act under a special authority, which it is not only their duty to pursue, but it should be made to appear to the court by their own showing, that this authority was pursued. Whatever facts in relation thereto are stated in their report, the court is bound prima facie to give credit to; but the court cannot presume that they have duly executed their authority, when they are themselves silent upon that subject. It should particularly appear when and where the depositions were taken. As to the depositions taken at Iberville by P. not only out of his district, but within the district of another commissioner, it is impossible that they can be supported, any more than if they had been taken by a person not authorised by the court to take them. And having thus furnished the court with evidence of his total disregard of the authority given to him in those instances, I am well warranted in doubting at least, whether he has been more attentive to it in others where he is silent as to the place at which the commission was executed.

The plaintiffs' counsel then offered in evidence depositions taken under a commission to Baltimore, in an ejectment for the real estate of the intestate, brought in the supreme court of this state by some of the present plaintiffs, against the defendants, Montgomery and wife. These were also objected to, upon the ground that they were res inter alios acta, and that they were inadmissible even to prove pedigree, (the purpose for which they are offered) having been taken post litem motam. Phil. Ev. 177, 178, 222, 226, 230, 233; Gilb. Ev. 61, 31, 33; The Berkeley Peerage Case, 4 Camp. 401; Hayward v. Firmin, decided in 1766, cited in the Case of the Berkeley Peerage; King v. Cotton, 3 Camp. 444; Whitelocke v. Baker, 13 Ves. 511.

On the other side were cited Goodright v. Moss, Cowp. 591; 2 Hen. & M. 55; Kirby, 258; Gilb. Ev. 65; 3 Atk. 415; [Massey v. Leaming] 4 Dall. [4 U. S.] 123; Barr v.

Gratz, 4 Wheat. [17 U. S.] 220; 2 Phil. Ev. 267, 268; Bull. N. P. 233; Duke of Athol's Case, 2 Strange, 1151; 2 Phil. Ev. 234, 269; 1 Vern. 413; 2 Hen. & M. 193; 2 Munf. 167; [Davis v. Wood] 1 Wheat. [14 U. S.] 6; [Queen v. Hepburn] 7 Cranch [11 U. S.] 290; 1 Wash. [Va.] 123; 2 Wash. [Va.] 146, 148.

WASHINGTON, Circuit Justice. As depositions, the evidence is inadmissible, inasmuch as it was taken in a cause between different parties from those who are now before this court, though in relation to the same question. Were the plaintiffs the same, I think the objection would not hold, on the ground that Mr. Cross was not a party to the suit in which the depositions were taken, since Montgomery was, and as representing his co-administrator, as well as the estate of the intestate, he had every opportunity of cross-examining the witnesses. The executors or administrators of the deceased are considered in law as but one person, representing the testator; and the acts done by any one of them, which relate to the estate of their testator or intestates, are deemed the acts of all, inasmuch as they have a joint and entire authority over the whole. Godol. 134; Rolle, Abr. 924; 2 Ves. Jr. 265; Shep. Touch. 484, 485. A release of a debt, or judgment confessed by one executor, binds his companions. 1 Dyer, p. 23, pl. 146. Surely then there is a privity of interest and estate between executors or administrators, at least as apparent as between several remainder men claiming in succession under the same deed or will, in which case, a subsequent remainder man may give in evidence, in an action by or against him, a verdict rendered in favour of a prior remainder man; for they both claim under the same deed. Phil. Ev. 227; 1 Ld. Raym. 730; Com. Dig. "Evidence," A 5; Bull. N. P. 232. But the plaintiff not being the same, and it being perfectly clear that, if the depositions had been in favour of the defendants in that cause; as if, for example, they had proved Mrs. Montgomery to be the sole heir of the intestate; they could not have been read against such of the present plaintiffs as were not parties to that suit, neither can they be used by these plaintiffs against the defendants on that suit. For I conceive, that if any rule of law can be considered as established, that is, which Gilbert lays down in his treatise on Evidence, p. 28, "that no one can take benefit by a verdict (or deposition) who had not been prejudiced by it had it been contrary." See, also, Bull. N. P. 232; Duchess of Kingston's Case [20 Howell, St. Tr. 355]; Hardw. 472. But I am of opinion that the depositions are admissible as declarations in relation to pedigree, and are at least as satisfactory to prove that matter as hearsay or reputation.

It is admitted by the defendants' counsel, that, as a general rule, hearsay and reputation may be given in evidence to prove a pedigree, but that a special verdict finding a pedigree, or depositions taken to prove it in one cause, cannot be given in evidence in another cause, between different parties, because they are only equal to declarations made after the question of pedigree had become the subject of controversy, and consequently after an improper bias may have been impressed upon the mind of the witness, or person making the declaration. This exception from the admitted general rule is taken in the case of Whitelocke v. Baker, 13 Ves. 511, and in the Berkeley Peerage Case, 4 Camp. 401. These cases are of modern date, the latter having been decided in the house of lords in the year 1814. They cannot, therefore, be considered as authorities to control the judgment of this court; and I feel perhaps less disposed to yield an assent to the reasoning on which they proceed, in consequence of impressions made upon my mind from the time I was a student of law, until these cases were cited, that the long and well established rule was otherwise than what they state it to be. In the case of the Berkeley Peerage, two decisions only are referred to, and these at nisi prius. The first by Chief Baron Reynolds, in the year 1730, in support of the exception to the general rule; and the other in 1766, by Lord Camden; which, being much later in date, overrules the former case, and establishes the rule, so far as a nisi prius decision could have that effect.

Buller, in his Nisi Prius, which was published before the American Revolution, states as an exception to the general rule, that, wherever hearsay and reputation are evidence, as in questions of pedigree, a special verdict between other parties, stating a pedigree, is evidence to prove a descent. Bull. N. P. 233. He mentions the Duke of Athol's Case, 2 Strange, 1151, in which Mr. J. Wright stated this to be the rule, and that his opinion in that respect was generally approved, although the determination of the other judges was contrary. But why were they contrary? Not because the rule, as laid down by Mr. J. Wright, was not considered the correct one, but because it did not appear, in that case, but that the witnesses upon whose testimony the verdict was found, might have been examined in the case under consideration; and there can be no doubt but that depositions taken in one case, cannot be read in another where the parties are different, even in a question of pedigree, unless the witnesses are shown to be dead. But it may fairly be concluded from the reasons which govern the majority of the court, that if this proof had been given, there would have been no difference of opinion between the judges. The case of Goodright v. Moss, Cowp. 591, is not otherwise important upon this point, than as it gives us the opinion of Lord Mansfield, who, although deeply learned in the civil law, and by no means disinclined to adopt its principles upon all

proper occasions, was not influenced by the distinction between evidence of declarations ante, and post litem motam: and although Mr. Justice Aston concurs in awarding a new trial upon another ground, he expresses no dissent from the opinion of Lord Mansfield, or which can be construed to favor this distinction. It is stated by some of the judges in the Case of the Berkeley Peerage, that the rule at nisi prius, as far back as they could recollect, had been to exclude evidence of declarations made after a controversy had commenced. I must therefore take the fact as it is stated, that this had been the experience of those judges; but I must also believe that the rule was unknown to Mr. Justice Buller, as well as to the judge who dissented from the opinion delivered in the above case. This point is, I presume, now settled in England by the two decisions above alluded to; but the question is, how has it been understood in this country, before and since the American Revolution? As the nisi prius decisions alluded to by the judges in the Berkeley Peerage Case were never in print, it may fairly be presumed that they were unknown in this country, and consequently they could not have influenced the decisions of the courts of the different states. The only authoritative rule known was that which was laid down by Mr. Justice Buller, and by Mr. Justice Wright in the Duke of Athol's Case. I have had no opportunity of looking into the American cases; but I am strongly inclined to think, from expressions to be met with in many of the state decisions, that the rule of post litem motam has never been recognized in the United States. See the cases cited by the plaintiffs' counsel on this point, to which I add the case of Ross v. Cooley, 8 Johns. 128; 1 Yeates, 17, 152; Swift, Ev. 122. It is not without great diffidence that I venture to dissent from the reasoning of the judges in the Berkeley Peerage Case. But it seems to be rather artificial than solid when directed against the admissibility of the evidence; although I acknowledge that the possibility of an undue bias having been produced by the existence of the controversy, might with propriety be urged against the credit to be given to the evidence, where the proofs in the cause are contradictory, and to be weighed. I am apprehensive that great mischief and injustice might be the consequence of excluding the only species of evidence, which circumstances, not within the control of the parties interested, may have left to them; on the ground of a presumed bias created by an existing or even presumed controversy. I am persuaded that, carried to the extent stated in that case, the rule would exclude hearsay and reputation in a great majority of cases, where it can alone be resorted to, to prove pedigree. I am of opinion that upon proof being made of the death of the witnesses, the depositions may be read.

NOTE [from original report]. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship, a letter then written, stating the pedigree of the claimants, was not considered as excluded by the rule of law, which declares that declarations relating to pedigree, made post litem motam, cannot be given in evidence. [Elliott v. Peirsol] 1 Pet. [26 U. S.] 337.

BOUDINOT (BRADFORD v.). See Case No. 1,765.

BOUDINOT (CARSON v.). See Case No. 2,462.

Case No. 1,695.

BOUDINOT v. SYMMES.[1]

[Wall. C. C. 139.]

Circuit Court, E. D. Pennsylvania. May 25, 1801.

EQUITY—PRACTICE IN CHANCERY—COMMISSION OF REBELLION.

The court will, under circumstances, order a commission of rebellion to be returnable immediate; and will set down the cause for a hearing at the same term: and direct the bill to be taken pro confesso.

In equity. The defendant who resided in the territory northwest of the Ohio, when in Philadelphia in the year 1796, was served with a subpoena from the equity side of this court, to appear and answer the plaintiff's bill. He entered his appearance by Rawle; but put in no answer, and stood in contempt. In this situation the complainant took out an attachment to compel an answer; and was proceeding with the other process used in Westminster; namely, an attachment with proclamations, commission of rebellion and sequestration. But in April sessions, 1799, the practice in this case being mentioned, Iredell [Circuit Justice] and Peters [District Judge] were of opinion, that it was not necessary nor practicable to pursue the English practice; but that the bill might be taken pro confesso, on the return of the first attachment, non est inventus. But in April sessions, 1800, Chase [Circuit Justice] and Peters [District Judge] present, it was held that such mode of proceeding was inadmissible; that until some legislative provision or rule of practice was established, the method which obtained before must be pursued. Accordingly the decree pro confesso, was set aside; and the plaintiff proceeded to issue an attachment with proclamations, which being also returned non est inventus, Ingersoll, after stating these proceedings, said that the next process was a commission of rebellion, which, regularly, must have fifteen days between the test and the return, as all other process of contempt should have: but as it was desirable to have an order for sequestration in this term, so as that the bill might be set down for hear-

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

ing and taken pro confesso, which could not be until the commission of rebellion returned non est, and a sequestration ordered. Harr. Ch. Pr. (New Ed.) 203; 3 Bl. Comm. 443, 444. He therefore moved for an order that a commission of rebellion do issue against the defendant, returnable immediate, directed to the marshal, &c. He said that it was in the discretion of the court, under circumstances, to expedite this process for contempt; that in this case, they were merely formal, the defendant was out of the state, and would not answer. That great delay had already been incurred; and it was due to justice that the plaintiff should have the benefit of a decree by default. He cited Hinde, Pr. 122, to show that the court might order the return immediate.

GRIFFITH, Circuit Judge. This is a special motion, and requires notice. Has Mr. Rawle had notice?

Ingersoll: He has not; but he will not except on that account. I will answer for that; if he objects, the order shall be vacated.

CURIA: Take your order; it is perfectly reasonable. The whole proceeding in these cases, as applied to the state of things in this court, is dilatory, nugatory, and expensive: it must be altered.

The commission was immediately made out, and returned non est. The court then appointed a serjeant-at-arms, and directed him to go in quest of the defendant. The serjeant not being able to find him, returned to the court, that the defendant eluded his search: whereupon a sequestration was ordered.

Ingersoll, on producing the bill, moved to have the cause set down for a hearing; which was done. And upon his further motion, it was ordered that the plaintiff's bill be taken pro confesso, and that a decree be entered accordingly; with leave, nevertheless, to the defendant to move, at the next sessions of the court, to set it aside upon filing an answer: and that proof of the service of this order, made before any magistrate of the North Western Territory, should be held sufficient.

BOUGHER (UNITED STATES v.). See Case No. 14,627.

Case No. 1,696.

In re BOUGHTON.

[1 McA. Pat. Cas. 278.]

Circuit Court, District of Columbia. Jan. Term, 1854.

PATENTS FOR INVENTIONS—APPEAL FROM COMMISSIONER'S DECISION—EVIDENCE—EQUIVALENTS—COMBINATION—ANTICIPATION.

[1. On an appeal from the commissioner's decision refusing to grant a patent, it is proper for the court to consider the most material parts of a correspondence had between the commissioner and the applicant, wherein facts are stated, and have been acted upon, and not denied, giving the applicant the benefit of the rule that, when part of the statement is used, the whole of the contemporaneous statement should be received.]

[2. The true criterion of mechanical equivalence is identity of purpose, and not of form or name; and this is a question of fact to be judged of on inspection or the testimony of experts. It is an inference to be drawn from all the circumstances by attending to the consideration whether the contrivance used by one party is used for the same purpose, performs the same duties, or is applicable to the same object as the contrivance of the other party.]

[3. There may be a patent for a combination producing a certain result, although neither any of the parts nor any portion of the combination less than the whole are new; for the thing patented is the combination, and not its parts.]

[4. The combination, in a thistle-digger, of wheels and knives, the knives working under ground at any required depth in a nearly flat position, and sufficiently tilling it, especially in hard, clayey, Canada-thistle soil, the wheels operating to prevent sidewise motion of the knives, whereby they would slip around hard places, is not anticipated by the prior use of wheels in plows, harrows, seed-planters, and the like, or by the combination of a sled with knives which are drawn along the surface of the ground in marshy places, to cut off the "bogs."]

[In equity. Appeal from the refusal of the commissioner to grant a patent. Reversed. Patent No. 10,467 was granted to Enos Boughton, January 31, 1854.]

MORSELL, Circuit Judge. On the day appointed for the trial, by previous notice duly given, the examiner on the part of the office appeared and laid before the judge the grounds of the commissioner's decision, in writing, with the original papers and correspondence filed in the cause. The appellant did not appear, nor did any one on his behalf. The notice was renewed, and still no one appeared on the part of the appellant. The subject will therefore be considered without further delay.

It appears from the papers that this is one of that class of cases provided for in the seventh section of the act of July 4, 1836 [5 Stat. 119], in that part of the section which begins thus: "But whenever on such examination it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had been before invented or discovered or patented or described in any printed publication in this or any foreign country as aforesaid, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application or of altering his specification to embrace only that part of the invention or discovery which is new." Acting under this part of the law, and on the claim of the appellant as first stated in his specification, the commissioner, on the 5th of

November, 1850, in a letter addressed to said Enos Boughton, says: "The claim of your application for a patent for a 'thistle-digger' has been duly considered, and I regret to say you have been anticipated in your invention. The devices for raising and depressing the instrument you will find substantially the same as yours in the wheel-cultivator of Samuel Ide, rejected June 12th, 1849. The device of your cutting-blades you will find in the bog-cutter of J. D. Filkins, patented January 9th, 1849." On the 19th of November, 1850, the appellant modified his claim according to the form that it is now found in his specification, that is to say: "I do not claim any part of the raising and depressing device, nor do I claim the knife or the wheels separately; but what I do claim is the combination of the knife with the wheels, for the purpose of cutting up the ground and destroying thistles or any other obnoxious weeds, plants, or grasses growing therein." The result of the action of the commissioner on the case as then presented was communicated by him to the appellant in a letter of the 25th of November, 1850, in these words: "The new claim of your application for a patent for a thistle-digger, presented for reconsideration of the application of the 19th instant, has been carefully examined, and I am sorry to say it does not appear to present any patentable feature, and the office must decide as it did at first. You make the claim rest on the combination of the cutting-knives with the wheel. Now, as wheels have been long and generally known in the application to plows, horse-hoes, seed-planters, harrows, and cultivators of all kinds, machines for excavating roads and canals, for digging potatoes, &c., it is not regarded as patentable to apply wheels to digging-machines used in the same way as in cases above mentioned, even if it could be shown that they had never before been used for such purpose."

During the pendency before the commissioner a considerable correspondence, in the character of a statement of facts and argument relating to the nature of the claim and the operation of the machine, took place between Boughton and him, which has been filed in and made a part of the case; at the close of which the commissioner, still adhering to his decision, as before stated, the appellant renewed the oath as required by law, and appealed therefrom, filing sundry reasons of appeal. The specifications, besides stating the claim as just mentioned, states particularly the nature of it, and his invention to consist in running the knife in nearly a flat position at any required depth under ground, and thereby cutting up and loosening the soil. The machine in all its parts is therein also particularly described. It is admitted by the office that the form and character of the machine is sufficiently shown in the drawing and model which accompany the specification. The reasons of appeal, though informally drawn up, seem in substance intended to embrace the amount of what the appellant had urged in his correspondence with the office, as before alluded to. The most material matters thereof are: First, that his invention consists in a combination of the wheels and knives for the purpose of cutting up the ground and destroying thistles; that it is new and useful; that the office has not shown that there was any such combination in existence, and that the usefulness of the machine has never been called in question. Second and third, that the references given by the office are irrelevant and unsatisfactory, his claim being neither upon the knife nor wheels, individually, but the combination of the two; that as to Filkins' machine, the knife is gauged by a sled hitched forward of it and guided by handles behind, for proof of which reference is made to Filkins' model and claim; and that as to the knife in Prettyman's machine, which is supposed to be like his, he says the office seems to be wandering from the claim for a combination. The fourth, fifth, and sixth relate to the ground of objection taken by the office, that the wheels perform no new office, but do the same thing they do in the plow, cultivator, and seed-planter, namely, they gauge the depth. The appellant says: "Now, they perform another and equally important office with the gauging the depth: They prevent the knife from sliding sideways around a hard place, which, from its very shape, it would do if it were not for the wheels. Now, the plow does not depend upon the wheels for this; and the cultivator or seed-planter will slip over a hard place whether they have wheels or not." The seventh is, that there is no such machine as his in its operation and effect; that the combining the knife with the wheels necessarily causes each to perform a different office from what it had done before, and forming, by means of the combination, a machine which performs the office of cultivating the soil or cutting thistles in a more easy, rapid, and effectual, and, in all respects, a better manner, than can be done without such combination.

The two replies to these reasons appear to be the same in substance. The first part states an historical account of the case in its first stages, which I have already taken some notice of. The report notices and comments particularly on the letter of the 27th May, 1851, from Boughton to the commissioner of patents. Thus, in Boughton's reply of the 27th May, 1851, he says, respecting the functions of the wheels in his machine, that they not only gauge the depth, but they also prevent the side-wise motion of the knife. "From the shape of the knife it would run around a hard place if it were not for the wheels." "The only reply to that which needs to be made is that the wheels will, in cases referred to by the office, perform the same functions as Mr. Boughton claims for the wheels of his machine. They will in all cases prevent any tendency to a side move-

ment, and just as much in one case as in the other; and hence, as before stated, the wheels in this machine perform no new functions, and hence there is no patentable combination in the case."

In his reply to the third reason the commissioner says: "The function of the wheels is nothing more nor less than guiding the cutter-blade in its depth and preventing any tendency in the same to a side movement; and the sled-runners in Filkins' cutter do the same thing and in the same way. If the wheels prevent the cutting-blade from descending below a certain depth, the sled of Filkins does the same thing equally well. If the wheels prevent the cutting-blade from slipping from side to side, as in running around hard clay spots, the sled-runners would do the same thing in the same way, but much more effectually, because they would cover a greater length fore and aft, and have a firmer hold upon the ground than wheels could possibly have. Now, it is a rule of practice long ago established in the patent office, and sustained by the courts, that where two devices are capable each of doing the same thing, and in substantially the same way, they must be equivalents of each other, and when one has been used the other is not patentable." Again: "But it is not admitted that such use of the wheels (as by Boughton's machine) is a new use, for they have done the same service with plows and cultivators of almost all kinds from time long past."

The initiatory evidence upon which the commissioner acted in forming his opinion as first declared was upon a comparison of the appellant's machine with those of Ides, Filkins, and Prettyman, before the final decision was declared; and whilst the subject was still kept open, he submitted to a correspondence on the subject with Boughton, and which, as before stated, has been laid before me as forming a part of the case for my decision. It may therefore be proper to bring into review the most material parts of it, where facts are stated and have been acted upon, and not denied; and also to give the appellant the benefit of the rule that where a part of the statement is used, the whole of the contemporaneous statement should be received, the part which operates for him as well as that which makes against him. Such, it is believed, will be the proper rules of evidence on the occasion.

He states that the construction of his machine is totally different from that of Filkins or any other, both in the operation and effect; that none has been shown by the office to be like it in its combination; that from a summer's use of one he had tilled fifty acres of land—"hard-clay, Canada-thistle land"—in a superior order to what he ever saw the same land before, with little more than half the labor and team theretofore bestowed, and was enabled to go about four times over with the same labor that would be required to plough once; that it is eminently useful; that the bog-cutter is no such kind of a tool, and no such use was contemplated by the inventor; that it is gauged by a sled hitched forward of it, and by handles held by hand behind, and not a wheel about it, and contrived for the purpose of running on the top of the ground; and he refers for proof to the claim of Filkins; that the cutters in Prettyman's machine, even if resembling his, are different in the combination; that the allegation or objection "that the wheels perform no new office" is partly true and partly not; that it is true they gauge the depth, but they also prevent the sideway motion of the knife; that from the shape of the knife it would run around a hard place if it was not for the wheels; the plow does not depend upon the wheels for this; and the same is the case with the cultivator and seed-planter, from the very defects in their operation under wheels for this purpose, for they will slip over hard places whether with wheels or not; that in his combination a machine is found which performs a new office, or an old office in a different manner from all other machines, and in a manner which for hard soil is much better than any other method, and this is novelty; that there is no machine which performs the office of tilling the soil in the same manner.

Filkins, in stating the nature of his invention, says: "It consists in arranging in a proper frame-work a set of horizontal steel knives, which are drawn along the surface of the ground, and cut or shave off what are termed bogs from marshy places, thus leaving a clear surface, and also in attaching the middle beam of the aforesaid frame to the rear end of a sled, the front or inclined parts of the runners being provided with steel knives, so that, as the machine is drawn along by the team, when the runners come in contact with a bog, the knives will split it, and yet keep the machine level and steady." He states, also, that the machine is guided by handles in the rear attached to a beam.

The commissioner supposes that the claim in this case is subject to the objection of "the want of novelty," because merely analogous to the machines referred to, and to some others not particularly referred to, and because of a double use. He states the rule of practice established in the patent office and sustained by the courts to be that where two devices are capable each of doing the same thing, and in substantially the same way, they must be equivalents of each other; and when one has been used, the other is not patentable. And again: "But it is not admitted that such use of the wheels (as by Boughton's machine) is a new use; for they have done the same service with plows and cultivators of almost all kinds from time long past." The principles as stated by the commissioner must be admitted. The only

question is whether they are, according to principles of patent law, applicable to the present case. The rule on the subject of mechanical equivalents, in other words, is that "the identity of purpose, and not of form or name, is the true criterion in judging of the similarity or dissimilarity of two pieces of mechanism;" or "whether one thing is a mechanical equivalent for another, is a matter of fact to be judged of on the testimony of experts or on an inspection of the machines; and, in the language of the books, it is an inference to be drawn from all the circumstances of the case, by attending to the consideration whether the contrivance used by the one party is used for the same purpose, performs the same duties, or is applicable to the same object as the contrivance used by the other party." It is sometimes very difficult to draw the line between what is form and what is substance. Supposing the rule as laid down to be applicable, and that is to be the test, will the claim of the appellant fall unfavorably within it? The form and contrivance and the operation of the machine are different from that of those referred to: —as to the first, in the wheel and axle, and the peculiar fastenings and contrivances attached thereto, the latter being the sled and runners. Can this be said to be an equivalent? It may be very sufficient for the purpose Mr. Filkins intended it for, as before alluded to, and as expressed in his specification—that of operating on the surface of the soft, marshy ground, and splitting the bogs—but very inadequate and inappropriate for working under the ground at any required depth, and sufficiently tilling it, especially in hard, clayey, Canada-thistle earth; and in preventing the sideways motion of the knives—all this is the purpose, object, and effect which Boughton's machine is contrived and intended for. It is also stated to be a great labor-saving machine. Are not these substantial and useful differences in construction, object, operation, and effect? And so as to the other machines, plows, &c. But it seems to me that in adopting that rule the learned commissioner has not sufficiently adverted to the nature and character of the claim of the appellant. He does not claim for a new machine, or for any new and improved parts of a machine, for any new functions of the wheels or knives individually, or for any new combinations of particular parts of existing machinery or machines, but for the union of all, by which a new and useful combination is produced. And he contends that it has not been made to appear that there ever was such a combination before.

I will now proceed to state some of the principles established by adjudged cases, which I think are applicable to and ought to rule in the decision which I am about to make. Curtis, 1st edition, 1844, page 82, says: "There may be a patent for a new combination of machines to produce certain effects, whether the machines constituting the combination be new or old. In such cases the thing patented is not the separate machines, but the combination." For which is cited Barrett v. Hall [Case No. 1,047]; Park v. Little [Id. 10,715]. In the case reported in 16 Pet. [41 U. S.] 340 (Prouty v. Ruggles), Chief Justice Taney, in delivering the opinion of the court, says: "The patent is for a combination, and the improvements consist in arranging different portions of the plow and combining them together in the manner stated in the specification, for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new, nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described." This invention is not intended to be the case of improvement of any existing machine. If it were, then the question would be, whether it is a real or material improvement, or only a change of form. In Moody v. Fiske [Case No. 9,745], Judge Story, in delivering the court's opinion, and speaking of the claim for a combination only, says: "In such a case, proof that the machines or any part of their structure existed before forms no objection to the patent, unless the combination has existed before, for the reason that the invention is limited to the combination." In the case of Barrett v. Hall [supra], the same judge says: "The true legal meaning of the principle of a machine with reference to the patent act is the peculiar structure or constituent parts of such machine." Again: "The principles of two machines may be very different, although their external structure may have great similarity in many respects. It would be exceedingly difficult to contend that a machine which raised water by a lever was the same in principle with a machine which raised it by a screw, a pulley, or a wedge, whatever in other respects might be the similarity of the apparatus." These authorities might be added to, by stating or referring to many others, but it is deemed unnecessary.

Upon the whole, therefore, I think there are substantial differences between Boughton's claim for a combination in his machine and those referred to by the commissioner, in form, power, way, and principle, and that the decision of the commissioner is erroneous, and ought to be reversed, and the same is hereby reversed; and I do hereby determine that Enos Boughton is entitled to a patent as prayed for.

BOUGHTON (ADJUSTABLE WINDOW SCREEN CO. v.). See Case No. 81.

Case No. 1,696a.

BOULIGNEY et al. v. UNITED STATES.

[1 La. Law J. 184.]

District Court, D. Louisiana. June 8, 1876.

PUBLIC LANDS—FRENCH GRANTS—SALE BY SPAIN—INDEMNITY.

[Act June 22, 1860 (12 Stat. 85), provides for the confirmation of grants of land made by a foreign government in Louisiana prior to the cession of the territory to the United States, and in section 6 declared that, when land so granted has been sold by the United States prior to the confirmation of the grant, the person entitled may enter a like quantity on any of the public lands of the United States. Petitioners held a complete and valid grant from the French government of Louisiana to certain lands therein, and the succeeding Spanish government made grants of land within the limits of this grant, both being prior to the cession of Louisiana to the United States. *Held* that, although these Spanish grants have been confirmed by the United States, the French grantees are not entitled to indemnity for the land so diverted from them, for the liability of the United States to indemnify them extends only to the case of lands sold by itself.]

[This was a petition filed by Charles Bouligney and others against the United States to adjust petitioners' claim to certain land in the state of Louisiana, which they claimed by virtue of a grant from the late French government of that territory. The petition was filed under Act June 22, 1860, which provides for the adjustment and confirmation of claims growing out of grants of land in Florida, Louisiana, or Missouri, emanating from a foreign government, and bearing date prior to the cession of the territory out of which those states were formed to the United States. Section 6 of the act, referred to in the opinion, provides that "whenever it shall appear that the lands claimed, and the title to which may be confirmed, under the provisions of this act, have been sold, in whole or in part, to the United States prior to such confirmation, * * * the party in whose favor the title is confirmed shall have the right to enter upon any of the public lands of the United States a quantity of land equal in extent to that sold by the government." Petition granted in part, and denied in part.]

Albert C. Janin, for plaintiffs.

J. R. Beckwith, Dist. Atty., and J. W. Gurley, Asst. Dist. Atty., for the United States.

BILLINGS, District Judge. This case having been submitted upon the pleadings, evidence, and briefs, and the court having carefully considered the demand of the petitioners, and it appearing from the evidence that the grant made on the second of March, 1765, by the French government of the province of Louisiana, to Messrs. Dauterive and Masse, is a complete and valid grant, embracing 212,255 and 99-100 acres, of which 1295 and 57-100 acres are now vacant lands, and that subsequently to the date of said grant from the French authorities, the Spanish authorities in the province of Louisiana made to other persons complete grants within the limits of said grant of 1765 to the extent of 27,056 and 44-100 acres, and various incomplete grants to the extent of 48,146 and 47-100 acres, which have since been confirmed by the United States government, and the court being of the opinion that the act of congress of June 22, 1860, under which this suit is prosecuted, does not contemplate the allowance of an indemnity by the United States for the lands thus granted by way of complete and incomplete grants before the acquisition of the province of Louisiana by the United States, but that said act does provide for an indemnity for such lands embraced within valid ancient grants as the United States have sold or otherwise disposed of:

It is ordered, adjudged and decreed that the heirs and legal representatives of Jean Antoine Bernard Dauterive, to wit (here the names of the heirs and legal representatives are inserted in the decision), recover from the United States, through the general land office, certificates of location, or land scrip, to the extent and amount of 135,757 and 51-100 acres, to be located upon any of the public lands of the United States, subject to private entry, at $1.25 the acre, according to the provision of the sixth section of the aforesaid act of congress of June 22, 1860. And it is further ordered, adjudged and decreed that the said plaintiffs recover from the United States patents for the following described tracts of land, situated in the southwestern district of Louisiana, to wit (here the tracts of land are enumerated in the decision), that is to say, for 1,295 and 57-100 acres of the aforesaid grant of March 2d, 1765, which are vacant and undisposed of.

Case No. 1,697.

In re BOUND.

[4 N. B. R. (1871) 510 (Quarto, 164).][1]

District Court, S. D. New York.

BANKRUPTCY—DISCHARGE—FAILURE TO KEEP PROPER BOOKS OF ACCOUNT.

Where it appears from the evidence that a bankrupt has failed to keep proper books of account, the case is one in which, under [Act 1867 (14 Stat. 531)] section 29, a discharge cannot be granted.

[In bankruptcy.]

S. J. Crooks, for bankrupt.

J. F. Roberts, for creditor.

BLATCHFORD, District Judge. The first specification, in so far as it charges that since the passing of the bankrupt act, the bankrupt being a tradesman within the meaning thereof, has not kept proper books of account in his business, is sustained by the evidence, and a discharge is refused on the ground that such allegation is equivalent

[1] [Reprinted by permission.]

to an allegation that the bankrupt being a tradesman has not, subsequently to the passage of said act, kept proper books of account, and that the case is, therefore, one in which, under section 29, a discharge cannot be granted.

Case No. 1,697a.

BOUNTY v. KERRIN.

[Betts' Scr. Bk. 533.]

District Court, S. D. New York. March, 1856.

SALVAGE—CONTRACT—TENDER—COSTS.

[1. One who contracts to perform a salvage service for a specified gross sum can recover no more, although the work proves to be actually worth many times that sum.]

[2. The merits of a libel in personam for salvage services are not affected by the fact that respondent has replevied the salved property from the salvor.]

[3. Tender made before suit brought, and not repeated in court, does not bar costs.]

[In admiralty. Libel by John Bounty against Patrick Kerrin to recover salvage. Decree for libelant.]

A. Nash, for libelant.

F. C. Bliss, for respondent.

Before BETTS, District Judge.

The libelant, with the aid of a sloop and several men, raised for the defendant the boiler and machinery of a wrecked steamboat. He claims a salvage reward for the service, or a quantum valebat compensation, of at least $25 per day, amounting to $218.50, and, upon the evidence, the latter sum appears no more than reasonable compensation for the service rendered, without considering it one of a salvage character. The respondent proves by his agent that he made a specific contract with the libelant to do the work for the gross sum of $25. The witness was not discredited, nor was there evidence contradicting him on this point. Evidence was offered by the respondent that he had dispossessed the libelant of the machinery after it was raised, by replevin, and had tendered him in specie $25 before suit brought.

Held, that libelant's recovery must be limited, on the testimony, to $25; that the replevin action did not affect the merits of this suit; and that the tender proved, not having been made in court, did not bar costs. Decree for the libelant for $25, with interest from October 10, 1854, and full costs.

BOURN (GOODYEAR v.). See Case No. 5,561.

Case No. 1,698.

BOURNE v. ASHLEY.

District Court, D. Massachusetts. June, 1863.

WHALE FISHERY—PROPERTY RIGHTS IN WHALE—CUSTOM AND USAGE—SUFFICIENCY.

[1. A whale belongs to the ship from which the first iron is placed, though the actual killing is by the crew of another vessel, or they take part therein.]

[2. By long usage, the first iron, whether attached to the boat or not, holds the whale.]

[3. Though local usages of a particular port will not supersede the general maritime law, yet this doctrine does not apply to a custom embracing an entire business, and concurred in for a long time by persons engaged therein.]

[Cited in Swift v. Gifford, Case No. 13,696; Ghen v. Rich, 8 Fed. 161.]

Case No. 1,699.

BOURNE et al. v. ASHLEY et al.

[1 Lowell, 27.][1]

District Court, D. Massachusetts. Sept. Term, 1865.

TROVER—MEASURE OF DAMAGES.

In a proceeding in the nature of trover for the conversion of a whale in the Okhotsk sea, the measure of damages is the value of the whale at the time of the conversion, which can be found by taking the value of the oil and bone at New Bedford, which was the ruling market of the country at the time, and was the home port of both vessels, less the expense of cutting in and boiling, freight and insurance; to the amount thus ascertained, interest at six per cent is to be added.

[Adhered to in Bartlett v. Budd, Case No. 1,075. Explained in The Ontario, Id. 10,543. Approved in Swift v. Brownell, Id. 13,695. Distinguished in Dyer v. National Steam Nav. Co., Id. 4,225. Cited in Guibert v. The George Bell, 3 Fed. 585.]

At law. Libel promoted by [Jonathan Bourne and others] the owners of the ship Washington, against [Abraham Ashley and others] the owners of the ship Endeavor, both of New Bedford, for the conversion of a whale in the Okhotsk sea, in July, 1858. The merits of the case had been decided by Judge Sprague in favor of the libellants [Case No. 1,698], and the only point remaining open was the measure of damages, which came up on the assessor's report. We are entitled to receive the highest value of the oil and bone at New Bedford, without any deductions. Our vessel was on the ground, and the men were ready to cut in and boil the whale, and were obliged to come home without a full catch. Taber v. Jenny [Case No. 13,720].

T. D. Eliot and T. M. Stetson, for libellants.

R. C. Pitman and R. A. Pierce, for respondents.

LOWELL, District Judge. I hold the measure of damages in trover to be the value of the goods at the time and place of the conversion. In some courts the plaintiff has been permitted to recover a higher price if the goods have risen before the time of trial. This rule has led to great difficulties, and those courts have been obliged to adopt a

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

good many artificial exceptions, such as that the suit must be brought within a reasonable time, &c. Romaine v. Van Allen, 26 N. Y. 309. The weight of authority is in favor of the other rule. Watt v. Potter [Case No. 17,291]; Pierce v. Benjamin, 14 Pick. 356; Pinkerton v. Manchester & L. R. Co., 42 N. H. 424; Sedg. Dam. 481; Coolidge v. Choate, 11 Metc. [Mass.] 79. And the value which governs is, of course, the market price in the case of articles which have a market price; though the wrong-doer cannot escape the payment of damages for the conversion of an article which is of value only to the owner, by showing the absence of a market for the article. Stickney v. Allen, 10 Gray, 352.

In this case, the respondents introduced the evidence of very respectable experts to show what they would be willing to give for whales in the Okhotsk sea. The assessor finds the average estimate to be one-third of the value of the oil and bone at New Bedford. But all this evidence merely goes to prove that there is no market price for whales at that place. It is undertaking to show the value of an article by the price which persons will give for it who do not want it; whereas market price presupposes the presence of persons who do want the article. There is no market price for whales anywhere, because they are never brought to market; nor is there any market for oil and bone in the Okhotsk sea. These facts do not deprive the libellants of the fair value of their whale, but only oblige us to arrive at it by other means than such conjectures. We must discover, as well as we may, the value of this article to a person who happened to want it, for the respondents have put themselves in that situation. This value must be the price of the oil and bone in some market, less the expense of making the oil and bone out of the whale and getting it to market. Some of the witnesses, indeed, when their attention was directed to the true point of inquiry, said that the oil and bone were worth in the Okhotsk sea all they were worth in New Bedford, less freight and insurance. See Coolidge v. Choate, 11 Metc. [Mass.] 79; Selkirk v. Cobb, 13 Gray, 313. The market of New Bedford, which the witnesses and the assessor adopted, is the controlling market of the country as well as the home port of both vessels, and furnishes the proper standard. The damages, then, will be the value at New Bedford of the oil and bone made, or which might have been made, from this whale, less the average necessary expenses of converting the whale into oil and bone, and freight, insurance, and other usual charges, with interest on the sum thus arrived at. It was strongly urged that most of those charges and expenses ought to be rejected, because they were not incurred by the libellants' request, and did them no good, since their men were ready to do the work, and their vessel was able to bring home the product. For this position, Taber v. Jenny [Case No. 13,720] is cited. I do not profess to understand that case fully; but the assessor's report and the arguments seem to assume that the oil and bone, actually brought home, ought to be paid for, and the only question was, what charges should be deducted, and this turned upon the fact that the libellants' vessel was unable to fill up her cargo, and, therefore, the labor and freight would have cost them nothing. The rule which I have taken, and which is the ordinary rule, was not argued. A rule which makes the damages depend on the arrival of the vessels, and on the good or ill fortune of their adventures after the time of the conversion, cannot be upheld. The action accrued immediately, and might have been maintained, though the respondents had never received the oil and bone at the home port, and though the libellants had got a better whale immediately after this was lost; and the measure of damages ought to be the same whenever and wherever the action is brought, and whether the libellants were skillful or otherwise, and fortunate or not, and whether the respondents were insured or uninsured. In short, it is unsafe to base the amount of the recovery, in a case of this kind, upon circumstances happening afterwards. It is upon these very grounds that the rule of time and place of conversion was adopted.

The report will be recommitted to the assessor to find the expense of cutting in and boiling, which is the only element of the computation not fully presented by him, unless the parties agree upon it. I see no reason for denying costs to the prevailing party. Ordered accordingly.

Case No. 1,700.

BOURNE et al. v. MAYBIN.

[3 Woods, 724.][1]

Circuit Court, S. D. Mississippi. Nov. Term, 1877.

GUARDIAN AND WARD — CONCLUSIVENESS OF GUARDIAN'S ACCOUNTS — FAILURE TO ACCOUNT AFTER WARD'S MAJORITY—REMEDY OF WARD—COLLATERAL REMEDY — FILING CLAIM AGAINST BANKRUPT GUARDIAN—EFFECT OF—ALLOWANCE OF—PARENT AND CHILD — SUPPORT OF CHILD—LIABILITY OF CHILD'S ESTATE FOR — ESTATES—LIFE TENANT AND REMAINDER-MAN—CONTRIBUTION—TRUSTS—APPROPRIATION OF TRUST ESTATE BY TRUSTEE — LIABILITY OF GUARDIAN FOR INTEREST.

1. In Mississippi a ward is not concluded by the annual accounts of the guardian, filed and passed upon without notice by the probate court, during the infancy of the ward.

2. In that state, upon the filing of his final account by a guardian, his inventory and annual accounts and his whole administration of the trust are subject to challenge and examination.

3. The Code of Mississippi, which declares that when a ward arrives at the age of twen-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ty-one or is married, the guardianship shall cease, and the guardian shall deliver up to the ward, or the husband, as the case may require, all the property of the ward in his hands, and on failure to do so, shall be liable to an action on his bond, creates the relation of creditor and debtor between the ward and guardian on the failure of the guardian to comply with the requirements of the statute.

4. The fact that the accounts of a guardian with his ward were in course of settlement in the probate court, does not preclude the ward from proving her claim against the guardian in the probate court.

5. B commenced in a state chancery court a suit against her late guardian, after his adjudication in bankruptcy, for a final settlement of his guardianship, and obtained a decree against him for the amount of the trust estate found in his hands, but the assignee was not a party to the suit: *Held* (a), that the claim of the ward against the bankrupt estate was not merged in the decree of the chancery court, but was a provable claim against the bankrupt estate; (b) and that the assignee was not bound by the amount found by the chancery court, nor would the bankrupt be bound by the allowance of the claim by the bankrupt court.

6. Suit brought and judgment recovered against a bankrupt on a fiduciary debt which the bankrupt does not discharge, does not preclude the creditor from proving the debt as a claim against the bankrupt estate.

7. The general rule is: that if a father be guardian of his child, he must support the child, if of sufficient ability to do so.

8. But it is within the discretion of the court to allow one who is guardian of his own child compensation for the support of the ward out of the ward's estate.

9. The general rule in equity is, that where land is charged with a burden, every portion of the estate should bear its share of such charge.

10. So, where the incumbrance is on the entire estate and there is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal.

11. A tenant by the curtesy who happens to be guardian for the remainder man cannot apply his ward's estate to remove the incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest so paid.

12. The rule of contribution in such cases stated.

13. A guardian who filed neither inventory nor account, but used his ward's estate as if it were his own, is bound to pay interest on the value of the estate, and there is nothing in the Code of Mississippi to relieve him from this obligation.

14. A trustee is bound to keep clear, accurate and distinct accounts—otherwise all presumptions are against him, and all obscurities and doubts are to be taken adversely to him.

15. A trustee who, previous to the late war of the Rebellion, appropriated the trust estate to his own use, is liable for interest thereon during the period of the war.

In bankruptcy. Appeal from [an unreported] decree of the district court, allowing claim of Mary L. Bourne against bankrupt estate. [Decree affirmed.]

On December 30, 1868, Joseph W. Maybin was adjudged a bankrupt. On January 24, 1877, the bankrupt estate being still unsettled, Mary L. Bourne, with Joshua W. Bourne, her husband, filed for allowance a claim against the bankrupt estate for the sum of $30,000. The claim was presented in the form of a petition, which set forth the facts upon which it was based, and prayed that the assignee of the bankrupt might be made a party, and that an account might be stated of the amount due to petitioner from the bankrupt estate. The petition contained the averments required by section 5077, Rev. St., for the proof of a demand against a bankrupt estate, and was verified by the affidavit of Mary L. Bourne and Joshua W. Bourne, her husband. The petition was answered by the assignee, who denied any indebtedness from the bankrupt to said Mary L. Bourne, claimed that the accounts between said Mary L. Bourne and the bankrupt had been settled by the probate court of Warren county, Mississippi, and that nothing was due her from the said Joseph W. Maybin, and pleaded the limitation of three, six, and ten years, prescribed by the Code of Mississippi. Upon the issues thus raised voluminous proofs were taken, and a reference was made to a master, who stated an account, and reported that there was due the said Mary L. Bourne from the said bankrupt estate the sum of $30,492.95. Exceptions were filed to the report, which were overruled, and the report was confirmed, and the district court declared and decreed that on the 24th day of January, 1877, the date of the declaration of a dividend to other creditors of said bankrupt estate, there was due to the said Mary L. Bourne from the bankrupt estate of said Joseph W. Maybin the said sum of $30,492.95, and allowed the same as a proven claim against the said estate. From this decree the assignee took an appeal to this court.

The claim of Mary L. Bourne against the estate of Maybin arose, as she claimed, from certain property received by Maybin as her guardian. Maybin was the father of Mrs. Bourne, who, by the death of her mother on February 22, 1851, inherited, as she claimed, a number of slaves and other personal property. On September 26, 1851, Maybin was appointed guardian for his daughter, the said Mary L., and received, as such, her estate. The law in force at that time (Rev. Code Miss. 1857, art. 146) required a guardian, "within three months after his appointment, to return to the probate court, under oath, a true and perfect inventory of all the estate, real and personal, and an appraisement thereof and of all money or other things which he may have received, or taken possession of, as the property of his ward." The law also declared, "he shall, annually, return an inventory, under oath, of the increase of the estate, if there be any, by the birth of slaves or the increase of other property, and he shall, in like manner, report all losses by death or otherwise." Article 147 declared: "Such guardian shall, at least once in every year, and oftener if required, exhibit his ac-

counts, showing the receipts and disbursements of money on account of his ward, supported by proper vouchers, in which he shall also show the annual product of the estate under his management, and the sale and disposition of such product. His accounts shall also state his expenditures in maintaining his ward," etc. Maybin filed no inventory of the property which came into his hands, as required by law, nor did he file any accounts. In August, 1861, he was cited by the probate court to file his inventory and accounts. In response to this citation, he filed an answer, in which he stated that about ten years before he had been appointed guardian of the person and property of his said daughter, that he owned a large estate in his own right, and had but two children, and the property owned by his said ward was but a small portion of what he expected to give her. "Hence your respondent," the answer proceeded, "has never felt that it was necessary to return an inventory of her estate or property, or keep or render any accurate and detailed account of the receipts and disbursements of her property, or for or on her account." The answer further stated that the ward of the respondent was the owner of the undivided half of certain slaves, naming them, nineteen in number, five of whom had been born since his appointment as guardian, and that these slaves were all the property which had come to the hands of respondent as such guardian. The answer further stated, that for about six years last past, respondent had employed a private tutor for his ward, at an expense of from $450 to $500 per annum, and that in the future the expense of her support and education "would exceed the annual hire of the said half of said negroes." The answer, thereupon, prayed the appointment of appraisers to make and return an inventory of the property of the ward, and to assess the annual hire thereof during the time it had been in respondent's hands, and that to save respondent the trouble of keeping a detailed account of disbursements for his said ward, her support and education might be set off against the hire of her negroes.

In pursuance of the prayer of this answer, the probate court appointed three appraisers, who appraised the hire of twelve negroes, from 1851 to 1861, at $600 per annum, amounting, in the aggregate, to $6,000, from which they deducted $1,000 for expenses of negro children, leaving a balance due, for the hire of the slaves of the ward for the period aforesaid, of $5,000. This report was confirmed by the probate court. Upon the coming in of this report, Maybin filed a statement of his account for the preceding ten years. The debit side of the account contained but one item for hire of slaves from 1851 to 1861, $5,000, and the credit side two items, one of $5,000, amount allowed by probate court for the years 1851 to 1861, inclusive, and amount paid court fees, $14.50, showing a balance due the guardian of $14.50. This account, thus stated, was approved by the probate court. Maybin never filed any further account. On the 5th day of April, 1866, in response to a citation from the probate court, he filed an answer in which he stated, that the only property of his ward which had at any time come into his hands as guardian, consisted of negroes, and he knew of no other property of his said ward; that as a result of the war, etc., this property had been destroyed; that by an agreement with the probate court in 1861, it was understood that the hire of her slaves should be appropriated to the support and education of his ward; that the hire, after that date, was not sufficient for that purpose, and that he, therefore, had no property or effects of his said ward in his hands. Upon this answer the probate court declared that "the same is hereby allowed, confirmed and ordered to be recorded, and it is further ordered that the said guardian be discharged from further accounting to this court until citation shall issue requiring him to do so." No citation had ever been issued, and no further account had ever been filed by said guardian. On the 10th of October, 1867, said ward was married to her present husband, the said Joshua W. Bourne.

G. Gordon Adam and Frederick Speed, for petitioner.

W. B. Pittman and A. B. Pittman, contra.

WOODS, Circuit Judge. The defense of the statute of limitations set up in the answer cannot prevail. The evidence shows that the petitioner was married to her present husband while an infant. She has, therefore, from her birth been under the disability of either infancy or coverture, either of which suspends the statute of limitation under the Code of Mississippi: Code 1857, art. 12, § 2, c. 57, p. 400, and Code 1871, § 2156. Nor is the petitioner concluded by the accounts as they are styled, filed in the probate court by Maybin, as guardian, and the action of the court thereon. Both were filed during the infancy and before the marriage of the ward, and were passed upon without any notice to her. Neither of them are final accounts, but are expressly stated to be annual accounts. Such accounts are not conclusive on the ward. The Code of 1857, art. 148, c. 60, provides for a final account by the guardian after his trust has ceased, either by the marriage or majority of the ward. "And the guardian shall also make a final settlement of his guardianship by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of his annual accounts, either as debits and credits, and also all other disbursements, charges and amounts received and not contained in any previous annual account." The Code then proceeds to declare that such account shall be open to

the inspection of the ward, and the court shall fix a day for hearing the same, and shall cause notice thereof to be given to the ward to appear and show cause why the final account of the guardian should not be allowed and approved. At the appointed time the court shall proceed to examine the final account and to hear the proofs for and against it, "and if the court shall be satisfied, after full examination, that the account is just and true, it shall make a final decree of approval, ratifying and confirming the guardianship, or it may allow only so much of the account as seems right," etc. These provisions make it perfectly clear that, on the filing of a final account, the whole administration of the trust and all the annual accounts and the inventories are subject to challenge and examination. The absurdity of binding an infant by an annual or partial account, passed upon by the probate court without notice, finds no place in the jurisprudence of this state, and so the supreme court of the state has repeatedly held: Austin v. Lamar, 1 Cushm. 189; Harper v. Archer, 9 Smedes & M. 71; Coffin v. Bramlett, 42 Miss. 194.

It is next contended by the defendant that the claim of the petitioner is not of such a nature as to be provable against the bankrupt estate; that only debts, and debts which were in existence at the date of the bankruptcy, can be proven; and that, as between guardian and ward, the relation of debtor and creditor does not exist until there has been a final accounting in the probate court, and a balance found due the ward. If this proposition were true, then the claim of every ward or other beneficiary of a trust whose guardian or trustee was adjudged a bankrupt before settlement of the trust, would be excluded from participation in the proceeds of the bankrupt estate. A conclusive answer, however, to this theory of the defense is found in the Code of Mississippi, which declares (Code 1857, art. 148, c. 60, p. 462) that "the powers and duties of every testamentary or other guardian over the person and estate of his ward shall cease and be determined when such ward shall arrive at the age of twenty-one years, or be lawfully married, and in either event the guardian shall forthwith deliver up to the ward or to the husband, as the case may require, all the property of every description of said ward in his hands, and on failure shall be liable to an action on his bond." Clearly, this provision of the Code raises the relation of debtor and creditor between guardian and his late ward as soon as the guardianship ceases. Mrs. Bourne was married and the powers of the guardian, as such, ceased more than a year before the bankruptcy of the latter, and he was liable to suit in any court of competent jurisdiction for the recovery of the amount which might be due from him to his ward. The relation of debtor and creditor must, therefore, have existed between them as soon as the guardianship was terminated by the marriage of the ward.

Another objection to the proof of the petitioner's claim, similar to the one just considered, is that the debt of the petitioner is not a provable one, because her claim is pending and undetermined in a court, to wit, the probate court, which has full jurisdiction thereof. We think this objection is fully answered by the case of Payne v. Hook, 7 Wall. [74 U. S.] 425. In that case, Anne Payne, a citizen of Virginia, filed her bill in the circuit court of the United States against Hook, public administrator of Calloway county, Missouri, and the sureties on his bond, to obtain her distributive share in the estate of her brother Fielding Curtis. The bill charged gross misconduct on the part of the administrator and false settlements with the probate court, and it appeared from the bill that Hook had not yet made his final settlement with the probate court. The bill was demurred to because, among other grounds, the probate court had exclusive jurisdiction concerning the duties and accounts of administrators until final settlement, and the administration complained of was still in progress, and resort should be had to that court to correct the accounts of the administrator, if fraudulent or erroneous. In reply to this objection to the bill, the supreme court said: "The circuit court of the United States for the district of Missouri had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it." "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union." These remarks apply with pertinency to the jurisdiction of the bankrupt court, and to the facts of this case. The jurisdiction of the bankrupt court depends upon the act of congress. It cannot be controlled or limited by state legislation. It is uniform, and is required by the constitution to be uniform throughout all the states. Section 711 of the U. S. Revised Statutes declares, "that the jurisdiction vested in the courts of the United States of all matters and proceedings in bankruptcy, shall be exclusive of the courts of the several states," and section 4972, "that the jurisdiction conferred upon the district courts, as courts of bankruptcy, shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." Section 5106 declares, "that no creditor whose debt is provable shall be allowed to prosecute to final judgment, any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined, * * * provided, that if

the amount due the creditor is in dispute the suit may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due." These citations from the statutes clearly show the jurisdiction of the bankrupt court to ascertain the amount of a claim against the bankrupt estate, and the fact that the claim may be in suit in another court does not divest it of that jurisdiction. It is true, that the bankrupt court could not arrest a suit brought against the debtor to recover a debt which the bankruptcy would not discharge, but it clearly has the jurisdiction to ascertain for itself the amount of the debt, where it is called on to apply towards its payment a part of the assets of the bankrupt estate. Where a bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate: Rev. St. § 5067. It seems clear, then, that the petitioner had a provable debt against the estate, for immediately on her marriage she might have maintained a suit against her guardian, upon his bond, in any court of competent jurisdiction, to recover whatever might be due her from him, and the fact that the probate court had jurisdiction to ascertain the amount did not oust the jurisdiction of the bankrupt court to do the same thing.

It is next objected to the claim of petitioner, that in November, 1869, she commenced a suit against her late guardian Maybin, in the chancery court of Warren county, Mississippi, for a final settlement of his guardianship, and, on April 22, 1873, obtained a decree against him for $20,609, and it is claimed that the debt being merged in the decree, neither the decree, nor the original debt on which it was founded, can be proven against the bankrupt estate. Many authorities are cited to show that the debt or claim on which a judgment is based is merged in the judgment. This is, of course, the general doctrine, and is not disputed. The rule of merger is that no further action can be prosecuted between the same parties upon a matter already ripened into judgment. There is no offer in this case to establish the debt by proof of the decree against Maybin, rendered by the state court. The proof offered is evidence to establish the claim upon which that decree was founded. Can this be admitted? I think it clear that the claim presented against the bankrupt estate is not merged in the decree against the bankrupt. The decree is against the bankrupt, founded on a fiduciary debt which his bankruptcy does not discharge. The claim sought to be established in this case, is a claim against the estate of the bankrupt. There can be no merger unless both the bankrupt and the assignee are concluded by the decree of the state court. It is clear that the assignee is not concluded, for he was not a party to the decree. As to him the proceedings and decree of the state court were res inter alios acta. When the decree is presented as a claim against the bankrupt estate, he clearly has the right to contest it, and insist that he is not bound by it, and to require the creditor to make good his claim by proof. He can not be bound by a decree to which he was not a party. So, neither is the bankrupt, in a suit brought against him to recover the amount of a fiduciary debt which is not discharged by the bankruptcy, bound by the allowance of the claim by the bankrupt court. So far as such a debt is concerned, the assignee in no degree represents the bankrupt, and when suit is brought against the latter to establish the claim against him, and to be enforced against his subsequently acquired property, he may well say, I have had no day in court on this claim, and insist on his right to contest. The great majority of claims against a bankrupt estate are not contested; they are allowed upon the ex parte proof of the creditor. To say that such an allowance would be binding upon the bankrupt, in a suit brought to recover a fiduciary debt not discharged by the bankruptcy, seems clearly untenable. The decree in the state court against the bankrupt, and the allowance of the claim for the sum demanded by the bankrupt court, are entirely independent of each other. They are proceedings instituted for different purposes, and against different parties. The doctrine of merger does not apply. The bankrupt is not bound by the allowance of the claim by the bankrupt court, and the assignee is not bound by the decree of the state court. It is true that there are authorities of the highest respectability which have held that, if after the institution of proceedings in bankruptcy, judgment is recovered on a provable debt, the original debt is merged and extinguished in the judgment, and the judgment is not provable against the estate of the debtor, nor discharged by the certificate: Bradford v. Rice, 102 Mass. 472; Cutter v. Evans, 115 Mass. 27; In re Gallison [Case No. 5,203]; In re Mansfield [Case No. 9,049]; Holbrook v. Foss, 27 Me. 441; Pike v. McDonald, 32 Me. 418; Sampson v. Clark, 2 Cush. 173. These decisions are placed on the doctrine of merger, which we have seen does not apply here, and because the creditor, by taking judgment and so changing the form of the debt and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation thereon, is held on his part to have elected to look to the debtor personally and to abandon his right to prove against the estate, and the debtor, on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in

order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim, and, therefore, the rights of the parties must be governed by the judgment which one has moved for and the other has suffered to be rendered. It is evident that these reasons do not apply to a claim based on a fiduciary debt which is not discharged by the bankrupt act. The bankrupt law expressly provides (Rev. St. § 5117) that "no debt created by the bankrupt * * * while acting in a fiduciary capacity shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Here seems to be a clear authority to such a creditor to pursue both remedies, to prove his debt and to prosecute his action against the bankrupt. And in New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, it was held that proof of a debt not barred by the bankruptcy does not preclude an action against the bankrupt thereon, and the converse seems to follow inevitably that suit brought against the bankrupt does not preclude proof of such a debt against the bankrupt estate. It cannot, therefore, be said that, by electing to pursue one remedy, he abandons the other, when the law gives him both. Nor can it be said that the debtor, by not interposing his discharge as a defense to the action against him, waives his right to set up his certificate against the plaintiff's claim, for he has no such right, and therefore cannot be said to waive it. On the other hand, the weight of authority seems to be in favor of the proposition that the taking of judgment by a creditor pending proceedings in bankruptcy, does not prevent the plaintiff in any case from proving his claim: Clark v. Rowling, 3 N. Y. 216; Monroe v. Upton, 50 N. Y. 593; Harrington v. McNaughton, 20 Vt. 293; Downer v. Rowell, 26 Vt. 397; In re Brown [Case No. 1,975]; In re Vickery [Id. 16,930]; In re Stevens [Id. 13,391]; In re Rosey [Id. 12,066]. But whichever way the authorities may preponderate on this question, no case can be found which decides that a judgment after bankruptcy, on a debt not barred by the bankruptcy, precludes proof of the claim in the bankrupt court.

My conclusions are, therefore, (1) that the decree rendered against Maybin after his adjudication upon a fiduciary debt which is not barred by the bankruptcy, does not bar the proof of the claim in the bankrupt court; and (2), that the claim of the creditor against the bankrupt estate is not merged in the decree in his favor against the bankrupt; and (3), that as the assignee was not a party to the decree against the bankrupt, he is not concluded by it, and may insist that the creditor shall prove his claim by other evidence than the record of the decree, and as the assignee has insisted on such proof in this case it was properly offered and received. These conclusions being reached, it only remains to consider whether the report of the master, finding the amount of the claim in favor of the petitioner to be $30,492.95, should be sustained. Upon this finding three questions of law arise: 1. Whether Maybin should be credited with any payments made by him for the support and education of his ward, she being his daughter; and 2. Maybin being a tenant by the curtesy of certain lands, the fee of which was in his ward, and having made certain payments to discharge a mortgage incumbrance thereon, what credit should he be allowed for such payments in his accounts with his ward. 3. Whether Maybin should have been charged with interest on any balances which might be found in his hands.

Of these three questions in their order:

1. The evidence shows that Maybin, during the greater part of the time while he was guardian for his ward, was a man of large means. The general rule is, that if a father be guardian, he must support his child, if of sufficient ability to do so: Reeves, Dom. Rel. 283. It is, however, within the discretion of the court to allow the father who is guardian a sum out of his ward's estate in payment of his support of the ward. It appears from the record that the probate court, in 1861, consented to allow Maybin his expenditures in behalf of his ward out of her estate. Although the safe and proper course for the guardian would have been to obtain the consent of the court to this arrangement in advance, yet the court having sanctioned the expenditure after it was made, I am of opinion that Maybin should be allowed all the expenditures in behalf of his ward which the testimony satisfactorily establishes. Maybin's own testimony on this subject is loose and unsatisfactory. He produces no vouchers and gives no dates. In my judgment, the only money expended for his ward which he proves is a payment of $500, made to his ward's grandfather in her behalf. This payment is corroborated by the witness Brian, otherwise I should not consider it as satisfactorily proven. I think, therefore, that Maybin should be allowed a credit for $500, as of the 31st day of December, 1857, the latest date to which the testimony of the witness Brian could apply. No other payments are shown by Maybin to have been made on behalf of the ward, and no other credits ought to be allowed him by reason of alleged expenditures in her behalf.

2. The evidence shows that Maybin was the tenant by the curtesy in a tract of land of which his daughter and ward was seized in fee. At the time Maybin's life estate commenced he was about twenty-three years of age. Within a year or two after the inception of said life estate, Maybin, as reported by the commissioner, paid to relieve said real

estate of a mortgage incumbrance left upon it by the ancestor of his ward the sum of $9,250, to which the commissioner added interest in the sum of $11,402.95, making the principal and interest $20,652.95. Half of this sum, to wit, $10,326.47, the commissioner allowed as a credit to Maybin. His counsel claims that he is entitled to a credit for the whole sum, principal and interest. It is true that the personal property is the primary fund for the payment of the debts of a decedent's estate, and that in general the heir of a mortgagor or the devisee of his real estate may call upon the executor or administrator to discharge the mortgage on the real out of the personal estate, and this rule is extended to a widow in favor of her dower in an estate mortgaged to secure the purchase money: Crabb, Real Prop. 914; Cope v. Cope, 2 Salk. 449; Brown, Max. 560; Henagan v. Harllee, 10 Rich. Eq. 285; Cumberland v. Codrington, 3 Johns. Ch. 229. But the principle is adopted in favor of the heir devisee and doweress alone (Coote, Mortg. 467, 468; Cope v. Cope, supra; Torr's Estate, 2 Rawle, 250; Mansell's Estate, 1 Pars. Eq. Cas. 367), and has no application to the respective rights of the remainder man and tenant for life or for years. The general rule in equity is, that where land is charged with a burden, each portion of the estate should bear its equal share of such charge: Stevens v. Cooper, 1 Johns. Ch. 425; Story, Eq. Jur. § 477; Cheeseborough v. Millard, 1 Johns. Ch. 409; Gibson v. Crehore, 5 Pick. 145. Where the incumbrance is on the entire estate, and there is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal. If, for example, there is a tenant for life and a remainder man in fee of an estate, subject to a mortgage which is due and must be paid at once to save foreclosure, and the remainder man, to save the estate, pays the mortgage, he is not obliged to take the share of the tenant for life in annual installments of interest, to continue as long as he shall live. He is entitled, as equitable assignee of the mortgagee, to immediate payment, and the sum which he thus has a right to claim is the present worth of an annuity equal to the amount the annual interest would be, computed for the number of years which the tenant will live. This is assumed by the courts to be fixed for this purpose by the tables of longevity. Whatever this sum may amount to is deducted from the gross amount paid for redemption, and the balance is the proportion to be paid by the remainder man. Of course the same rule of computation is applied if the tenant redeems and calls on the remainder man for contribution: 2 Washb. Real Prop. 197; Swaine v. Perine, 5 Johns. Ch. 482; Gibson v. Crehore, 5 Pick. 145; Houghton v. Hapgood, 13 Pick. 154; Squire v. Compton, 2 Eq. Cas. Abr. 387; Foster v. Hilliard [Case No. 4,972]; Carll v. Butman, 7 Me. 102, 105; Jones v. Sherrard, 2 Dev. & B. Eq. 179. This is the rule applicable to this case. The proposition that a tenant by the curtesy, who happens to be the guardian of the remainder man, can apply his ward's estate to remove an incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest of the sum so paid, is entirely without foundation, and has no support in any adjudicated case. Applying the rule above laid down, to ascertain what portion of the $9,250 paid by Maybin to remove the incumbrance on the land in which he held a life estate he was bound to contribute, and taking his age at the time of payment to be twenty-three years, and computing interest at six per cent., the rate fixed by law in this state, it turns out that Maybin's proportion of the sum paid was $5,772, and his ward's portion $3,478. For this latter sum, with interest from the date of its payment, Maybin is entitled to a credit. As the commissioner has allowed a sum considerably larger than this, he cannot complain.

3. It is next to be considered whether Maybin was chargeable with interest upon the amounts realized from the estate of his ward. The general rule on this subject is thus laid down in Perry on Trusts. "If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or neglects to settle his account for a long time, he will be liable to pay simple interest at the legal rate:" Volume 1, § 468. The report of the commissioner shows that Maybin received slaves of his ward, in September, 1851, whose clear yearly hire amounted to $1,325, and other personal property of the gross value of $4,350. Maybin's report, filed in August, 1861, shows that up to that time he had filed neither inventory nor account, but had used his ward's property as if it were his own, and employed it in his own business. Under this state of facts he is clearly liable for interest on the hire of the slaves as it accrued from year to year, and for the interest on the value of the other personal property, unless relieved by the law of this state. The Code of Mississippi of 1857, pages 461, 462, provides (after requiring the guardian to file annual accounts) as follows: "And for no balance of money in his hands on such accounts, shall a guardian be charged with interest, but the court may direct him to place the same at interest." It is perfectly apparent that this provision was not intended to apply to a case like the present. Here the guardian, who is in receipt of a yearly income from the estate of his ward, files neither inventory nor account for ten years, and then makes a grossly false statement of the condition of his ward's estate, giving no detailed account of the assets of his ward, or of his expenditures in her behalf, falsely

stating the amount of her property at less than one-half what it really was, and giving a palpably false and exaggerated statement of his expenditures in her behalf, thus making it appear that there was nothing due her, when in fact a large sum was due. Clearly, this is not the case in which the Code intended to relieve the guardian from the liability for interest, and the commissioner was right in charging interest.

It remains to pass upon the correctness of the sum found due from Maybin to his ward by the commissioner. "A trustee is bound to keep clear, distinct and accurate accounts. If he does not all presumptions are against him, and all obscurities and doubts are to be taken adversely to him." Blauvelt v. Ackerman, 23 N. J. Eq. 495. "Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation. If a trustee makes such use of the money he will be responsible for all loss, and he may be compelled to pay the highest rate of interest:" Perry, Trusts, § 464. Applying these rules to the case in hand, it is impossible to say that the commissioner has reported too large a sum against the guardian. The estimate made by the commissioner, of the amount which should have been received for the hire of slaves, seems to be supported by the testimony which would have justified a much higher valuation. His estimate of the value of the personal property, other than slaves, which come to the hands of the guardian, and was appropriated by him as his own, is also borne out by the evidence. Besides, the commissioner has allowed the guardian $1,641 more than he should for removing the mortgage incumbrance on the property subject to his life estate, and he has omitted to charge interest against the guardian for the four years of the war. As the guardian had appropriated the trust estate to his own use, and treated it from the beginning of his guardianship as his own, there is no ground for this omission. He is chargeable with interest from the time he appropriates his ward's property until he accounts and pays for it. I do not go into a minute discussion of the evidence on which the commissioner based his conclusions, because his report is presumed to be correct until error is made to appear. This has not been done. Even allowing the guardian a credit for the $500 which it is shown he paid towards the maintenance and education of his ward, and interest on this sum, the balance found by the commissioner is too small when his mistake in the amount allowed for satisfying the mortgage on the ward's lands, and his failure to charge interest during the war, are taken into consideration. The amount actually due the petitioner is considerably larger than the amount reported. As the sum reported will more than absorb all the assets of the bankrupt estate, the petitioner does not ask for any modification of the decree.

In my judgment, the claim of the petitioner against the bankrupt estate of Maybin, for the amount found due by the district court, is according to law, is sustained by the evidence, and the finding and allowance of the district should be affirmed. Ordered accordingly

BOURNE (MERRIMAN v.). See Case No. 9,480.

Case No. 1,701.

BOURNE v. SMITH.

[1 Lowell, 547.] [1]

District Court, D. Massachusetts. March Term, 1871.

SHIPPING—THE MASTER—LAY OF WHALING CATCH—CUSTOM AND USAGE — EVIDENCE—BURDEN OF PROOF.

1. A usage for masters of whaling vessels to wait for their lays until the owners shall choose to sell the oil is unreasonable and void.

2. It seems, that a master might, for a valuable consideration, bind himself so to wait in a particular voyage.

3. The burden of proving such an agreement is on the owners.

4. Such an agreement *held* not to be proved in this case.

5. The master is not to suffer a diminution of his lay for oil sold on credit and never paid for, though due diligence was exercised by the owner.

[Cited in Crowell v. Knight, Case No. 3,445.]

In admiralty. The libellant [G. W. Bourne] proceeded for his lay of one-thirteenth in the oil and bone procured on the Atlantic whaling cruise of the schooner William Martin, of which he was master, and the defendant [Heman Smith] was managing owner. The voyage began in November, 1867, and ended in September, 1868; and the libel was filed in March, 1871. The answer admitted the voyage and stated the amount of oil taken, but set up as a bar to the action, that on the arrival of the vessel, the libellant instructed and requested the defendant as agent of the vessel and her owners to take the oil and keep it until he should think it for the interest of all concerned to sell, which time has not yet arrived, excepting as to a small part thereof, which he sold to a person in good credit, and after due inquiry and care, but who has never paid for it. [Decree for libellant.]

C. T. Bonney, for libellant.

J. L. Eldridge, for respondent.

LOWELL, District Judge. A long series of careful decisions by Judge Sprague, rarely appealed from, and in no important particular varied by the circuit court, has settled the law of this court in respect to the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

rights and duties of the owners and men concerned in whaling voyages. The master and crew have no property in the oil, no voice in its disposition, no right to demand any specific portion of it, against the wish of the owners; their lays are wages, which, by consent, they may take in kind, but which in the absence of such consent, they are entitled to have paid them at the cash price in the port of delivery, as soon after the arrival of the vessel as the amount and quality can be reasonably ascertained.

Any possible hardship that this course of business may be supposed to cause to the owners, is compensated in this way: they have full power to sell in good faith enough oil to satisfy the demands of the seamen, and such a sale fixes the price, and they cannot suffer loss, or if they do not care to do that they are bound to account for the cash price only. Whether these decisions, which cover a great many particulars, not important to be mentioned now, were thought by the owners to be sufficiently favorable to them, I do not know; but they have certainly acquiesced in the greater part of them, and voyages are constantly settled by the rules so established. Some points which formerly rested on doubtful usages have now been incorporated into the contracts; such as the right to ship home oil in the course of the cruise, which appears to be a reasonable and useful modification of the agreement. Some others concerning charges to be made by the owners may still be disputable.

In the present case the defendant, at the hearing, asked leave to amend his answer by setting up a custom of the port of Boston, which is the place referred to in the articles, and is the home port of the schooner, for masters to wait until the oil is sold before receiving their wages. As the libellant was not prepared with evidence on this point, I refused to permit the amendment, excepting as laying a foundation for evidence before the assessor, if the case should go farther. Upon reflection I cannot bring myself to think that such a usage would be reasonable. The master is often poor, dependent for his support and that of his family on his earnings; the supposed usage gives him no property in the oil and no right to interfere in its disposition; the owners may often have reasons connected with their own business for putting off the sale, and they are sure to gain interest and expenses; and the supposed usage is altogether a one-sided affair which no court could tolerate. I shall therefore refuse to refer any such question to the assessor.

The defence besides undertakes to make out a contract by this master to wait for his lay so long as the defendant shall see fit to keep the oil, or any part of it unsold. That such a bargain might lead to a delay of more than two years and a half, this case plainly shows, and it would be very difficult to sustain such an agreement, as against the seamen, excepting upon the most plenary proof that it was entered into understandingly and for a valuable consideration. I do not remember that any of the numerous cases which deny the power of owners to incorporate unusual and onerous stipulations into their shipping articles, have applied that protection to the master, who is an agent of the owners, supposed to be a man of intelligence and capacity, and I am inclined to think that a master may, if he chooses, bind himself by a contract, which if set up as a usage would be unreasonable, or if imposed upon a crew would be oppressive.

The contract here set up, if expressed in common law terms, would be this: In consideration that the owners would give the libellant the advantage of any rise there might be in the price of the oil, he agreed not to demand his wages until the oil was sold. The parties are in direct conflict upon the question, whether such a bargain was ever made. I see no reason to doubt that the owners have acted in good faith, under a claim of right, and that they would have given the plaintiff the advantage of a rise. As oil has unfortunately fallen largely in price, this controversy was to be expected, and that is one objection to making such a bargain by parol. The burden of proving this special defence is on the defendant, and I do not think he has sustained it. Trying, as I always do, to give the utmost weight to the evidence on both sides, so far it appears to be honestly given, and looking to see a possible explanation of the apparent contradictions, I yet find it impossible to reconcile the statements of the only important witnesses, the parties to the action.

The master declares that he repeatedly asked for a settlement, and he proves that when he went on his next voyage in November, 1868, he left a power of attorney with a friend to settle his voyage. The friend swears that he demanded a settlement, but was told by the defendant that the libellant had agreed to wait till the oil was sold. On the other hand the defendant swears that neither the libellant nor his attorney ever demanded a settlement, but that they merely asked him when the oil would be sold, and consulted with him about it.

Such a contract ought to be proved by clear and decisive evidence, because it is in derogation of the rights of the master, and the parties do not stand on a footing of entire equality. Upon the weight of the evidence, including the improbability that the owner would make a definite bargain upon a subject which he considered to be regulated by usage as matter of right, I must hold that the defence is not made out. My decree must be for the libellant, with

a reference to ascertain the cash value of his lay within a reasonable time after the arrival of the vessel. Of course the libellant has no concern with the sale on credit, for it is not pretended that his contract required him to guarantee the sales as well as to wait till they were made, and the general rule is well settled that all such sales are at the absolute risk of the owners. Decree for the libellant.

BOURS (DESSAU v.). See Case No. 3,825.

Case No. 1,702.

In re BOUSFIELD et al.

[16 N. B. R. 481.][1]

District Court, N. D. Ohio. Nov. 9, 1877.

BANKRUPTCY—SALE TO CREDITOR—INADEQUACY OF PRICE.

A sale of stock to a creditor who holds it as collateral security for ten dollars per share when it is worth twenty-five dollars per share, will be set aside for inadequacy of price, and a resale ordered.

[On certificate of register in bankruptcy.]

Application to set aside a sale of stock. [Granted.]

Opinion of Register:

Diodate Clark, Caroline Kellogg, and Kitty Clark, are creditors of Bousfield & Poole, as follows:—

Diodate Clark	$10,283 50
Caroline Kellogg	5,141 00
Kitty Clark	2,673 32

As collateral security for the payment of these claims Diodate Clark, for himself and the others, held one hundred and nineteen shares of stock in the Ohio Wooden Ware Company pledged by the bankrupts. The assignee and the creditors were unable to agree as to what was the value of the stock as provided in section 5075 of the bankrupt act.

On July 20, 1876, the assignee and these three creditors filed with me a petition in which they state they cannot agree as to the value of the stock; that they believe a public sale would be the best way to determine its value, and ask me to make an order authorizing Diodate Clark, or any agent of his, to sell the stock at private auction to the highest bidder. In compliance with this request, on July 21, 1876, I made the following order: "That said Diodate Clark and any authorized agent of his be, and are hereby authorized and empowered to sell said one hundred and nineteen shares of Ohio Wooden Ware Company's stock, at public auction, to the highest and best bidder, on his having published notice of the time and place of such sale for at least ten days prior to the day of sale in the Cleveland Daily Herald, and that a report of such sale be made to me in writing, duly sworn to forthwith, after such sale, specifying the amount for which the same sold, and to whom sold." See 5 Law Rep. 303 [In re Grant, Case No. 5,690], for Judge Story's opinion, indorsing the mode of determining the value.

On August 5, 1876, George W. Calkins filed with me his affidavit that, as agent of Diodate Clark, he had caused the stock to be advertised and sold in pursuance of said order, and that the same was sold on August 5, 1876, to Diodate Clark, at and for ten dollars per share, making one thousand one hundred and ninety dollars, and also filed with his affidavit a copy of the notice of sale, with the affidavit of J. H. Faxon, bookkeeper for the Cleveland Herald, that said notice was published in the Cleveland Herald for ten days prior to the date of sale.

To this sale, on October 4, 1876, Frank W. Parsons, representing J. B. Hervey, a creditor of said bankrupts' estate, filed objections which are embodied in a statement duly sworn to by him, and are in substance as follows: That the sale of the stock was advertised to be held at the office of the Ohio Wooden Ware Company on August 5, 1876, between the hours of nine and ten a. m. He attended at the place named to bid on the stock, and was ready and willing to bid and pay for said stock the sum of twenty-nine dollars per share, but was informed the same had been sold for ten dollars per share. That about two or three weeks before said sale he had stated to G. W. Calkins that he would make him a standing offer for the stock of thirty-nine dollars per share, as it then stood, but that afterwards and before the sale a dividend had been declared reducing its value to twenty-nine dollars per share. The matter remained in this condition with the expectation on my part, for some time, that it would be adjusted, and then was overlooked until October 31, 1877, when I entered an order for a hearing on November 2, 1877, and served notices thereof on all parties.

November 2, 1877, the parties all appeared, and I proceeded to take the testimony of the following-named witnesses, in regard to the matter, viz.: Frank W. Parsons, J. M. Gorham, William C. Stahle, J. B. Hervey, George W. Calkins, Thomas F. Croty, and Wm. Waterman, which testimony was all reduced to writing, and is herewith returned. In my judgment the testimony taken establishes fully the following: 1st. That the sale of the stock was made at twenty minutes before ten o'clock a. m. on the 5th day of August, 1876. 2d. That it was conducted in the usual and ordinary way, in full compliance with the requirements of the order, and that every person connected with the sale acted honestly and in good faith. 3d. That the stock sold for ten dollars per share, where in fact its real value was twenty-five dollars per share. So that in my judgment there is no reason to set aside the sale and

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order a new one, unless the inadequacy in price at which it sold, as compared with its real value, is a good reason to do so.

The rule in England, as I understand it, is that a sale will not be set aside upon the ground of gross inadequacy of price, unless an agreement with bond is given to pay more. I am cited to a case in 4 W. Va. 600 (Sinnett v. Cralle's Adm'r), in which it was held as follows: "A sale of 1,700 acres of land for less than $5,000, will be set aside for inadequacy of price, upon affidavits of ten persons that the actual value was twice or thrice that sum." But I do not understand this to be the rule in this country, nor do I think the weight of authority supports this rule. I understand the rule to be as laid down in 62 Barb. 280 (Kellogg v. Howell), viz.: "A sale under a judgment will not be set aside in the absence of fraud, surprise, or well-grounded misapprehension, simply because a higher price can be reasonably anticipated on a resale of the premises." But I am inclined to think that this general rule does not prevail in a bankruptcy proceeding, where the court by its officers hold the estate for the benefit of all the creditors, and is required to look to the protection of the interests of all with great care. By repeated rulings, both under the bankrupt law of 1841 [5 Stat. 447], as well as the bankrupt law of 1867 [14 Stat. 524], this principle has been recognized, and to such an extent it would seem that a greater responsibility is thrown upon a bankruptcy court in that respect than upon an ordinary court of chancery.

In Bump, Fraud. Conv. (9th Ed.) p. 168, the author states as follows: "The court on application of any party in interest has complete supervisory power over such sales" (sales by assignees and officers of court), "including the power to set aside the same and order a resale, so that the property sold may realize the largest sum." Judge Dillon, in Re O'Fallon [Case No. 10,445], held as follows: "Where a public sale of the real estate is made by the assignee in bankruptcy, under the order of the bankruptcy court, and the property is struck off to the highest bidder, such sale is subject to the approval of the court, which has a discretion to refuse to confirm it for a mere inadequacy of price. It is not necessary that there should be fraud, or such gross inadequacy of price as to be evidence of fraud." Because of these authorities, and especially because of the decision of Judge Dillon above quoted, and for the reason that the one hundred and nineteen shares of stock sold for ten dollars per share, when the testimony shows that it was in fact worth twenty-five dollars per share, I recommend that an order be entered that the sale of the stock be set aside, and that another sale of it be ordered. It will be observed that this is a case where the rights of a third party, who has in good faith paid his money, do not intervene, the stock having been bid off by the creditor who held it as collateral security. There being opposition to this, I certify the same to your honor for determination.

M. R. Keith, Register in Bankruptcy.

J. M. Henderson, for assignee and exceptors.

Charles E. Pennewell, for creditors.

WELKER, District Judge. I have examined with care the foregoing opinion of M. R. Keith, register, and considered the arguments and authorities submitted by counsel in this case, and fully concur in the opinion as above given, and direct that an order be entered setting aside the sale in accordance with the recommendation of the register, and ordering another sale to be made.

[NOTE. For other proceedings in relation to the same bankrupt estate, see Cases Nos. 1,703, 1,704.]

Case No. 1,703.

In re BOUSFIELD & POOLE MANUF'G CO.

[16 N. B. R. 489.][1]

District Court, N. D. Ohio. Oct. 19, 1877.

BANKRUPTCY — PREFERENCE — PENALTY FOR RECEIVING — PROCURING FRAUDULENTLY — WHAT AMOUNTS TO.

1. The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference unless it appears that such bill of sale included more than the creditor was entitled to.

2. An intent to gain a preference, accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not come within the provisions of the bankrupt act, which impose penalties upon creditors who knowingly receive a preference.

3. All transactions to prefer a bona fide creditor come within the four months' clause of section 5128; the six months' clause applies to other creditors.

4. An effort to secure an honest debt from a failing creditor is not an actual fraud within the meaning of section 5021.

[On certificate of register in bankruptcy.]

In the matter of exceptions filed by the assignee to the claim of the Ohio Wooden Ware Company. [Exceptions dismissed.]

The Bousfield & Poole Manufacturing Company made an assignment under the state law to J. A. Reddington for the benefit of its creditors. On March 6, 1876, the Bousfield & Poole Manufacturing Company filed a voluntary petition in bankruptcy, and on March 8, 1876, was adjudged bankrupt. On September 26, 1877, the Ohio Wooden Ware Company proved in the usual form its claim on two notes, made by bankrupt, on which there was claimed due at the time of filing of the petition the sum of five thousand two

[1] [Reprinted by permission.]

hundred and ninety-two dollars and thirty-three cents. To this claim the assignee on September 27, 1877, filed exceptions, and asked that the claim be expunged for the reason: That, upon the books of the bankrupt, the Ohio Wooden Ware Company appear to be indebted to said bankrupt in a large sum, to wit, over thirteen thousand dollars. Issue was joined and the following questions arose: 1st. Whether the Bousfield & Poole Manufacturing Company has a set-off against the claim of the Ohio Wooden Ware Company. 2d. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of logs of bankrupt on September 8, 1875. 3d. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of zinc of bankrupt, on October 23, 1875. 4th. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of bankrupt of merchandise and manufactured articles, consisting of glue, washboards, woodenware, and other articles, in October, 1875.

Opinion of Register:

The first defence set up by the assignee is that there is existing upon the books of the bankrupt, an account which shows a balance due from the Ohio Wooden Ware Company, of more than sufficient to cancel its claim in this case, viz.:

On Ledger "C," page 53, a balance of	$10,919 53
On Ledger "C," page 179, a balance of	2,547 54
Total	$13,467 07

The testimony taken in the case shows substantially this state of facts in regard to these accounts.

Under date of September 8, 1875, there is a charge against the Ohio Wooden Ware Company for

250,000 feet of white pine timber, at $10.75	$ 2,687 50
1,000,000 feet of white pine timber, at $13.75	13,750 00
Total	$16,437 50

—Which amount went to make up the balance on Ledger C, page 179, of two thousand five hundred and forty-seven dollars and fifty-four cents. Mr. J. M. Gorham testifies, that of this amount of timber so charged at thirteen dollars and seventy-five cents per thousand, there was six hundred and eleven thousand two hundred and twenty-five feet which was never received by the Ohio Wooden Ware Company, and amounted to eight thousand four hundred and four dollars and forty-four cents. There is no testimony to contradict this, and I think the amount should be deducted.

Under date of October 23, 1875, there is a charge against the Ohio Wooden Ware Company, for

43 casks of sheet zinc	$5,512 27

It is agreed by the parties that this zinc was replevined by May & Co., of Boston, of whom it was purchased by the Bousfield & Poole Manufacturing Company, claiming that it was obtained from them by fraud, by the Bousfield & Poole Manufacturing Company, and that no title passed to either the Bousfield & Poole Manufacturing Company, or to the Ohio Wooden Ware Company; that a verdict was rendered in said case for May & Company, upon which a judgment was rendered, which is still in full force. From this it seems that the Ohio Wooden Ware Company obtained no title to the zinc charged against them, and received no benefit therefrom, and although the charge was proper at the time, it should be now stricken out, or a corresponding credit made.

Under date of August 7, 1875, there is a charge against the Ohio Wooden Ware Company for two notes:

One for	$2,597 50
And the other for	2,611 66
Total	$5,209 16

It is admitted by the parties, and the proof shows that these two notes are the two notes upon which the Ohio Wooden Ware Company makes proof of its claim in this case. Upon this state of facts the account would, in my opinion, stand as follows:

Ohio Wooden Ware Company, Dr.

Balance on Ledger "C," page 53	$10,919 53	
Balance on Ledger "C," page 179	2,547 54	
		$13,467 07

Ohio Wooden Ware Company, Cr.

By deficit on timber	$8,404 34	
By amount charged for the zinc	5,512 27	
		$13,916 61
Leaving a balance due the Ohio Wooden Ware Company of		$ 459 54

—Besides the amount due on the two notes embraced in the proof of claim. I am therefore of the opinion that no set-off exists against either one of these notes.

The second defense set up by the assignee is, that on the 8th day of September, 1875, the claimant, knowing that the bankrupt was insolvent, purchased of it timber and logs of the value of sixteen thousand four hundred and thirty-seven dollars and fifty cents, and thereby obtained an illegal preference, and that by reason thereof they are not entitled to prove only a moiety of their claim. The testimony shows that an arrangement was entered into between the bankrupt and the claimant for the purchase of logs, by which it was arranged and understood that the Ohio Wooden Ware Company should furnish the Bousfield & Poole Manufacturing Company with money to buy logs for both, it being understood that the Bousfield & Poole Manufacturing Company were to have about two-thirds of the logs, and the Ohio Wooden Ware Company about one-

third of them. The logs were purchased by and in the name of the Bousfield & Poole Manufacturing Company, and when brought to Cleveland were landed upon the dock of the Bousfield & Poole Manufacturing Company, that company having a dock and hoisting apparatus, and the Ohio Wooden Ware Company having none. From this pile of logs each would use as their necessities required, keeping an account of the amount used in what is called a log account. On the 8th of September, 1876, the Ohio Wooden Ware Company took from the Bousfield & Poole Manufacturing Company a bill of sale of all the logs remaining upon the dock, knowing at the time that the Bousfield & Poole Manufacturing Company was insolvent. It is evident from the testimony that the Ohio Wooden Ware Company furnished the money to the Bousfield & Poole Manufacturing Company for the purchase of logs for them, and with the understanding that the logs were to be delivered to them on the dock of the Bousfield & Poole Manufacturing Company at the cost thereof, and when delivered there they were entitled to take as many logs as the money which they had furnished had paid for. The logs were purchased on joint account, and in case no division had taken place before the bankruptcy the assignee could have been required to give an account to the Ohio Wooden Ware Company for the full amount of their interest in the logs. A separation of the interest of the Ohio Wooden Ware Company was made by the bill of sale on September 8, 1875. I think the testimony shows, and it seems to have been the understanding of the parties, that the Ohio Wooden Ware Company were the owners of so much of the logs as their money paid for. As the testimony does not show that the bill of sale was given to them for any more logs than they were entitled to, I am of the opinion that in taking the logs they received no preference, but only took what they had paid for, and that which in law belonged to them. The record shows that this is a voluntary petition, filed on March 6, 1876; the alleged preference occurred five months and twenty-eight days before the filing of the petition. I do not think that the testimony exposes any actual fraud, so as to bring it within the construction given by the courts to the six months' provisions contained in section 5129.

The third defense set up by the assignee is, that on the 23d day of October, 1875, the claimant, knowing that the bankrupt was insolvent, purchased of it forty-three casks of sheet zinc of the value of five thousand five hundred and twelve dollars and twenty-seven cents, and thereby obtained an illegal preference, and that by reason thereof they are not entitled to prove only a moiety of their claim. The testimony fully establishes that the officers of the Ohio Wooden Ware Company, at the time they received this zinc, knew that the Bousfield & Poole Manufacturing Company was insolvent; that they took it in payment of a pre-existing debt, and more than four months before the filing of the petition in bankruptcy, no consideration being paid at the time. The testimony further shows that the Bousfield & Poole Manufacturing Company, at the time transferred the zinc to the Ohio Wooden Ware Company, had no title, and conveyed no title, to the Ohio Wooden Ware Company, so that the Ohio Wooden Ware Company although it sought to obtain a preference, did not, in fact, obtain any. The bankrupt act, section 5084, provides that any person who has accepted a preference shall not prove his claim, etc. Section 5021 provides, that if the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended, such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt. The intent to obtain a preference accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not, in my opinion, come within those provisions of the bankrupt act which impose penalties upon creditors who knowingly receive a preference.

The fourth defence set forth by the assignee is that the Ohio Wooden Ware Company received an unlawful preference, by the purchase from the bankrupt of merchandise and manufactured articles, consisting of glue, wash-boards, woodenware, and other articles, in October, 1875. It will be seen on examination of the testimony that no evidence was offered to sustain this allegation.

A question arises as to whether any of these alleged preferences occurred within the time specified by the bankrupt act, which permits or requires the court to pronounce them fraudulent. They all occurred more than four months before the filing of the petition, and were acts to secure or pay a then existing creditor. The courts seem to have held that all transactions to prefer a bona fide creditor come within the four months' clause, section 5128: "After the lapse of four months the preferences—simple preferences—which an insolvent debtor may have made, are to be held valid as against all the world so far as the preferred creditor is concerned." See cases cited, ninth edition of Bump's Bankruptcy, pages 799 and 800. The six months' provision is held by the courts not to apply to cases arising between the bankrupt and a bona fide creditor, but between the bankrupt and others. See ninth edition of Bump's Bankruptcy, pages 828 and 829, and cases there cited: especially Bean v. Brookmire [Case No. 1,168]; Gibson v. Warden, 14 Wall. [81 U. S.] 244; Hubbard v. Allaire Works [Case No. 6,814]; Babbitt v. Walbrun [Id. 694].

Still another question arises, and that is whether a creditor who, more than four months before the bankruptcy, received a

preference, knowing that the bankrupt was insolvent, can prove his claim for more than a moiety. Section 5021 provides: "And such person (that is, the person receiving a payment or conveyance) if a creditor, shall not, in cases of actual fraud, be allowed to prove for more than a moiety of his debt." There is nothing dishonest or illegal in a creditor securing a debt due him from a failing debtor. He may take payment or security, knowing the insolvency, and there is no dishonesty or actual fraud in it. If, however, within the three months bankruptcy proceedings intervene, he may lose the payment or security thus honestly taken. If, however, the three months expires, his title to the payment or security taken has become perfect. But does the penalty prohibiting him from proving but a moiety of his claim remain? The statute in terms makes no limitation, but provides that no creditor shall, in case of actual fraud on his part, prove but a moiety of his claim. I can find no case deciding this question, but am inclined to the opinion that in cases of actual fraud this penalty remains. But what is the actual fraud specified? It is something more, in my opinion, than an effort to secure an honest debt. It contemplates some act of the creditor's which is actually fraudulent at the time it is committed. It does not, in my opinion, embrace the act of a creditor who attempts by proper and ordinary effort to secure an honest debt—which act may afterward become a legal fraud by reason of the filing of a petition and adjudication in bankruptcy. "A mere fraud on the bankrupt law by accepting a preference in violation of its provisions is not an actual fraud." In re Riorden [Case No. 11,852.] In my judgment the act of the Ohio Wooden Ware Company in obtaining the payment was honest at the time, and no actual fraud was committed by it so as to prevent it from having its entire claim in this case. I therefore recommend that the petition and exceptions filed by the assignee be dismissed, and that the claim be allowed.

M. R. Keith, Register.

C. B. Bernard, assignee in person.

Charles E. Pennewell and Benjamin R. Beavis, for Ohio Wooden Ware Co.

WELKER, District Judge. I have carefully examined the foregoing opinion of M. R. Keith, register, and considered the arguments and authorities submitted by counsel in this case, and fully concur in the opinion of the register, and direct that an order be made dismissing the petition and exceptions filed by the assignee; and that an order be made requiring the assignee to pay to the above-named creditor such dividend as other creditors of the same class may be entitled to receive.

[NOTE. For other proceedings relating to the same bankrupt estate, see Cases Nos. 1,702 and 1,704.]

Case No. 1,704.

In re BOUSFIELD & POOLE MANUF'G CO.

[17 N. B. R. (1878) 153.][1]

District Court, N. D. Ohio.

BANKRUPTCY — ASSETS RECEIVED FROM ASSIGNEE UNDER STATE LAW—RIGHTS OF CREDITORS—ACTION BY CREDITOR—FAILURE TO JOIN ASSIGNEE —INTEREST ON CLAIM — JUDGMENT OF UNITED STATES—PROOF OF PRIORITY.

1. Where an adjudication has been had and an assignee under the state law has surrendered the estate in his hands, the rights of creditors are to be determined by the court under the provisions of the bankrupt law, and not under those of the state law.

2. Where leave has been granted to a creditor, pursuant to the provisions of section 5106, to proceed in a cause which was then pending, a judgment obtained therein is valid, although the assignee is not made a party.

3. Interest upon the claim accruing after the commencement of the proceedings is allowable.

4. Where the United States has recovered a judgment in such an action, such judgment, including the damages, costs, and interest, is entitled to priority, and no proof of the claim need be made.

[On certificate of register in bankruptcy. Exceptions to claim. Overruled.]

Opinion of Register:

In the above named case the United States, on the 2d day of September, A. D. 1876, filed proof of a claim against said estate amounting to twenty-one thousand one hundred and twenty-seven dollars and seventy-six cents, with interest thereon from April 4, 1876, which claim is upon a judgment rendered in the circuit court of the United States at the April term thereof, 1876. On the 27th day of September, A. D. 1877, John C. Lee, attorney for the United States, filed a motion asking for an order on C. B. Bernard, the assignee, to pay said claim with interest up to the present time, in full, out of the money now in hands. And thereupon, at the same time, C. B. Bernard, the assignee, appeared and filed the exceptions to said claim.

The first objection is, that, prior to the proceedings in bankruptcy having been commenced, the bankrupts made a general assignment for the benefit of their creditors to J. A. Reddington, and thereby the status of all creditors became fixed so as to be governed as to any preference by the laws of the state of Ohio, and that as the laws of the state of Ohio gave no preference to the United States, it could obtain none by virtue of the bankrupt proceeding. It appears that the assignee under the state law has surrendered the entire estate to the assignee in bankruptcy. In my judgment, by virtue of the adjudication in bankruptcy, and the surrender of the estate to the assignee in bankruptcy, the district court obtained full jurisdiction of the estate. If I be correct in this, then the district court obtained full jurisdiction to administer the estate under the bankrupt act, and in accordance with its provisions, so that whatever might

[1] [Reprinted by permission.]

have been the result if the state assignment had proceeded, the estate has now to be settled under the provisions of the bankrupt act. In my judgment, the jurisdiction of the district court having attached, the rights of creditors are to be determined by the court under the provisions of the bankrupt law, and not under the provisions of the state law.

The second objection is, that the assignee under the state law held the estate in trust for the creditors, and the turning over the estate by him to the assignee in bankruptcy works a great injustice to the other creditors. This may be true in its practical effect, but if the district court obtained full and complete jurisdiction over the estate, by virtue of the proceedings in bankruptcy, I can see no way but that the estate must be settled under and in accordance with the provisions of the bankrupt act, and not in accordance with the provisions of the state law governing assignments. If the provisions of the state law are to govern in one respect, then it may, with equal force, be claimed that they should govern in all respects—which would render the bankrupt act nugatory.

The third objection is, that the assignee was not made a party in the suit in which the judgment is rendered, and therefore the judgment was nugatory and void. It appears by the proof that the court granted leave to the claimant to proceed with said case, which was then pending in court in pursuance of the provisions of section 5106. No order was made requiring the assignee to be made a party, and I know of no law requiring that to be done. Section 5047 is only permissive, and provides that the "assignee may defend the same as the bankrupt might." As there is no law requiring the assignee to be made a party, and as the court had full jurisdiction by service of a summons upon the parties, I think the judgment is valid. The fourth objection as well as the fifth objection are disposed of by the above opinion on the third objection.

The sixth objection is, that no creditor whose debt is provable shall be allowed to prosecute to a final judgment, any suit at law or in equity therefor against the bankrupt, until question of the debtor's discharge shall have been determined. The same section which contains the above provision, viz., section 5106, also provides, "that if the amount due the creditor is in dispute, the suit by the leave of the court in bankruptcy may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy." It appears by the proof that, for some reason satisfactory to the court, leave was granted to proceed with the case to judgment, and judgment was rendered. What facts or arguments were presented to the court to induce this I do not know, nor in this proceeding can that be inquired into; it is enough that a judgment was rendered and the forms of law complied with.

The seventh objection is an objection to charging the costs accruing in that case against the estate. This is governed by the bankrupt act, which provides that the case "may" proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy. This says nothing about the costs, but seems by its language to provide that nothing but the amount found due shall be proved in bankruptcy. Section 5101 provides that the estate shall be distributed as follows: First. To pay all costs. Second. To pay all debts due to the United States, and all taxes and assessments under the laws thereof. There can be no doubt but that the record shows the entire judgment, damages and costs, as a debt due to the United States. For this, under the provision above quoted, it is entitled to priority of payment, and is not bound to make proof of the claim. See Lewis v. U. S. [92 U. S. 618]. In my opinion the objection is not valid.

The eighth objection is an objection to paying any interest in the claim after the commencement of the proceedings in bankruptcy. Section 966, Rev. St., provides that interest shall be allowed on all judgments from the date of the rendition of the judgment, and section 5101, above quoted, provides that after the payment of costs all debts due to the United States shall be paid. I am therefore of the opinion that this exception should be overruled.

I recommend said exceptions be overruled, and that an order be allowed directing the assignee, from the money in his hands belonging to the said estate, to pay the entire claim of the United States, including damages, interest and costs. All of which is respectfully presented.

M. R. Keith, Register in Bankruptcy.

C. B. Bernard, for the estate.

John C. Lee, Dist. Atty., for the United States.

WELKER, District Judge. I have carefully examined the foregoing opinion of M. R. Keith, register, and fully considered the arguments and authorities submitted by the counsel in this case, and fully concur in the opinion of the register, and direct that an order be made, as recommended by him, directing the assignee to pay, out of the moneys in his hands belonging to the said estate, the claim of the United States, being the amount of the judgment, including costs and interest on the judgment to the time of payment.

[NOTE. For other proceedings in relation to the same bankrupt estate, see Cases Nos. 1,702 and 1,703.]

BOUTEILLE (CASTELLO v.). See Case No. 2,504.

Case No. 1,705.

In re BOUTELLE.

[2 N. B. R. (1868) 129 (Quarto, 51);[1] 15 Pittsb. Leg. J. 616; 1 Chi. Leg. News, 30.]

District Court, D. New Hampshire.

BANKRUPTCY—DISCHARGE—WHO MAY OPPOSE.

Creditors who have not proved their debts can oppose discharge of bankruptcy; but they must prove, or it must clearly appear from the evidence before the court, that they are bona fide creditors, or the appearance will be denied.

[Cited in Re Murdock, Case No. 9,939; Re Groome, 1 Fed. 469.]

In bankruptcy.

CLARK, District Judge. Hendricks D. Batchelder, a creditor named in the schedule, but proving no debt, moves for leave to appear and resist the discharge of the bankrupt. This motion raises the question whether a creditor who has not proved his debt can be allowed to oppose the discharge of a bankrupt. The twenty-ninth section of the act of March 2d, 1867 [14 Stat. 531], provides: "That upon an application for a discharge by a person adjudged bankrupt, the court shall order notice to be given by mail to all creditors who have proved their debts. and by publication at least once a week in such paper as the court shall designate," to appear, &c. Now if only such creditors as have proved their debts are to be notified to appear, the inference is very strong that no others are expected or allowed to appear, unless there is something else in the act or proceedings which will authorize it.

It seems to be the policy of the bankrupt law to divide the bankrupt's property among his creditors—but to treat none as creditors who do not prove their debts. All creditors named in the schedule are served with notice of the proceedings, that they may come in and prove their debts—but they are not allowed generally to act until they have done so, as against the other creditors, estate or assignee. The various provisions of the act seem to indicate very clearly that no creditors, except such as prove their debts, should "have part" in the proceedings. Thus: Section thirteen. The creditors shall choose an assignee—the choice to be made by the greater part in value and in number of those who have proved their debts. Also —The judge may, on "request in writing of any creditor who has proved his claim," require the assignee to give bond. Same section. Creditors may, with the consent of the court, remove an assignee "by such vote as herein provided for the choice of an assignee," that is, by a majority in number and value of those who have proved their debts. Section 18. The same section provides for filling vacancies in the same manner. And here it is to be remarked, that notice is to be given to all known creditors—but only those who have proved their debts can act. All are notified, because, if they will, they can prove their debts, and act. All creditors, whose debts are duly proved, shall be entitled to share, &c. Section 27. "The court shall thereupon order notice to be given by mail to all creditors who have proved their debts." Section 29. No person shall be entitled to a second discharge "unless the assent in writing of three-fourths in value of his creditors who have proved their claims," &c. Section 30. In all proceedings "commenced after one year" no discharge shall be granted to a person whose assets do not pay fifty per centum, unless the assent of a majority in number and value of creditors who have proved their claims is filed in the case, &c. Section 33. Section forty-three provides that if three-fourths in value of the creditors, whose claims have been proved, shall determine, &c. Such proceedings are to bind a creditor whose debt is provable, in the same manner as if he had proved his debt. Generally, in all legal proceedings, a person must be a party on the record to entitle him to appear in a suit. Sometimes the party in interest may appear, but he is usually obliged to connect himself with the cause by becoming responsible for the costs, or in some other way.

Under the English bankrupt law, the practice is to admit only those who have proved their debts, to come in and resist the discharge. James, Bankr. 134. Such was the practice under the act of 1841; and it is noticeable that, the language of that act (5 Stat. 443, § 4) provides that notice shall be given to all the creditors, who have proved their debts, and other persons in interest, to appear and show cause why a discharge should not be granted. Yet the court allowed none but creditors who had proved their debts to appear. And in the case of Morse v. Presby, 5 Fost. [N. H.] 299, it was held that notice need be given only to creditors who had proved their debts—a narrow construction of the statute, as the court remarked, but following the rule of the United States court. These provisions and citations would seem to show it to be the intent of the law, that none but creditors who had proved their debts, should be allowed to appear to resist the discharge of the bankrupt. It is true that the discharge will bar the debt of a creditor which is provable and not proved, and it would seem to be equitable that he should have an opportunity of resisting and defeating a discharge, which will bar his debt; and the decision of Hall, J., in Re Shepard [Case No. 12,753], in the northern district of New York, goes upon the ground that a party cannot be bound by proceedings of which he had no notice. But it must be remembered that in the adjudication in bankruptcy, notice goes to all creditors named in the schedule, and to others whose names the debtor may furnish, (section 11 of

[1] [Reprinted from 2 N. B. R. 129 (Quarto, 51), by permission.]

the act of 1867,) to come in and prove their debts, and thus become a party to the proceedings, and if he will not, a creditor cannot well complain that the proceedings, so far as he is concerned, are "ex parte." He has a notice and an opportunity. He might be a party if he would, by proving his debt, but he will not; he then cannot complain.

There may be cases where a party could not prove his debt without sacrificing his interests, but they are generally protected by the act. In the northern district of New York, in Re Shepard [supra], it has been held by Judge Hall, that a creditor who had not proved his debt might come in and resist the discharge. In Re King [Case No. 7,784], it was held to the contrary in the southern district, and also by Judge Sherman in the southern district of Ohio. So far, I should be inclined to the opinion that a creditor who had not proved his debt should not be admitted to resist the discharge, but by section ten of the act of March 2d, 1867, the justices of the supreme court of the United States are directed to frame orders, among other things, "for regulating the practice and procedure of the district court in bankruptcy, and the several forms of petitions, orders and other proceedings to be used in said court in all matters under this act."

Pursuing this provision of the statute, the supreme court have framed certain orders, and one upon the application of a bankrupt for a discharge. It is number fifty-one of the general orders—and is in these words: "District of ——, ss.: On this —— day of ——, A. D., 18—, on reading the foregoing petition (petition for a discharge) it is ordered by the court that a hearing be had upon the same on the —— day of ——, A. D., 18—, before said court, at ——, in said district, at —— o'clock m.; and that notice thereof be published in —— newspapers printed in said district for —— times, once a week, and that all creditors who have proved their debts, and other persons in interest, may appear at said time and place, and show cause, if any they have, why the prayer of said petition should not be granted." This language is specific—that other persons in interest, besides creditors who have proved their debts, may appear. It cannot be misunderstood.

The order purports to be the order of the district court, but it is prescribed by the justices of the supreme court of the United States in pursuance of the statute, and is as binding upon the district court as if prescribed by the statute totidem verbis. The interest is a pecuniary one, and must be proved to the court—but when it is shown satisfactorily, this court must give effect to the order. It may have its discretion and say how the interest shall be shown—what proof shall be required and received, but when the proper proof is made the court cannot refuse the party interested the opportunity to appear and oppose the discharge of the bankrupt.

In the case before the court the bankrupt has placed the name of the applicant as his creditor in his schedule of debts. He says he owed him the sum of four hundred and thirty dollars, but that the creditor has security of the value of five hundred dollars, which he has sold, of which sale he, the creditor, retains the proceeds. There is no evidence for what sum the security held by the creditor was sold, nor its value, except the statement in the schedule, to wit: five hundred dollars. This is the only evidence of the applicant's interest. He shows nothing further. He has commenced a suit against the bankrupt, which is still pending; but no judgment has been had, and the suit cannot proceed even to ascertain the amount due, without the consent of this court. There is no evidence that anything is due on that suit, and the court cannot presume that the security sold by the creditor brought less than its value. The applicant does not show a sufficient interest to entitle him to appear and resist the debtor's discharge, and the application is therefore denied.

Case No. 1,706.

In re BOUTON.

[5 Sawy. 427.] [1]

District Court, D. California. March 7, 1879.

BANKRUPTCY—PETITION — QUORUM OF CREDITORS —SOLICITATION BY DEBTOR TO JOIN IN PETITION.

1. In computing the aggregate of provable debts and also the amount of debts represented by the petitioning creditors, secured debts must be eliminated from the calculation. Debts partially secured must be reduced by the amount of the security, and all offsets due the debtor deducted. Debts barred by the statute at the time of the commencement of the proceedings are not to be included in the computation.

2. Lawful solicitation by a debtor to induce his creditors to sign a petition against him in involuntary bankruptcy is permissible.

[See In re Saunders, Case No. 12,371; In re Israel, Id. 7,111; also, In re Jewett, Id. 7,305; In re Hazens, Id. 6,285.]

[In bankuptcy. Objections by intervening creditors to petition to adjudicate E. Bouton an involuntary bankrupt. Overruled.]

E. H. Risford, for bankrupt.

O. P. Evans, for intervening creditors.

HOFFMAN, District Judge. Certain creditors of the above-named alleged bankrupt having filed a petition praying his adjudication as an involuntary bankrupt, other creditors intervened, alleging that the creditors who had joined in the petition did not constitute the necessary statutory quorum. The alleged bankrupt thereupon filed a list of his creditors, and an additional or supplemental petition was filed by other creditors, who desired to join in the proceedings. The matter was thereupon referred to the regis-

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

ter to take proofs as to the number of creditors who had signed, and the proportionate amount of provable debts represented by them. He has reported the testimony taken by him, which is very voluminous.

In computing the aggregate of provable debts, and also the amount of debts represented by the petitioning creditors, secured debts must be eliminated from the calculation. Debts partially secured must also be reduced by the amount of the security, and all offsets justly due to the debtor should in like manner be deducted. In re California Pac. R. Co. [Case No. 2,315]. Debts barred by the statute of limitations must also be omitted from the calculation. But this observation applies only to debts outlawed at the time of the commencement of the proceedings in bankruptcy.

If the calculation be made on these principles, it will be found that the debts represented by the petitioning creditors very considerably exceed the proportion of the total indebtedness required by the statute. This result will not be affected by the rejection of the debts which are open to controversy or suspicion. The validity of the debts of this latter class it will be the duty of the assignee to rigorously investigate.

The objection that the court has no jurisdiction, by reason of the repeal of the statute, is wholly untenable. Jurisdiction was acquired by the filing of the original petition, and the right to continue and complete the proceedings is expressly reserved by the repealing act. Some evidence tending to show what is called "collusion," has been adduced. It may be conceded that the proceedings were taken with the knowledge and consent of the debtor, and in the case of some of the petitioning creditors, at his instigation, or that of his attorney. But it has been held that lawful solicitation by a debtor to induce his creditors to sign a petition against him in involuntary bankruptcy is permissible. It is enough if they are really creditors, and no advantage over the rest of the creditors is offered or sought to be gained by them. In re Duncan [Case No. 4,131].

The only difference between an involuntary and voluntary proceeding is, that in the former case the debtor is not obliged to procure the assent of one fourth in number and one third in value of his creditors to his discharge. That assent is presumed to have been given by their joining in the petition. But in a voluntary case, the bankrupt may obtain by lawful solicitation the requisite assent; and as observed by the learned judge in the case last cited, there is no reason why he may not resort to the same means to procure them to unite in the petition against him, and thus secure the same result.

I am of opinion that on the issue tendered by the intervening creditors, viz., as to whether the requisite quorum of creditors have joined in the petition, the proofs are in favor of the affirmative. A decree of adjudication will, therefore, be entered. In the computation of the quorum of petitioning creditors, I have excluded Mrs. Bouton and her debt. It has repeatedly been held that a preferred creditor has no standing in a court of bankruptcy to proceed for adjudication against the debtor for the very act to which the creditor has been a party. 2 Lowell, 438 [In re Currier, Case No. 3,492]. I have included in the computation the debts due Dike Bros. and the Flint & Sand Co., as the objections to their allowances seem to me untenable.

Case No. 1,707.

BOUTOUR v. PECKHAM.

[Cited in Re Masterson, Case No. 9,268. Nowhere reported; opinion delivered orally, and not recorded.]

Case No. 1,708.

BOUTWELL v. ALLDERDICE.

[2 Hughes, 121.] [1]

Circuit Court, E. D. Virginia. May, 1876.

FEDERAL COURTS—DISTRICT COURT—JURISDICTION IN BANKRUPTCY.

The United States court, as a court of bankruptcy, being always open and having no separate terms, may examine any order or decree which may have been given in a pending cause, and set aside and vacate it upon a proper showing; provided, rights have not become vested which would be disturbed by so doing.

[Petition to review an order of the district court of the United States for the eastern district of Virginia.]

Petition for review. The former assignee in bankruptcy, [William H.] Allderdice, had been required to settle his accounts, and these were referred to Atkins, special commissioner, for defendant. The report was returned on the 10th May, 1875, showing a considerable balance due from the assignee, who excepted to parts of the report. About the middle of August following Allderdice absconded, and another assignee was soon afterwards appointed. On the petition of this substituted assignee an order was granted on the 23d of August, 1875, before a final hearing of the exceptions to the commissioner's report, and for the purpose of giving the substituted assignee the benefit of a judgment and execution lien upon the real and personal estate of Allderdice, overruling his exceptions to the commissioner's report, confirming the report, and directing execution to issue forthwith for the amount shown by the report to be due. Thus matters stood until March 6th, 1876, when counsel for Allderdice asked for a recommittal of the commissioner's report for the purpose of modification, and an order was granted, so far

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

modifying that of August, 1875, as to allow a revisal of the former assignee's accounts by the commissioner. Thereupon, the substituted assignee petitioned the circuit court for a review. [Dismissed.]

WAITE, Circuit Justice. The order of March 6th, 1876, which we are asked to review, does not in any respect modify or suspend that of August 23d. That remains in full force. The district judge has, in his discretion, seen fit to entertain a motion for a re-examination of the accounts of Allderdice, and has sent them to a master with new instructions. This he had the right to do. "A proceeding in bankruptcy from its commencement to its close is but one suit. The district court for all the purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation." Sandusky v. First Nat. Bank of Indianapolis [23 Wall. (90 U. S.) 289]. Any proceeding which may have been instituted for the collection of the amount adjudged due by the order of August 23d, is not affected by the order of March 6th. If a lien has been acquired in that proceeding it still continues, notwithstanding what has as yet been done by the district court, and if upon further examination of the accounts it shall appear that the order of August 23d should be modified, it may be done in a manner not to destroy the security to the extent that it may be properly enforced. The petition for review is therefore dismissed.

BOUTWELL (GALVIN v.). See Case No. 5,207.

Case No. 1,709.

BOUYSSON et al. v. MILLER et al.

[Bee, 186.] [1]

District Court, D. South Carolina. July 9, 1802.

ADMIRALTY—FOREIGN ATTACHMENT.

Attachments may issue out of the admiralty courts of the United States, against the goods or debts of an absent person, so as to make him a party to the suit.

[Cited in Manro v. Almeida, 10 Wheat. (23 U. S.) 467; Reed v. Hussey, Case No. 11,646; Smith v. Miln, Id. 13,081; Wilson v. Pierce, Id. 17,826; Atkins v. Fibre Disintegrating Co., 18 Wall. (85 U. S.) 305; The Alpena, 7 Fed. 363; Card v. Hines, 36 Fed. 575; The Bremena v. Card, 38 Fed. 145. Distinguished in Atkins v. Fibre Disintegrating Co., Case No. 602.]

[See Clarke v. New Jersey Steam Nav. Co., Case No. 2,859; Atkins v. Fibre Disintegrating Co., 18 Wall. (85 U. S.) 272; Manchester v. Hotchkiss, Case No. 9,004. Contra, New England Ins. Co. v. Detroit Nav. Co., Id. 10,154; McGrath v. The Candalero, Id. 8,810.]

[In admiralty. Libel by Bouysson and Holmes against Miller and Ryley. Respondents' demurrer to the libel overruled.]

BEE, District Judge. The question before the court arises on a demurrer to the libel in this cause, which, though not expressly a plea to the jurisdiction, is intended to operate as such. The arguments of the counsel for the defendants suppose that this court cannot issue attachments against the property of absent debtors, so as to make them parties to a suit in the admiralty. It is contended that the court can proceed in rem, or in personam, but that an attachment against property is a different proceeding, and cannot issue from hence. Or, admitting that it could, can operate only against property on the high seas, or within the flux and reflux of the sea; as laid down in Clarke's Praxis, § 24. It was also contended that if this doctrine be admitted, third persons may be deprived of their property without a trial by jury. That when courts of common law have jurisdiction, this court has none. That as the court is not one of record, it must always shew its authority. That of the two clauses (24th and 28th) quoted from Clarke, the one is positive and the other not so; and that unless they are so construed as to be reconciled with each other, the authority is ambiguous.

On the other side it was said, that by the laws of the United States, vol. 2, p. 139 [Act Sept. 29, 1789; 1 Stat. 93, § 2], the proceedings in every admiralty cause must be according to the course of the civil law. That Clarke's Praxis is of the highest authority to shew what is the practice of courts of admiralty, as appears from 1 Atk. 296; 3 Durn. & E. [3 Term R.] 338; and 3 Bl. Comm. 108. That the practice as to attachments against the property of absent debtors, was peculiar to civil law courts, and has been adopted from thence, in some instances, by the courts of common law. And that when this court has original jurisdiction, it will extend it to all collateral matters.

This is a new question, and makes it necessary that the jurisdiction of this court as to matters civil and maritime should be investigated. By the 9th section of the judiciary law of congress [Act Sept. 24, 1789; 1 Stat. 76], it is declared that district courts, in addition to other powers therein mentioned, (and by subsequent acts, extended) shall have exclusive original cognizance of all civil causes of admiralty and maritime

[1] [Reported by Hon. Thomas Bee, District Judge.]

jurisdiction. Hence it acts both as an instance and prize court, and its authority to do so was settled by the supreme court of the United States, in Glass' Case. See Dallas's Reports [3 Dall. (3 U. S.) 6]. In England, the court of admiralty, as court of prize, proceeds in rem; as an instance court, both in rem and personam. As both jurisdictions are united here, we must next inquire how they are to be exercised. The act of congress, 8th May, 1792 [1 Stat. 276, § 2], declares that the proceedings in cases of admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages of courts of admiralty, as contradistinguished from courts of common law. Clarke's Praxis has hitherto been looked upon as the best book of its kind, and has been resorted to as of uncontraverted authority. The authorities already quoted recognize it as such. By the 24th section of this book we are told, that the contents of the preceding chapters must be understood of defendants personally arrested in a civil cause. But, "if he is out of the kingdom or so absconds that he cannot be arrested, then if he has any goods, wares, ship, or parts of a ship or vessel upon the sea, or within the flux and reflux of the sea, a warrant is to be taken out to these effects." The 28th clause goes further. "Sometimes the person to whom you have lent money, or who is indebted to you upon some maritime contract, cannot be met with, to be arrested, or has no goods that the marshal can come at, but you know where and in whose possession your debtor's goods are, or at least some person that owes your debtor money; in that case, you may sue out a warrant to the effect of the one specified in the 24th chapter." The English practice of admiralty courts is clear from these sections, in the cases therein stated. Courts of admiralty in this country are recently established, and furnish few precedents; but such as we have are conformable to the practice as laid down by Clarke.

As this is a suit for seamen's wages, it must be admitted that it relates to a contract of a maritime nature. This court, therefore, has jurisdiction of the original matter, and no less of what is merely incidental. Hopk. 140 [Dean v. Angus, Case No. 3,702]. I am of opinion, therefore, that the proceeding by attachment is agreeable to the rules and usage of admiralty courts. If the actors cannot proceed in this way, they lose all remedy whatever may be their right of action. To attach a debt works no greater injury, as it appears to me, than the attaching of goods; the party is not thereby deprived of any advantage which he could claim if personally arrested, the attachment operating only to bring him before the court. The principal question, being of admiralty jurisdiction, must be tried in this court, and in case of a decision against him, his attached goods or debts stand in the place of his person, unless he appears and redeems them.

As to depriving third persons of a trial by jury, it may be observed, that if the property of such persons be attached, they may appear, and, upon proper proof, may have it restored. I see nothing in the case of Del Col v. Arnold, 3 Dall. [3 U. S.] 333, to controvert what I have laid down. The fourth point investigated there was: "Whether the ship and her cargo could, before condemnation, be attached, and made liable in that suit to the captors;" and this strengthens the present decision, inasmuch as it implies that, after condemnation, such attachment would have been regular. Besides, the general question of the power in this court to issue attachments like the present was not before them, nor does any thing in that report tend to divest it of the jurisdiction it is called upon to exercise against the present defendants.

I have fully considered the circumstances and arguments brought before me, and am clearly of opinion, that attachments against the goods or debts of absent persons may issue out of this court of admiralty. Therefore, let the demurrer be overruled.

[NOTE. For trial of this case upon the merits, see Case No. 1,710.]

Case No. 1,710.

BOUYSSON et al. v. MILLER et al.

[Bee, 190.] [1]

District Court, D. South Carolina. Aug. 13, 1802.

SEAMAN—WAGES—CAPTURE OF VESSEL.

Owners decreed to pay the usual monthly wages, upon proof of the voyage, and of the mariner's doing duty on board. The vessel was captured.

[See, as to the effect of capture upon seamen's wages, Emerson v. Howland, Case No. 4,441; Philips v. McCall, Id. 11,104; Brown v. Lull, Id. 2,018; Pitman v. Hooper, Id. 11,185; Williams v. The Juno, Id. 17,724; Girard v. Ware, Id. 5,460.]

[In admiralty. Libel by Bouysson and Holmes against Miller and Ryley for seaman's wages. Decree for libellant Holmes, and libel dismissed as to Bouysson.]

BEE, District Judge.

In this case wages are claimed of the defendants, as owners of a vessel called the William and Sarah, which left this port in April 1802, bound, as is alleged, to the coast of Africa. The libel states that she was captured by a Spanish privateer, on the coast of South America, and sold. No evidence is adduced either as to the extent of the voyage, the rate of wages, or time of their becoming due. Holmes claims from this port; Bouysson from Sierra Leone. The cause of capture of the vessel is wholly in the dark.

[1] [Reported by Hon. Thomas Bee, District Judge.]

Several witnesses have been examined; their testimony amounts to this: that in the beginning of April 1800, Holmes, one of the actors, applied to one Thomas Covenay to be his security for his advance money, on board this vessel, in case he should not comply with his agreement to go the voyage. It seems that Covenay declined to do so. M'Lane proved that Holmes took some stores from his house in company with the captain of this schooner. He says the vessel was then about to sail for Cape de Verd. He did not see the things carried on board. John Watson says that about two years ago he saw Holmes, as cook to Captain Harris, come to his store, with the captain. He saw him several times carry things on board; and understood from Harris that he was going to the coast of Africa. Gardner says that he was at Bance Island, on that coast, and saw Holmes on board a schooner called the William, from Charleston. He was generally about the camboose. He had known Holmes in this port, and they were together about a fortnight at this island. Morrison proves that, in the month of March last, Holmes came on board his vessel at the Havanna, and asked for a passage to Charleston, which was given him. There is no further evidence respecting Holmes.

An affidavit has been produced on the part of Bouysson, which is inadmissible, first because he is a party concerned; and secondly, because he was present in court, and should have been examined viva voce, if at all. A case has been quoted from Bay's Reports, 453, to shew that the affidavit of a party interested may be admitted as evidence. But, two circumstances of that case are wanting here; for, the defendant there agreed expressly to be bound by the affidavit; and the person who made it was absent. No other testimony is offered to support Bouysson's demand, except that of Henry Wessner, who says he was at Sierra Leone, on the coast of Africa, from May to July 1800. That some time in June he heard the captain of this schooner tell Bouysson's landlady that if she would bring him her bill, he would pay it. That he saw Bouysson carry his clothes on board, and the landlady told him the captain had paid the money.

This suit has assumed different shapes. A libel was filed in April last against Miller and Morrison, as owners of this vessel, by the present actors. A plea was filed by Morrison on the 3d May, setting forth that he never had any interest in the vessel or cargo, either as owner, or otherwise; and, that Miller was absent from the state. Upon this, another suit by attachment against the property of Miller and Ryley, was instituted. To this, a demurrer was interposed, and, upon argument, overruled [Case No. 1709], and then the parties upon whom the attachment was served, filed their answer of the 7th instant. These persons disclaim any knowledge of the actors, or of the matters stated in their libel, except from the information of the actors themselves. They believe Miller and Ryley, who are absent from the state, to be owners of this schooner. It is admitted that Thomson, one of the defendants, is agent for Miller and Ryley. Stipulations have been entered into according to the practice of the court, that if a decree be given against the absent parties, these defendants will be answerable to the amount.

From the pleadings little can be inferred. None of the defendants are interested in the suit, except as garnishees. What they acknowledge is mere hearsay, and not sufficient to affect the owners of the schooner. We are compelled therefore to have recourse to such proof in support of this libel, as has been already stated. As to Bouysson, there is no evidence of a contract for wages, nor of any voyage by him performed. He was in a distant country, and must naturally have wished to return home. What the amount paid to the landlady was we do not know, but it probably discharged any demand he was entitled to make. As to him, I must therefore dismiss the libel.

The testimony in favour of Holmes is much stronger. It is proved to my satisfaction that he acted as cook on board this vessel in the harbour of Charleston, and afterwards went in her, in the same capacity, to the coast of Africa. A determination similar to this took place two years ago, in the case of a vessel belonging to Tunno and Price, of this place, condemned at Majorca. Let Holmes, therefore, receive his wages for two months, as it appears probable that he found security for a month's pay in advance, though Covenay declined to become so. No rate of wages having been fixed, I decree that the defendants pay the same at thirty dollars per month, with costs of suit.

[NOTE. For decision overruling a demurrer to the libel, see Case No. 1,709.]

Case No. 1,711.

BOVING et al. v. LAWRENCE.

[1 Blatchf. 607.][1]

Circuit Court, S. D. New York. Oct. Term, 1850.

CUSTOMS DUTIES—VERMILION — MERCURIAL PREPARATIONS.

Vermilion, invoiced as such, and known in commerce by that name, although, chemically speaking, it is a mercurial preparation, is, under the tariff act of July 30th, 1846 (9 Stat. 42), subject to a duty of 20 per cent. ad valorem under Schedule E, being specifically named therein. It is not included under "mercurial preparations" in Schedule D.

At law. This was an action [by Herman Boving and Melchior Wiltie] against [Cornelius W. Lawrence] the collector of the port

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

of New-York, to recover back an excess of duties paid on vermilion. It was charged with a duty of 25 per cent. ad valorem under Schedule D of the tariff act of July 30th, 1846 (9 Stat. 46), as a mercurial preparation. The plaintiffs claimed that it was only liable to a duty of 20 per cent. ad valorem under Schedule E, as vermilion. A verdict was taken for the plaintiffs, subject to the opinion of the court on a case to be made.

NELSON, Circuit Justice. The article in question was invoiced as vermilion, and is bought and sold, and known in trade and commerce, under that denomination, and falls, therefore, under the enumeration of "vermilion" in Schedule E. Chemically speaking, it is according to the evidence, a mercurial preparation, but if it had been intended by the framers of the act to include it under the description of "mercurial preparations" in Schedule D, it would not have been carried into the list by name under Schedule E. Judgment for plaintiffs.

Case No. 1,712.

BOVING et al. v. LAWRENCE.

[1 Blatchf. 616.][1]

Circuit Court, S. D. New York. Oct. Term, 1850.

CUSTOMS DUTIES—GARDEN SEEDS.

1. Where certain seeds, such as mustard, caraway, cardamon, and fenugreck, were invoiced as seeds, and the jury found that they were known as such in trade: *Held*, that they fell within Schedule I in the tariff act of July 30th, 1846 (9 Stat. 49), under the head of "garden seeds, and all other seeds not otherwise provided for," there being several kinds of seeds specifically provided for in the act.

2. Those words in Schedule I cannot be restricted to seeds imported for agricultural purposes.

At law. The plaintiffs [Cornelius Boving and Melchior Wiltie] brought this action against [Cornelius W. Lawrence] the collector of the port of New-York, to recover back an excess of duties paid on mustard seed, caraway seed, cardamon seed, and fenugreck seed, in a crude state. At the trial, before Mr. Justice Nelson, in November, 1848, it appeared that the articles were invoiced by the above names; that the plaintiffs were importers of drugs; that the articles were kept and sold by druggists; that they were all of them medicinal; that seedsmen and grocers also kept mustard seed; that cardamon seed and fenugreck seed were used exclusively for medicinal purposes; that caraway seed was used by bakers; and that mustard seed was chiefly sold by grocers. Evidence was given on both sides on the question whether the articles were known to the trade as medicinal drugs or as seeds. The plaintiffs claimed, that they were seeds, and were free of duty under Schedule I of the act of July 30th, 1846 (9 Stat. 49), under the head of "garden seeds, and all other seeds not otherwise provided for." The defendant claimed, that they were subject to a duty of 20 per cent. ad valorem, which was the duty charged on them, either under Schedule E as "medicinal drugs, in a crude state, not otherwise provided for," or under section 3 as non-enumerated articles. The court charged the jury, that the only question for them to consider was, whether the articles were seeds, and known in commerce as such, and that if they should be of opinion on the evidence that, commercially speaking, they were seeds, and so called and known, the plaintiffs were entitled to a verdict. The jury found for the plaintiffs, and the defendant now moved for a new trial, on a case. [Denied.]

Francis B. Cutting, for plaintiffs.
J. Prescott Hall, Dist. Atty., for defendant.

NELSON, Circuit Justice. There are several sorts of seeds provided for specifically in the act of 1846 [9 Stat. 49], such as aniseed, flaxseed, hempseed, linseed, &c., and it is claimed, therefore, by the plaintiffs, that the seeds in question in this case are necessarily embraced in the free list in Schedule I, under the head of "all other seeds, not otherwise provided for." The articles have always been imported as seeds, and it is found by the jury that they are known in trade by that denomination, and are bought and sold as such. It is supposed, however, by the defendant, that the words "all other seeds," in the connection in which they are found in the free list—"garden seeds, and all other seeds, not otherwise provided for"—are to be confined to seeds imported for agricultural purposes; and that, if seeds are imported for any other purpose, they must be ranged under some other head, or fall within the third section of the act. But we do not see how the terms can be thus restricted. They are very broad—"garden seeds, and all other seeds, not otherwise provided for." Others are provided for, and the phrase, therefore, seems to leave nothing for intendment. We think that the finding of the jury, in connection with the clause in the free list, is decisive of the question. New trial denied.

Case No. 1,713.

BOWAS v. PIONEER TOW LINE.

[2 Sawy. 21.][1]

District Court, D. California. May 17, 1871.

TOWAGE—NEGLIGENCE IN TOWING—LIABILITY—MEASURE OF DAMAGES—PARTNERSHIP—WHAT CONSTITUTES BETWEEN OWNERS OF TUG AND BARGE.

1. A tug towing a barge approached a wharf where the latter was to land, but failed to make

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fast her lines by reason of their slipping and parting. The barge was driven by the tide against the wheel of a stern-wheel steamer lying at an adjacent wharf, thereby causing the wheel to revolve, and to inflict serious injuries on the libellant, who was at work in the wheel. *Held*: 1st, that the barge was in fault in not properly providing and handling the lines upon which she relied to stop her headway; 2d, that the tug was in fault in casting off the barge before she was properly secured, or in not affording her timely aid, or in removing to so great a distance that it was impracticable to do so; 3d, that the libellant was not bound to lash the wheel of the steamer in such manner as to prevent all injurious consequences of the negligence of others; it was sufficient if the lashings were strong enough to resist the action of the tide or waves, the swell of a passing vessel, or any other force which might reasonably be anticipated; 4th, even if the lashings were not so strong as prudence required, the immediate cause of the accident was the negligence of the respondent, and the rules relating to contributory negligence do not apply.

[Cited in Hall v. Little, Case No. 5,939; Peterson v. The Chandos, 4 Fed. 649; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 653.]

2. The rule which restricts damages to such as may reasonably be supposed to have been contemplated by the parties, has no application to cases of tort.

3. When the owner of a tug agreed with the owner of a barge that both vessels should be employed in a freighting business, the wages of the servants of the association and expenses, except for repairs, to be paid out of the earnings, and the balance or profits to be divided between them in proportion to the stipulated values of the vessels; *held*, that this agreement constituted a partnership, and that either partner was liable in an action of tort for damages caused by the negligence of the servants and agents of the partnership, while conducting its business.

[Cited in The Henry Buck, 39 Fed. 213.]

[In admiralty. Libel by Warren O. Bowas against the Pioneer Tow Line to recover damages for personal injuries. Judgment for libellant.]

Milton Andros, for libellant.

Ed. B. Mastick and T. I. Bergin, for respondent.

HOFFMAN, District Judge. On September 23, 1870, the libellant, who was engineer of the stern-wheel steamer Pilot, was at work in her wheel, repairing her rudder heads. He had been so engaged but a few minutes, when her wheel was struck by a barge, which had shortly before been in tow of the steamer Pioneer, and which, having failed to make a landing at an adjacent wharf, drifted down upon the Pilot. The force of the blow, and the weight of the barge, which was laden with from 250 to 270 tons of freight, caused the wheel to revolve, and the libellant was jammed between the paddles and stern of the boat with great violence, thereby sustaining painful and severe injuries; to recover damages for which this action is brought.

The Pilot, at the time of the accident, was lying at Cowell's wharf, her usual and proper berth, to the use of which she had the exclusive right. The end of Front Street wharf, at which the barge attempted to land, was distant two hundred and eighty-seven feet, and it was parallel, though projecting further into the stream, to the end of Cowell's wharf, at the side of which the Pilot was lying. The collision occurred in broad daylight, between ten and eleven o'clock in the morning. The Pilot had arrived at her berth some hours previously, and was fastened to the wharf in the usual manner. It is not pretended that any vis major, or unexpected force of wind, or tide, forced the barge upon her, or that any thing could have been done by the steamer to avoid the collision.

The legal presumption, therefore, is that the accident was occasioned by the fault of the vessel in motion, and this presumption becomes conclusive when the circumstances are examined in detail. It appears that the barge had been towed by the Pioneer to within a short distance (variously estimated by the witnesses), from the end of Front Street wharf. She was then cast off, and a few moments afterwards a line was sent from the barge to the wharf. It was taken by some one not in the employ of the respondents and passed around a pile, but so unskillfully and imperfectly fastened, that it slipped as soon as a strain was brought to bear upon it. A second line was thereupon sent ashore and made fast, but it parted as soon as it was drawn taut. A third line was then taken to the wharf by a man in a skiff, but before it could check the motion of the barge, which had during all the time been slowly drifting towards the Pilot, the collision occurred. The barge was provided with an anchor, which could have been let go at a moment's notice. The tug was also near, and, it would seem, could without difficulty have taken hold of the barge and arrested her course. To cast off a heavily laden barge which has no means of controlling her own movements, trusting to her ability to get, without accident, a line ashore by which she may be brought up, may well be deemed, as the result in this case demonstrates, a want of proper care and caution, unless the tug remains in a position to render instant assistance if needed.

But the more obvious and unquestionable exhibition of skillfulness and want of diligence consisted in the failure to make fast the first line, when it was successfully sent ashore and even passed around a pile. Some evidence was adduced by the respondents to show a custom or usage in this port to send lines ashore to be made fast by the wharfinger, or any other person who may be casually on the wharf, and willing to take them. Whether such be the practice is immaterial. If masters of water craft choose to confide the performance of so important a service to unskilled or unknown persons, they do so at their own peril. They are as much

responsible for the want of skill and diligence of agents and servants so employed, as they would be if the servant had been expressly hired for the purpose. But especially, under the circumstances of this case, should that liability be enforced; for the line sent ashore was unprovided with a loop, which could readily have been slipped over a pile on the wharf. It was, therefore, necessary to make it fast by a knot; an operation which, the result in this case shows, requires some skill and practice. The parting of the second line also discloses a want of skill and diligence on the part of the respondents. It must have occurred from one of two causes. Either the line was insufficient, or the person in charge of it failed to slack it off, so as to bring a strain upon it gradually, and not by a sudden jerk. There is some evidence that the latter was the cause of its parting. But in either case the respondents were in fault.

There is also evidence tending to show that the tug might have taken hold of the barge, and prevented her from drifting down upon the Pilot. If so, she was bound to have gone to her assistance. The slipping of the first line, and the parting of the second, were observed by those in charge of the tug, and the danger of collision with other vessels, if the barge continued to drift, was obvious. If the tug, being near enough to render assistance, failed to do so, she was in fault. If she was too far off to be able to reach the barge in time, she was in fault in casting off a loaded barge, without means of locomotion, to take her chances of making a successful landing, at the risk of colliding with other vessels, in case of failure, while she herself removed to a distance too great to permit her to interpose to prevent accidents. The proofs do not show with certainty that the drifting of the barge could have been checked in time to avoid the accident, by letting go her anchor. It seems most probable that such would have been the effect. But at all events, the effort should have been made. It required but an instant to let the anchor go; and the consequences of allowing the barge to continue to drift were apparent. I think it clear on the foregoing facts, and they are substantially undisputed, that the collision was caused by the want of due care, skill, and diligence on the part both of the tug and the barge.

It is objected that the respondent, who is the owner of the tug, is not liable to this action. It is admitted that the Pioneer Tow Line is a corporation duly incorporated under the laws of this state.

In August, 1870, the Pioneer Tow Line entered into an agreement with the owners of the barge Hermann, substantially as follows: The barge was valued at $4,000, the Pioneer at $12,000. Joseph Francis, one of the owners of the barge, was to act as her captain at a salary of $70 per month, and was to hire her crew. The Pioneer Tow Line Co. was to man the Pioneer, and each party was to keep his vessel in repair at his own expense. The person in charge of the Pioneer was to make all engagements for carrying freight, collect all the earnings, and out of them pay all the running expenses of and supplies for both boats, and the wages of all persons employed on either. The barge was to carry all freight from any place on the Sacramento river to this city, the transportation of which might be contracted for by the man in charge of the Pioneer. Both vessels were to be under the general command and direction of the master of the Pioneer. The Pioneer was to tow the barge up and down the river in furtherance of the joint enterprise. The earnings after the payment of all expenses as above mentioned were to be divided in the ratio of four to twelve.

The vessels were running under this arrangement at the time of the collision. The Pioneer had two deck hands who worked upon the barge in loading and unloading cargo. The deck hands of the barge also worked upon the Pioneer in taking in coal, and also freight when the latter took any, which was but seldom.

It is, I think, evident that the parties to this agreement were not only liable as partners to third persons, but were such inter sese. The property used in carrying out the common enterprise was not, it is true, jointly owned by the partners. But this is not necessary to constitute a partnership. The capital stock of a partnership may consist in the use of property owned separately by the individual partners, or one partner may be the sole owner, and the other may contribute only skill and labor. It is sufficient if the partners agree to have a joint interest in, and to share the profits and losses arising from the use of property and skill either separately or combined. Meyer v. Sharpe, 5 Taunt. 74; Champion v. Bostwick, 18 Wend. 178. In the case at bar the parties contributed to the common stock, the one, the use of a steam tug, the other that of a barge. They were to be employed in carrying out the common enterprise, the use of each being indispensable to the other to accomplish its objects. The wages of the employees and the expenses of both vessels, excepting for repairs, were to be paid out of the earnings of both vessels, and the profits of the business were to be divided as such between the partners. The servants employed on either vessel were the servants of the association, and it seems performed services on board of either, as the necessities or convenience of the joint enterprise required. Under this agreement either party would clearly be entitled to an account of the earnings as against the other, and to a lien upon the fund as against his general creditors. Nor can it be doubted, that any person who furnished labor or supplies for the common enterprise might look to the partnership for his remuneration. A fortiori, must third

persons, who have been injured by the negligence of the servants and agents of the partnership while conducting its business, have the same right in an action of tort against either. Champion v. Bostwick, ubi supra; 1 Starkie, 272.

It is true that the somewhat arbitrary doctrine of Grace v. Smith, 2 W. Bl. 998, and Waugh v. Carver, 2 H. Bl. 235, by which the mere participation in the profits of an undertaking was held to create a partnership liability as to third persons, whatever the real relations of the parties inter sese, may be considered as overruled, both in England and America. Cox v. Hickman, 8 H. L. Cas. 268; Bullen v. Sharp, L. R. 1 C. P. 86; 1 Story, Partn. § 38; Denny v. Cabot, 6 Metc. [Mass.] 82; Colly. Partn. p. 33 et seq., in notes.

But all the cases agree that where there is a participation in the profits, as such, and no opposing circumstances exist to show that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, and as a mere compensation for labor and services, where it appears that the alleged partner has an interest in the profits similar in character to that of the other partners; or, to use a term recently suggested, that those interests are homogeneous (Am. Law Reg. April, 1871 [Essay on the Criteria of Partnership, vol. 10, p. 215]), the party so participating in the profits will be liable as a partner to third persons, and would probably be so considered as between himself and his associates (Story, Partn. § 38; per Mr. J. Branwell, in Bullen v. Sharp, ubi supra).

In the present case, the interest of the parties in the profits was not only similar, but identical. The tort complained of was not, as in Champion v. Bostwick, committed by a servant, hired and paid by one of the partners, but by the servants of the partnership, who were paid out of the common earnings; and it was committed by them while engaged in the business of the partnership. For damages so caused, the partnership is unquestionably liable.

The libellant's right to recover is further resisted on the ground that he substantially contributed to the injury by his own negligence, in not more securely fastening the wheel before going into it. The contributory negligence, which will at common law bar the plaintiff's right to recover for an injury sustained by the fault of another, is the failure to exercise such care and diligence as men of ordinary prudence usually exercise under similar circumstances; and this will, of course, be in proportion to the probability of danger. 35 N. Y. 27; 31 Pa. St. 512; Smith, Repar. p. 79; Saund. Neg. 61; Shear. & R. Neg. p. 33, and notes.

The lashings by which the wheel of the Pilot was secured, were of the kind and strength always used on board the boat, whenever there was occasion to enter the wheel. A few minutes before the accident, several men had gone into the wheel without objection, and the libellant himself, who was an engineer of considerable experience, and who had no motive to incur any unnecessary risk, appears to have entertained no apprehension of danger.

Under such circumstances it is difficult to say, notwithstanding that in the opinion of some of the witnesses the lashings should have been stronger, that, in neglecting to secure the wheel more firmly, he was guilty of culpable negligence, or disregarded the dictates of ordinary prudence. It is not denied that the lashings were strong enough to resist the action of the tide or waves, the swell of a passing vessel, or any other force which might be reasonably expected to be applied to the wheel. All ordinary accidents were, therefore, provided against. The libellant was not bound to take extraordinary precautions against the consequences of the negligence of others. The law will not account it a want of ordinary prudence, if he has acted on the presumption that others will act, in accordance with their obvious duties. Shear. & R. Neg. p. 34, and cases cited; Newson v. New York C. R. Co., 29 N. Y. 390. Nor can the wrong-doer accuse him of culpable negligence in failing to take extraordinary precautions to prevent the injurious consequences of a wrong which he was under no obligation to anticipate, and was powerless to prevent. Tonawanda R. Co. v. Munger, 5 Denio, 266.

If, as appears to be contended by the respondent, the libellant was bound to take precautions, not only against ordinary accidents, and such as might reasonably be expected, but also against extraordinary dangers caused by the negligence of others, and should, therefore, have secured the wheel in such a manner as to render this collision innocuous, what limits can be assigned to the precautions he was bound to observe?

If against this collision, should he also have secured himself against the consequences of a collision with a larger vessel; and, if so, how much larger, and moving at what velocity? He was certainly not called upon to provide against any and all collisions, which the negligence of others might occasion; and, if not against all, why against this? It is sufficient if, while lying in a slip to which his boat had the exclusive right, with no reason to apprehend danger from any other vessel, he has exercised the usual care and diligence, which common prudence suggested, to avoid the ordinary dangers which he might reasonably anticipate. If he has done so, the respondent has no right to say to him, "if you had foreseen my negligence, and the lashings had been stronger, the consequences of my tort might have been less injurious," any more than the master of a vessel who has, by his own fault, caused damage to another, has a right to refuse full compensation for the damage sustained, on

the ground that, if the injured vessel had been stronger, the injury would have been less.

But even if this defense were admissible, the testimony fails to sustain it. It does not appear that even if the lashings had been all that some of the witnesses require, they would have been sufficient to resist the force of the collision. The weight and momentum of the barge caused them to part instantly. Whether or not the force was sufficient to have caused stronger lashings to part, or to break the paddles or the cross-beam to which they were fastened, is purely conjectural; and until it is satisfactorily shown that it was not, there is no ground for the assertion that the supposed negligence in any degree contributed to the injury. Nor is it at all clear that the alleged negligence in this case, if any existed, was such as to bar the libellant's recovery.

It is not every act of negligence, even though without it the injury would not have occurred, which will be held to be contributory negligence, such as to defeat the action of the plaintiff. Thus where the plaintiff fettered the forefeet of his donkey and left him upon the highway, and the defendant negligently drove over and killed it, it was held by Lord Abinger that he was liable, notwithstanding that the donkey might have been improperly on the highway. Davies v. Mann, 10 Mees & W. 549; Mayor, etc., of Colchester v. Brooke, 7 Q. B. 376. So in Greenland v. Chaplin, 5 Exch. 243, 248, Pollock, C. B., said: "I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." So where the plaintiff was injured by the fall of an anchor on a steamboat, caused by a collision with the steamboat of the defendant, it was held no defense that the anchor might have been improperly stowed, or that the plaintiff was on a part of the deck where he ought not to have been. Greenland v. Chaplin, 5 Exch. 243. So where oysters were placed in a channel of a public navigable river, so as to create a public nuisance, yet a person navigating the river was holden not justifiable in negligently or willfully running his vessel against them, and so destroying them when he had room to pass without so doing. 7 Q. B. 377; Saund. Neg. p. 65.

It is perhaps not easy to deduce from the cases any precise and universal rule as to contributory negligence, but I think it may be affirmed that where, as in this case, the alleged negligence in no degree contributes to the happening of the accident; where the latter arises solely from the culpable negligence of the defendant; when it is doubtful whether any degree of diligence on the part of the plaintiff would have materially diminished the consequences of the defendant's fault, and the extent to which this might have been so diminished is incapable of ascertainment—such negligence cannot be set up either to defeat the action or to mitigate the damages.

It is further contended, on the part of the respondent, that the libellant cannot recover for the bodily injury sustained by him, his pain and suffering, medical expenses, loss of time, etc., because these were not the natural consequences of the collision, and such as may reasonably be supposed to have been contemplated by the parties. In regard to consequential damages on the breach of a contract, the rule of the Code Napoleon (Code Civ. liv. 3, tit. 3, arts. 1149–1151), and of the Louisiana Code (articles 1928, 2294, 2295), that the debtor who has been guilty of no bad faith or fraud, is liable only for such damages as were contemplated, or may reasonably be supposed to have been contemplated by the parties, has been adopted in recent decisions in England and America. Hadley v. Baxendale, 9 Exch. 341; Fletcher v. Tayleur, 17 C. B. 21; Griffin v. Colver, 16 N. Y. 489. See Sedgw. Dam. (5th Ed.) p. 79 et seq.

The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, where the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered of the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for it. But these cases, like those of contract, where damages are claimed, not on the ground that they were or should have been foreseen, but simply as the direct result of the breach, are subject to the limitation of the rule, which requires such damages to be certain and direct. Sedgw. Dam. p. 86, in note.

In the case at bar, no consideration is needed of the vexed questions, in regard to proximate and remote causes, or direct and consequential effects. The injury complained of, was the direct and immediate result of the collision occasioned by the respondent's negligence, as much so, as if the colliding vessel had herself struck the libellant. The damages he sues for were the natural and inevitable effects of that injury which have followed without the intervention of any other cause to enhance or modify them. They necessarily include a compensation for pain and suffering, for loss of time, for medical attendance and support during the time that he has been disabled, and for such permanent injury or continued disability as he has sustained. The amount of this compensation remains to be determined.

As soon as possible, after the occurrence of the accident, the libellant was extricated from his perilous position, carried on the wharf, and laid upon a mattress. A physician who happened to be near was summoned. He found him insensible, with breathing hurried and labored, and moaning from intense pain. After ascertaining that none of the long bones were broken, the physician directed him to be carried to his hotel on a lounge procured for the purpose. On arriving at the hotel he was examined by the physician who had been called to him, and, also, by his family physician. He was found by them to be suffering great pain, and the slightest movement of his body, or left limb, caused him to scream in agony. He complained of inability to see, and suffered from retention of urine. The latter symptom passed off, however, in a couple of days. On a subsequent examination, the physicians became convinced that he had sustained a fracture of the crest of the ilium. Dr. Scott testifies, that on placing his hand on the crest of the ilium, he discovered mobility and crepitus. About the thirteenth day symptoms of tetanus were observed, but they disappeared without serious consequences.

The libellant was confined to his bed for six weeks from the time of the injury. For two weeks thereafter, he was able merely to move about his room on crutches. Before the accident he was a man of unusually robust and healthy constitution, never having been sick, as he states, a day in his life.

At present he complains of constant pain in his back, inability to use his limb which is smaller, and, as some of the physicians think, shorter than the other. He is unable to dispense with crutches, and at present incapable of performing any labor requiring ordinary strength and activity. As to his chance of final recovery the physicians disagree. Those who have recently examined him, discover no traces of a fracture of the ilium, and are of opinion that none such could have existed. They admit, however, that if other physicians detected shortly after the accident mobility and crepitus, those indications would be conclusive. Some of the physicians express a confident expectation of an ultimate complete recovery, while others consider it impossible that he can be restored to his former condition.

There seems to be reason to apprehend that the nerves of the sacrum, or perhaps the spinal column, have sustained an injury, the nature or consequences of which cannot be known. A year appears to be the shortest time in which a full restoration is expected by the most sanguine of the physicians. At the time of the injury the libellant was earning one hundred and twenty-five dollars per month, and his board, estimated at fifty dollars—in coin. This, from the date of the accident to March 23, the day of trial, would amount to one thousand and fifty dollars in coin, or about one thousand one hundred and fifty dollars in legal tenders at ninety-one cents. His expenses for medicine and medical attendance have amounted at the customary rates to about three hundred and seven dollars in currency. The compensation for mental and physical suffering, and the indemnity for the inability of the libellant to pursue his ordinary calling until his complete recovery, if that ever takes place, are not susceptible of definite computation.

It has appeared to me, considering on the one hand that it is by no means certain that he will ever be entirely restored to health; and on the other, that a substantial cure may be effected at no very remote day, and that in the meantime he is not wholly incapacitated from pursuing certain avocations, the sum of five thousand dollars is a just amount to be allowed him.

BOWDELL v. FARMERS' & MERCHANTS' NAT. BANK. See Case No. 1,714.

Case No. 1,714.

BOWDEN v. FARMERS' & MERCHANTS' BANK OF BALTIMORE.

[1 Hughes, 307;[1] 2 Browne, Nat. Bank Cas. 146; 14 Bankers' Mag. 387; 25 Int. Rev. Rec. 405; 1 Wkly. Jur. 639.]

Circuit Court, D. Maryland. April Term, 1877.

BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF TRANSFEREE OF STOCK.

Under the provisions of the national banking act, the transferee of shares of the capital stock of a national bank, under a transfer made absolute in due form on the books of the bank, is liable to creditors of the bank as a stockholder, notwithstanding the transfer was in fact made as collateral security for the payment of a debt, which has since been paid, the share still standing on the books of the bank in the name of the transferee at the time of the suspension of the bank.

[See National Bank v. Case, 99 U. S. 628; also, Moore v. Jones, Case No. 9,769.]

At law. This was an action of trespass on the case in assumpsit, the facts being as follows: The First National Bank of Norfolk, duly organized under the provisions of the national banking act, having suspended on the 26th day of May, 1874, the plaintiff [George E. Bowden], on the 3d day of June in that year, was duly appointed by the comptroller of the currency, a receiver to take charge of and to wind up the affairs of the bank. In the month of August, 1875, the plaintiff was directed by the comptroller to enforce the whole of the personal liability of those owning the stock of the bank at the date of its suspension. In the month of February, 1872, one Burwell, who was the owner of twenty shares of the capital stock of the bank, transferred the same absolutely

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

and in due form on the books of the bank, to the defendant bank as collateral security for the payment of a debt due by Burwell, to the latter bank. In the month of August, 1872, the debt due by Burwell being discharged, the defendant bank returned to him the shares assigned, with power of attorney to retransfer the shares on the books of the Norfolk bank. The retransfer, however, was not made, and the shares continued to stand in the name of the defendant bank until the suspension of the Norfolk bank, in May, 1874. In pursuance of the instructions of the comptroller demand was made by the plaintiff on the defendant for payment of the par value of the said twenty shares of stock, which was refused; and thereupon this suit was brought to recover of the defendant the par value of said shares. [Judgment for plaintiff.]

In this case a jury trial was waived, and it was tried before the court, in pursuance of the provisions of section 649 of the Revised Statutes of the United States.

L. L. Lewis, A. Sterling, Jr., and George H. Chandler, for plaintiff, relied on Rosevelt v. Brown, 1 Kern. [11 N. Y.] 148; Hale v. Walker, 31 Iowa, 344.

Charles Marshall, for defendant.

GILES, District Judge. The facts as proved before the court were as follows: The First National Bank of Norfolk was a bank duly organized under the national bank act of 1863 and 1864; that by the stock ledger of said bank a certain Burwell held twenty shares of the capital stock of the said bank, of the par value of $100 each; that he subsequently borrowed money of the defendant to this suit, and to secure the payment of the same, transferred to the defendant his twenty shares of the capital stock of the said First National Bank of Norfolk, which transfer was made on the books of said bank by a surrender of his certificate, and a new certificate issued to the said defendant; that said defendant, when said loan was paid, returned said certificate of stock to said Burwell, with a power of attorney indorsed on the back of the same, authorizing him to retransfer the said twenty shares to himself, but this was never done; but the said stock continued to stand in the name of this defendant up to the time of the closing of the said First National Bank of Norfolk, without anything on the face of the books of said bank to show that the defendant held the said twenty shares over as security for a loan, and not as the legal owner of the same; that subsequently, to wit, on June 3d, 1874, the comptroller of the currency, in pursuance of the power and authority vested in him by the said act of congress, closed the said bank and appointed the plaintiff receiver of the same; and on the 13th day of August, 1875, the said comptroller determined that, in order to discharge the legal debts and liabilities of the said bank, "it was necessary to enforce the individual liability of the stockholders, as provided for by the 12th section of the act of congress of 3d June, 1864" [13 Stat. 102], and he directed the said plaintiff, as receiver, to institute such legal proceedings as might be necessary to enforce against the stockholders of said bank their liabilities under said act; in pursuance of which direction and authority this suit was brought.

The counsel for the defendant has contended that it is not responsible, upon the grounds, first, because it held the said twenty shares of the capital stock of the said Norfolk bank only as a security for a loan made to its real owner; and, secondly, because, before the closing of the said bank, the loan had been paid to the defendant, and it had delivered to the borrower the certificate of the said stock with power of attorney on the back thereof to retransfer it to him.

The court does not consider either of these reasons sufficient to prevent a recovery of the amount claimed in this suit. By the 12th section of the act of 1864, it is provided, "that every one becoming a shareholder by such transfer shall in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares," and by the said section it is also provided that the shares shall be transferable on the books of the bank. Now, it was the duty of the defendant, having taken an assignment on the books of the said bank of the twenty shares, when its loan was repaid to it, to have seen that these shares were transferred back to the said Burwell on the said books, and having failed to do so before the said bank was closed by the comptroller, the receiver was authorized to regard it as the legal owner of these shares. I therefore give judgment in this case for the sum of two thousand dollars with the costs of this suit.

[NOTE. For decisions in other actions by the same plaintiff to enforce personal liability of the shareholders, see Cases Nos. 1,715 and 1,716.]

Case No. 1,715.

BOWDEN v. MORRIS et al.

[1 Hughes, 378.][1]

Circuit Court, E. D. Virginia. July and September, 1876.

BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—ACTION FOR CONTRIBUTION — PROOF OF INSOLVENCY — NEW TRIAL—FAILURE OF PROOF—RELIANCE ON OBITER DICTA.

1. In the trial of a suit at law, brought by the receiver of a national bank against its stockholders, for a contribution of a hundred per cent. to meet the liabilities of the bank, under section 5151 of the Revised Statutes of

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the United States, no evidence was presented to show that the bank was insolvent, or that it was so to the extent of a hundred per cent. of its capital stock; but the plaintiff, as to such liability, produced only a letter of the comptroller of the currency to the receiver, alleging that he had "determined that, in order to discharge the legal debts and liabilities of the bank, it would be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders." Held, that the plaintiff was not entitled to recover, as no proof, established by legal evidence, had been presented at the trial, of the fact that the bank was insolvent, and insolvent to the extent of one hundred per cent. of its capital.

2. On motion afterwards for a new trial, based on the ground that the plaintiff's attorney had relied upon the language used by the learned justice of the supreme court of the United States, in his decision in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, held, that this was a sufficient ground for awarding new trial.

These were actions of assumpsit [by George E. Bowden, receiver of the First National Bank of Norfolk, against W. H. Morris and others, shareholders thereof, for contribution. There was judgment for defendants, but a new trial was thereafter granted. The cases] were heard together, the facts of all being the same. Plea of non-assumpsit. By stipulation between counsel a jury is waived, and the issues of fact, as well as law, are submitted to the court.

L. L. Lewis, U. S. Atty., for plaintiff.

Richard H. Walke, W. H. C. Ellis, and Harmanson & Heath, for defendants.

HUGHES, District Judge. These suits are founded upon section 5151 of the Revised Statutes of the United States, which provides that: "The shareholders of every banking association shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares," etc.

At the trial of these causes, the only evidence presented by counsel for the plaintiff bearing on the point on which the cases turn, are: 1st, the comptroller's certificate of the organization of the First National Bank of Norfolk, with a capital stock of a hundred thousand dollars, dated the 23d of February, 1864. 2d. A list of the subscribers to the capital stock to that amount, among whom are the defendants in these suits, for the respective numbers of shares set forth in the declarations. 3d. A certificate of protest showing that the bank failed and suspended payments on the 28th of May, 1874. 4th. The comptroller's certificate, dated June 3d, 1874, of the appointment of the plaintiff as receiver of the bank, with power to act as such under the general banking law. 5th. Printed copies of the demand of the plaintiff upon the defendants for the amounts sued for, sent through the mail. 6th. The following letter from the comptroller to the receiver:

"Treasury Department, Office of Comptroller of Currency, Washington, August 13th, 1875. Sir: Having determined that in order to discharge the legal debts and liabilities of the First National Bank of Norfolk, it will be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders owning stock at the date of the suspension of said bank, so far as the same can be done by legal proceedings, you are directed at once to institute such legal proceedings in the proper court, as may be necessary to enforce against each and every shareholder of said bank owning stock or any interest therein at the time said bank suspended, his or her personal liability as such stockholder, under the provisions of section 5151 of the Revised Statutes of the United States, and this order must be held to extend to all cases save those where, because of bankruptcy or apparent insolvency, such legal proceedings would be of no avail. Very respectfully, John Jay Knox, Comptroller of the Currency.

"George E. Bowden, Esq., Receiver First National Bank, Norfolk, Va."

Except this letter, and the certificate of the protest of a single ten dollar note of the bank, made on the 28th of May, 1873, there is no evidence in the cause tending to show that the bank is liable for contracts, debts, or engagements of any sort, or to any amount beyond its assets.

In order to establish the liability of these defendants, it must appear from the evidence —1st, that the receiver is authorized to bring these suits; and 2d, that the bank owes "contracts, debts, and engagements" beyond its assets, requiring the contributions sued for from these shareholders. Of the authority of the receiver to sue, and to sue for the amounts for which these suits are brought, the certificate and the letter of the comptroller are sufficient proof. The supreme court of the United States has so decided in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 498. At page 505, Justice Swayne says, "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if

put in issue must be proved." See, also, Cadle v. Baker, 20 Wall. [87 U. S.] 650, to the same effect. Of course, this decision is the law of the present case; and accordingly I am authorized to hold that the comptroller's certificate of June 3d, 1874, is sufficient proof that the plaintiff is the receiver of the bank, and that his letter, dated 13th of August, 1875, is conclusive proof that the receiver had authority to sue in these cases. No stockholder can dispute that authority, and none of these defendants do dispute it. Whether to sue, when to sue, and for how much to sue, are matters for the exclusive determination of the comptroller, who directs the receivers according to his determination, and whose determination can be controverted or resisted by no stockholder of the insolvent bank.

But the United States attorney, who is counsel for the plaintiff, assuming that the comptroller's letter of August 13th, 1875, was proof, not only of the receiver's authority to sue, but of the fact that the bank owed "contracts, debts, and engagements" a hundred per cent. over and above its assets, and that the defendants were liable for such contracts, debts, and engagements to the amount of a hundred per cent. on the par value of their shares, presented no evidence whatever (unless this letter of the comptroller, not sworn to, be deemed evidence) of the fact that the bank owed debts of any sort, to any amount, for which the shareholders were liable, under section 5151 of the Revised Statutes, insisting that the decision in Kennedy v. Gibson made the comptroller's letter of August 13th, 1875, conclusive proof of that fact, which the defendant stockholders could not controvert.

I cannot possibly assent to such a construction of that decision. That case turned wholly and exclusively upon the authority of persons and officers connected with the subject-matter, and not at all upon any question of evidence affecting the merits of the controversy. The principal question in the case was, whether the receiver could sue before being directed to do so by the comptroller, and it was decided that he could not, and that he should allege in his bill or declaration that instructions to sue had been given. Another point decided was, that creditors of the insolvent bank cannot sue its shareholders for contribution under section 5151, and that the receiver alone can sue. The remaining point decided was, that although it was made by law the duty of the United States attorney to bring such suits, yet the receiver, by approval of the treasury department, might retain other counsel to bring and conduct them. No question but one of authority to sue was raised in the case, and, of course, no other point was decided. What value the comptroller's instruction to the receiver possessed as evidence of the liability of the shareholders to contribute to the debts of the bank was not a point in the case, and, of course, was not decided. It is true that some of the expressions of the learned justice who delivered the opinion of the court seem to hold that the comptroller's instructions to the receiver to sue, and for how much to sue, are sufficient proof at the trial of the insolvency, or of the extent of the insolvency, of the bank over and above its assets, but even if those expressions were intended to bear such a construction (which I do not think they were), they are but obiter dicta, and, as such, can have no authority in the decision of the questions necessary to be decided in these causes. Moreover, this dictum was predicated only of suits in equity brought by receivers of national banks. A court of equity may very well call in, from the stockholders of such a bank, even a greater contribution than might be actually necessary to meet its engagements, for, under the elastic practice in chancery, any surplus could afterwards be readily refunded to the stockholders. But the judgment of a court of law is absolute, and the dictum under consideration was never intended to be applied in actions at law brought by these receivers.

It is a constitutional provision that no person shall be deprived of his property except by due process of law. Except in cases where property is taxed, or otherwise taken for public purposes, by due process of law is meant by suit in a court of justice, and upon judgment according to the law and evidence. In the present cases suit is duly brought, and the court is bound to render its judgment according to the law and the evidence. The law makes these defendants liable only for the debts of this bank which it may owe beyond the value of its assets, and there must be proof in these cases that its debts are a hundred per cent. more than its assets can meet. How is such a fact to be proved? Clearly it can only be proved by legal evidence, evidence taken under the usual tests, for instance, of the oath, and of cross-examination. Surely the "determination" of the comptroller of the currency, that the stockholders of this bank are liable to the extent of a hundred per cent. above its assets, however correct it may be in fact, is not legal evidence of the fact such as a court of justice must accept as conclusive and incontrovertible. Surely the supreme court of the United States could not have intended, in Kennedy v. Gibson, to hold that such "determination" is not only evidence, but conclusive proof, which the "stockholders cannot controvert." Congress has sometimes gone as far as to enact that the transcript of a public officer's accounts, certified to be taken from the books of the treasury department, shall be prima facie evidence of their correctness as against that officer, but it has never gone so far as to declare such evidence to be conclusive and incontrovertible. So, the law of Virginia makes the signature of the maker of a promissory note, alleged in the declaration of the

plaintiff to have been signed by the maker, prima facie genuine, but it nowhere declares that the genuineness of such a signature shall not be questioned or controverted. There is no law of congress making the "determination" of the comptroller even evidence of the insolvency of a bank or of the extent of it, much less prima facie or conclusive evidence.

If this letter of the comptroller to the receiver were conclusive evidence against the defendants in these causes, not only as to the receiver's authority to sue, as he has done, but also as to the liability of these defendants for "contracts, debts, and engagements" of the bank to the extent of 100 per cent. on their shares, why resort to a court of law at all? Surely a court of justice is something more than a mere machine for obediently executing the foregone determinations of some other tribunal; something more than the registering office of the judgment of another branch of the government. Surely the court has higher functions to perform in cases tried before it, than the ministerial duty of rendering such judgment as may be prescribed to it by subordinate officers of an executive bureau. If the mandate of the chief officer of a bureau at Washington were binding as to those matters submitted to a court in the trial of a cause which go to the very merits of the demand, why try it elsewhere than at the bureau itself?

It may be ever so notorious that this bank is insolvent to the extent of a hundred per cent. beyond its assets, and that the payment of its debts may require contributions from its stockholders to full one hundred per cent. on their stock; but courts and juries must be deaf and blind to all facts except those which are submitted to them in evidence. They are sworn to try and decide according to the evidence submitted at the trial; and facts of the widest notoriety, if not so submitted, not only cannot be considered but must be studiously excluded from consideration.

The comptroller's letter of August 13th, 1875, is conclusive no farther than as to the receiver's authority to sue, and as to how much he shall sue for. It proves nothing at all as to the extent of the insolvency of the bank, and as to the liability of the defendants on their stock. This liability must be shown affirmatively by some sort of positive evidence; it cannot be inferred from hearsay or from the mere fact that the comptroller has ordered suit for the par value of the shares of the defendants. As nothing but the comptroller's letter was offered in evidence, it is impossible for me to hold that the liability of the defendants has been proved. As there was no evidence whatever presented at the trial, save this letter of the comptroller (itself not having the dignity of an affidavit) that this bank was bound for any contracts, debts, or engagements beyond what its assets could meet, no case is proved against the defendants. The court accordingly decides that upon the evidence submitted at the trial they are not liable as set forth in the declaration; and finds for the defendants in each of these cases.

[Motion for New Trial.]

These cases were further heard on the 2d September, 1876, on a motion of the United States attorney for a new trial. The ground of the motion was, that as counsel for the plaintiff, he had relied confidently upon the strong language of Justice Swayne, in the supreme court of the United States, used in delivering its decision in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 505, to the effect that the "determination" of the comptroller that suits should be brought against the stockholders of an insolvent national bank for a percentage on their subscriptions was conclusive against the stockholders as to their liability, and the extent of it, and incontrovertible; and therefore it was that he had not submitted evidence which was abundantly at his command showing that the First National Bank was in fact insolvent to the full amount of its capital stock; thinking it unnecessary to do so in view of the decision of the supreme court referred to.

HUGHES, District Judge. This motion is of course addressed to the discretion of the court; and its success must depend upon the two considerations, 1st, whether substantial justice was done at the former trial; and, 2d, if not, whether that was the result of inexcusable negligence or other fault in the plaintiff or his counsel.

I suppose that it will be conceded that substantial justice was not done at the former trial. The allegation of the district attorney is, that he had full proof at command that the First National Bank of Norfolk is insolvent to the extent of a hundred per cent. of its capital stock beyond its assets. If so, and the law making its stockholders liable severally for that amount on their stock, substantial justice was not done in a trial in which that liability was not established by proof which was readily available.

The only remaining question, therefore, is, whether the district attorney's excuse for not producing evidence which he had at his command is admissible and sufficient; which is, that he relied upon the language used by the supreme court in Kennedy v. Gibson, 8 Wall. [75 U. S.] 505, as dispensing with the necessity of proof. The language referred to, used by Justice Swayne, who delivered the unanimous opinion of the court, was this: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders

cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

I have already shown that this language, so far as the question of proof of the liability of stockholders as distinguished from the authority of the receiver to sue was concerned, was obiter dictum. But it was certainly calculated to mislead. If used by the judge of any inferior court, there would have been less excuse for relying upon it; but, used as it was by a justice of the supreme court of the United States, in pronouncing the unanimous opinion of that august bench, I feel bound to concede the validity of the excuse of the district attorney. See Starkweather v. Loomis, 2 Vt. 573. I will therefore allow a new trial, and continue there these causes to the next term of the court.

NOTE [from original report]. At the second trial of the cases the proper proofs were submitted and verdict and judgment were for the plaintiff in all the cases.

[NOTE. For decisions in other actions by the same plaintiff to enforce personal liability of the shareholders, see Cases Nos. 1,714 and 1,716.]

Case No. 1,716.

BOWDEN v. SANTOS et al.

SAME v. TURNER et al.

[1 Hughes, 158;[1] 1 Thomp. Nat. Bank. Cas. 271.]

Circuit Court, E. D. Virginia. May Term, 1877.

BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY — FRAUDULENT TRANSFER OF STOCK—TRANSFERRER'S LIABILITY.

The transfer of shares of the capital stock of a national bank, made with intent to exonerate the owner and transferror from liability as a stockholder to creditors, is void as against creditors of the bank.

[See Davis v. Stevens, Case No. 3,653.]

In equity. These two cases are so nearly alike that it is only necessary to consider one of them, which will be the one first named. This was a bill in chancery filed by the plaintiff [George L. Bowden], as receiver of the First National Bank of Norfolk, to enforce the personal liability of the defendant, [C. A.] Santos, as the owner of thirty-nine shares of the capital stock of the said bank. On the 26th day of May, 1874, the bank suspended, and on the 3d day of June of that year the plaintiff was appointed its receiver by the comptroller of the currency, in pursuance of the provisions of the national banking act. [Decree for plaintiff.]

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

L. L. Lewis, for plaintiff.

Baker & Walke and W. H. C. Ellis, for defendants.

HUGHES, District Judge. The bill in this case is filed to set aside certain transfers of the shares of the capital stock of the First National Bank of Norfolk (of which the plaintiff is receiver) made by the defendant, Santos, to the defendants, Lamb and Williams, a few days before the suspension of the bank, in May, 1874. It also prays that Santos may be decreed to pay to the plaintiff the par value of the shares thus transferred.

As to the facts, the bank suspended on the 26th day of May, 1874, and is utterly insolvent. The defendants, Santos and Lamb, at the time of its suspension were directors, and for a long time prior thereto had been officers of the bank. The defendant, Lamb, was president up to a short time before its suspension. For some time before that event the bank had been in a critical condition, and it had been evident to the officers that its "suspension was a mere question of time." The defendant, Santos, aware of the condition of the bank (it was the subject of frequent discussion by the directors), and anxious to relieve himself of liability as the holder of the stock in question, transferred in due form, on the books of the bank to Lamb, nineteen of his shares on the 16th May, and his remaining twenty shares to Williams on the 21st day of May, 1874. At the time of these transfers both Lamb and Williams were insolvent, and have ever since been unable to respond to the demands of the creditors on account of these shares. At the time of these transfers there were already standing in the name of Lamb on the books of the bank over 200 shares of its capital stock. The receiver has been unable to make anything out of either Lamb or Williams on account of their liabilities to the bank. On the other hand, Santos, at the time of these transfers, was, and is, a man of high standing and credit in business circles, and of large means.

In his answer it is averred by Santos that the transfer of the shares was a bona fide transaction, and for valuable consideration; but the allegation in the bill that Williams was insolvent, and unable to respond to the demands of the creditors on account of these shares, is not denied. It is abundantly established by the evidence in the case that the transfers were made to exonerate the defendant, Santos, from his liability as a stockholder. In his answer, Santos declares that he was never the purchaser or owner of the nineteen shares transferred to Lamb. And yet the testimony shows that he executed his note (which he has since been requested to pay) for these shares, and that they stood in his name on the books of the bank for a considerable number of months before he transferred them to Lamb.

The defence set up that these shares were formerly bought in by Lamb for account of the bank, and that it was agreed between them that if Lamb, acting for the bank, would buy the shares for the bank, he might place them in Santos's name, provided he would indemnify him, i. e., take a transfer of the shares when it should be desired by Santos, is invalid. Under the provisions of the national currency act (Rev. St. § 5201) a national bank is prohibited from purchasing or holding its own shares. What is forbidden to be done directly the law does not allow to be done indirectly. Consequently the promise on the part of Lamb to take the shares when requested, if it could be sustained on any ground under the circumstances of this case, certainly cannot be sustained on the ground upon which it is placed in the answer. It is founded upon an illegal agreement, and the case comes strictly within the ruling of the judges in the case of Ex parte Walker, 39 Eng. Law & Eq. 579. Plain as these facts are, they are no plainer than the law of the case. Indeed, there is no serious defence set up against the prayers of the bill, except the technical one that a bill does not lie, no discovery being sought, and there being adequate remedy at law. Counsel for defence rely, as to the doctrine that there is no such thing as fraud per se, on Davis v. Turner, 4 Rand. [4 Grat.] 422, and as to jurisdiction of equity where no discovery is sought, on Home Ins. Co. v. Stanchfield [Case No. 6,660], and Meze v. Mayse, 6 Rand. [Va.] 658. But this is a case of trust, and equity has jurisdiction in all matters of trust. That the capital stock of an incorporated company is a trust fund for the payment of the debts, and is required by courts of equity to be honestly and faithfully guarded and handled, is settled by very many decisions of the courts of this country. I refer only to Wood v. Dummer [Case No. 17,944]; Upton v. Tribilcock, 1 Otto [91 U. S.] 47; Sanger v. Upton, Id. 60; Webster v. Upton, Id. 71; Nathan v. Whitlock, 9 Paige, 159; 6 Paige, 337. See, also, 2 Story, Eq. Jur. § 1252. Any contract, especially among the officers of an incorporated company, involving the withdrawal of any portion of the capital stock from the reach of creditors, will not be tolerated by a court of equity. 6 Paige, 337; Ex parte Bennett, 27 Eng. Law & Eq. 572; Ex parte Walker, 39 Eng. Law & Eq. 576, etc. In the case of Nathan v. Whitlock, 9 Paige, 159, the defendant, Whitlock, who had been a director of the company, transferred his stock to Brown, the president of the company, the latter giving his note, in place of Whitlock's, for the stock transferred. The company afterwards failing, and Brown being insolvent, the receiver was allowed to recover of Whitlock the amount of his shares transferred to Brown. The court held the transfer of the stock to be a fraud upon the rights of the creditors, and ineffectual to relieve Whitlock of his liability, and that Whitlock, having been a director of the company, must be presumed to have known its situation, and had no right to shift from himself to an irresponsible person the liabilities of a holder of the capital stock transferred. In Upton v. Tribilcock, 1 Otto [91 U. S.] 47, the supreme court says: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." Again, in the case of Sanger v. Upton, 1 Otto [91 U. S.] 60, the law is laid down as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied."

Again, in the case of Webster v. Upton, 1 Otto [91 U. S.], is it said (page 71): "The whole subscribed capital stock of a corporation is a trust fund for the payment of creditors when the corporation becomes insolvent. * * * The stock cannot be released, i. e., the liabilities of the stockholders cannot be discharged, to the injury of creditors, without payment."

In Angell & Ames on Corporations (10th Ed. § 535), it is said that a solvent stockholder, who has given a stock note for his stock, cannot upon the insolvency of the company, or in contemplation of that event, even with the consent of the directors, transfer his stock to an irresponsible person, and be discharged from liability. So, at section 623, it is said that, however strictly the personal responsibility imposed upon members of an incorporated company may be construed to be against creditors, one point is very clear, and that is, that no member can exonerate himself from his liability, and defeat the claims of creditors, by transferring his stock to a bankrupt. Any other doctrine is offensive to the plainest and best settled principles of morality and equity. A man is estopped to deny the truth of his admissions that have been acted upon by others. "He who is silent when he ought to speak will not be heard when he ought to remain silent." So, as Mr. Santos silently sat by and saw innocent persons contracting with the First National Bank of Norfolk, perhaps on the strength of his name appearing on the stock list of the bank, he will not be heard in a court of equity to say, against the just demands of creditors, that "he was never the purchaser or owner of the stock transferred as aforesaid." The ground of the equitable

liability of the members is the credit which the company has gained, as a corporation, on the promise of the individual members to raise a fund to enable the corporation to fulfil its engagements. Ang. & A. Corp. (10th Ed.) § 603.

To the same effect many authorities might be cited, but it is confidently believed that sufficient has been adduced to establish the conclusion that the transfers of the stock made by Mr. Santos were illegal and void, and that, consequently, the defendant, Santos, must be held liable for the par value of the thirty-nine shares of stock transferred to his co-defendants. I will sign a decree requiring the defendants, or either of them, to pay the par value of the shares held by Santos before their transfer, with costs.

[NOTE. For decisions in other actions by the same plaintiff to enforce the personal liability of the shareholders, see Cases Nos. 1,714 and 1,715.]

BOWDEN v. TURNER. See Case No. 1,716.

Case No. 1,717.

The BOWDITCH.

[3 Ware, 71.][1]

District Court, D. Maine, April 10, 1856.

SHIPPING — THE MASTER — LIEN FOR WAGES AND DISBURSEMENTS—SEAMEN — LIEN FOR WAGES—SALVAGE — WHO ARE SALVORS — SALVAGE BY SEAMEN.

1. The master has a lien on the freight for his wages, and necessary disbursements for the use of the ship.

2. The seamen have a lien on the freight for their wages.

[See Pitman v. Hooper, Case No. 11,185; Sheppard v. Taylor, 5 Pet. (30 U. S.) 675; The Monadnock, Case No. 9,704.]

[See note at end of case.]

3. In case of shipwreck, they have a lien on the savings of the wreck.

4. They may have a further claim against the wreck in the nature of salvage, when it is saved by their exertion.

[See Brackett v. The Hercules, Case No. 1,762.]

In admiralty.

Butler, for libellant.

Shepley, for claimant.

WARE, District Judge. This is a libel against the owners of the schooner Bowditch, by the seamen for their wages. In November last, when the crew shipped, E. P. Talbot was master. He took the schooner on a verbal contract or agreement, to be employed in the coasting trade on shares; he, as master, to receive twenty dollars a month wages, and to be himself at the expense of victualling and manning, and, after deducting port charges, to pay over to the owners one-half of the net freight for the hire or charter of the vessel. The schooner sailed from Portland on the 23d of November, for Alexandria, with a cargo of plaster, and earned freight to the amount of $183.90, which, after deducting port charges and the master's wages, left a net freight of $123.72, one-half of which, to wit, $61.86, belonged to the owners. At Alexandria, after making some repairs, she took in a cargo of coal for New York, and on her passage to that port was wrecked and lost on Jones' beach, a beach about four miles from the shore of Long Island. The crew remained by the vessel, and faithfully labored to save as much as practicable from the wreck. The fragments saved were afterwards sold in New York for $545.75, including $16.00 for which the hulk was sold as it lay. This, after the deduction of $70.69 expenses, left the net sales of the wreck, $475.06.[2] Three-quarters of the vessel were insured by the Ocean Insurance Co. for $2,250, and the vessel being valued at $5,000 in the policy, this was three-fifths of the value of the three-quarters. The owners were duly informed of the loss and communicated the information to the underwriters, but made no abandonment, nor did the insurers claim to have or exercise any control over the savings of the wreck, or the proceeds of the sale, on the ground that there was a technical total loss. The proceeds were left in the hands of the commission merchant, by whom the wreck was sold subject to the orders of the owners.

The libellants claim wages against the owners. First, on the ground of their general liability as owners. Secondly, if this liability is denied, on the distinction that if the vessel was let to the master on such terms as constituted him owner for the voyage, on the ground that the owners have had the advantage of the freight received; and thirdly, on the ground that they have, at least, the constructive possession of the proceeds of the wreck. It is an indisputable principle of maritime law, that the seamen are entitled to be paid their wages from the freight earned. Whenever this is earned, wages are due. Freight earned and put on shore is saved from the consequences of a subsequent shipwreck. It is in part the proceeds of their own service. In this case freight was earned at Alexandria, and though not paid over to the owners, was appropriated to their use in the purchase of a boat for the vessel and other repairs. And they being bound for the repair of the vessel, it must be considered as received by them. The seamen have also a lien on the savings from the wreck, which gives them a priority over all other claims, except the expenses of salvage. The owners must be considered as having the possession of the proceeds of their savings. The master, who on such occasions is the agent of all who

[1] [Reported by George F. Emery, Esq.]

[2] See note at end of case.

have an interest in the ship, put the fragments saved into the hands of a commission merchant, by whose order they were sold, and the proceeds of the sale paid to him. He holds the fund and is ready to pay over the amount to any party who is entitled to receive it. Prima facie this is the owner. He has not parted with his right by an abandonment, nor have the underwriters claimed to disturb his exclusive possession on the ground that they have an interest in the proceeds. My opinion is, that the libel may well be maintained against the respondents on the ground, that they are in the possession of a fund pledged to the crew for their wages. As this is sufficient it is unnecessary to consider the other question of the personal liability of the general owners, when the vessel is let under such an agreement as this was. Skolfield v. Potter [Case No. 12,925].

The libellants also claim, against the savings of the wreck, a further reward in the nature of salvage. The right of seamen to maintain such a claim, was presented some years ago to this court in the case of The Dawn [Case No. 3,666]. And after a very full and elaborate argument, I came to the conclusion that in cases of shipwreck, seamen were bound to remain by the wreck and render their best services to rescue the property from destruction; and that if this service was faithfully performed, they were entitled to their full wages out of the remains of the wreck, to the time of the disaster; and, according to the circumstances of the case, might be entitled to an additional compensation in the nature of salvage. This, as in all other cases of salvage, would be measured by the circumstances of danger and labor which attended the service, but that it ought in all cases to be sufficient to pay their expenses home.

NOTE [from original report]. It seems to be well settled in this country, that the master has a lien on the freight for his necessary disbursements, for incidental expenses, and his liability for such expenses and also for his own wages. Note to Abb. Shipp. p. 147, and the cases there cited; 1 Ware, 149 [Drinkwater v. Spartan, Case No. 4,085]; 7 Cow. 670; 3 Mason, 255 [The Packet, Case No. 10,654]; 18 Rich. [18 Pick.] 530. Though notwithstanding the decision of Lord King in White v. Baring, 4 Esp. 22, it is otherwise settled in England. Smith v. Plummer, 1 Barn. & Ald. 575; Abb. Shipp. 147, 377, note. The reason given for refusing the master a lien on the freight is, that he has no lien on the ship for his wages and that the freight is incident to the ship. But the master is authorized to receive the freight, and if he has it in his hands he may pay himself, though he has no personal claim against the owners; for when there are cross demands it is only the balance that is due. See further, as to the English law, Abb. [Shipp.] 656, note. I have nothing to add to what is stated in the case of The Dawn [supra] as to the right of seamen to claim as salvors. In the case of The Neptune, 1 Hagg. [Adm. 227], Lord Stowell seemed to limit their claim to that of wages. In that case the wreck was saved by the crew; but in the case of The Reliance, Sir S. Lushington held that their claims were good for wages against the wreck, though it was abandoned by them and saved by other parties. 2 W. Rob. [Adm.] 119.

Case No. 1,718.

BOWDITCH v. BOSTON.

[11 Alb. Law J. 342.]

District Court, D. Massachusetts. May 29, 1875.[1]

MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—BLOWING UP OF BUILDINGS.

[Statutory authority to blow up buildings to prevent the spread of fire, when consented to by three fire-wards of the city, does not render the city liable for buildings blown up on the authority of only two of the fire-wards.]

[See note to Case No. 1,719, following.]

[Action by Alexander G. Bowditch, assignee in bankruptcy of Armstrong & Co., against the city of Boston, for damages sustained by the destruction of buildings to check spread of a fire. Judgment for defendants.]

[Before LOWELL, District Judge.]

The case of Bowditch v. City of Boston [Case No. 1,719], which was tried recently before Judge Lowell, of the United States district court at Boston, involves the liability of the city for damages resulting from the blowing up of buildings for the purpose of checking a conflagration. General Burt, the postmaster of Boston, and several other persons were authorized in writing by Chief Engineer Damrell to blow up buildings and remove goods. The part of the city toward which the fire was advancing was districted, and General Burt was assigned to the section which contained the building in question. It seems that a Massachusetts statute provides that a building may be destroyed to check a conflagration by the act of three fire-wards in a city. The members of a board of engineers of Boston were the fire-wards of the city. But when the authority was given to General Burt, by the chief engineer, only one other engineer was present. Burt and three or four others attended to the blowing up in his district. The court held, that the plaintiff could not recover for the building blown up, on the ground that the city could not be held responsible for the destruction of the property, except as provided in the statute. No evidence had been presented showing that three fire-wards or engineers had ordered the destruction of the building. The decision is sustained by Judge Dillon in his work on Municipal Corporations (section 757), where it is said that the liability in such cases is purely statutory, and in order to change it the case must be clearly and fairly within the enactment. In Coffin v. Nantucket, 5 Cush. 269, it was held, that where the statute allows such a recovery only when a building is demolished by

[1] [Affirmed by circuit court in Bowditch v. Boston, Case No. 1,719, and by supreme court in 101 U. S. 16.]

the order of three fire-wards, a destruction by the order of one of these officers creates no liability against the corporation. A by-law authorizing one officer to exercise these powers in urgent cases was therefore adjudged void. And at common law, in cases of imminent and urgent public necessity, an individual or municipal officer may raze or demolish houses and other combustible structures in a city to prevent the spreading of a conflagration, the city thereby incurring no responsibility.

Case No. 1,719.

BOWDITCH v. BOSTON.

[4 Cliff. 323.] [1]

Circuit Court, D. Massachusetts. May Term, 1876.[2]

TRIAL—PROVINCE OF JUDGE—SUBMISSION TO JURY—MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—LIABILITY FOR TORTS OF OFFICERS—AUTHORIZATION OF TORT—RATIFICATION—LIABILITY FOR DESTRUCTION OF BUILDINGS.

1. In the United States circuit courts, judges are not now bound to submit a case to the jury, merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of that party.

[See note at end of case.]

2. A preliminary question is left for the judge, not whether there is literally no evidence to support the issue; but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed.

[See note at end of case.]

3. Prima facie, a municipal corporation is not liable for the trespass or wrongful acts of its officers; but it may become liable, under special circumstances; as where the act, if not wholly ultra vires, was expressly authorized by the governing body of the corporation, or where it was done by the officers of a corporation within the scope of their duties, and subsequently ratified by the corporation.

4. The liability of a city corporation for buildings destroyed or pulled down to stay the progress of a fire is purely statutory, and never existed at common law.

5. Where property is injured or destroyed by firewards, to prevent the progress of a fire, the liability of the city for such destroyed property being a statutory one, the plaintiff's case must be brought strictly within the statute creating the liability, or the corporation is not responsible.

[See note at end of case.]

6. Property destroyed by officers of a city to stay the progress of a conflagration is not private property taken for public use, under the constitution of Massachusetts.

[Error to the district court of the United States for the district of Massachusetts.

[Action by Alexander G. Bowditch, assignee in bankruptcy of Armstrong & Co., against the city of Boston, for damages sustained by the destruction of buildings to check spread of a fire. From a judgment for defendant (Case No. 1,718), plaintiff appeals. Affirmed.]

In this state, firewards, or any three of them, present at any place in immediate danger from a fire, and where no firewards are appointed, the selectmen or mayor and aldermen present, or in their absence, two or more of the civil officers present, or in their absence, two or more of the chief military officers of the place present, may direct any house or building to be pulled down or demolished, when they judge the same to be necessary in order to prevent the spreading of the fire. Gen. St. Mass. p. 177, c. 24, § 4. Whenever it is adjudged at any fire by any three or more of the engineers present, of whom the chief engineer, if present, shall be one, to be necessary, in order to prevent the further spreading of the fire, to pull down, or otherwise demolish any building, the same may be done by their joint order. City Ords. p. 237, § 11. Damages were claimed by the plaintiff as assignee in bankruptcy of the estate of Armstrong & Co., for the destruction of the stock of merchandise, fixtures, machinery, and tools of the bankrupt, situated in a certain described building in said city, by the authorities of the city during the time of what is known as the great fire of November, 1872. Compensation for the alleged injury having been refused, the plaintiff, as such assignee, instituted this action of tort, to recover for the value of the property destroyed, the writ containing six counts. Four of the counts were founded upon the statute of the state, which provided that certain public officers may, under certain conditions, direct any house or building to be pulled down or demolished, when they judge the same to be necessary in order to prevent the spreading of the fire.

The first count alleged that the order to demolish the property was given by the mayor and aldermen. The second count alleged that the order was given by three firewards of the city. The third count, that it was given by two of the civil officers of the city. The fourth count, that it was given by two of the chief military officers of the place. Unlike those which preceded it, the fifth count claimed to recover upon the ground that the property was taken for public use without just compensation. Cities and towns are by the statute of the state made liable, in certain cases and under certain conditions, to persons whose property is injured or destroyed by persons engaged in a riot, and the sixth count of the writ was founded upon section 8 of that statute. Gen. St. p. 816, c. 164.

Service was made, and the corporation defendant appeared in the district court, where the suit was brought, and pleaded the gen-

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

[2] [Affirming decree of the district court in Bowditch v. Boston, Case No. 1,718. Decree of the circuit court affirmed by supreme court in 101 U. S. 16.]

eral issue, denying every allegation of the several counts of the declaration. Subsequently the case came to trial, and the court, at the close of the plaintiff's case, instructed the jury that the evidence introduced by the plaintiff was not sufficient to warrant the jury in finding a verdict in his favor, and directed a verdict for the defendant, to which instruction the plaintiff excepted. Judgment was accordingly rendered for the defendant, and the plaintiff sued out a writ of error, and removed the cause into this court.

S. B. Allen and G. W. Morse, for plaintiff.

The plaintiff claims that there was evidence for the jury upon all the counts in his declaration, which embrace three grounds of action for the same cause of action. First. Under Gen. St. Mass. c. 24, §§ 4–6. Second. Under the constitutional provision providing for the taking of private property for public purposes. See Const. Mass. pt. 1, art. 10; Const. U. S. art. 5, Amend. Third. Under Gen. St. Mass. c. 164, § 8.

It appears by Gen. St. Mass. c. 24, §§ 1–8, that the election of firewards seems to be left to the discretion of each city or town. The firewards seem intended to be a tribunal entirely distinct from the engineers, but having jurisdiction over them. A body of men of the very highest qualifications and best judgment is contemplated, as they can assume entire control at a fire. The highest power is conferred upon them by section 4, viz.: to pull down or demolish any house or building when they judge the same to be necessary to prevent the spread of fire. But the same section provides that where no firewards are appointed, certain other officers shall have the same power. By sections 26 and 41 the like power is conferred upon the engineers. There seems to be no provision in the statutes as to how many of the engineers shall act. It is left to the whole board, and there are thirteen besides the chief. See City Fire Ord. § 1.

If the legislature has left the power in the hands of the whole board, it is questionable whether the city government can pass a valid ordinance, placing the power in the hands of a small portion of the members, as has been attempted by section 11, City Fire Ord. But however that may be, the engineers are not firewards, although their powers, to a certain degree, are co-extensive. When we examine the whole of Gen. St. Mass. c. 24, together with its history, it is perfectly evident that the legislature meant just what its language imports in section 4; that "where no firewards are appointed, the mayor and aldermen present, or in their absence, two or more of the civil officers present," &c., shall have jurisdiction. Sections 4, 5, 24, 26, and 41, c. 24, were passed at different times. See Rev. St. c. 18, § 5; Acts 1839, c. 138, § 4; Acts 1844, c. 152, § 9. The statutes conferring power upon the engineers were passed subsequently to that constituting the firewards, and the several acts were re-enacted and collected into this one chapter in 1860. If the legislature had intended to confer the power to demolish buildings upon the mayor and aldermen only, in the event of there being no firewards or engineers, such would have been the language; for the subject has three times been before the legislature, as will be seen. If such was the intention of the legislature, it would seem that the alternate provision was idle, as it appears plainly enough under the law that a city without firewards or engineers is an impossibility, and if it is not a city, there are no mayor and aldermen. And furthermore, if such had been the intent of the legislature, it would have expressly provided how many engineers should have jurisdiction. If any number less than the whole board can make such an order, why may not one of them do so? The word "three," qualifying the power of the firewards, does not refer to engineers. It will be observed that the presiding judge ruled, at the beginning of the trial, that, to render the city liable, the order to demolish must have been given by three engineers, to which ruling the plaintiff excepted. That ruling, of course, ended the trial upon the first, third, and fourth counts of the declaration, but all question of pleadings being waived, the plaintiff proceeded as if the second count were amended, alleging the order to have been given by three engineers, as well as upon the fifth and sixth counts. This ruling, at the outset of the trial, and the exception to it, saves every question raised by the first, third, and fourth counts. There is no doubt, however, from the evidence which strayed into the case (incompetent, of course, under the above ruling), that two civil officers gave the orders, and as policemen of the city are such officers, the order was carried out under the supervision of two civil officers. Fisher v. Boston, 104 Mass. 87; Buttrick v. Lowell, 1 Allen, 172.

But the plaintiff claims that there was sufficient evidence to go to the jury, that the order was given by three engineers, or by their authority, sufficient, under the circumstances, to render the city liable under the statute. It has been held that the three firewards must all be present at the particular building to be destroyed, and by unanimous consent condemn it to destruction; but a law which is so inflexible that it cannot be adapted to particular circumstances, is only an instrument of oppression. Where there is a small fire, so that three of the engineers can deliberate upon the expediency of demolishing a particular building, and leave others to see to the general safety, then a stricter construction of the statute is called for; but when a whole city is on fire, and nearly all the fire apparatus

of the principal cities of the commonwealth is on hand, requiring superintendence from the engineers, and human life is in danger at a hundred points, to be relieved only by their efforts, with the murderers and pilferers who hang about such scenes to subdue, and whole streets upon different sides of the fire require demolition to save the remainder of the city, it would be almost criminal for the engineers to divide up into triumvirates, and, as a judicial tribunal, grimly consider the evidence, and doom each particular building to destruction, with the scene of death and desolation going on about them. It would be impossible that such a course could be carried out; for, first, if the number of engineers had been multiplied tenfold, there would not have been enough to have done this and superintended at the different points of the fire; second, it would be impossible to keep a record of the buildings so passed upon at such a time; third, when the circle of the fire is so large, all prominent points requiring the constant presence of an engineer, three engineers could rarely be got together to decide what to demolish in every emergency, and it is only in case of the strictest emergency that they should demolish any building. The best that could reasonably be done was to designate a general or particular line of buildings to be destroyed, and put the execution of it into the best hands possible, which the officers passing the orders have power to do. See Gen. St. c. 24, § 6; City Fire Ord. § 6. The court will always bear in mind in this case, that this is only a question of whether there was any evidence to go to the jury. The sufficiency of the evidence is for the jury, and not for the court. The plaintiff is entitled to every reasonable inference to be derived from the testimony.

The plaintiff, having a leasehold interest in the premises, is the owner within the meaning of the statute, and may recover for such interest in the building, as well as for his personal property destroyed there. New York v. Lord, 17 Wend. 285; same case, with very exhaustive opinion, 18 Wend. 126; Ratcliffe v. Eden, 1 Cowp. 485; Hyde v. Cogan, 2 Doug. 699; Wilmot v. Horton, Id. 702, note. By reference to Rev. St. Mass. c. 18, § 7, the statute provided that "every owner of such house or building shall be entitled to recover reasonable compensation therefor," and so the statute stood until the commissioners who revised the statutes in 1860, changed the phraseology to its present form, viz.: "if the pulling down or demolishing such house or building, is the means of stopping the fire, . . . the owner shall be entitled to recover a reasonable compensation." This change of phraseology, and the dropping the word "therefor," and the words "such house or building" after the word "owner," certainly makes the statute much broader, and must have been intended to extend the remedy to all parties whose property should be destroyed, and especially to all owners of the house or building.

If the plaintiff's property was demolished by the order of the city government of Boston, to stay a great public calamity which was hanging over the city, there can be little doubt that it amounts to a taking of private property for public use within the meaning of the constitutional provision. Const. Mass. pt. 1, art. 10; Const. U. S. art. 5, Amend.; New York v. Lord, supra; American Print Works v. Lawrence, 1 Zab. [21 N. J. Law] 248; Id., 3 Zab. [23 N. J. Law] 605. By 7 & 8 Geo. IV. (A. D. 1827) c. 31, all the statutes in England relative to remedy against the hundred for injuries by parties riotously and tumultuously assembled were consolidated. This statute provides that if certain buildings, &c. (enumerating nearly all classes), shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, the inhabitants of the hundred, or any district in the nature of a hundred, wherever it is situate, shall be liable to yield full compensation to any person damnified by the offence, provided that the persons damnified, or such of them as had knowledge of the circumstance, shall go before some justice of the peace residing near and having jurisdiction over the offence committed, and shall state upon oath the names of the offenders, if known, and become bound to prosecute the offenders, when they become known. If they disperse voluntarily, it is for the jury to consider whether they did what they did with intent to demolish. Clarke v. Burdett, 2 Starkie, 504, is a case where a house was destroyed,—the house of plaintiff. The mob was returning from an election. The counsel representing the hundreds contended that the injuries contemplated by the statutes were such as were to be effected by a mob assembled for seditious purposes only. Lord Chief Justice Abbott said: "The statute extended to all cases where the injury was effected by a mob, whatever was its object. It was by no means uncommon, where the legislature had a particular object in view, in making a particular statute, to extend the particular enactments beyond the particular and immediate objects and apply it to other matter suggested by it. In the present case, the section which related to seditious practices was quite distinct from the clause which gives the present remedy." In Sampson v. Chambers, 4 Camp. 221, a mob aroused by the corn bill assembled around the plaintiff's house, supposing it to be the house of one who had supported the measure, and threw stones and brickbats against it for a considerable time. The mob cried out, "No corn bill;" and while the cry was going on, the cry that "The Piccadilly butchers are coming," was raised. The life guards rode up, and the mob dispersed. Lord Ellenborough held that there was a sufficient "beginning

to demolish" within the meaning of the statute, and plaintiff had a verdict. 1 Geo. I. St. 2, c. 5, provides that if twelve or more persons unlawfully, riotously, and tumultuously assemble, &c., the balance of the act being substantially the same as 7 & 8 Geo. IV. c. 31. The legislature, in passing this statute, having given no definition of the term "riot," within the meaning of the enactment, the common-law definition must prevail; and if there was such riotous demonstration as to terrify any subject, it is sufficient to sustain that part of the charge of riot. Reg. v. Phillips, 2 Moody, Cr. Cas. 252; Beatson v. Rushforth, 7 Taunt. 45. Where insurers paid the amount of the loss occasioned by the demolition of a house by rioters, they might maintain an action in the name of the assured against the hundred, under the statute. Mason v. Sainsbury, 3 Doug. 61. But they cannot in their own name. London Assurance Co. v. Sainsbury, Id. 245. Reed v. Inhabitants, etc., of Gainsbury, 4 Dowl. & R. 250, was under the statute of 9 Geo. I. c. 22, § 8. The only evidence was that some of the inhabitants saw two strange men, at two o'clock in the morning, standing near the property. Soon after, the property was in flames. The court ruled there was sufficient evidence from which the jury might infer that the property was wilfully set on fire. See, also, Lord King v. Chambers, 1 Starkie, 195, and 4 Camp. 377. An act of New York (1855), provides:— "Whenever any building or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action." A fire broke out at the time of the draft riots in New York, July, 1863. In an action under this act it is held, in Ross v. New York, 4 Rob. [N. Y.] 50, that circumstantial evidence is admissible to show that the fire might have been occasioned by a riot or mob. And evidence that a group of men were standing by the hose, and some of them expressed a desire to cut the hose, should be submitted to the jury as tending to connect the fire with a mob or riot actually existing, in connection with threats previously made by the rioters to burn these very premises. In Darlington v. New York, 31 N. Y. 164, and Davidson v. New York, 2 Rob. [N. Y.] 230, the above act was held constitutional. In Sarles v. New York, 47 Barb. 447, it is held the above act covers property carried off by the mob, as well as that destroyed. A riot is defined to be, by elementary writers, "an unlawful act of violence." Since the legislature has placed the execution of what was once a common-law right, belonging to any citizen, into the hands of a special tribunal, that tribunal alone can lawfully execute that power. The act, if performed by others, is an unlawful act of violence. For other leading cases upon the subject of riots, see State v. Renton, 15 N. H. 172; State v. Snow, 18 Me. 346; State v. Straw, 33 Me. 554; State v. Connolly, 3 Rich. Law, 338, 2 Chit. Cr. Law, 274; Brown v. Perkins, 1 Allen, 89; Miller v. Shaw, 4 Allen, 500; Com. v. Campbell, 7 Allen, 542; Tyson v. Booth, 100 Mass. 261; Lord Gordon's Case, 21 How. State Tr. 539; Com. v. Gibney, 2 Allen, 152; Scott v. U. S., 1 Morris (Iowa) 142; Williams v. State, 9 Mo. 270.

There is certainly evidence to go to the jury that Hall, the owner, made proper efforts to discover the perpetrators and to bring them to justice. See Report, pp. 78, 79, 85-88. It is quite probable that the evidence might have operated very differently upon the minds of the jury than upon that of the presiding judge. It will be observed that he remarks in his ruling that he doubts "whether there is any evidence that Hall ever undertook or made any inquiries to speak of until this case was brought." It was a question of fact, and should have been submitted to the jury upon the evidence.

J. P. Healy and H. W. Putnam, for defendant.

The defendant is not liable at common law for the destruction of the plaintiff's property, whether real or personal, in the manner alleged in any of the counts or disclosed by any of the evidence. A municipal corporation is not liable for the tortious acts of its agents or officers acting entirely outside of the scope of their corporate duties and employments, and without any special authority from the governing body. Dill. Mun. Corp. § 770, and cases cited; Thayer v. Boston, 19 Pick. 511, 516.

1. Neither the mayor and aldermen, nor any of the civil officers of the city, have any authority, either at common law or under the charter of the corporation, to destroy either buildings or personal property of the citizens, as the agents of the city.

2. The military officers of the place, whether those be United States army or state militia officers, are not the agents of the city, and cannot bind it by their acts. The former derive all their powers and duties from the acts of congress, which in no way connect them with the states or cities in or near which they happen to be quartered. The latter derive all their powers and duties from the state, and their powers and duties and the manner of their appointment and removal are all provided for by state statutes, which do not connect them in any way with the municipal corporations situated within the limits of the state. Gen. St. Mass. c. 13.

3. Firewards, engineers, firemen and policemen are not agents of the city in its corporate capacity, and do not derive their authority from the city. They are public officers forming a part of the governing power of the commonwealth, and vested by statute

with certain powers and duties which they exercise independently of the city. The defendant is not responsible for any of their tortious acts. Hafford v. New Bedford, 16 Gray, 297; Buttrick v. Lowell, 1 Allen, 172; Fisher v. Boston, 104 Mass. 87, 94; Wheeler v. Cincinnati, 19 Ohio St. 19; Dill Mun. Corp. §§ 758, 773. Moreover, no individual or municipal officer who demolishes houses in good faith to prevent the spread of a fire commits a tortious act in so doing; and therefore, his acts not being such as to render himself personally liable for a tort, they cannot subject his principal (assuming the city to be such) to any liability. 2 Dill. Mun. Corp. (2d Ed.) § 756, and cases cited. As all the testimony shows the acts of the above-named individuals and officers to have been done in good faith, there was no tort committed by them.

4. Municipal corporations are not liable in damages at common law for property of individuals destroyed by riotous, or tumultuous assemblies. Dill. Mun. Corp. § 760, and cases cited; Davidson v. New York, 2 Rob. (N. Y.) 230; Darlington v. Same, 31 N. Y. 164; Western College v. Cleveland, 12 Ohio St. 375; Prather v. Lexington, 13 B. Mon. 559; Ward v. Louisville, 16 B. Mon. 184.

There is no evidence to support a verdict for the plaintiff under the statutes of the commonwealth, the liability of the defendant in any event being purely the creature of statute. Under the first five counts of the declaration the plaintiff relies upon Gen. St. c. 24, §§ 4, 5, which are as follows:—"Sect. 4. The firewards, or any three of them present at a place in immediate danger from a fire, and where no firewards are appointed, the selectmen or mayor and aldermen present, or in their absence two or more of the civil officers present, or in their absence two or more of the chief military officers of the place present, may direct any house or building to be pulled down or demolished, when they judge the same to be necessary in order to prevent the spreading of the fire. Sect. 5. If such pulling down or demolishing of a house or building is the means of stopping the fire, or if the fire stops before it comes to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building is that in which the fire first broke out, the owner shall receive no compensation." Acts 1850. c. 262, § 3 (under which act the fire department of the city of Boston, as it existed in November, 1872, was established by city ordinance), is as follows:—"Sect. 3. The engineers or other officers of the department, so appointed as aforesaid, shall have the same authority in regard to the prevention and extinguishment of fires, and the performance of the other offices and duties now incumbent upon firewards, as are now conferred upon firewards by the Revised Statutes or the special acts relating to the city of Boston now in force." Rev. St. c. 18, §§ 4, 7, are substantially the same as Gen. St. c. 24, §§ 4, 5; and it appears by the commissioners' report that no change was intended, although the phraseology is slightly different. (Report of the Commissioners on the Revision of the Statutes, 1838, pp. 208, 209.) And there are no special acts relating to the city of Boston which touch this point. It is, therefore, immaterial whether the powers of the engineers are determined by Rev. St. c. 18, § 4, or Gen. St. c. 24, § 4. The city ordinance establishing the fire department as it existed in November, 1872 (Laws and Ordinances of City of Boston, Ed. 1869, p. 237), is as follows:—"Sect. 11. Whenever it is adjudged at any fire, by any three or more of the engineers present, of whom the chief engineer, if present, shall be one, to be necessary in order to prevent the further spreading of the fire, to pull down or otherwise demolish any building, the same may be done by their joint order."

The New York cases, arising after the fire of 1837, turned upon the wording of the New York statute, which gave a remedy against the city to "the owners of such building and all persons having any estate or interest therein for the damages they have sustained by the pulling down or destroying thereof." New York v. Lord, 17 Wend. 285; Id., 18 Wend. 126.[3]

The court rightly ruled (pages 9, 10) that the orders for the destruction of buildings must be given by three of the engineers, in order to render the city liable. The statute above cited (Acts 1850, c. 262, § 3) expressly confers upon the engineers the powers of firewards in respect to the demolition of buildings. Gen. St. c. 24, §§ 4, 5, confer certain judicial discretion, and the power to carry out that discretion, upon officers (firewards) vested by law with certain duties in relation to the extinguishment of fires; and the identity of the duties and functions, not of the names, determines who shall exercise the powers. Similar cases are common in the legislation of Massachusetts. Thus, engineers of fire departments established by selectmen of towns (Id. § 26), and in fire districts (Id. § 41), have all the powers of firewards; the board of aldermen of the city of Boston have the powers of highway surveyors (City Charter, § 41; Acts 1854, c. 488, § 41), and of county commissioners for Suffolk county (Gen. St. c. 17, § 33). Powers so given are upheld by the decisions of the supreme judicial court of Massachusetts. Benjamin v. Wheeler, 15 Gray, 486, 490; Heald v. Lang, 98 Mass. 581; Long v. Sargent, 101

[3] But see Bronson, J.'s, very able dissenting opinion, and the cases of Mayor, etc., of New York v. Stone, 20 Wend. 139, 25 Wend. 160; Russell v. New York, 2 Denio, 461,—approving of Bronson, J.'s, opinion, and holding that the city is not responsible for destruction of personal property owned by a person who is not himself an occupant.

Mass. 117; Fisher v. Boston, 104 Mass. 94. The statute on which the plaintiff relies (Gen. St. c. 24, § 4) has been construed by the supreme judicial court of Massachusetts to mean that three firewards must determine upon the particular building which they shall adjudge necessary to be destroyed. It is the united judgment of the officers to whom the power is given, acting upon the immediate exigency which is contemplated by the statute. It is not sufficient that a general conclusion or judgment be arrived at, that it is necessary to destroy some buildings in order to put a stop to the further extension of a fire. Coffin v. Nantucket, 5 Cush. 269; Ruggles v. Nantucket, 11 Cush. 433, 436, 437; Parsons v. Pettingill, 11 Allen, 507, 511; Dill. Mun. Corp. § 757, and cases cited.

III. Under the sixth count, the plaintiff relies upon Gen. St. p. 816, c. 164, § 8, which is as follows:—"Sect. 8. When property of the value of $50 or more is destroyed, or property is injured to that amount, by any persons to the number of twelve or more, riotously, routously, or tumultuously assembled, the city or town within which the property was situated shall be liable to indemnify the owner thereof, to the amount of three-fourths of the value of the property destroyed, or of the amount of such injury thereto, to be recovered in an action of tort: Provided, that the owner of such property uses all reasonable diligence to prevent its destruction or injury, and to procure the conviction of the offenders." This section is contained in a chapter prescribing penalties for criminal offences against the public peace. The preceding section (Id. § 7) makes it a state-prison offence (i. e. a felony) for "persons unlawfully assembled to demolish . . . any building" . . . And it is evidently intended that, for the same crime, cities and towns shall be liable in damages to property holders. There is no statutory definition of "riot," "rout," and "tumult," in Massachusetts, and the common-law definitions of those words must be followed. The terms "riotous," "routous," and "tumultuous," as applied to an assembly, are in law synonymous. Such an assembly as either of these adjectives would indicate becomes a "riot" when its members commit any overt acts of violence, such as the destruction of property. "Tumultuous" or "unlawful" assembly, and a "rout," are the preliminary steps to a "riot," and contain all the ingredients of the latter offence, except the actual execution of the criminal enterprise. Hawk. P. C. bk. 1, c. 65, §§ 3–5; Rosc. Cr. Ev. (8th Ed.) 902; 1 Russ. Crimes, 266, 272; 2 Whart. Cr. Law, § 2473 et seq.; Reg. v. Soley, 11 Mod. 116, 2 Salk. 594. The gist of the present case is the overt act, i. e. criminal destruction of property, for which the city is held liable to give indemnity, and the plaintiff must, therefore, prove a "riot." He must show that twelve or more persons took such part in the destruction of his property as to render them each and all guilty of the crime of "riot."

The common-law definition of a "riot" is as follows:—"A tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." Hawk. P. C. bk. 1, c. 65, § 1; Rosc. Cr. Ev. (8th Ed.) 901; 1 Russ. Crimes, 266; 2 Whart. Cr. Law, § 2473 et seq.; 2 Bish. Cr. Law, § 1183 et seq. In the case at bar the number of persons must be twelve instead of three, that number being fixed by the statute above cited. (The constitutionality of a similar act has been passed upon in New York, and sustained, though with a strong dissenting opinion by Ingraham, J. Davidson v. New York, 2 Rob. [N. Y.] 230; Darlington v. Same, 31 N. Y. 164.) To constitute a riot, then, several things must be proved:—1. An "unlawful assembly" of twelve or more persons, i. e. a meeting under circumstances which the law does not allow, and with a common criminal intent. Rosc. Cr. Ev. (8th Ed.) 906; Hawk. P. C. bk. 1, c. 65, §§ 3–5; Rosc. Cr. Ev. (8th Ed.) 902; Dougherty v. People, 4 Scam. 180; Reg. v. Soley, 11 Mod. 116, 2 Salk. 594. 2. A confederation of twelve or more, with promises of mutual assistance in carrying out the common purpose with violence if necessary. 3. Tumult and disturbance of the peace by twelve or more in forming and moving towards a performance of the common purpose. 4. The actual commission of the act by twelve or more, with circumstances inspiring terror. 5. Some private quarrel or malice actuating the twelve or more persons claimed to be rioters. In this case none of these propositions are proved. There is no evidence whatever of any unlawful assembly with a common purpose, either when they first assembled or afterwards, to destroy this building. Com. v. Gibney, 2 Allen, 150; State v. Stalcup, 1 Ired. 30; State v. Kempf, 26 Mo. 429; Newby v. Territory, 1 Or. 163; Prince v. State, 30 Ga. 27. There were crowds in the streets, as there always are at fires, watching, as spectators, the fire that was raging. They did not have any other common purpose either in assembling or after they assembled. Only three or four persons are shown to have had any common purpose to demolish this building. Others were outside, looking on; but there is no evidence that they knew of the intended demolition at all, or, if they did know of it, that they had any other thought than to see the explosion, which they supposed was being executed under lawful authority and for the purpose of stopping the spread of the fire. There is no evidence of a criminal intent or

desire to wantonly destroy property. Acts done bona fide with the intent to save property by destroying buildings with gunpowder, which would in any event be inevitably destroyed by fire, are legal and justifiable, and are not evidence of a criminal intent. Mouse's Case, 12 Coke, 63; 2 Dill. Mun. Corp. § 756, and cases cited; Patterson, J., in Reg. v. Langford, 1 Car. & M. 602; Maleverer v. Spinke, 1 Dyer, 35a; Governor v. Meredith, 4 Term R. 794. No other motive than the above-mentioned one is shown in any persons having any thing whatever to do with the blowing up of this building. Persons standing around looking on do not become aiders and abettors, or confederates, from the mere fact of not resisting the acts of others. Com. v. Griffin, 3 Cush. 523; Com. v. Berry, 5 Gray, 93; Brown v. Perkins, 1 Allen, 89, 98; Pennsylvania v. Craig, Add. 190; State v. McBride, 19 Mo. 239; State v. Calder, 2 McCord, 463; Fauvia v. New Orleans, 20 La. Ann. 410. There is no evidence whatever that the building was blown up in a violent manner, and under circumstances of terror to the owners or occupants. Actual force must be proved. Rex v. Bathurst, Sayer, 225; King v. Wilson, 8 Term R. 357. Also circumstances calculated to excite terror, in order to prove the necessary allegation in an indictment that the act was done in terrorem populi. Rex v. Hughes, 4 Car. & P. 373; Rex v. Cox, Id. 538; Com. v. Runnells, 10 Mass. 518; 1 Bish. Cr. Law, § 979, and cases cited. More than a mere civil trespass must be proved. The court will not submit a case to the jury upon the appearance of a mere scintilla of evidence in support of plaintiff's case. There must be a kind and amount of evidence which would reasonably warrant a verdict for plaintiff. Clifford, J., in Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 664, 665; Ryder v. Wombwell, L. R. 4 Exch. 39; Giblin v. McMullen, L. R. 2 P. C. 335; Jewell v. Parr, 13 C. B. 916; King v. Accumulative L., F. & G. Assur. Co., 3 C. B. (N. S.) 151; Wheelton v. Hardisty, 8 El. & Bl. 262, 266.

CLIFFORD, Circuit Justice. Since the case was entered here, the same has been fully argued, the error assigned being that the district court erred in directing a verdict for the defendant. Instead of that, the proposition is, that, inasmuch as the evidence was in its nature legally admissible, its sufficiency to prove the issue was for the jury, and it was error in the presiding justice to withdraw it from their consideration. Authorities undoubtedly may be found, in which it is held that it is necessary in all cases to leave the question to the jury, if there is any evidence, even a scintilla, in support of the issue; but it is now well-settled law that the question for the judge in such a case is not whether there is literally no evidence to support the issue, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. Ryder v. Wombwell, L. R. 4 Exch. 39. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of that party. Giblin v. McMullen, L. R. 2 P. C. 335.

Most of the modern decisions are in accord with the views expressed in that case, and they show the rule to be that there is, or may be, in every case, before the question is left to the jury, a preliminary question for the judge, not whether there is literally no evidence to support the issue, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Jewell v. Parr, 13 C. B. 916; Toomey v. London, B. & S. C. Ry. Co., 3 C. B. (N. S.) 150; Wheelton v. Hardisty, 8 El. & Bl. 266; Schuchardt v. Allens, 1 Wall. [68 U. S.] 369; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 637; Schuylkill & D. Imp. & R. Co. v. Munson, 14 Wall. [81 U. S.] 448; Pleasants v. Fant, 22 Wall. [89 U. S.] 120. Under that rule it is clear that the ruling of the district court was correct, unless the views of the plaintiff can be sustained in regard to the causes of action set forth in the fifth and sixth counts of the declaration. Prima facie, a municipal corporation is liable for the trespass or wrongful acts of their officers; but it may become liable under special circumstances, as where the act, if not wholly ultra vires, was expressly authorized by the governing body of the corporation, or where, without special authority, it was done by its officers in the scope of their duties or employment, and has been ratified by the corporation. Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, agents to judge of an emergency and to perform or direct the performance of acts which a private individual would do at his peril. Acts authorized to be done to prevent the spreading of fire may be put as an example of the kind. Officers of such corporations are accordingly sometimes authorized to pull down or destroy buildings to stay the progress of fire, and such corporations are in certain cases and under certain conditions made liable by statute for the value of the property injured or destroyed for the purpose; but the liability of the municipal corporation in such a case is purely statutory, and never existed at common law. Hence, in order to recover for such a claim, the case must be clearly proved, and be fairly brought within the statutory provision. Consequently it is decided that, where the statute allows such a recovery only when a building is demolished by the order of three firewards, a destruction of it by the order of one of those officers will

create no liability against the corporation. Engineers in this state have the same authority in regard to the prevention and extinguishment of fires, and the performance of other offices and duties in respect thereto, as firewards, and the same rule applies in determining whether or not the corporation is liable for their acts. Gen. Acts, 1850, c. 262, § 3; Gen. St. p. 181, c. 24, § 41.

Claims of the kind, whether the property was injured or destroyed by the act of the firewards or engineers, must be brought strictly within the statute creating the liability, or the corporation will not be held responsible. Statutes of the kind cannot be modified by a by-law, as, for example, where the statute allowed such an order to be given by three firewards, and the by-law authorized one to exercise it in urgent cases, the supreme court of Massachusetts held that the by-law was void; that the injured party could not recover. Coffin v. Nantucket, 5 Cush. 271. In order to charge the corporation in such a case, the remedy being given only by statute, the case must be brought clearly within the true intent and meaning of the provision creating the liability. Taylor v. Plymouth, 8 Metc. [Mass.] 465; Hafford v. New Bedford, 16 Gray, 302.

Houses or buildings situate at a place in immediate danger from a fire may, by the order of three firewards, be pulled down or demolished, when they judge the same to be necessary in order to prevent the spreading of the fire. Property within such a house or building, it may be admitted, is within the scope and meaning of the provision, and the succeeding section provides that the owner shall be entitled to recover a reasonable compensation from the city or town, if such pulling down or demolishing of the house or building was the means of stopping the fire, or if the fire stopped before it came to the same, unless the house or building pulled down or demolished was the one in which the fire first broke out, in which event the provision is that the owner shall receive no compensation. Gen. St. p. 176, c. 24, § 5. Cities and towns are liable to that extent, and under those conditions, and not otherwise. Unless, therefore, the evidence offered by the plaintiff at the trial brings his case within those provisions, he cannot recover in this action. Such an action cannot be maintained unless it appears that the house or building was pulled down or demolished by the order of three firewards or three engineers, or by the joint order of some one of the other classes of officers named in section 4 of that act.

Much discussion of that question is unnecessary, as it has already been decided by the supreme court of the state. "The plain intent of the statute is that no house or building shall be demolished unless it shall be judged necessary by three firewards, or by the other officers authorized to act in their absence, or where no firewards have been appointed." Ruggles v. Nantucket, 11 Cush. 436. Nothing is left for construction, since that decision, in disposing of the cause of action set forth in the first four counts in this case, as the court there say, "It is the united judgment of the officers to whom the power is given, acting upon the immediate exigency, and determining the necessity which is contemplated by the statute. Its language is capable of no other reasonable interpretation. It is a joint authority expressly given to the officers designated, acting together, and cannot be exercised by a minority or by any one of them," and the court add, what it is important to observe, that it is not sufficient that a general conclusion or judgment was arrived at by three firewards, or the other officers mentioned, that it was necessary to destroy some buildings in order to put a stop to the further extension of a fire. They must go further. They must determine upon the particular house or building which they shall adjudge necessary to be destroyed for the purpose, as this cannot be left to the individual judgment of any one of the firewards. Federal courts, in construing state statutes, follow the decisions of the state, and in general regard the construction given to the statute by the state court as binding as the text. Leffingwell v. Warren, 2 Black [67 U. S.] 603; Loring v. Marsh [Case No. 8,514]; McKeen v. Delancy, 5 Cranch [9 U. S.] 22.

From these rules, it is very clear that the plaintiff failed to prove any right to recover under the first four counts of the writ. Evidence was given upon the subject, as, for example, the chief engineer, Damrell, testified that at a meeting of three or four engineers with him, it was voted, if, in the judgment of the chief engineer, gunpowder could be used in any way to stay the conflagration, the board were ready to co-operate, but he states that it was contrary to their judgment that gunpowder was used. Two engineers, Green and Smith, were designated to act with the chief engineer, but he testifies that he and his associates did not designate any building to be destroyed, and that they had not decided at that time to blow up any building. Persons subsequently met in consultation at the mayor's office, but three engineers were not present. Damrell was there, and perhaps Green, but no others of that class of officers. According to the testimony of William L. Burt, he, said Burt, was assigned to the district where this building was situated, by the mayor and chief engineer, with authority to use gunpowder at his discretion, and it appears that Burt blew up the building with the concurrence of Green, but no other engineer ever assented to the act. All that is proved is that one engineer gave the order, which is clearly insufficient to support the action, the rule being that "three engineers must determine upon the particular house or building which

they shall adjudge necessary to be destroyed for the purpose." In the case at bar, the evidence fails to show any joint judgment of three firewards or engineers as to the necessity of destroying the building which contained the property, the value of which the plaintiff seeks to recover in this action.

Private property, under the constitution of the state, cannot be taken from the owner, or be applied to public uses, without his own consent, or that of the representative body of the people, and the provision is, that, whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. Gen. St. p. 17. Viewed in any light, the evidence had no tendency to show that the property destroyed was taken by the corporation for any use, public or private. Enough appears to show that the property was destroyed, but there is no evidence whatever that the order for its destruction was given by any one who had any authority to represent the corporation in that regard, which is all that need be said upon the subject.

Nor can the action be sustained under the sixth count, for the reason that the evidence introduced has no tendency whatever to show that the persons who destroyed it were engaged in a riot. Instead of that, the tendency of the evidence is to show that the order for the destruction of the building was given by William L. Burt, with the concurrence of one engineer, and it is not charged, even in argument, that they were engaged in any riotous proceedings. Suffice it to say that the charge of riot is wholly unsupported by the evidence, and that there is no evidence in the case, to support the sixth count of the writ, which deserves any consideration. Judgment of the district court affirmed, with costs.

[NOTE. This case was affirmed by the supreme court on the ground that the rule is settled in the United States courts that in a civil case, whenever the evidence, clearly, does not warrant a verdict for a party, and that if there were such a verdict the opposing party would be entitled to a new trial, the court should direct the jury to find according to its (the court's) views; also, that, the remedy being given by statute, the case must be brought clearly within it; and, further, that there was no proof of compliance with the statute, by an adjudication of three of the engineers present as to the necessity for the destruction of the building, nor proof that such destruction was by their joint order. In the language of Mr. Justice Swayne: "At least three engineers of the fire department—the chief engineer, if present, being one—must have consulted together touching the blowing up of that particular building. They must all have arrived at the conclusion that it was necessary to destroy it in order to arrest the progress of the flames. They must all, jointly and specifically, have ordered that building to be destroyed. * * * We have failed to find the slightest proof that any three of the fire engineers ever consulted in relation to destroying the building to which this controversy relates; that any three, jointly or severally, expressly or by implication, gave an order that it should be destroyed; or that this particular building was ever present to the minds of any three of the engineers, in that connection." Bowditch v. Boston, 101 U. S. 16.]

BOWDOIN, The (The HAUGESUND, v.). See Case No. 6,220.

BOWDOIN (PARKMAN v.). See Case No. 10,763.

BOWEN (BUXTON v.). See Case No. 2,260.

Case No. 1,720.

BOWEN et al. v. CHASE et al.

[7 Blatchf. 255.][1]

Circuit Court, S. D. New York. June 2, 1870.

REMOVAL OF CAUSES—APPLICATION—SUFFICIENCY OF AFFIDAVIT—AUTHENTICATION.

1. Where a suit is sought to be removed into this court from a state court, under the act of March 2d, 1867 (14 Stat. 558), the affidavit which is, by that act, required to be made and filed in the state court, must, at least in the absence of any controlling statute of the United States, be taken and certified in such manner as the state law requires in respect to the taking and certifying of affidavits to be received and used in the courts of the state.

[Cited in Sutherland v. Jersey City & B. R. Co., 22 Fed. 358.]

2. If such an affidavit purports to be taken and certified in conformity with the provisions of the state statute of New York of April 7th, 1869 (Laws N. Y. 1869, c. 133), it must have attached to it such a certificate as is required by the second section of that statute.

3. Where such an affidavit was entitled, "In the Supreme Court of the State of New York," followed by the names of the parties at full length, and stated that the affiant "is one of the plaintiffs in the suit above-entitled and that he has reason to believe and does believe that, from prejudice and local influence, he will not be able to obtain justice in this court": *Held*, that such affidavit was a substantial compliance with the provision of the said act of 1867, requiring the party to make an affidavit, stating "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court."

[Cited in Fisk v. Henarie, 32 Fed. 421; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 862.]

[At law. Actions of ejectment by Champlain Bowen and others against Nelson Chase and others. Defendants moved to strike the causes from the docket, and plaintiffs moved for a commission. Defendants' motion denied, and plaintiffs' motion as to case No. 3 granted.]

Charles Tracy and Clarence A. Seward, for plaintiffs.

Charles O'Conor and James C. Carter, for defendants.

BLATCHFORD, District Judge. Three of these suits, of which there are four with the same title, are known as Nos. 1, 2 and 4. They, as well as suit No. 3, are actions of

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

ejectment originally brought in the supreme court of the state of New York. On the 30th of October, 1869, the plaintiffs in each suit of those known as Nos. 1, 2 and 4 filed in that court a petition for the removal of the suit into this court, verified by them, and also certain affidavits accompanying the petition, and a bond offered as the surety required on such removal. On the 13th of November, 1869, a motion was made in the state court, in each suit, by the plaintiffs, on notice to the defendants, that the bond be accepted. When the motions came on to be heard, in each case, the petition was read, and the counsel for the plaintiffs then proposed to read the affidavits verifying the petition, and also the other affidavits beforementioned as accompanying the petition. This was objected to on the part of the defendants, on the ground that none of the affidavits were made or authenticated in such manner as to entitle them to be read. The court sustained the objection, and then made an order in each case reciting the proceedings and dismissing the petition. Notwithstanding this, the plaintiffs have, in each case, filed in the office of the clerk of this court certain papers purporting to be copies of the process, pleadings, depositions, testimony and other proceedings therein, exemplified or certified by the clerk of the state court, and have caused each suit to be docketed in this court, or its title to be entered in the book wherein entries are made of the proceedings taken in causes pending in this court. The defendants, claiming, in each case, that it has not been lawfully removed to this court and is not pending therein, now move that it be stricken from the docket of this court, and that all entries in respect to it be stricken from the books in the office of the clerk of this court, and that the papers so filed be stricken or taken from the files of this court. The plaintiffs, claiming, in each case, that it is pending in this court by removal from the state court, move for a commission to examine certain persons in Rhode Island as witnesses therein.

The removal in these cases was sought to be effected under the act of March 2d, 1867 (14 Stat. 558), which provides as follows: "Where a suit is now pending or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory" (Act July 27, 1866; 14 Stat. 306), "are required to be done upon the removal of a suit into the United States court; and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit; and, the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process."

The only material question for consideration in the view I take of these cases is, as to whether the affidavit accompanying the petition, and purporting to be the affidavit required by the act of 1867, was authenticated in such manner as to entitle it to be used in the state court for the purpose for which it was, under that act, offered to be used. I do not speak of the affidavit verifying the petition. The act does not expressly require the petition to be verified by affidavit. In that respect it differs from the act of March 2d, 1833 (4 Stat. 632), and from the act of March 3d, 1863 (12 Stat. 755), both of which acts expressly require the petition for removal to be verified by affidavit. I confine the inquiry to the affidavit mentioned in the act of 1867. The act requires the affidavit to be made and then to be filed in the state court; and it prescribes what the affidavit shall state.

Although the affidavit is one to be made for the purpose of securing a privilege created by a law of the United States, and although the making of the affidavit is prescribed by a law of the United States, yet the affidavit is one which is to be received and used in a judicial proceeding pending in a state court; and it cannot be doubted that it must be taken and certified, at least in the absence of any controlling statute of the United States, in such manner as the state law may require in respect to the taking and certifying of affidavits to be received and used in the courts of such state. It is not claimed that the affidavits in these cases were taken or certified in conformity with any statute of the United States prescribing the mode of taking or certifying them; and the act of 1867 merely says that the affidavit is to be made and filed in the state court. The affidavits in question were made to be used in the state court. They were made to be filed in the state court, that is, to be received by such court in judicial proceedings therein. Unless the affidavit is so first filed there can be no removal of the suit.

The affidavits here were evidently intended to be taken and certified in conformity with the provisions of the act of the legislature of the state of New York, passed

April 7th, 1869 (Laws N. Y. 1869, c. 133). That act provides as follows: "Section 1. In cases where by law the affidavit of any person residing in another state, or in any territory of the United States, is required or may be received in judicial proceedings in this state, the same may be taken and certified by any officer authorized by the laws of such state or territory to administer oaths and take and certify affidavits to be used in the courts of record of such state or territory. § 2. To entitle such oath or affidavit to be read in the courts of this state, there shall be stated in the body of such affidavit, the name, residence, age and occupation of the deponent or affiant, and there shall be attached to the jurat or affidavit a certificate, under the name and official seal of the clerk, register, prothonotary or other officer authorized by the laws of such other state to make such certificate, of the county in which the officer taking and certifying such oath or affidavit resided, specifying that such officer was, at the time of taking such oath or affidavit, duly authorized to take the same, and that such clerk, register, prothonotary or other officer is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or certificate is genuine, and that such oath or affidavit purports to be taken in all respects as required by the laws of such state or territory; and such oath or affidavit so taken and certified may be read in any court or before any officer in any suit or proceeding in this state, with like force and effect as if such oath or affidavit had been taken before any officer authorized by law to take affidavits in this state to be read in courts of record."

The plaintiffs in these cases resided all of them in the state of Rhode Island, and the affidavits were all of them taken in that state. There being several plaintiffs in each case, they did not all unite in one affidavit in each case, but several affidavits were made in each case, each affidavit being made by different plaintiffs. Some of the affidavits in a case were taken by a justice of the peace and some by a public notary. The authority of these officers to take the affidavits, as being officers provided for by the first section of the New York statute of 1869, is not questioned. The difficulty is with the forms of the certificates attached to the affidavits, as not being in the form required by the second section of that statute. In respect to the justice of the peace, the certificates are made by the clerk of the supreme court of Rhode Island within and for the county of Providence. In respect to the public notary, the certificates are made by the clerk of the court of common pleas of Rhode Island within and for the county of Providence. None of the certificates state, as is required by the New York statute, that the clerk making them is well acquainted with the handwriting of the officer taking the affidavits, and the certificates in respect to the public notary fail to state that the affidavits taken by him purport to be taken in all respects as required by the laws of Rhode Island. There is nothing in the certificates that amounts in substance to a compliance with the New York statute in these particulars.

There is no question here of any attempt by the state, by legislation, to embarrass the exercise of the privilege of removing a cause into the federal court. The requisitions of the state statute as to the form and contents of the certificate are not unreasonable, and any person seeking to have received or used, in a judicial proceeding in a court of the state of New York, an affidavit made by a person residing in another state, taken by such an officer as is specified in the first section of the New York statute of 1869, must have attached to such affidavit a certificate specifying in substance the particulars required to be specified therein by the second section of that statute; otherwise, the affidavit is not entitled to be received or used in a court of the state of New York. Such was undoubtedly the view of the court which dismissed the petitions, and there is no sound principle on which the correctness of that view can be questioned. It is equally clear, that the affidavit must be one that is entitled to be received or used in the state court, before it can be employed in effectuation of a removal of the suit to the federal court.

It follows, that the motion of the defendants must be granted and the motion of the plaintiffs be denied, as to cases Nos. 1, 2 and 4. As to case No. 3, the proceedings in it, for the removal of the cause, have been the same as those in the three cases of the same title, known as Nos. 1, 2 and 4, with certain exceptions hereafter mentioned, and the same motions are now made in it as in cases Nos. 1, 2 and 4, with the addition, that the defendants move that it be remanded to the state court. On papers in all respects the same as those in cases Nos. 1, 2 and 4, the state court made an order that the prayer of the petition be granted and that such state court proceed no further in the action. The defendants did not, in the state court, take the objections to the forms of the certificates attached to the affidavits, which they took to the forms of the certificates attached to the affidavits in cases Nos. 1, 2 and 4, but expressly waived such objections, and they have expressly waived them in open court, in this court, on these motions. This applies not only to the affidavits provided for by the act of 1867, but also to the verifications of the petitions.

The only ground urged, in case No. 3, for remanding the case to the state court, is, that no one of the plaintiffs states in his affidavit that he "has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in

such state court." Each affidavit is entitled thus: "In the supreme court of the state of New York," followed by the names of the parties at full length. The affiant states, that he "is one of the plaintiffs in the suit above entitled," and that he "has reason to believe and does believe that, from prejudice and local influence," he "will not be able to obtain justice in this court." This is a substantial compliance with the act of congress. The motion of the defendants is denied and the motion of the plaintiffs is granted, as to case No. 3.

[NOTE. For the disposition in the supreme court of a bill to establish defendant's title, and to enjoin prosecution of the actions herein, see Bowen v. Chase, 94 U. S. 812; and, for the final disposition of one of the actions herein, see 98 U. S. 254.]

Case No. 1,721.

BOWEN v. CLARK.

[1 Biss. 128;[1] 5 Am. Law Reg. 203.]

District Court, D. Wisconsin. Nov. Term, 1856.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment with preferences, made by two members of a firm, in the absence and without the knowledge or consent of the third, who had previously refused to give preference to any creditors, is not valid as to him.

[See Marsh v. Bennett, Case No. 9,110; In re Lawrence, 5 Fed. 349; Halsey v. Fairbanks, Case No. 5,964; and see note at end of case.]

2. He having repudiated the assignment, and with the aid of his partners and a mortgagee of a portion of the property regained possession of it, this court will not entertain a bill by preferred creditors to compel redelivery to the assignee.

3. Although in Wisconsin a mortgage of a retail stock, not duly filed, or accompanied with delivery of possession, is void as to creditors, a bill by preferred creditors against the mortgagors and the mortgagee, who is equally preferred will not lie unless the mortgagee claims payment in full to their prejudice.

4. Where the principal assigning partner was, at the time of the execution of the assignment, laboring under the immediate effects of intoxication, well known to the assignee and the agent of the creditors procuring the assignment, the transaction will not be favored in a court of equity.

[See Johnson v. Harmon, 94 U. S. 371.]

In equity.

Joseph A. Sleeper and Finch & Lynde, for complainants.

Bennett & Sloan, for defendants.

MILLER, District Judge. This bill is filed by two firms,—Bowen & McNamee, and Sachett, Belchor & Co., of New York, who are creditors of the firm of H. O. Clark & Co., which was composed of Clark, Smith and Justin. This firm being largely indebted, on the third day of July, 1854, an assignment of their stock in trade and choses in action and effects was made to Stevens in trust. The assignment is in the form of an indenture between Clark, Smith & Justin, partners, under the name, style and firm of H. O. Clark & Co., party of the first part, and Charles Stevens of the second part, and it is signed, with seals annexed, H. O. Clark, Ira Justin, A. Hyatt Smith by H. O. Clark, his partner, H. O. Clark & Co., Charles Stevens. The trust created is to convert all the assigned property into cash, and first to pay in full the claims and demands of Miller, A. Clark, Brewster and the two firms, complainants, and then all the remaining partnership debts, pro rata.

On the 19th of May, previous to the date of the assignment, Clark, Justin and Smith, by their attorney, Clark, under their respective seals, executed to Brewster a chattel mortgage of all their stock in trade in their store in Janesville, to secure the payment in six months of the nominal sum of $16,000, with a schedule of the goods annexed. This mortgage was to secure money loaned and to be loaned, as it might from time to time be required. The mortgage provides that "until default be made in the payment of the aforesaid sum of money, the party of first part to remain in quiet and peaceable possession of the said goods and chattels, and in the full and free enjoyment of the same, and until such demand be made, the possession of the party of the first part shall be deemed the possession of an agent or servant for the sole benefit and advantage of his principal, the party of the second part." Smith intending to be absent at Washington, had given to Clark a general power of attorney to transact his business in his absence. He was at Washington when the mortgage and assignment were executed.

In the month of June the firm of H. O. Clark & Co. transferred these goods and their book accounts and effects to Miller, and took his notes for the consideration, but in a few days after, this sale was rescinded, and the property was returned to the firm. In the meantime, Gilkison, the agent of Bowen & McNamee, in the presence of Clark, urged Smith, who was then at Janesville, for security, which Smith declined. He was not willing to distinguish between or give preferences to any creditors of the firm. Clark and Justin were the active members of the firm, particularly Clark, and on Smith the credit principally depended. Clark had been drinking for two days before the execution of the assignment, with the knowledge of the plaintiff's agent and of the assignee. And about the middle of the day, after he had slept off his intoxication, he, in their presence, examined the assignment and suggested the creditors to be preferred. He knew what he was doing, but the assignee thought he had better sign the paper before he got another drink.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Immediately after the execution of the assignment, the assignee took possession, and he continued in possession—selling goods at retail and collecting debts—until the thirteenth day of August. When the assignment was executed and the assignee was placed in possession, Brewster was absent. After Smith returned from Washington, he repudiated the assignment, and gave notice of it to the assignee, and he and the other members of the firm, with Brewster, the mortgagee, demanded of the assignee, and, on the thirteenth day of August, took the assigned property from the assignee, without opposition on his part, and he refuses to bring suit for the property, or its value, without indemnity against costs and expenses. While he had the property in his possession, he realized by sales and collections four thousand dollars. All the remaining property embraced in the assignment was taken from the assignee, he having united the stock of another store with the mortgaged stock in the Janesville store.

This suit is brought to enjoin the several members of the firm and Brewster, from using, selling, or disposing of the property embraced in the assignment, and to compel them to deliver said property to the assignee, so that he may proceed in the execution of the trust, and to account, and that the chattel mortgage to Brewster be decreed to be fraudulent and void.

It is well understood that a mortgage may be made to secure future advances, when this is a constituent part of the original agreement, and so recited. This mortgage did not contain such recital. What portion of the sum of sixteen thousand dollars had been advanced, or was owing, at the date of the assignment, is immaterial at this time.

By the statute law of this state, a mortgage of personal property is not valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk. This mortgage was so filed. But this is a mortgage of a retail store—the mortgagors continuing in possession, treating the property as their own, and retailing from day to day. By every sale and fresh supply, the mortgaged goods changed their identity. I have no doubt such mortgages are fraudulent as to creditors, and void as against executions and attachments. Whether the power of disposition exists on the face of the mortgage, or is so understood, or agreed between the parties at the time the mortgage is executed, or is fairly to be inferred from its provisions, it is equally void, although it may be filed with the clerk according to the statute. It is to be considered and treated as a means of hindering or delaying creditors. Griswold v. Sheldon, 4 Comst. [4 N. Y.] 581; Freeman v. Rawson [5 Ohio 1]; Jordan v. Turner, 3 Blackf. 309.

But this is not a proceeding of attachment or execution on the part of the creditors claiming adversely to the assignment. These plaintiffs claim under the assignment as preferred creditors, equally with Brewster the mortgagee. The demands of the preferred creditors are not specified in the assignment, but their whole amounts are to be first paid, or, in case of a deficit of assets, they are to be paid pro rata. These plaintiffs are not in a situation, at present, to contest the validity of the mortgage. Unless there be a deficit of assets, and Brewster claims payment in full, under his mortgage, to their prejudice, the validity of the mortgage cannot be questioned by them. The repudiation of the assignment, and the reclamation of the property, with the aid of Brewster, do not enable the plaintiffs to question the validity of the mortgage of a creditor equally preferred with themselves. By re-possessing themselves of the property, these parties made themselves trustees for the creditors, and they are bound to account, if the assignment is valid and effectual and should be enforced in a court of equity. The assignment is signed by Clark as partner of Smith, not as attorney in fact, as the mortgage is signed. The power of attorney is not referred to, and it does not appear on its face to have been intended as an authority to Clark to execute the assignment, nor was it so considered by the parties.

It is a consequence of a partnership that each acting partner is a general agent of the firm,—that is, has an implied authority to act for the firm, in all business within the scope of the business transacted by it. In all that a firm has undertaken to do, or usually does, an acting partner is identified with the company. In the case of Rogers v. Batchelor, 12 Pet. [37 U. S.] 221, Mr. Justice Story remarks: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself, and any disposition of those funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds for which the partner is responsible to the partnership; though in the case of bona fide purchasers, without notice for a valuable consideration, a partnership may be barred by such acts. Whatever acts, therefore, are done by any partner in regard to partnership property, or contracts beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner." One partner can, in the name of the firm, replenish the stock in trade, and even sell or dispose of it, in the usual course of the business. He can dispose of an article of the stock in trade in payment of a debt of the firm. He can mortgage the stock or dispose

of a portion of it, to raise funds to preserve the credit, or to pay debts of the firm.

In the absence of a co-partner from the country, the acting partner may assign to a trustee for certain creditors of the firm, the cargo of a certain ship, and of certain debts, to raise funds in aid of the credit of the firm (Harrison v. Sterry, 5 Cranch [9 U. S.] 289); and under like circumstances, in the absence of one partner from the country who could not be consulted, an assignment of the whole property of the concern, by one partner, was held valid by Marshall, C. J., in Anderson v. Tompkins [Case No. 365]. From the opinion in that case, it may be inferred that the Chief Justice was of the opinion, that the authority of the acting partner in this respect was unlimited, but there is no doubt that the fact of the absence of the partner in England controlled the decision, as he remarked, "It is true Murray (the absent partner) had a right to be consulted; had he been present, he ought to have been consulted. The act ought to have been, and probably would have been a joint act, but Murray was not present. He had left the country and could not be consulted. He had by leaving the country confided everything which respected their joint business, to Tompkins, who was under the necessity of acting alone." In the case of Pearpoint v. Graham [Id. 10,877], Mr. Justice Washington remarked, that, "It may admit of serious doubt, whether one partner can, without the consent of his associate, assign the whole of the partnership effects otherwise than in the course of trade, in which the firm is engaged in such manner as to terminate the partnership. His assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is the obvious design, and such must be its necessary consequences;" and Mr. Justice Story, in his work on Partnership (section 101, note), on a review of the cases, concludes, that there is no small difficulty in supporting the doctrine even under qualifications, that one partner may make a general assignment of all the partnership property.

The authority in a single partner to dispose of partnership property is not an inseparable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of the firm, that he will not be bound by the act of another partner puts a stop to the implied authority. See 1 Am. Lead. Cas. 292, and cases cited. This agency does not exist where the partners are present, or can be consulted. In Anderson v. Tompkins [supra], it is asserted that "this power would certainly not be exercised in the presence of a partner without consulting him, and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix upon it the imputation of fraud. In this respect, every case must depend upon its own circumstances." In Deckard v. Case, 5 Watts, 22, an assignment by one partner directly to certain creditors to pay debts of the firm, after the other partner had left the country, was sustained, on the principle of an implied power of a partner to dispose of the whole partnership effects, as held in Mills v. Barber, 4 Day, 428, and in McCullough v. Sommerville, 8 Leigh, 415, and other cases; but the peculiar facts of such cases were urged in support of the decision. In Hennessy v. Western Bank, 6 Watts & S. 300, the same principle was maintained in the case of a general assignment, with preferences, of partnership effects to trustees, executed by two of three partners, in the absence from the country of the third partner; but the absence and a power of attorney of the third party are recited as the authority under which they executed the assignment. But in the case of Deckert v. Filbert, 3 Watts & S. 454, it is decided that one of a firm has not power to make an assignment of the effects of the partnership for the benefit of creditors, against the express dissent of his co-partner. That assignment was made after the dissolution of the partnership by advertisement, but the dissent of the non-assigning partner was the ground of the decision. See, also, Kirby v. Ingersoll, Har. [Mich.] Ch. 172; [Hughes v. Ellison, 5 Mo. 463];[2] Drake v. Rogers, 6 Mo. 317. In Hitchcock v. St. John, 1 Hoff. [Ch.] 511, the assignment was made in New York, while the absent partner was in Georgia, and it was declared void. In Dana v. Lull, 17 Vt. 390, the assignment was declared void, for being made by one partner, who had the superintendence and care of the business, while the other partner, who resided in a different part of the state, was absent, and was not consulted. In Deming v. Colt, 3 Sandf. 284, and in Hayes v. Heyer, Id., assignments made by one partner without the knowledge or assent of the other partner, who was present, or might have been consulted, were adjudged void. So, also in Havens v. Hussey, 5 Paige, 30, an assignment to a trustee, for the benefit of creditors giving preferences of the stock in trade by one partner, while the other was objecting to it, was adjudged to be fraudulent as to that partner, and void. The chancellor expressed his satisfaction, "that such an assignment is both illegal and inequitable, and cannot be sustained."

The principle upon which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of partnership, the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied

[2] [Citation from 5 Am. Law Reg. 203.]

authority, his contracts are valid and binding on his co-partner. One member of a firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in equal proportions. And no such authority as that can be implied. And in Fisher v. Murray [1 E. D. Smith (N. Y.) 341] it was held that to support an assignment of the whole of the partnership property to a trustee, for the payment of debts by one partner or any number short of the whole, even without preferences, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners, or from their acts or declarations, either before or subsequent thereto, it must appear that it was executed with their assent, or by their authority.

The court of errors of New York in the case of Mabbett v. White, 2 Kern. [12 N. Y.] 442, by a vote of five judges to two, expressed the opinion of the majority, that one partner had authority to sell and transfer all the co-partnership effects directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his co-partner, although the latter is at the place of business of the firm, and might be consulted, and that such transfer is valid, although the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm. This was in fact a controversy at law between creditors of the firm, and there was evidence, although contradictory, of the subsequent assent of the non-assenting partner. That decision virtually rejects the principle of implied agency, and in my opinion, it can only be sustained, if at all, upon the ground which was not stated by the majority, that in a controversy at law between creditors, one creditor cannot object to the validity of such an assignment to another creditor, but that the non-assigning partner alone can make the objection. Such is the law, in case of a judgment confessed by one partner against himself and his co-partners. The judgment is valid until reversed or set aside at the instance of the non-confessing partners, and a like sale under execution issued on such a judgment will vest a good title in the purchaser of the partnership property. Nor can third persons or creditors object to such judgment or sale. Grier v. Hood, 1 Casey [25 Pa. St.], 430.

From an examination of the cases, it will be found that some peculiar and controlling circumstance influenced the decision. A distinction seems to exist in some of the cases between assignments directly to creditors in discharge of debts, and assignments to trustees, giving preferences to creditors. And if such distinction really exists, then there should be a difference in the effect given to the one in a suit at law between creditors, and to the other in a case of equity, by a preferred creditor against the non-assigning partner.

The property of a co-partnership upon the insolvency of the firm is considered in equity as a trust fund for the payment of the partnership creditors generally, and equity should be slow to enforce an assignment at the hands of a preferred creditor. A court of equity will readily enforce the trust and grant relief in cases where the assignment is for the creditors generally, upon the favorite maxim that equality is equity. This principle of equality has always been a favorite with a court of equity, but it has not been adopted as a principle of the common law. This inequitable principle of the common law is, however, being modified by legislation. In the two great commercial states of New York and Pennsylvania, assignments with preferences to creditors are now prohibited by statute, and no doubt the prohibition will become general. Such assignments have only been tolerated upon the principle that the owner of the property has a right to make disposition of it in payment of his debts. The courts require that all assignments should be fair and bona fide, and not tainted in the smallest degree with fraud, and even then, such as give a preference to a creditor or creditors are not favored in a court of equity.

The principle to be extracted from nearly all the decisions, appears to be this, "that as a general assignment, if it does not dissolve the partnership, it at least takes away from the partners the right of disposing of the effects assigned, all the members, if they are present, have a right to be consulted on such a step; that an assignment by one partner against the known wishes of another would be a fraud upon him and invalid, and an assignment without his knowledge would be presumptively so. But if one partner has left the country, he must be considered as having vested in the other implied authority to act in all matters for the benefit of the firm, and an assignment under such circumstances, if fairly made and beneficial to the interests of the company, will be sustained." 1 Am. Lead. Cas. 444. Smith was not absent from the country, but he was at Washington, where he might have been written to, or seen personally in four days, or telegraphed to in one day. Especially was this the duty of the agent of the plaintiffs, and Clark, as they had full notice from him of his objection to preferring any of the creditors of the firm. Smith's assent to the assignment was essential, under the circumstances, to its validity as to him. If he, on his return, had acquiesced in the assignment, he would be bound by it; but, on the

contrary, he gave notice of his dissent to the assignee, and carried it out, with the aid of his co-partners and of the mortgagee, by regaining possession of the property. When Smith objected to giving these creditors security in preference to others, the property was in the possession of Miller, but the firm had then the avails of the sale to Miller, whatever they were. The return of the property by Miller to the firm does not vary the matter in the least, or justify the presumption, that Smith had come to any different conclusion upon the subject of a preference.

The assignment is valid as to Justin. And Clark's intoxication is not established by the proof to an extent that should authorize the court to pronounce the assignment void as to him. When he executed the assignment he knew what he was doing; he was not deprived of his reason or understanding. "Courts of equity as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced." 1 Story, Eq. Jur. § 231.

It is not satisfactorily proved that imposition was practiced upon Clark by the plaintiff's agent, who procured the assignment, but he and the assignee had full knowledge of Clark's intoxication while the assignment was being written, and that he was laboring under its immediate effects at the time of its execution. They knew that Clark was acting in the matter for Smith, as well as for himself, and with due regard for the interests of Smith, they should have postponed the execution of the assignment until it could be done with care and deliberation, by a sober man. If this circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity. My opinion is that the complainants have not a proper case for equitable interposition by this court, and that the bill should be dismissed.

NOTE [from original report]. For an extended discussion of the doctrine of assignments for the benefit of creditors, see opinion of Story, J., in Halsey v. Whitney [Case No. 5,964]. See, also, McGregor v. Ellis, 2 Disn. 286; Graves v. Hall, 32 Tex. 665. One partner has no authority to make a general assignment of partnership property (Stein v. La Dow, 13 Minn. 416 [Gil. 381]; Hughes v. Ellison, 5 Mo. 463; Ormsbee v. Davis, 5 R. I. 442; Pettee v. Orser, 18 How. Pr. 452; Wilson v. Soper, 13 B. Mon. 411; Fisher v. Murray, 1 E. D. Smith, 341; Kemp v. Carnley, 3 Duer, 1), not even though the other partner be absent from the state (Hook v. Stone, 34 Mo. 329). On the application of non-consenting partner, a receiver will be appointed. Wetter v. Schlieper, 6 Abb. Pr. 123. It has been held, however, that under certain circumstances one partner might make a valid assignment of partnership property for the benefit of creditors, without preference. Lamb v. Durant, 12 Mass. 54; Robinson v. Crowder, 4 McCord, 519; Mills v. Barber, 4 Day, 428. And in Forkner v. Stuart, 6 Grat. 197, it was held that a sale by one partner to a bona fide purchaser is valid though it convey the whole stock.

Case No. 1,722.

BOWEN v. HERRIET.

[1 MacA. Pat. Cas. 310.]

Circuit Court, District of Columbia. Sept., 1854.

PATENTS—INTERFERENCE—RIGHT OF APPEAL FROM COMMISSIONER.

[No appeal lies from a commissioner's decision on interference where the issues tried were the same, in effect, as those tried on a former interference. Pomeroy v. Connison, Case No. 11,259, followed.]

[Appeal from decision of commissioner of patents.

[Application by Julius Herriet for a patent. From a decision of the commissioner of patents on interference, Bowen, assignee of John L. Kingsley, appeals. Dismissed.]

W. P. N. Fitzgerald, for appellant.

Chas. M. Keller, for appellee.

MORSELL, Circuit Judge. On the 16th of April, 1852, Julius Herriet made his application for a patent, which was so modified afterwards as to present his claim in the form in which it now is. In his specification he says: "What I claim as my invention, and desire to secure letters-patent for, is making moulds and plates for printing characters or figures of gutta-percha or India rubber, compounded with some other substance or substances, substantially such as described, which shall give to the compound the required hardness and stiffness, and not destroy its plasticity when in a heated state, substantially as described." He says his invention consists in producing printing-plates and moulds of a preparation or compound of which gutta-percha or India rubber constitutes the chief ingredient, which preparation or compound shall be sufficiently plastic when heated to admit of moulding or embossing by pressure to form a mould from a form of types, which can then be distributed, and the printing-plate or plates thus formed by the mould or moulds, when produced and cold, will be sufficiently hard to present sharp lines and angles and to resist the required pressure for practical and economical purposes, and when worn out admit of being worked over again by being reheated. He says as to the composition: "I take by weight three parts of gutta-percha or three parts of India rubber or caoutchouc, and three parts of finely-pulverized graphite or soap-stone, or plaster of

Paris, or chloride of lime, or per-oxide of manganese, or other equivalent, and by grinding or otherwise in a heated state mix them together as in the manufacture of the usual compounds of gutta-percha or India rubber."

During the pendency of this application, that is to say, on the 23d of January, 1853, a patent for a composition of matter consisting of gutta-percha, oxide of iron, and oxide of antimony had been granted to John L. Kingsley. On the 5th of February, 1853, the commissioner in his letter directed to Herriet states: "A patent was granted to John L. Kingsley in the early part of January, 1853, for the use of a composition which, as far as can be ascertained from your specification and modified amended claim, is the equivalent of yours; or, to say the least, it performs all that you claim to do. Now, unless you are enabled to point out something specific which you have done that was not done by Mr. Kingsley, this reference must stand as a bar to the grant of your claim. If you regard the point of the invention in the two cases as the same, but dispute the priority, then you will of course call for the declaration of interference."

At the request of the parties an interference was declared between Herriet's application and Kingsley's patent on the 23d of July, 1853, and a hearing was appointed for the 5th of September, 1853, under which authority testimony was taken and filed by Herriet. On which 5th of September, the day set for the hearing, Kingsley filed a new application for a gutta-percha composition for stereotyping, which in substance states his claim to be making a composition or compositions that can be hardened at will or made soft when required without deterioration, using the natural or uncured gums, gutta-percha, or caoutchouc or India rubber as a basis for his compositions, and combining therewith any and all foreign or other substances which will render a composition wholly or partially rigid when required for use, that is, when used for moulds or for plates for stereotype purposes, and the adaptation of these plates to printing for all stereographic or letter-press printing. The particular description of foreign substances particularizes a great number, embracing metals, stones, alkaline earths, hard gums, resin, and glue; after which he says: "One of these compounds being as follows, viz.: Mix one part of per-oxide of antimony with nine parts of per-oxide of iron, both being in the form of impalpable powder, and these I grind into gutta-percha, in the proportion of one pound of gum to one pound of mixed powder, the same being ground together in the ordinary way of mixing the gums for use, by grinding the same between two rollers of different running speeds."

Under these circumstances, the day of hearing was postponed to the first Monday in October. A new interference, embracing Kingsley's new application and a patent of Leonardo Westbrook of July 19th, 1853, the application of T. N. Dickenson, and that of Herriet, was ordered for the first Monday in October. On the 10th of December, 1853, the case was finally decided by the commissioner on the whole of the testimony taken in the interference between said parties Herriet—Kingsley, Dickenson, and Westbrook. He says, after the most careful consideration of the testimony in this case, Julius Herriet is found to be the first inventor of the subject-matter of the present interference. The reasons are more fully stated in a paper on file. A patent will therefore be issued to the said Herriet unless some of the other parties appeal from this decision within thirty days from this date. Dickenson had withdrawn his application, and no appeal was prosecuted by Westbrook; so that the only part of the case now before me is that which was between Kingsley, assignor of Bowen, and Herriet.

It is apparent on the face of these proceedings that the subject which claims the first consideration is that which is connected with my jurisdiction; that is, whether the essential part of the issue between these two parties on which the decision just recited is grounded was not the same with the subject-matter of the patent granted to Kingsley in January, 1853, alluded to in the first interference declared.

For the purpose of a comparison, let the facts be noticed in the last branch of his specification filed in this case, in which he particularly states the foreign substances of which his composition consisted. He says: "Mix one part of per-oxide of antimony with nine parts of per-oxide of iron, both being in the form of impalpable powder, and these I grind into gutta-percha, in the proportion of one pound of gum to one pound of the mixed powder, the same being ground together in the ordinary way of mixing the gums for use," &c. In the other part of his specification he claims for his composition a great number of other foreign substances; but, as he himself says, the oxides were the best for the purpose of the invention.

In the testimony taken in this case since he filed his schedule he says that he had been experimenting for a number of years up to the year 1849 to discover a suitable composition with gutta-percha for plate and moulds for stereotyping purposes, and found the materials did not sufficiently harden the gum; that he had previously experimented with India rubber, but found that not so hard as gutta-percha. After stating particularly a great number of such foreign substances used by him in each of said years 1845, 1846, 1847, 1848, and 1849, he says in this last year he tried, in a compound with gutta-percha, the oxides of iron and antimony, which he found to answer best and to

harden better than any other composition which he had made. To use his own language, he says: "As I mix per-oxide of iron and antimony, they form a chemical combination with the gum, and render it much harder than any other substance that I have been able to find. My composition made of those materials is as hard as copper; it is very much harder than gutta-percha." Such, then, being the facts on the part of the appellant, I think I cannot be mistaken in the deduction than in the estimation of Mr. Kingsley the two foreign agents—oxide of iron and antimony, with gutta-percha chemically combining in the composition—were, if not the only sufficient foreign substances, greatly the best.

It is true Herriet contends, and has offered proof for the purpose of showing, that a mixture of graphite or the other substances, as stated in his specification, in composition with gutta-percha, are, or would be, sufficient; but it is not proved or pretended that they are the best or better for the purpose or more than equivalent to those stated in Kingsley's patent. If, then, there be no doubt that the required consistency and hardness of gutta-percha or the other gum for stereotyping purposes have been discovered by Kingsley to have been perfectly effected by the process or application of the foreign agents mentioned in his patent, (and I think there can be none,) then what is the rule of patent law? Curtis says: "Where the invention or subject-matter is the process of making a particular thing, which may or may not be made by more than one process, the inquiry will be whether it has been made by the use of the process covered by the patent." In section 145 he says: "It is therefore essential that the specification should describe some practical mode of carrying the principle into effect, and then the subject-matter will be patentable, because it will be, not the principle itself, but the mode of carrying it into effect; and on the question of infringement it will be for the jury to say whether another mode of carrying it into effect is not a colorable imitation of the mode invented by the patentee." In section 146 he states the rule to be, that although the specification, after having described the application of the principle by some contrivance or arrangement of matter, omitted to claim all the other forms of apparatus or modifications by which the principle might be applied beneficially. Yet the patent does cover all these without particular description, by covering the application of the principle. Again, section 229 (same book), it is laid down "that wherever the real subject covered by the patent is the application of a principle in arts or manufactures, the question on an infringement will be as to the substantial identity of the principle and of the application of the principle; and consequently the means, machinery, forms, or modifications of matter made use of will be material only so far as they affect the identity of the application."

It must therefore satisfactorily appear that, according to the rules of law applicable to the foregoing facts, the change, if any, made in the invention aforesaid by the composition formed by the application of any of the other different kinds of foreign substances did not materially vary the identity of them, but must be considered as a mere substitute; and therefore the issue tried as between these parties was essentially that formed under the first original declaration of interference and the appeal virtually by a patentee. For the foregoing reasons, and upon the authority of the decision in the case of Pomeroy v. Connison, decided by Judge Cranch in the year 1842 [Case No. 11,259], to which I particularly refer, my opinion is that I have no jurisdiction of the appeal of Bowen, Assignee of Kingsley, v. Herriet, and shall, with this opinion, return the papers, specimens, &c., to the patent office.

Case No. 1,723.

BOWEN et al. v. HOWARD et al.

[5 Cranch, C. C. 308.] [1]

Circuit Court, District of Columbia. March Term, 1837.

EXECUTION—PROPERTY SUBJECT TO LEVY.

A judgment of a justice of the peace cannot be seized and sold under a fieri facias issued by a justice of the peace.

Bowen & Dowling filed their bill in equity for an injunction to prevent the present defendant, Howard, from issuing execution against them, upon a judgment for $33.50, which he had recovered against them, and which they had paid and satisfied to one Thomas Lloyd, who purchased the judgment at a sale thereof, by a constable who had seized it upon a fieri facias issued by one against the said Howard, and sold it under that execution. These facts being stated in the bill, an injunction was granted by the chief judge, in vacation, on the 2d of November, 1833. The bill was taken for confessed, for want of the answer of the defendants, and upon the complainants' motion for a decree for a perpetual injunction.

THE COURT (THRUSTON, Circuit Judge, absent), upon considering the bill, was of opinion that the judgment could not be seized and sold under a fieri facias against the creditor in the judgment, and dissolved the injunction; whereupon the complainants dismissed their bill.

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

Case No. 1,724.

BOWEN et al. v. KENDALL.

[Brunner, Col. Cas. 704;[1] 23 Law Rep. 538.]

Circuit Court, D. Massachusetts. 1860.

REMOVAL OF CAUSE—EFFECT ON INJUNCTION—ACCOUNTING TO CHARGE MORTGAGEE WITH USURY—MORTGAGE—POWER OF SALE IN.

1. On the removal of a cause an injunction granted by the state court falls; the motion for an injunction must be renewed in the circuit court.

2. A mortgagee will not be required to account, that he may be charged with usury.

3. A power in a mortgage to sell the mortgaged property is a matter of contract and will not be overthrown by the court.

In equity. The bill in this case [by Simon Bowen] was brought in the supreme court of Massachusetts for Bristol county, in September last, and an injunction was granted by that court to restrain the defendant from selling certain real estate situated in Attleborough, particularly described in a certain mortgage made by Hervey M. Richards, to Benjamin Hoppin, to secure the payment of twenty-five thousand dollars. The defendant being a citizen of Rhode Island, the suit, upon his petition, was removed from the state court to the United States circuit court to be entered here on the next May term, and the supreme court thereupon, according to the act of congress,[2] in such case made and provided, could proceed no further. Taking advantage of this state of affairs, the defendant gave notice, and was proceeding to sell the real estate this day, when the bill in equity and transcript of proceedings in the state court were filed in this court, and an application made for an injunction to restrain him from such act. It was suggested to the court here: 1. That this court could not proceed because the cause was not to be entered here until the coming May term. 2. That this court could not grant an injunction because they had not ordered sufficient notice to the adverse party. 3. That the court could not do so without fully inquiring into all the facts. [An injunction was granted, but subsequently dissolved.]

Ellis Ames, and B. Sanford, for petitioners.

B. R. Curtis, for respondent.

SPRAGUE, District Judge, held, that in a pressing case like the present, he should deem the written notice given by the plaintiffs to the defendant of this application, coupled with the evidence that it was well understood by the defendant, as sufficient; that he should grant the injunction at once, inasmuch as the supreme court of the state had already done so, and that injunction had not been judicially dissolved; that he was not prepared to say that the defendant would not be punishable by the state court for a contempt, if he proceeded to violate their injunction. But as it seemed to be understood that the supreme court of the state would proceed no further, this court would forthwith grant an injunction to restrain the sale. Whether the respondent would be liable to an attachment, should he proceed to make the sale before the injunction could be regularly served on him, it being shown that he had notice of this application, he had no occasion now to determine.

Injunction issued.

The counsel for the defendant, on a subsequent day, moved that the injunction be dissolved. 1. Because no sufficient notice was given to the adverse party before this injunction was granted. 2. Because this court has no power to act in the premises. No bill in equity has been properly entered, or can be properly entered in this court before the next May term. The bill in the state court, where the injunction was first granted, was virtually a dead letter after the removal from that court, and the injunction fell with it; and both are inoperative until the next May term of this court, when the bill could only be properly entered here, and a new injunction could not be granted here until that time, and the injunction of the state court was in fact dissolved when the cause was taken from that court. 3. There were no merits in the plaintiffs' bill, and an injunction was not necessary.

SPRAGUE, District Judge. "It could not have been the intention of congress to allow a party to dissolve an injunction at his pleasure (no matter how important it was), simply by removing the case into a court of the United States."

Mr. Curtis. "Undoubtedly congress did not intend to do it; but my ground is that they have done it, as they have done a great many other things which they did not at the time intend to do. I think Judge McLean in Ohio has so decided."

SPRAGUE, District Judge. "I will hear you first upon the merits."

An affidavit of the defendant was then read to show that the defendant was rightfully proceeding to sell under a power of

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[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [From 23 Law Rep. 538:] The act referred to is the act of 1789, c. 20, § 12 (1 Stat. 79). It provides "that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, * * * and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, * * * it shall then be the duty of the state court to accept the surety, and proceed no further in the cause; and the said copies being entered as aforesaid in such court of the United States, the court shall then proceed in the same manner as if it had been brought there by original process."

sale mortgage, which was good and valid, and in his hands as an innocent purchaser, and that the plaintiffs had directly, positively, and repeatedly, in writing, recognized it, and admitted its validity, and thereupon defendant asks this court to dissolve this injunction. That it would not be equitable for persons who had caused another to purchase, under an appearance that all was right, to turn around and repudiate the sale. The plaintiff now alleges usury as a corruption of the contract between the maker and the original mortgagee. If this were so, it is contended that a court of equity will not, or ought not, to stop a sale of the property under the mortgage, unless the balance admitted to be due is brought into court or tendered. More than that, the party who sets up usury and flies to a court of equity, must come with clean hands. He must bring in the money actually advanced, with interest, or show his readiness and ability to refund it. That is not equity which permits a man to hold all he gets, and take back all he gave. But this contract was made in Rhode Island, and by the law of that state it must be construed, and by the laws of that state there is no penalty which can here be enforced. At any rate, let the contract be as it may, no court of equity will enforce a triple penalty, nor can it be enforced, even at law, before usury has actually been paid.

The counsel for plaintiffs contended: 1. That the defendant was not proceeding to sell in the manner pointed out in the mortgage. 2. That the state courts where the bill was originally filed can, by law, proceed no further after the removal of the cause therefrom. But by a petition now filed here in the nature of a bill of equity, whereby all the facts stated in the bill are adopted, and the record of the state court produced, the plaintiffs now make themselves plaintiffs here, and are in the same position as a plaintiff who files his bill at rules or in vacation. In England in cases of extreme necessity, waste, or emergency, injunctions have been granted on a petition before any bill had been filed. This is a suit in court, of which this court will take cognizance. 3. The notice was given, and the party actually was represented here, and his representative made suggestions to the court, and afterward said he would withdraw, but not until he had been heard and the decision was made against him. 4. As to the merits, the plaintiffs are ready to meet the questions when answer is made. The case cannot be tried on a preliminary motion. It would be a practical demurrer, which would precipitate a hearing before evidence taken. The injunction has been granted. The time for hearing on that question has gone by. The defendant must now put in his answer before he asks for its disposition.

On the merits our answer is: 1. That Kendall, the defendant, had knowledge of all the facts touching usury. 2. That whether he knew it or not, the law is peremptory, and gives the plaintiffs a right to deduct the whole amount of usury, and triple the amount; and usury can be set up against even an innocent purchaser. In this case the defendant took the note overdue.

SPRAGUE, District Judge: The original injunction in this case was ordered by the supreme judicial court of this state October 24th, and the case was then removed from the state court to be entered at the next term of the United States circuit court, to be held in May, 1861. Thereupon the bill of complaint and transcript of the proceedings in the state court were filed in this court, together with an application for an injunction; and on the 16th instant an injunction was granted here. This was done on the ground that there existed a pressing emergency to prevent a sale which was to have taken place that very day. It seemed to the court at the time that the urgency of the case required their interference, and that, too, without delay. But the question is now presented, had this court power to grant that injunction? Such power has been denied by the counsel. This case had been removed from the state court. That court could proceed no further in the suit, and the defendant was not bound to enter the case here until May next. It is contended that thereby the injunction of the state court became void, and that the defendant could act without regard to it. This court does not undertake to decide how far that is true, or how far the defendant might become liable as for a contempt of court if he should violate the injunction before it was in some other way dissolved. Suppose the injunction granted by the state court had been to restrain a man from selling a negotiable note fraudulently obtained, could a party holding the note have his case removed into the United States court, and then sell the note in five minutes after he had caused the action to be removed? This court feels certain that congress never intended to produce such a result. There is, however, great difficulty in so construing the act of congress. It is highly important that the cause should come within the jurisdiction of this court immediately on its removal from the state court; and yet such is the frame of the statute of the United States as to render it difficult, by any fair construction of its language, to sustain such immediate jurisdiction. This is the first time the question has been presented, and it need not now be decided; for by the view which I take of the case, it may be otherwise disposed of. When the application for this injunction was made, it was represented that delay would be ruinous, and the only purpose of the court in granting the injunction so promptly was to hold the property just as it was until further examination could be had. And I shall consider the question whether there ought to be an injunction upon the respondent in

the same manner as if the application therefor had now been heard for the first time.

The plaintiffs in their bill ask for an account, and to be allowed to redeem. For what is the respondent to account? Not for rents and profits, for he has never been in possession. It is indeed alleged that some payments have been made to his assignor, the original creditor, but these payments are indorsed on the notes, and were well known to the plaintiffs. The only ground urged for an account is, that credit should therein be given for a statute penalty for usury taken by the original creditor. It is not set forth in the bill at what place the contract was made, or where it was to be performed. It is not alleged that the defendant or his assignor has been guilty of a breach of any law of the state of Rhode Island or of Massachusetts. It is claimed that three times the amount of usury said to have been paid should be deducted under the law of Massachusetts. The real estate mortgage is in Massachusetts, but from the slight proof we have, it is probable that the contract was made, and to be performed in Rhode Island, and if so, then the laws of Rhode Island would govern it. The defendant, under oath, expressly denies all knowledge of any usury, and declares himself to be an innocent purchaser for a full consideration, and no one contends that he has personally received usury. Now this court, sitting as a court of equity, would not require from the defendant an account in order that he should charge himself with such a penalty. In this case the defendant had nothing to do with the alleged usury, or with any payment or receipt of it, and it is much better known to the insolvent debtor what sums have been involved in his dealings with the original mortgagee.

It is said that the plaintiffs wish to redeem and prevent the sale under the power contained in the mortgage, and allege that the defendant is not disposed to execute that power fairly, and with due discretion. But if the plaintiffs wish to redeem, they should bring their money into court, or tender it, or at least make it certain that the defendant can have it. Here no money is tendered; no security offered. If a depreciation of the property takes place, the whole loss may fall on the defendant, and he has already offered to make a discount if the plaintiff will redeem, and to give an extension of time if security is given for the payment of the debt. Is it reasonable, then, to place the holder of the mortgage in a condition to lose a portion of his debt by causing delay, when the property is yielding but little? This ground cannot warrant the injunction.

As to the conduct of the sale, we need only say that the power of sale is a matter of contract, and should not be overthrown by the court. If the defendant exercises his right, and executes the power of sale, he is responsible for good faith, and must use proper care and discretion in the conduct of it. If he is guilty of a breach of trust, he must answer for that hereafter. His pecuniary ability is unquestioned, and the plaintiffs do not contend that there is any want of means to answer for his good conduct. It is said that the advertisements of the sale are insufficient. But they seem to be all that the contract between the parties has required. And if the plaintiffs consider the three newspapers which contain the notice of sale insufficient, they can easily advertise in other papers, and describe the property as fully as they please. Under the terms of this contract the court will not order the creditor to divide up the mortgaged estate, or to sell it by retail, or in parcels. The defendant is bound to use good faith, and to endeavor to sell the estate for the most it will bring. He acts on his own responsibility, and the court will not now express either approbation or disapprobation of the course he proposes to pursue. He acts under his contract, and must do his duty to all concerned. I shall order the injunction to be dissolved.

BOWEN (LEE v.). See Case No. 8,183.

BOWEN (PAWTUCKET INST. FOR SAVINGS v.). See Case No. 10,852.

BOWEN (TOUCEY v.). See Case No. 14,107.

BOWEN (UNITED STATES v.). See Cases Nos. 14,628 and 14,629.

Case No. 1,725.

BOWEN v. WATERS.

[2 Paine, 1.] [1]

Circuit Court, S. D. New York. Oct. Term, 1827.

SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—MISTAKE.

1. On a bill for specific performance, the rule of courts of equity is, that the agreement should be certain, fair and just in all its parts, and that all the material parts should be known to both parties; and if any of these ingredients be wanting in the case, a decree will be refused.

[See Kendall v. Almy, Case No. 7,690; Smith v. Burnham, Id. 13,019; Oakley v. Ballard, Id. 10,393; King v. Thompson, 9 Pet. (34 U. S.) 204; McConnell v. Lexington, 12 Wheat. (15 U. S.) 582.]

2. The contract of which specific performance is sought, ought not only to be proved, but the terms of it should be so precise that neither party could reasonably misunderstand them; and if it be vague or uncertain, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but leave the party to his legal remedy.

3. Nor will it compel a specific performance where the contract is a hard or unreasonable bargain, or where there has been any sort of surprise which renders it unfair to call for an execution of it.

4. There is a very important distinction running through the cases between ordering a con-

[1] [Reported by Elijah Paine, Jr., Esq.]

tract to be rescinded and decreeing a specific performance; and the latter kind of relief is often denied even where the circumstances are not sufficiently strong to induce the court to require the contract to be given up.

5. Although a party contracting through an agent, being ignorant of facts with which his agent was acquainted, may yet have bound himself at law, it does not follow that a specific performance would be decreed if there was clearly such a mistake or misapprehension as to the subject-matter of the contract as to render it unjust or inequitable to enforce it.

[In equity. Bill by Ephraim Bowen against Jason Waters for specific performance. Dismissed.]

R. Sedgwick, for complainants.
H. Ketchum, for defendants.

THOMPSON, Circuit Justice. The bill in this case was filed to compel a specific performance of a contract alleged to have been entered into by the defendants for the purchase of a cotton factory at Newport, on the east side of Canada Creek, in the county of Herkimer.[2] The contract, if at all concluded between the parties, is to be collected from sundry letters which passed between some of the parties in relation to this purchase. And one of the difficulties in the case is, to ascertain with any satisfactory certainty and precision from this correspondence what the contract was. The great question seems to be as to the nature and extent of the water-privilege embraced within the contract, and which was to be conveyed by the complainants to the defendants.

It seems to be admitted by the bill, that this privilege was, at least, water sufficient at all seasons of the year to drive one thousand spindles in certain machinery called water-frames, and the necessary apparatus and machinery to prepare cotton for spinning, according to the practice in January, 1812, and sufficient water for a machine-shop to make and repair machinery for the use of said mill and factory. On the part of the defendants it is contended that there was no such limitation upon this water-privilege; but that the complainants were to convey to them the first water-privilege sufficient to

[2] It is a matter of discretion in the court whether or not to decree a specific performance; not dependent, however, upon the arbitrary pleasure of the court, but regulated by general rules and principles. Rogers v. Saunders, 16 Me. 92. When a contract in writing is certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance. Id. The performance may in a proper case be decreed, where the party has lost his remedy at law. Id. But negligence in the performance of contracts, are not thereby to be encouraged; and the party seeking performance must show that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready to perform. Id. Where the binding efficacy of a contract has been lost at law by lapse of time, a court of equity will grant relief, where time is not of the essence of the contract. Id. A written agreement concerning lands may be enforced in equity, although binding only on the party to be charged. Id. The court will not compel a specific performance, where the remedies are not mutual, and where the party who is not bound, lies by to see whether it will be a gainful or a losing bargain to abandon it in the one event, and in the other to consider lapse of time as nothing, and claim a specific performance. Id. A bill for a specific performance, by a vendor against a purchaser, is not to be dismissed upon the mere ground that the vendor's title was not perfect at the time of filing the bill. Dutch Church v. Mott, 7 Paige, 77. A specific performance may be decreed if it appears by the master's report that the vendor is in a situation to give a perfect title, except where the purchaser has been materially injured by the delay. Id. A party having an equitable title by a contract, complete in all its parts, is entitled to a specific performance of course. Buchannon v. Upshaw, 1 How. [42 U. S.] 84. The specific performance of an agreement is not a matter of right, which a party can demand from a court of equity, but is a matter resting merely in the sound discretion of the court. Tobey v. County of Bristol [Case No. 14,065]. Equity views a bond conditioned to convey land as articles of agreement, and will decree a specific performance of the condition. Fitzpatrick v. Beatty, 1 Gilman, 454. A party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance. Scott v. Shepherd, 3 Gilman, 483. If a party seeking to enforce a specific performance wishes to set off against the amount to be paid by him, an indebtedness to him from the other party, he should lay the proper foundation for it in his bill, or he cannot be relieved. Id. A bill in equity to enforce the specific performance of a contract, must show a complete performance of all the stipulations on the part of the complainant to entitle him to a decree. Church v. Jewett, 1 Scam. 54. A party seeking the specific performance of a contract, for the sale and conveyance of a tract of land, cannot excuse himself for not tendering the purchase money, when due, upon the ground that the vendor had conveyed the land to a third person. Doyle v. Teas, 4 Scam. 202. An application for the specific performance of a contract, is addressed to the sound legal discretion of the court. Frisby v. Ballance, Id. 287. It is no objection to enforcing the performance of a contract for the sale of the lands in behalf of the vendee, that the vendor did not own the lands when the contract was made. If he can make a good title to all at the time of the decree, the court will direct him to convey the whole; if he can make title to a part only, the vendee may take such part with a compensation for the residue. Allerton v. Johnson, 3 Sandf. Ch. 72. If the vendor contracts to sell land, and the title of a part of it fails, the vendee may claim a specific performance of contracts, as to that part of the land to which the vendor can give him a title, and for a compensation in damages as to the part of the land to which the title fails. Morss v. Elmendorff, 11 Paige, 277. The court of chancery may decree the specific performance of a contract for the sale of lands lying in another state, where the party who is to make the conveyance is within the jurisdiction of the court, and has been served with process. Sutphen v. Fowler, 9 Paige, 280. And where the defendant in such a suit is an infant, the proper decree is, that he convey the legal title to the premises when he arrives at the proper age to enable him to do so, according to the laws of the state where the property is situated; and that in the meantime the vendee be permitted to re-

drive whatever number of spindles they chose to put into the factory, and the use of water for a machine-shop for whatever machinery they might wish to make. The correspondence was not carried on in the name of all the parties, and some parts of it cannot be understood as being in behalf of the parties to the present suit. It was commenced in the summer of 1825, by a letter from Jason Waters to Ephraim Bowen, making some inquiries in relation to the factory. To which Bowen on the 16th of September, 1825, answered, and among other things stated, "that the cotton-mill has secured to its owners at all times a sufficiency of water in preference to all other mills to turn and operate one thousand spindles of water-frames, with a machine-shop and preparation for spinning cotton as in the year 1812," and at the close of the letter adds, "if after waiting a reasonable time we do not hear from you, we shall conclude that you do not mean to purchase." On the 16th of November following, this letter was answered declining to make the purchase, and inquiring whether a lease of the cotton-factory could be had. This was refused. Thus the treaty for a purchase must be considered as broken off. And it is proper here to notice, that Jason Waters had thus far acted with the view and expectation that a Mr. Wolcott would unite with him in the purchase, and not the other defendants. It is material to notice this, because the letter of the 16th of September is the only one that speaks of the water-privilege particularly. The subsequent correspondence after the other two defendants became in any manner parties to it, only speaks of the cotton-factory and appurtenances in general terms; and when any mention is made of the water-privilege, it is spoken of as the first water-privilege. If the letter of the 16th of September is considered as sufficiently designating the extent of the water-privilege, the inquiry would arise, how far the other two defendants were bound by the communication to Jason Waters, at a time when they had no interest or concern in the purchase.

Jason Waters, in his answer, admits he received the letter of the 16th of September, but states that as he had then relinquished the idea of purchasing the property, he only read the letter and filed it away, and paid little attention to its contents, and that he did not show it to the other defendants or either of them, or communicate to them the contents; and the other defendants deny

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ceive and retain the possession of the property. Id. The owner of two lots which had been sold on an execution against him, agreed with M. that she should buy one of the lots, and pay the price by redeeming both from the sheriff's sale. M. was to take a deed from the sheriff, pay all liens and charges, and on receiving the surplus, beyond the price of the one lot, with interest at a day fixed, was to convey the other lot to the vendor; or if such payment were not made, was to retain both lots. The vendor was, by a like covenant, to give possession of the lot sold to M. Held, that by the agreement, M. became the purchaser of the one lot, and took the other lot as a security for her advances beyond the price of the former; and that she was bound to convey to the vendor, on being refunded such excess, with interest. Barton v. May, 3 Sandf. Ch. 450. Held, further, that if the contract were to be treated as an agreement by M. to sell the other lot to the former owner, on payment of such excess, and receiving possession of the one at the time stipulated; a partial failure to deliver possession at that time, would not warrant M. in refusing to convey the other lot, on receiving the excess. Id. Where parties contracted for the sale of land, for a gross sum or price, under a mutual mistake as to the quantity contained in the parcel sold, believing it to contain about a fourth more than its actual contents, and the vendee has taken possession, made valuable permanent improvements, and paid nearly all the price; equity will compel the vendor to convey the land actually owned by him, with a ratable deduction from the price for the deficiency. Voorhees v. De Meyer, 3 Sandf. Ch. 614. D. sold to G. by an executory contract, two lots of wild land, which, by the survey and location thereof, made for D. and others, contained 187½ acres; the one intending to sell, and the other believing that he was buying the lots as thus surveyed. It turned out that in making such survey and location, the surveyor had extended and marked his line beyond the true boundary of the tract he was laying out, and had thereby included 43½ acres in D.'s two lots, to which he never had any right or claim. Held, that this was a case of mutual mistake. That the deficiency was not in the subject-matter of the contract, for that was the two lots as marked and surveyed for D.; but that the difficulty was in giving title to that subject-matter. Id. Equity will not compel a purchaser to take land which is involved in a doubtful and disputed question of boundary. Id. In a suit by the vendor, to compel the specific performance of a contract for the purchase of land, a performance may be decreed, if the complainant is able to make a perfect title to the premises at the hearing. Baldwin v. Salter, 8 Paige, 473. But where the complainant asks for an injunction to restrain the defendant from parting with the property which was to be transferred in payment of the complainant's land, or for a receiver of such property, he must show that he is in a situation to fulfil the contract; and it is not sufficient to show that he may possibly be able to perform the contract at the hearing of the cause, but he must show a present ability to perform it, where the defendant has a right to require an immediate performance of the agreement. Id. The granting a specific performance is not a matter of right but is always a matter of sound and reasonable discretion, which grants or withholds relief, according to the circumstances of each particular case. Mathews v. Terwilliger, 3 Barb. 50. Where the vendee, in a contract for the sale of lands, gave notice to the vendor of his refusal to perform the contract, held, that no tender of a deed by the vendor was necessary, in order to sustain a bill for specific performance. Crary v. Smith, 2 Comst. [2 N. Y.] 60. Where in a contract for the sale of lands, the purchase-money is to be paid or secured, and the conveyance executed, on a particular day, and neither party performs, or offers to perform on the day, either party may claim specific performance in equity, making the offer incumbent on him in the bill; and the failure to make a tender before the commencement of the suit, will only affect the question of costs. Stevenson v. Maxwell, Id. 408. A bill for specific performance may be maintained against the heirs of the vendor. Newton v. Swazey, 8 N. H. 9.

having any knowledge of this letter or the limitation upon the water-privilege as now set up on the part of the complainants; and the answer of the defendants, in this respect, is not disproved. This letter of the 16th of September, and whatever passed between the complainants and Jason Waters prior to the 16th of November, when he wrote to Ephraim Bowen that he had given up the purchase, must be laid out of view as it respects the other defendants; and their contract, if any was entered into, must be collected from what passed after that time; and no part of the subsequent correspondence will warrant the conclusion that the defendants understood there was to be any such limitation in the use of the water as is now set up, but supposed that by the general terms in which the letter referred to the property, the water-privilege to be conveyed was the first right to the water in sufficient quantity to supply the large water-wheel appurtenant to the factory, according to its then dimensions, and thereby to operate any machinery that could be put into the factory, and not that they were limited to water sufficient to operate one thousand spindles of water frames as used in 1812. The water-privilege must have been one of the principal, if not the most important object of the purchase. And without the most plain and explicit language was used, it would be unreasonable to compel the defendants to carry into execution a contract clogged with such a limitation, which would very much embarrass, if not preclude them from availing themselves of the improved machinery that is almost daily brought into operation. And if such was clearly the contract, it would be a hard and unreasonable bargain, and one which a court would feel itself under no obligation to see carried into specific execution. The contract, which is sought to be specifically executed, ought not only to be proved, but the terms of it should be so precise that neither party could reasonably misunderstand them. If the contract be vague or uncertain, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but leave the party to his legal remedy. [Colson v. Thompson] 2 Wheat. [15 U. S.] 341. Nor will it compel a specific performance when it is a hard and unreasonable contract. 2 Schoales & L. 165. So, where it appears that at the time of entering into the contract for the sale of a tract of land there was a misunderstanding between the parties as to the identity of the land to which the contract related, a court of equity, in its discretion, will not interfere by decreeing a specific performance. 5 Munf. 1015. If this be a sound rule, it applies with peculiar force to the present case; for, admitting that Jason Waters would be bound by the letter of the 16th of September, and could not set up any mistake or misapprehension, this could not, in justice, be set up against the other defendants, for the contents of that letter were clearly unknown to them. And if it should even be admitted that the other defendants had so far made Jason Waters their agent to complete the purchase, as to make it binding on them at law, it would by no means follow that this court would decree a specific performance, if there was clearly a mistake or misapprehension as to the subject-matter of the contract, or if it would be unjust or inequitable to enforce it.

These are familiar principles applicable to this branch of equity jurisdiction. In the case of Buxton v. Lister, 3 Atk. 383, it was said that nothing is more established in a court of equity than that every agreement ought to be certain, fair and just in all its parts, and that if any of these ingredients are wanting in the case, the court will not decree a specific performance; all the material facts must be known to both parties. And again, in Mortlock v. Buller, 10 Ves. 305, the doctrine laid down is that a court of equity is not bound specifically to execute every contract. That if there was any sort surprise that made it not fair or honest to call for an execution, chancery would not lend the extraordinary aid of decreeing a specific performance. And this relief is often denied even when the circumstances are not sufficiently strong to induce the court to require the contract to be given up. In the case of Osgood v. Franklin, 2 Johns. Ch. 23, it is said there is a very important distinction, which runs through the cases, between ordering a contract to be rescinded and decreeing a specific execution. It is not an uncommon case for the court to refuse to enforce for inadequacy of price, and yet refuse to rescind.

In the case now before the court, it is very difficult to say whether any certain and precise contract was concluded between the parties, growing out of the correspondence. And if the letter of the 16th of September is laid out of view, there is certainly not enough to support the contract according to the complainant's view of it, as shown by the deed tendered. The water-privilege thereby conveyed is as follows: "Together with the water-privilege calculated to drive one thousand spindles in water-frames, and the necessary apparatus and machinery to prepare cotton for spinning, according to the practice in January, 1812. And also a sufficiency of water for a machine-shop; to make and repair machinery for the use of said mill or factory thereon standing, at all seasons of the year." The correspondence, according to every reasonable construction, shows that the defendants were to have conveyed to them the factory with the first privilege of the water. And this would, according to every reasonable intendment, carry a right to operate any machinery that might be put into the factory, and driven by a water-wheel of the dimensions of the one then in use. To restrict the quantity of water to any particular kind of machinery, would either preclude

the defendants from ever making any improvement or changing the machinery. Or if such charge was made, leave the question open to litigation whether a greater quantity of water was not used than would have driven one thousand spindles in water-frames, according to the practice in 1812. Nor would the correspondence seem to warrant the other restriction or limitation of water for the machine-shop, to the making and repairing machinery for the use of the factory only. But admitting the contract to be made out according to the terms of the deed, it is very certain that it was not according to the understanding of at least two of the defendants; and would, therefore, be a contract entered into through mistake and misapprehension, and without a full knowledge of all the circumstances; and in this view of it, would be one of those cases in which the complainants should be left to their remedy at law to recover damages for breach of the contract. The bill must, accordingly, be dismissed without prejudice—with costs.

BOWEN (WISE v.). See Case No. 17,905.

BOWEN, The JAMES. See Case No. 7,192.

BOWEN, The J. L. See Case No. 7,322.

Case No. 1,726.

BOWERBANK v. MORRIS.

[Wall. Sr. 118.][1]

Circuit Court, D. Pennsylvania. May 25, 1801.

MARSHALS—REMOVAL — APPOINTMENT OF SUCCESSOR—ACTS BEFORE NOTICE OF APPOINTMENT.

The old marshal is not removed by the appointment of a new one, until he receives notice of such appointment; and all acts done by him before such notice, are good.

[Cited in U. S. v. Bank of Arkansas, Case No. 14,515.]

[See Ex parte Hennen, 13 Pet. [38 U. S.] 230; and see, contra, Overton v. Gorham, Case No. 10,626; U. S. v. Bank of Arkansas, Id. 14,515; also, Stewart v. Hamilton, Id. 13,429.]

In equity. This was a rule, on the motion of Rawle, to show cause why the sales made by John Hall, late marshal of the Pennsylvania district, of certain lands taken in execution, as the property of Robert Morris, the defendant, should not be set aside. The following facts were agreed: On the —— day of March last, (1801), a commission, as marshal of the eastern district of Pennsylvania, issued to John Shee, who did not accept. On the 28th March, another commission issued to John Smith; this was received and accepted on the 4th April, and notice of it given by John Smith, the new marshal, to John Hall, the old marshal, on the same day. On the 10th day of April, John Smith took the oath of office, and gave security as by law directed. The sales in question had commenced under a venditioni exponas issued to and received by Hall, prior to the 28th March last, and were adjourned over from day to day; but on each day of adjournment, tracts of land were sold, which had not been exposed to sale the preceding day. Sales were thus made after the 28th March, and before the 4th April; and after the 4th April, and before the 10th April; and after the 10th April. The motion was, to set aside all the sales made after the 28th March.

Rawle, who took the rule, stated that several of the bar would argue on behalf of purchasers at different times, and would affix different periods for the termination of the first marshal's authority. He was to have argued, that the first marshal's authority ceased on the date of the commission to Smith; but on full consideration he was of opinion that the bare appointment and commission, until accepted and notice given to the old marshal, was not a removal so as to avoid the intermediate acts of the old marshal between the date of the last commission and notice of it. He cited the acts of congress relating to the question, and which are noticed in the opinions of the court. He insisted, therefore, that under his rule, all the sales posterior to the 4th April, 1801, ought to be set aside, but that up to that day, they should stand. It might be argued, that the seizure in execution by Hall, being previous to the 28th March, all the sales would relate to that act; and on the principles of the common law in respect to chattels the seizure divested the defendant's property, and though a supersedeas came after seizure, and before sale, the sheriff might proceed. But there was, in the first place, no analogy between a seizure of goods and of lands; and secondly, the act of congress of the 7th May, 1800, has expressly directed that whatever lands are not actually sold by the old marshal before his removal, shall be sold by the new marshal; and the only question that can be raised, is, when was the old marshal removed? I contend, with reference to his official acts, on the 4th April, when he received notice of the appointment and acceptance of his successor. He cited Willes, 280; 4 Term R. 411; 12 Gilb. Ex'ns, 22.

Ingersoll. What we want, is the decision of the court for our direction and security. It is for the interest of my client to contend that all the sales are good under the venditioni to Hall. He seized the lands, and began the sales, prior to the appointment of Smith; and every individual sale under that seizure, let there be ever so many, and continue as long as they will, must relate to the seizure, and form, in legal construction, but one sale of the property. The act of the 7th May, 1800, leaves the doctrine of relation where it was. The lands in this case, under the venditioni, are chattels for the satisfac-

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

tion of debts; and the rule of the common law is, that the sale relates to the seizure, &c. The purchaser of a parcel of the land seized by Hall before the 28th March, though he purchased after that, or after the 4th April, or the 10th April, has a right to refer his purchase to the levy, and to say that the seizure and sale make but one act, and relate to the first moment of execution. There seems no inconvenience from this construction, but a great safety and security to purchasers who know nothing of the change of officers, and only look to the executive seizure, and officer who first advertises and then sells.

Dallas. The 1st question is, when was Hall removed from office? I am to contend that he was removed eo instanti that the appointment of the new marshal was complete. This was at the date of the new commission on the 28th March, 1801. The signing the new commission determines the office of the old marshal—he is removed; the pleasure of the president is expressed, and that is the tenure of the marshal. The acceptance of the new marshal and notice are not requisite to the removal of the old one; though Smith had not accepted, yet Hall was out. Surely the president may remove, without appointing a substitute: he may vacate the office; this he does by the new appointment. The purchaser under Hall, after his removal in this way, has no title; the sale is void. As to the inconvenience and injury to purchasers who buy, pay, and take titles without notice, this cannot alter the case; it is casus omissus, and the legislature only can cure it Where the office expires by its own limitation, which is four years, or the marshal dies, the law transfers the authority, and no inconvenience can result to a purchaser. But on an official removal by the president, the power to act ceases from that instant; the old commission is vacated by the new one, and all acts after the date of the last commission, are, ipso facto, void. 2d. As to the doctrine of relation contended for by Mr. Ingersoll, it cannot be seriously urged. The act of congress of the 7th May, 1800 [2 Stat. 61], expressly enacts, that where a marshal takes land in execution and dies, or his time expires, or he is removed before sale, the land so unsold, shall be sold by the new marshal. All the sales, then, of the defendant's land, after the 28th March, 1801, are void: the marshal was removed then, and the lands being unsold, must go to the new marshal.

E. Tilghman. The period which determines the authority of the old marshal to sell, is notice of his removal. All his acts between the date of the new commission, and notice of it are good. He is not removed, quoad intermediate acts, in legal contemplation, till then. All the sales up to the 4th April, 1801, must stand. Mr. Ingersoll's doctrine of relation founded on the analogy of the common law in cases of goods, will not hold. By seizing of goods, the sheriff has property, may bring an action, may sell and give possession; the interest is divested out of the defendant: but in the case of land in Pennsylvania, he has no interest in rem, or in re, but a bare authority. They are, indeed, as chattels, subject to pay debts, but bear no other resemblance; the sheriff cannot give the purchaser possession. Then comes the act of congress of the 7th May, 1800, which puts an end to the doctrine of relation by enacting, that where the officer is removed, and any lands which he has seized, are unsold, the new marshal shall sell them. The term, sale, is complex: it supposes a vendor and a purchaser. Will any one carry the fiction so far, as to say, that a lot purchased by A. on the 10th March, was sold on the 1st February preceding!

M. Levy. I hold that the old marshal was not removed, until the new marshal was sworn into office, and had given security agreeably to the act of 24th September, 1789 (1 Laws U. S. 65 [1 Stat. 87], § 27), by which it is enacted, "that a marshal shall be appointed for the term of four years, but shall be removable from office at pleasure;" "and before he enters on the duties of his office, he shall become bound," &c. "and take an oath," &c. Common law, and the common good, dictate the propriety of avoiding a lapse in this office. The execution of all criminal and civil process devolves upon the marshal; and the intention and policy of the legislature, no doubt, was, that the old officer should hold until the new one could act. Until the new one swears in, he is no officer; the term of office granted for the four years by the act to the preceding marshal, not being expired. His office continues till another can do the duty, unless, as has been contended, the commission and notice of it vacates the old office. The words of the act are, that the marshal shall be "removable from office at pleasure;" it does not define a removal from office. A new appointment merely, cannot be, it need not be construed a removal; a notice of it from the officer need not be so taken. It may fairly be construed that the president has removed from office the old marshal, when a complete appointment of a new one capable of doing the duties of the office, has been effected. I enter not upon the case supposed, that the president may vacate the office of a marshal: that is not now the question; nothing appears to manifest any such intention. The office here had not expired by law; and the president meant to continue the officer; and until he actually filled the office with a substitute, he did not remove nor intend to remove the predecessor. The president himself gave no dismission or notice of it to Hall: he sent a commission to Smith, meaning that he should be marshal when he accepted and qualified himself according to law; and until then Smith could not give notice that he was

marshal. It would be a strange exercise of the president's power, and not to be supposed, that he would mean to supersede the first officer and leave a chasm in the office, till it should please the new incumbent to accept, to give notice, to swear, and to give security. Is it to depend on the whim or procrastination of the intended successor, whether the office shall be filled or not! Upon a full consideration of the law and the principles which may with propriety govern this question, I think the true point of time at which a removal from office of the old marshal takes place in consequence of the new appointment, is when the person newly appointed becomes an efficient officer; in other words, when the office is filled.

He cited Col. Burr's opinion, in a collection of pamphlets, on the canvass of an election in the state of New York; also, Foot v. Prowse, 1 Strange, 625; 3 Brown, 167.

TILGHMAN, Chief Judge. By the act of congress of the 24th September, 1789 (1 Laws U. S. 67 [1 Stat. 87], § 28), it was provided, "that every marshal or his deputy when removed from office, or when the term of office is expired, shall have power to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." If this act had remained in force, it is clear that John Hall might have gone on to sell all the lands mentioned in the venditioni exponas; because that would have been an execution of the precept which was in his hands at the time of his removal. But by the act passed the 7th May, 1800 (5 Laws U. S. 145, § 3), it is enacted, "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die, or be removed from office, or the term of his commission expire before sale, or other final disposition of the same; in every such case, the like process shall issue to the succeeding marshal, and the same proceedings shall be had, as if such former marshal had not died or been removed, or the term of his commission had not expired." What were the reasons which induced the legislature to make the restrictions of the marshal's power in cases of precepts ordering the sale of lands, it is unnecessary for us to inquire: we are bound by the law as it is written. The intention of the act is plain; if a marshal is removed before he has actually sold the land, he shall not proceed to make the sale, but a new writ shall issue to his successor. But when shall he be said to be removed? A removal from office may be either express, that is, by a notification by order of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office. But in either case, the removal is not completely effected till notice actually received by the person removed. This construction of the act of the 7th May, 1800, avoids all inconveniences and is warranted by well established principles. In general, all persons who act by authority derived from others, may proceed to execute business until notice of the revocation of their authority; and their acts between the time of revocation of their power, and of their receiving notice of such revocation, are held good; and with regard to a sheriff in particular, it was held in the case of Boucher v. Wiseman, Cro. Eliz. 440, cited in 4 Bac. Abr. 446, that the execution of a fi. fa. by a sheriff after a writ of discharge had issued to remove him from his office, but before notice of such writ of discharge, was good. The marshals in many districts of the United States, live so remote from the seat of government, that a considerable time must elapse before notice can be received: and it cannot be supposed that it was intended to injure bona fide purchasers, who may have paid their money at marshal's sales before it was possible to know the marshal was removed. As to those sales which had not actually taken place when Mr. Hall received notice of Smith's appointment, I am of opinion, they cannot be supported by the doctrine of relation. A sale is a term well understood. When the marshal has struck off the land to the highest bidder, he has made the sale. But if he only puts the land up, and then adjourns the sale to some other time, it cannot be said he has made the sale. And if he receives notice of his removal before the time adjourned to arrives it would be directly contrary to the provisions of the act of congress, if he were to proceed to make the sale. I am therefore of opinion that all sales made by Mr. Hall, the late marshal, after he received notice of the commission to Mr. Smith, the present marshal, which is stated to have happened on the 4th April last, were contrary to law, and must be set aside.

GRIFFITH, Circuit Judge. The act for establishing the judicial courts of the United States passed the 24th September, 1789, creates the office of a marshal, designates his powers, and fixes the tenure of his commission. By the 27th section (1 [2] Laws U. S. 65 [1 Stat. 87]) it is enacted, "that a marshal shall be appointed, in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend," &c. "And to execute throughout the district, all lawful precepts," &c. "And before he enters on the duties of his office, he shall become bound for the faithful performance," &c. "and shall take the following oath," &c. By the 28th sec. "In causes where the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court may appoint. And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed, and

shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn. And every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." By this act, every marshal is to be appointed for four years, but is removable from office at pleasure; it was provided that the execution of all precepts in his hands at his death, shall be executed by his deputy, until a new marshal is sworn; or if at the expiration of four years, when his office ceases by its own limitation, or at the time of his removal from office, precepts are in his hands, they shall be proceeded upon by himself or his deputy. Had the law remained so, this question now debated, could not have arisen; for a venditioni exponas being a precept within the meaning of the law, the ex-marshal Hall would have been right in making the sales in question.

But for reasons best known to the legislature of the United States, it was enacted on the 7th May, 1800 (5 Laws U. S. 146), "that whenever a marshal shall sell any lands, tenements or hereditaments by virtue of process from a court of the United States, and shall die or be removed from office, or the term of his commission expire before a deed shall be executed for the same by him to the purchaser; in every such case the purchaser may apply to the court," &c. "And where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die, or be removed from office, or the term of his commission expire before sale, or other final disposition made of the same; in every such case, the like process shall issue to the succeeding marshal, and the same proceeding shall be had, as if such former marshal had not died or been removed, or the term of his commission had not expired." The only cases, then, where an old marshal, going out of office by efflux of time or removal, is restrained from proceeding on process in his hands, is, when having taken lands in execution, he has sold and made no deed, or has not sold; in both these cases, the new marshal shall, by order of the court, make a deed, or by new process proceed to sale.

All sales made after Hall was, in law, removed from his office, are void, and must be set aside. The notion of protecting sales actually made after a removal, by giving them a fictitious relation to the time of seizure or taking them in execution by the marshal, would defeat the very terms and evident intention of the law. Nothing can be plainer, than that the unsold lands are to be sold by a new writ, and by the new marshal. It can make no difference that, as in this case, the sales are begun; each sale on the adjourned days, though under the same execution or authority, is a distinct sale, at a different time, of a different property, and, it may be, to a different purchaser, and for a different price. It is, therefore, quite absurd to maintain that a sale made on the 4th April to A., was made to A. on the 27th of February. The act of congress speaks of sales, and I do not see how the common law doctrine of relation is at all brought in. If a sheriff seizes goods in execution, and afterwards a supersedeas comes, he may proceed, for an execution once begun shall proceed, as the expression is in the case cited from 4 Term R. 411, 412. But why? Because the supersedeas is too late; the property was divested from the debtor; it is in the officer; the sheriff has authority to sell. But in this case a previous law says, that where he has taken property in execution, and is removed before sale, he shall not sell, but the new marshal proceed with the execution.

The only question, then, is, "At what time was John Hall removed from his office." The expiration of the office by death, or limitation of the term, or a direct notice of dismission, are certain events; but removal by the pleasure of the president, effected merely by a new appointment, necessarily refers to some act or acts to be performed by the person having the power of appointment and removal. There can be no question, I apprehend, but that the president may, by a proper act of office, remove a marshal, without a new appointment. But this would not supersede him until he had notice of such declaration of the president's pleasure, and only from the time of notice; the office then would be vacant. That is not the kind of removal in this case. The removal here is effected by a new appointment; or, as his honour the chief judge observes, it is an implied removal by the commissioning another to the office. The president does not remove the old marshal by a discharge, and then proceed to make a new appointment, but he leaves the old marshal to proceed in the duties of his office, until certain acts are done relative to a new one, which amount to a removal. What are these? 1st. He nominates a new one to the senate, and the senate concur. Did he stop there, no one would say the old officer was removed: he may or may not appoint the other. 2d. He signs a commission for the new officer. Did he keep this in his pocket, no one will say that the old marshal is removed: the very withholding it is an expression of his pleasure for so long, that the new one shall not take, and the old one continue. 3d. He delivers the commission or patent to the new officer. If he refuses it, or sends it back, there is no new appointment, no officer. It has not been contended, that the commission to Shee, which he refused, superseded Hall. 4th. The new commission must be accepted and shown to the old marshal, or other notice of it given to him, before he can be said to

be removed from his office by the will or pleasure of the president. There is then a new patentee, and a proper discharge of the old marshal. I do not go the length of saying the new marshal must be sworn in, (though Mr. Levy's argument was very strong,) but he must accept and give notice by showing his commission or otherwise, to his predecessor; and from that time he must be considered as the officer, though before he "enters on the duties of his office," he must be sworn in. In the case of an implied removal, by the appointment and acceptance of another, nothing is more reasonable, than that all acts done by the predecessor before notice of his removal should be valid; or in other words, that until such notice, the removal of the principal is not complete. The reasons assigned by his honor the chief judge are very strong.

This case is not to be distinguished from other cases of revocable authority. The president, by the commission to Hall, gave him authority to do all acts as marshal until he revoked that authority. Now it is settled law, that "where a man makes an actual revocation of an authority, and, before notice, the other executes his authority, the revocation being without notice, is no revocation" (16 Vin. Abr. 4, pl. 7; Vivion v. Wild, 2 Brownl. 291), as where an arbitrator makes award before notice, though after the countermand, the award is good: or the attorney in fact makes livery on a feoffment after countermand, but before notice, the estate passes. By the demise of the king, at common law all commissions were at an end, yet in the case of Crew v. Vernon, Cro. Car. 97, where a commission had issued to examine witnesses, and the commissioners began the examination the day after the demise of the king, it was held, that all the depositions taken before notice of the demise to the commissioners, should stand; though it was allowed in that case, that the demise of the king determined the commission, and it was said, that if the demise before notice, were to avoid acts done under commissions from the crown, then many trials at nisi prius and attainders upon gaol deliveries after the demise would be avoided, which, it was agreed, were good before notice. Defendant in assize pleaded recovery before commissioners: plaintiff replied, that after the said commission, and before judgment given by those commissioners, another commission issued: and judgment was given for the defendant, the plaintiff not having alleged that the first commissioners had notice before; for the second commission to some purposes has relation to the date, yet acts done under the first commission before notice, are good: so adjudged 34 Ass. pl. 8. An attachment was issued before the demise of Charles II., but executed three days after, without notice; the return, however, of cepi corpus was made after notice, and then proceedings for the contempt: yet because the service was before notice of the demise; that, and the return and all subsequent proceedings were held good. Burch v. Maypowder, 1 Vern. 400. A commission was granted to examine witnesses at Algiers; the plaintiff died before execution of the commission, by which the suit abated, and of course the commission was at an end; yet the depositions being taken by the commissioners before notice of the death, they stood. Thompson's Case, 3 P. Wms. 194.

There are determinations on this very question upon the office of sheriff of England. Sheriffs there are nominated by the chancellor, and other great officers, to the king, who, if he approves, appoints one for the county, and issues a patent or commission: but it has ever been held, that notwithstanding the new appointment and patent made out, yet the office of the old one continues until a discharge or notice of the new patent is given to him; and this, not upon any statutable provision, but upon a lawful construction of what amounts to a removal of the old officer, and when, to the purposes of avoiding his acts, he is removed by the appointment of a new one. "False imprisonment was brought against St. John; he pleaded, that at the time, he was sheriff of Wiltshire, and took the plaintiff by a capias. The plaintiff replied, that one Earnley was sheriff, and traversed that St. John was sheriff; the defendant rejoined that he was sheriff all the year before, and had no notice of the patent to Earnley, and had received no discharge of himself; and on demurrer, the defendant had judgment, because all acts which he hath done as sheriff, are good in law till he has received his discharge, or has perfect notice of the new sheriff. Mo. 186, pl. 338. St. John's Case, cited 19 Vin. Abr. 451, pl. 3." In Westby's Case, 3 Coke, 71, the ancient sheriff is not discharged till three things are done, viz. the patent to the new sheriff, the writ of discharge, which is notice to the old sheriff, and the delivery of the prisoners, &c. The case cited by his honour, the chief judge, Boucher v. Wiseman, Cro. Eliz. 440, was this: Action on the case against Wiseman, because the plaintiff had recovered £100 against Pynder, and the defendant, as sheriff, levied £28 by fieri facias, and had not returned the writ or paid the money. Plea, not guilty. On evidence to the jury, it was proved that the writ was delivered the 9th November to Cowell, his undersheriff, and the same day he made execution, but the defendant, the sheriff, proved that a writ of discharge was delivered to him the same day, dated the 6th November. But because he did not prove that he had notice of this writ of discharge before the execution served, the court held clearly that he was yet sheriff, and chargeable to the plaintiff's action. "A ca. sa. was awarded to Clifton, then sheriff: a new patent was made to Kircombe, and before notice, Clifton arrested A., and left him in execution. Kir-

combe died, and then Fitz was made sheriff, who let A. go. The question was, if this was a good arrest by Clifton? for if not, then it was no escape. The court held clearly, that the arrest was good, and it was an escape; for Sir J. Clifton remained sheriff until the new patent is showed to him, so as he may have notice of his discharge; and if, in the meantime between the sealing of the new patent and the showing it to him, he keeps a county court, it is good." Fitz's Case, Cro. Eliz. 12.

The true time, then, of the "removal of a marshal by the pleasure of the president," where the removal is not by a direct discharge, or vacating of the office; but merely by the operation of a new commission or appointment, is when notice is given to the old marshal of the new commission by the president, or the showing of the commission to him by the officer, or other perfect notice. In the case stated, it is agreed that Hall had notice of the new commission and acceptance by Smith on the 4th April last. I agree, therefore, with his honor, the chief judge, that all sales by Hall previous to the notice are valid; but all sales after that day are void, and a new writ of sale must issue to the new marshal, Smith.

Rule made absolute to set aside all the sales made by Hall after the 4th April, 1801.

BASSET, Circuit Judge, absent.

Case No. 1,727.

BOWERBANK v. PAYNE.

[2 Wash. C. C. 464.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

BAIL—EXONERATION—INSANITY OF DEFENDANT.

The court refused to enter an exoneretur on the bail-piece, on the ground that the defendant was confined in the hospital, as a lunatic.

[See Gadsby v. Miller, Case No. 5,167.]

Rule to show cause why an exoneretur should not be entered on the bail-piece, the defendant being confined in the hospital, as a lunatic. The affidavit of the bail, on which the rule was granted, stated, that since the suit was brought, the defendant had become deranged in his mind, and was now in the hospital.

In support of the rule, Mr. Hare cited 12 Term R. 126; and though he admitted, that in a case like the present, the English cases were flatly against him, still, as the defendant, from his situation, could not relieve himself from confinement by availing himself of the insolvent law of the United States, humanity forbade his being thrown into jail by his bail, which his liability must compel him to do, if he cannot be relieved from his undertaking.

BY THE COURT. If we were satisfied that the derangement of the defendant were permanent, there is no legal ground for relieving the bail, since he is not prevented by any law from delivering him up; and humanity, if it were a ground on which the court could interfere, is not concerned in the question, whether the defendant shall be confined in a jail, or in the hospital. In either case, he will be taken care of. But what we deem conclusive, is, that there is no proof that the derangement of the defendant is more than temporary, and in such a case, nothing could justify a release of the defendant from this undertaking. Rule discharged.

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

BOWERMAN (UNITED STATES v.). See Case No. 14,630.

BOWERS (SCAMMON v.). See Case No. 12,431.

BOWERS (WEBB v.). See Case No. 17,319.

Case No. 1,728.

In re BOWIE.

[1 N. B. R. 628 (Quarto, 185);[1] 15 Pittsb. Leg. J. 448; 1 Am. Law T. Rep. Bankr. 97.]

District Court, D. Maryland. 1868.

BANKRUPTCY — INJUNCTION — RESTRAINING ENFORCEMENT OF JUDGMENT—WHO MAY OBTAIN—DISTRICT COURT—JURISDICTION.

1. Before the appointment of assignees, a petition for an injunction can be filed only by the bankrupt. After assignees are appointed, the petition should be filed by them.

[Cited in Thames v. Miller, Case No. 13,860; Re Steadman, Id. 13,330; Hudson v. Schwab, Id. 6,835.

[See Jones v. Leach, Case No. 7,475.]

2. United States district courts have full and adequate jurisdiction in all matters relating to bankruptcy, at law and in equity. Its jurisdiction, however, to sell real estate and pay off liens, is not exclusive.

[Cited in Clifton v. Foster, 103 Mass. 233; Re Mallory, Case No. 8,991; Re Brinkman, Id. 1,884; Re Hufnagel, Id. 6,837; Augustine v. McFarland, Id. 648; Re Cooper, Id. 3,190.]

[See Ex parte High, Case No. 6,473; Ex parte Columbian Metal Works, Id. 3,039; Ex parte Kahley, Id. 7,593; Anonymous, Id. 456; also, Foster v. Ames, Id. 4,965; Ex parte Rhodes, Id. 11,746; Davis v. Anderson, Id. 3,623.]

[3. Cited in Re Carow, Case No. 2,426, to the point that an assignee is accountable only to the court appointing him.]

[4. Cited in Re Brinkman, Case No. 1,884, to the point that an assignee will not be required to sell property incumbered for more than its value.]

[5. Cited in Phelps v. Sellick, Case No. 11,079, to the point that, as regards proof of debts,

[1] [Reprinted from 1 N. B. R. 628 (Quarto 185), by permission.]

secured and unsecured creditors stand upon the same footing.]

[In bankruptcy. Petition by Thomas F. Bowie, a bankrupt, to restrain enforcement of judgments. Dismissed.]

GILES, District Judge. In this case the bankrupt filed a petition, setting forth that several of his creditors, prior to his application for the benefit of the bankrupt act, had obtained judgment against him in the circuit court of Prince George's county (the county in which he resides), and that writs of fieri facias had been issued on said judgments, which had been levied on all his real estate; that said judgment creditors are proceeding to enforce these said claims against him, both at law and in equity, and that they are about to obtain a decree on the equity side of the said circuit court of Prince George's county, to sell all his said lands, with a view to have the proceeds of the same marshalled amongst the several judgment creditors, according to their priority of liens. All of which he claims to be in derogation of his rights under the bankrupt act, and of the exclusive jurisdiction of this court in the matter; and he prays for an injunction to be issued against the said judgment creditors, enjoining them from the enforcement of their said liens in the courts of the state; and from any further proceeding in the cause now pending in the circuit court of Prince George's county, as a court of equity. By an order of this court passed May 18, 1868, this petition was set down for hearing on Monday, June 1st, and public notice of the same was given. The said judgment creditors appeared by counsel on the day named, and filed their answer to the said petition, in which they allege several reasons why the prayer of the said petition should not be granted. First. That, inasmuch as said petition was filed after the appointment of assignees of said bankrupt, in whom all the rights of property of the said bankrupt became vested, he, the said bankrupt, had no standing in court, and no interest in the matter whatever, and that such application could only be made by the assignees. Second. That this court has no jurisdiction in the premises; that such relief could only be sought and obtained in the circuit court of the United States for this district; that, inasmuch as these defendants have not filed their claims against said bankrupt, and are not in any way parties to the said bankrupt proceedings, they cannot be made parties, and be restrained from exercising their lawful rights, by any proceeding in the bankrupt's case, but they can only be proceeded against by process duly issued from said circuit court upon a bill filed therein.

Besides these objections to the petitioner's right, and to the jurisdiction of the court, the respondents aver, that the judgments they hold are the oldest judgments against the said petitioner, and that the amount due on them far exceeds the value of the real estate of the said petitioner; and that by no possibility will anything remain for the general creditors. Various other matters are set forth in the said answer, which in the view I take of the case, it is not necessary for me to refer to. But the answer states, that, from the fact of there being so many executions on judgments against said petitioner, and in the hands of different sheriffs, it was found necessary to file a bill on the equity side of Prince George's county court, to which all the lien creditors, and the petitioner and his assignees, are made parties, to procure a decree for the sale of the real estate of said petitioner, and a distribution of the proceeds of said estate among said lien creditors according to their several priorities, and that a decree will shortly be obtained for that purpose unless they are restrained by the action of this court. This case was fully and ably argued by the petitioner, his counsel, and the counsel for the lien creditors.

In reference to the first objection, I would only say, that if the facts presented by the petition and answer justified the court in granting the relief sought, I would direct the petition to be amended, making the assignees parties to the same. Before the appointment of assignees, such a petition could only be filed by the bankrupt; after assignees are appointed, it should be filed by them, and if, in a case requiring such a proceeding, the assignees should neglect or refuse to institute it, the bankrupt could make this known to the court, and the court could either remove the said assignees or direct them to proceed in the matter.

In reference to the second objection taken by the respondents, I am clearly of the opinion that the petition was properly filed in this court; and that this court has, by virtue of the 1st section of the bankrupt act [of 1867; 14 Stat. 517], full and adequate jurisdiction over all matters relating to the settlement of the bankrupt estate, either at law or in equity, by way of petition or bill; and that, whenever a case is presented which shows that the relief sought by the petition is absolutely necessary to protect the interest of the general creditors, and to save from sacrifice the estate of the bankrupt, such relief will be granted. Now is this case one of that character? It is stated in the answer, was also stated in argument, and not denied by the petitioner, that the amount now due on the judgments against him, far exceeds the value of his real estate; and that in no event can there be any surplus for distribution among the general creditors. Why, then, should this court interfere? Its jurisdiction to sell said real estate and pay off said liens is not exclusive; I think this clearly appears from the 14th and 28th sections of the bankrupt act. By the 14th section the assignee is to defend

all suits at law or in equity, pending at the time of the adjudication of bankruptcy; and by the 28th section the assignee is to be allowed in his account for the fees, costs, and expenses of suits, &c. The 6th section of the bankrupt act of 1841 [5 Stat. 445] gave ample jurisdiction to this court over all matters connected with the due settlement of the bankrupt's estate; and while the supreme court held, that, in a case like the present, the district court had full jurisdiction to bring all parties in interest before it and marshal the assets, there was nothing in the act which required that it should in all cases be absolutely exercised; on the contrary, when suits are pending in the state courts, and there is no suggestion of fraud, and nothing appears which requires the equitable interference of this court to prevent mischief or wrong to the general creditors, or a waste or misapplication of the assets, the parties may well be left to proceed with such suits, &c. Therefore, while in the case Ex parte Christy, 3 How. [44 U. S.] 292, the supreme court sustained the action of the district court, which had granted relief in the premises, it denied relief in the case of Norton's Assignee v. Boyd, 3 How. [44 U. S.] 434. A similar decision was made by Judge McLean in his circuit, in the case of McLean v. Rockey [Case No. 8,891]. These decisions settle the law of this case, and give to us the rule by which we are to be guided in all similar applications. The petition filed in this case is therefore dismissed.

Case No. 1,729.

BOWIE et al. v. BLACKLOCK.

[2 Cranch, C. C. 265.][1]

Circuit Court, District of Columbia. Nov. Term, 1821.

NEGOTIABLE INSTRUMENTS—NON-PAYMENT—NOTICE TO INDORSER.

It is a sufficient excuse for not giving notice to the indorser of the non-payment of a promissory note by the maker, that the holder called at the usual place of business of the indorser, in business hours, and found it shut and no person there to receive notice.

[See Burrows v. Hannegan, Case No. 2,205.]

At law. Assumpsit [by Bowie and Kurtz] against R. S. Blacklock, surviving partner of the firm of N. & R. S. Blacklock, who were indorsers of William F. Thornton's note due 25th August, 1818. On that day N. Blacklock, one of the partners, died at Port Tobacco, in Maryland, and the store-house in Alexandria, where they usually transacted their mercantile business, was shut when the notary came, within the usual business hours, and knocked hard at the door, but no person appeared to whom he could give notice of the non-payment by the maker of the note. The defendant's dwelling-house was in Alexandria, a short distance from the store-house; but no notice was given or left at the dwelling-house.

THE COURT (nem con.) at the last term had, upon the trial, instructed the jury, that the plaintiffs could not recover, for want of notice to the defendant. The verdict being for the defendant, THE COURT permitted the plaintiffs to move for a new trial, on the ground of misdirection of the jury upon the question of notice.

Mr. Taylor, for the plaintiff, cited Crosse v. Smith, 1 Maule & S. 545, and Parker v. Gordon, 7 East, 385.

Mr. Mason, contra, cited Chit. Bills, 136, 201, 202.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the opinion before given, and instructed the jury that the holder of the note was only bound to call at the usual place of business of the defendant, in business hours; and if it be shut, and no person there to receive notice, the holder is excused for not giving notice.

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

BOWIE (FOWLE v.). See Cases Nos. 4,994 and 4,995.

Case No. 1,730.

BOWIE v. HENDERSON.

[Cited in Denny v. Henderson, Case No. 3,806. Nowhere reported; opinion not now accessible; subsequently affirmed by supreme court, 6 Wheat. (19 U. S.) 514.]

Case No. 1,731.

BOWIE v. HUNTER.

[4 Cranch, C. C. 699.][1]

Circuit Court, District of Columbia. March Term, 1836.

EVIDENCE—DECLARATIONS — IMPEACHING BILL OF SALE.

To prove that the bill of sale of a slave by a mother to her son was fraudulent as to her creditors, her declarations, prior to the date of the deed, were permitted to be given in evidence.

At law. Replevin for a slave named Mahala. The defendant [Alexander Hunter], the marshal of the District of Columbia, had taken the slave by virtue of fi. fa. against one Elizabeth Beale, the mother of the plaintiff [Allen P. Bowie]. The plaintiff claimed the slave under a bill of sale made by her to him, on the 22d of October, 1831, acknowledged and recorded the same day.

Mr. Bradley, for the defendant, contended that the bill of sale was fraudulent as to Mrs. Beale's creditors, and offered evidence to prove, that shortly before the execution of the bill of sale, she declared she would convey away all her property, so that the cred-

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

itor, who had obtained judgment against her, should never recover his debt.

Mr. Brent & Son, for the plaintiff, objected, that her declarations could not be given in evidence against her vendee, the plaintiff.

But THE COURT (CRANCH, Chief Judge, contra) permitted the evidence to be given. The reason stated by MORSELL, Circuit Judge, was that, perhaps, a knowledge of such declarations may, by the evidence, be brought home to the plaintiff.

Mr. Brent moved for a new trial, and cited 5 Binney, 109; 3 Wheeler, 260. But THE COURT refused to grant it.

BOWIE (MAGRUDER v.). See Case No. 8,964.

BOWIE (PATTERSON v.). See Case No. 10,825.

BOWIE (SWANN v.). See Case No. 13,672.

Case No. 1,732.

BOWIE v. TALBOT.

[1 Cranch, C. C. 247.][1]

Circuit Court, District of Columbia. July Term, 1805.

DEPOSITION—NOTICE OF TAKING.

1. In taking the deposition of a seafaring man under the statute of Maryland (1721, c. 14, § 3) it is not necessary that notice should be given to the adverse party in person. One day's notice to the attorney-at-law is sufficient.

2. The deposition cannot be read at the trial, unless the court shall be satisfied that the witness has departed from the district.

At law. Case against a common carrier, for negligence in carrying tobacco from Bladensburg in a scow.

Mr. Caldwell, for the plaintiff [Washington Bowie], offered the deposition of William Barry, a seafaring man, taken under the act of assembly of Maryland, 1721, c. 14.

Mr. Key, for the defendant [Lewis Talbot], objected that the notice was only to himself, as attorney, on the day before the taking, which was not reasonable notice. Every departure from the general rules of evidence, must be taken strictly. The act requires notice to the adverse party. In the act of 1779, c. 8, the word "attorney" is inserted; so in the act of congress (1 Stat. 88; Judiciary Act 1789, § 30).

THE COURT overruled the objections, saying that it is not reasonable that the party should have all the benefits of being present in court, and not liable to its disadvantages. The benefit of the act might be entirely avoided by the party concealing himself, or the opposite party may not know his residence. But THE COURT, not being satisfied that the witness had departed and was out of the District of Columbia at the time of the trial, rejected the deposition; upon which, a juror was withdrawn by consent, and the cause continued.

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

Case No. 1,733.

BOWIE et al. v. WHEELRIGHT.

[2 Cranch, C. C. 167.][1]

Circuit Court, District of Columbia. April Term, 1819.

SHIPPING—CHARTER-PARTY—CONSTRUCTION—DEFINITION—"CHARTER AND TO FREIGHT LET."

In a charter-party, the words "charter and to freight let," do not imply a covenant, in law, that the vessel is or shall be seaworthy.

At law. Covenant, on a charter-party. Breach, that the vessel was not seaworthy. General demurrer and joinder. The charter-party, upon oyer, did not appear to contain any express covenant of seaworthiness.

Mr. Taylor, for the defendant, contended that the defendant could not be made liable, unless there was an express warranty, or fraud, or misrepresentation.

Mr. Swann, for the plaintiffs [Bowie and Kurtz], contended that a covenant is implied in the act of hiring the vessel.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the charter-party, not containing an express averment that the vessel was seaworthy, could not support the averment of such a covenant in the declaration.

Case No. 1,734.

BOWKER v. DOWS.

[3 Ban. & A. 518; 15 O. G. 510; Merw. Pat. Inv. 253.][2]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—INFRINGEMENT — COMBINATION—VALIDITY.

1. Where a party sells an article to persons who intend to use it in the combination claimed in the patent, and it is advertised and sold for that very purpose, such sale is an infringement, although the manufacture and sale would not, per se, be an infringement.

[Cited in Holly v. Vergennes Mach. Co., 4 Fed. 82; American Cotton-Tie Co. v. Simmons, 106 U. S. 95, 1 Sup. Ct. 57; Schneider v. Pountney, 21 Fed. 404; Alabastine Co. v. Payne, 27 Fed. 560; Snyder v. Bunnell, 29 Fed. 48; Boyd v. Cherry, 50 Fed. 282; Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 26. Followed in Travers v. Beyer, 26 Fed. 450. Distinguished in Robbins v. Columbus Watch Co., 50 Fed. 555.]

[See Millner v. Schofield, Case No. 9,609a; Saxe v. Hammond, Id. 12,411; Coolidge v. McCone, Id. 3,186; Richardson v. Noyes, Id. 11,792; Barnes v. Straus, Id. 1,022;

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

[2] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 253, contains only a partial report.]

Maynard v. Pawling, 3 Fed. 711; New York Bung & Bushing Co. v. Hoffman, 9 Fed. 199; Schneider v. Pountney, 21 Fed. 399.]

2. A patent for a combination of saponine extracted from vegetable products with liquids containing carbonic acid gas is infringed by the sale of vegetable products containing saponine for use in such combination.

[Cited in Schneider v. Pountney, 21 Fed. 404; Hobbie v. Jennison, 40 Fed. 890.]

[See Cushing's opinion, 8 Op. Attys. Gen. 270; Crowell v. Harlow, 1 Fed. 140.]

3. Letters patent No. 193,476, granted to Horace L. Bowker, July 24th, 1877, for an improvement in syrups and mineral waters, *held* valid.

[In equity. Bill by Horace L. Bowker against Gustavus D. Dows to enjoin infringement of patent. Interlocutory decree for complainant.]

A. J. Robinson, for complainant.

Dana B. Gore, for defendant.

LOWELL, District Judge. The complainant, Horace L. Bowker, obtained a patent, No. 193,476, July 24th, 1877, for an improvement in syrups and mineral waters. The specification declares that the purpose of the invention is to create and sustain a sparkling, frothy foam or bead on any drink containing carbonic acid gas, when drunk from the bottle or fountain, and consists in combining with the syrups, mineral waters or drinks a small quantity of saponine extracts produced from any vegetable matters containing saponine, such as soap-bark, soapwort, and other plants which it mentions. It then describes the mode of obtaining the extract by steeping or boiling, and says that when the extract is mixed in small quantities with syrup, etc., it produces a foam and retains it a long time. He claims the combination of saponine, extracted from vegetable products, with syrups, mineral waters, ciders, beers, ales, etc., or other liquids containing carbonic acid gas, whether natural or artificial, as and for the purpose described.

The evidence for the complainant tends to show that the saponaceous extract has the properties ascribed to it, and that the complainant discovered this application of it. He makes an extract which he calls Bowker's gum, which has been sold to dealers in soda-water to a very considerable extent, and the defendant has sold an extract containing saponine for the same purpose and in large quantities. The directions for use, which are printed on the labels of the plaintiff's bottles, recommend the mixture of one or two ounces of the gum with every gallon of syrup, according to the amount of foam desired—for soda-fountains, one ounce; for beer, one or two ounces for every six pounds of sugar; for champagne cider, ten ounces of the gum to forty gallons of cider.

One objection taken by the defendant to the plaintiff's specification is that it does not describe the invention in such full, clear and exact terms as to enable a person skilled in the art to make and use it. No evidence has been taken by either party with a direct bearing upon this objection, which would be a formidable one if it appeared that the direction of the patent to mix a "small quantity" of the extract of saponine with the syrup or other liquid was one which required further experiment to enable the invention to be practiced advantageously. Taking only such evidence as arises incidentally in the case, we are not prepared to say that the description is insufficient. It appears by the directions accompanying the bottle, which we have quoted, that the difference of an ounce or two in the quantity used is not considered material; and we infer from this, and other testimony, that no great precision is required, and that a "small quantity" sufficiently describes the amount of the extract which is to be used in combination with the syrups and other liquids, in order to produce the desired effect; that the amount may be varied within pretty wide limits without affecting the result, except in degree, and that this may be ascertained very readily without what can be called experiment.

The defendant denies both the novelty and the utility of the invention. His principal witness, an able working chemist, who prepares the extract sold by the defendant, testifies that he made and used the discovery many years ago, but abandoned it because he found saponine to be very poisonous. This witness is contradicted not only by other witnesses, but by a letter in which he said that his compound, made before the date of the patent, was composed of certain other substances, without any mention of saponine; and on the other point, by the fact that he continued down to the time of the taking of his deposition, to sell a compound of saponine without any warning to his customers of its poisonous qualities, so that we think it would not be safe to decide, upon the strength of his evidence, that the invention was anticipated, or was not useful.

The defendant sells an extract containing saponine to persons who intend to use it in the combination claimed in the patent, and it is advertised and sold for that very purpose. Such a sale we regard as an infringement of the patent, though the manufacture and sale of the extract of saponine would not, without more, be an infringement. Where the patent was for a combination of the burner and chimney of a lamp, and the defendant made and sold the burner intending that it should be used with the chimney, he was held by Judge Woodruff to be liable as an infringer. Wallace v. Holmes [Case No. 17,100]. We do not think that the law requires us to hold those persons who actually use the combination (most of them, and perhaps all, without any purpose or knowledge of infringing), as the only persons liable, to the exoneration of the only person who makes and sells the extract for the express and avowed purpose of its use in the combination.

It has further been argued to us, with earnestness, that there is nothing patentable in the discovery that the foam in beverages can be increased by the use of saponine; but we are of opinion that it is clearly a case of a patentable discovery of a new use, in a combination, to produce a better result than was known before. Interlocutory decree for the complainant.

Case No. 1,735.

In re BOWLER.

Ex parte DUNLOP.

[2 Hughes, 319.][1]

District Court, E. D. Virginia. June, 1877.

LIENS—PRIORITY—BANKRUPTCY—EXEMPTION.

A lien for rent to the amount of $732.25 attached to the proceeds of the sale of two classes of the debtor's property, which sold respectively for $564 and $668.85, and a deed of trust creditors' lien attached to the property which brought the $564, while the debtor's right to an exemption attached (subject to the superior lien for rent) to the property which sold for $668.85, the lien for rent being superior to both the trust deed and right of exemption, and the deed of trust being superior to the right of exemption only in the $564. *Held*, that inasmuch as the lien for rent attached to "two funds," and was superior both to the trust deed and the exemption, it must be paid in full, and that the deed of trust lien must be subrogated to it as to the remainder of the aggregate fund, and that nothing could be given to the debtor for account of his exemption.

In bankruptcy. On the exceptions of John Dunlop, a trust deed creditor [of Henry Bowler, a bankrupt], filed April 12th, 1877, to commissioner's report, filed April 4th, 1877. [Exceptions sustained.]

HUGHES, District Judge. The landlord had a lien to the amount of $732.25 upon that part of the bankrupt's property which brought $1232.85. There were two classes of this property, which respectively brought $564 and $668.85. The deed of trust creditor had a lien upon so much of this same property as brought $564, and there was not enough for both by $63.40. The landlord's claim was, under the laws of Virginia, superior in dignity to that of the trust creditor on the property subject to the trust deed, and was also superior to the bankrupt's claim for an exemption, which (but for the landlord's claim) would have been payable out of that part of his property which brought $668.85.

This case differs from that of B. D. Cogbill [Case No. 2,954], decided in April, in the fact, that, in Cogbill's Case, the claim superior to the trust deed was that of a judgment creditor, whose right was, as to the general estate, inferior to that of the bankrupt for a homestead exemption. In Cogbill's Case the judgment creditor's claim was superior to that of the trust creditor's only as to the property covered by the trust deed, but was inferior to that of the homestead as to the remaining estate, and, therefore, he had not "two funds" out of which he was at liberty to make his debt; for, under the laws of Virginia, a judgment creditor's lien is not, in general, superior to the homestead.

In the present case, however, the landlord having two funds out of which he could make his debt, which as to both the two funds was superior to the bankrupt's claim for exemption, if he has been paid out of that one of the funds on which the trust deed creditor had no lien the trust creditor must be subrogated to his rights, and receive that portion of the aggregate fund which was left after satisfying the landlord. The exceptions of the trust creditor, John Dunlop, are therefore sustained, and an order will be made accordingly.

NOTE [from original report]. I have assumed in this decision that the lien for rent is superior to the bankrupt's right to what is called the "$500 congressional exemption," allowed by section 5045, Rev. St. U. S., just as the lien for rent is superior under the laws of Virginia to the right to a homestead exemption.

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

BOWLER (BEARD v.). See Case No. 1,180.

BOWLER (CONNECTICUT MUT. LIFE INS. CO. v.). See Case No. 3,106.

BOWLER (DUNDAS v.). See Cases Nos. 4,140 and 4,141.

Case No. 1,736.

BOWLEY v. GODDARD.

[1 Lowell, 154.][1]

District Court, D. Massachusetts. June, 1867.

SALVAGE—WHAT IS SALVAGE—WHO ARE SALVORS—OFFICERS AND CREW—COMPENSATION.

1. A steamer was engaged by the underwriters' agent to go to a vessel in distress with the understanding that her time and services should be liberally paid for if they were accepted and were successful, which they were. *Held*, the agreement was for salvage.

[Cited in Baker v. Hemenway, Case No. 770.]

2. A steamer was owned by the underwriters of Boston and was usually employed on salvage duty by special contract. Her officers and men were paid by the month, and had no right to demand more than their regular pay if they performed salvage services. *Held*, these facts constituted no answer to a demand for compensation reckoned upon the liberal basis of salvage, by the steamer when she was engaged to perform a salvage service by a ship not underwritten by the owners of the steamer, and without any special contract.

3. As between a ship so saved and the officers and crew of such a steamer, the latter are volunteers though paid by the month.

4. The value saved is not a very important element in awarding salvage when the danger is not immediate, and the situation of the saved vessel is such that other assistance might proba-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

bly have been rendered if that of the actual salvors had not been accepted.

[See The George Gilchrist, Case No. 5,333; The Cheeseman v. Two Ferry-Boats, Id. 2,-633.]

5. On a value of $160,000, $5,500 awarded to the two steamers.

In admiralty. The ship Coringa on her voyage from Calcutta to Boston with a very valuable cargo,—ship, freight, and cargo being worth about $160.000,—lost her rudder head when near Cape Cod, and became nearly or quite unmanageable. Her master brought her to anchor off Nauset light, about two miles from the beach, on the morning of Monday, the seventh of January, 1867, and set his colors union down. He refused the offer of the steamer Roman, of the Boston and Philadelphia line of packets, to tow him in, because the master would not disclaim salvage. In the course of the forenoon the underwriters' agent at Provincetown learned that there was a vessel in distress, and engaged the steamer George Shattuck to go to her assistance. This steamer plies between Boston and Provincetown twice a week each way, as a freight and passenger steamer, and sometimes tows vessels. The wind was so high from the northward and westward that the regular trip of the Shattuck had been postponed, and her master was disinclined to go to the assistance of the Coringa, but was induced to do so by a representation that life might be in peril. The underwriters' agent, with a whale-boat and some hands hired for the occasion, in addition to the crew and equipment of the steamer, went in her. They found the ship soon after dark on Monday, and were asked by the master to lie by him, to which they consented. The wind continued to blow so strongly for nearly two days that the steamer was not thought adequate to tow the Coringa to a port of safety, and she lay by, with fires banked, ready to give what aid she could in any emergency, and to tow the ship when the weather should moderate. In the afternoon of Wednesday, some forty-four hours after the arrival of the Shattuck, the powerful tug-boat Charles Pearson, owned in whole or in part by the insurance companies of Boston, and generally known as the underwriters' boat, came in sight, towing the dismasted bark Suliot from Provincetown to Boston. At the request of the master of the Coringa, this tug after some hesitation undertook to tow the ship. The George Shattuck assisted, and all four vessels were made fast together, and proceeded towards Boston in the following order: the George Shattuck, the Charles Pearson, the Coringa, the Suliot. The wind increased again and for some hours after nightfall, while going from Highland light to Race point, their progress was very slow. At last the bark parted the hawser by which she was made fast to the ship, and struck adrift. The steamers put back and found her in danger of going ashore, and the George Shattuck then made fast to the bark and brought her to Boston, while the Charles Pearson brought up the Coringa; and both arrived in safety during the forenoon of Thursday.

The owners, officers, and crews of the two tugs joined in this libel as alleged salvors of the ship and cargo. The owners of the property set up that the contracts were for towage services only. Mr. Smith, the underwriters' agent, called by the libellants, stated in his cross-examination that the arrangement with the master of the George Shattuck was, in substance, that the steamer should be liberally rewarded for her time if her services were actually used and were successful, and his understanding appeared to be that the precise amount of this reward should be for the underwriters to determine. He said further, that the insurance companies of Boston had furnished him with a sum of money to be invested in this steamer when she was built, and that he has always owned a small share in her, and that his arrangement with the managing owner and with the master when he took this interest in the steamer was, that he should be at liberty to employ her on salvage service at something less than salvage remuneration. The master and managing owner denied that there was any general arrangement or understanding of this sort, and the master denied that there was any special arrangement in this case. The officers and crew of the Charles Pearson were hired by the month, and their contract required them to perform duty in saving vessels, without further or other compensation. The steamer usually made a special contract in each case for payment by the day, the hour, or the job; and when this has not been done, her services have usually been settled for upon similar principles, that is to say, upon a consideration of her services, expenses, risk, &c., rather than upon a basis of salvage in any more enlarged sense. The master of the Coringa made no bargain with either steamer; but he testified that Mr. Smith informed him on Wednesday morning that he had engaged the George Shattuck as underwriters' agent, and that no advantage would be taken of the ship's situation; and that in asking the aid of the Charles Pearson he knew he was dealing with the underwriters' boat, and inferred that salvage would not be demanded, though his vessel was not underwritten by any of her owners.

B. R. Curtis & E. Merwin, for respondents.

The express contract in the one case, and the implied contract in the other, were for a quantum meruit compensation.

H. W. Paine, for the C. Pearson.

J. C. Dodge, for the G. Shattuck.

LOWELL, District Judge. There can be no doubt, and none is suggested, since the evidence has been put in, that the services rendered were in the nature of salvage; but

it is contended that salvage compensation is waived by the situation and acts of the parties. The presumption is, that such services were rendered for a salvage compensation; but this may be rebutted by evidence: The Versailles [Case No. 6,365]; The Independence [Id. 7014]. In the latter of these cases, Mr. Justice Curtis says, "What I decide is, that to bar a claim for salvage, where property in distress upon the sea has been saved, it is necessary to plead and prove a binding contract to be paid, at all events, for the work, labors, and service in attempting to save the property, whether the same should be lost or saved."

Tried by this test, there is no bar here, because neither steamer was to be paid unless successful. This test, indeed, is not conclusive, because there may be a contract for towage contingent, as most maritime contracts are contingent, upon the successful prosecution of the enterprise, and there may be a valid contingent contract fixing the amount of salvage; and either of these would preclude the assessment of damages by the ordinary rules of salvage. This is all that can be meant by a contract to bar salvage, for an admiralty court at the present day has undoubted jurisdiction of contracts of this kind, and such an one, if proved, would be no bar, but would only regulate the damages. The courts do not interfere with the liberty of contracting in such cases, excepting to see that it is not abused. If neither fraud, nor oppression is shown, the bargain will be upheld, though it be contingent, and be for a sum much less than the court would have awarded: The Catherine, 6 Notes Cas. Supp. xliii.; The Mulgrave, 2 Hagg. [Adm.] 77; Bondies v. Sherwood, 22 How. [63 U. S.] 214; The True Blue, 2 W. Rob. [Adm.] 176; The British Empire, 6 Jur. 608; The A. D. Patchen [Case No. 87]; The Helen and George, Swab. 368; The Enchantress, Lush. 93; Eads v. The H. D. Bacon [Case No. 4,232]. The contract must not only be fairly and honestly made, but the evidence must show a definite and explicit bargain. Mere loose talk will not do; The Salacia, 2 Hagg. [Adm.] 262. It is not unusual for masters in their laudable zeal for the interests of their owners, not only to underrate the service after it has been performed, but to fasten upon some expression of the salvors, such as that they would be reasonable in their charges, or the like, as binding them not to claim salvage. The objection to the allowance to the George Shattuck rests on such a statement; but in the evidence I find nothing which should have that operation. Granting that Mr. Smith's version of the conversation should be accepted without qualification, and that of the master should be wholly rejected, yet the engagement merely was that the steamer should be paid liberally if her services were accepted and were successful. But this must mean that the pay should be in some degree proportional to the success, because, if by great exertion and at great expense, only a small value had been saved, liberality contingent on success could not require a payment exceeding the value rescued; and the converse must hold in favor of the steamer; and this is salvage. Mr. Smith's understanding probably was, that the underwriters' estimate of liberality should be the final measure of its amount; but this cannot be accepted as a legal measure to render the contract either fair or explicit within the law. If an agreement to refer the amount to arbitrators will not bar a libel, much less would one which leaves the adverse party to be the sole judge of the controversy be such a bar. If the true construction of the conversation shows an agreement not to enhance the compensation if the ship should turn out to be a very valuable one,—and I am much inclined to think this is the real meaning of it,—that is no more than I should apply as the rule of damages in a case of this kind, for I have always considered that a vessel merely disabled, but in no immediate peril, and lying near a port from which assistance may be readily obtained, is to have the advantage of her situation, and to be presumed to take the first tug on substantially the terms that she could have had the next one for. In other words, that while such a service is salvage, and is to be compensated much more liberally than mere towage, yet, the peril not being immediate, the value saved is not so important an ingredient as in cases of more urgency. The service in such a case undoubtedly approaches much more nearly to a towage service than when the vessel is derelict at sea, or in any other desperate circumstances.

The Charles Pearson made no contract, and I am asked to infer one. I should be slow to conclude from circumstances alone, that a salvage service was undertaken for a mere quantum meruit. I recall no case in which such an implication has been made, and none has been cited. The officers and men of this steamer are paid by the month, and their wages are in full for all services of every kind. This is all that appears. Whether the pay is larger than ordinary wages, whether the contracts are binding on the men, these questions cannot be answered from the evidence before me; but this I hold to be plain, that these officers and men owed no duty to the respondents, and when they saved their property, were volunteers quoad them; what their rights may be among themselves does not concern the respondents. I cannot say that this fact bars the salvage. Nor do I see that the mode in which the managers of the steamers usually dealt with other persons constitutes an advertisement to the world that they were ready to undertake salvage services for towage wages. It is true, probably, of most tugs, that they are ready to make a bargain for any kind of service, and that from their position in a seaport town,

in the presence of an active competition, they will usually be obliged to make one or lose the employment. Still, I do not know, and am not instructed that there is any fixed rate of compensation based on anything like a mere quantum meruit. I suppose that many of these bargains must be, in effect, agreements for a fixed amount of salvage, approaching more or less nearly to what would be awarded by a court of admiralty. However this may be, this case does not find an agreement between these parties, express or implied, for mere towage. The master of the Charles Pearson could not have so understood it, because he would have had no right to undertake such a service without the consent of the master of the bark Suliot, which he already had in tow; and there is no evidence of any such assent; but in a case of salvage, he might well, under some circumstances, perhaps under these, considering the great value of the Coringa and her cargo, which appears to have been much greater than that of the Suliot, take the chances of damage to the Suliot, trusting to indemnity by way of salvage from the very valuable property in jeopardy.

I am of opinion, therefore, that both steamers are entitled to a reward, to be adjudged by a court of admiralty upon the principles governing cases of salvage. The question of amount is always nice and embarrassing. In this case, I find that the ship was not in the most imminent and pressing danger, but was lying where communication could be had, and was had, with her owners, and where assistance from other steamers might probably be availed of. It was on these grounds, no doubt, that the master refused the assistance of the steamer Roman; he had a right to consider that such a vessel, large and valuable, bound on an important voyage, with passengers and cargo, might properly demand a high rate of salvage, and being in no instant danger, he preferred to wait, if he could not make a definite bargain. I have already said that, in such a case, what may possibly be called a salvage quantum meruit, that is, a large and liberal compensation for what the work was worth to the steamer, without a very nice regard to value saved, should govern the salvage award. I find that the George Shattuck contributed nearly three days' time, with some trouble and discomfort to her crew, and some derangement, I suppose, of her ordinary business. The Charles Pearson gave a more valuable, powerful, and efficient vessel, and performed the greater part of the actual towing, but with much less time, and that already paid for, but with some risk of damage to the bark under her charge. Upon the whole circumstances, I have thought right to award to the George Shattuck three thousand five hundred dollars, and to the Charles Pearson two thousand dollars.

There was evidence that the broken hawser belonged to the ship, and was new and of some value, but how it came to be used or to be broken I am not informed, and the facts proved are not sufficient to enable me to say that the steamers, or either of them, should bear the loss. Upon this point I am willing to hear evidence before a final assessment of the damages, if any party desires it. Salvage decreed.

Case No. 1,737.

Ex parte BOWLING.

[1 Cranch, C. C. 39.] [1]

Circuit Court, District of Columbia. Oct. Term, 1801.

SHERIFFS AND CONSTABLES—SUMMARY SUSPENSION OF CONSTABLE.

A constable suspended from office before rule to show cause.

On an affidavit stating that Joseph Bowling, a constable, had dismissed a peace warrant, and had received for his services $1.62, THE COURT suspended him from office, and ordered a rule to be laid on him to show cause why an attachment of contempt should not issue. CRANCH, Circuit Judge, contra, because the charge was uncertain and ex parte,—no notice having been given.

BOWLING (GARLAND v.). See Case No. 5,242.

Case No. 1,738.

BOWMAN v. BARRON.

[4 Cranch, C. C. 450.] [1]

Circuit Court, District of Columbia. March Term, 1834.

SLAVERY—RIGHT TO FREEDOM—MARYLAND ACT OF 1796.

A Virginia slave of a Virginia owner was loaned by the widow to her son-in-law in Washington, D. C., until the estate should be settled and distribution made. The slave resided in Washington, under that loan, more than a year, and was then sent back to Virginia, and upon settlement of the estate was assigned to one of the distributees. *Held*, that the slave did not thereby acquire a right to freedom under the Maryland act of 1796, c. 67. Although the administrator, who was neither party nor privy to the lending, afterwards knew of it and did not object.

Petition for freedom [by Frederick Bowman, a negro].

Mr. Key, for the petitioner, contended, that a residence of the slave in Washington, was evidence of an importation with intent to reside which gives freedom under the first section of the Maryland act of 1796, c. 67; and cited the case of Green v. Jewett, in this court in May, 1832 [unreported].

Mr. Bryce and Mr. Jones, contra. Although the residence was indefinite, it was in its nature temporary. It was intended to

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

continue only until the estate should be settled. The act requires that the intended residence should be permanent. Johnson v. Mason, in this court in 1828 [Case No. 7,396].

Upon the prayer of Mr. Jones, for the defendant [Henry Barron]—

THE COURT (THRUSTON, Circuit Judge, doubting) gave the following instruction to the jury, namely: If the jury find from the evidence that the sending of the petitioner from Virginia to Washington was in consequence of a lending by the widow Barron to her son-in-law H. Gassaway; that the loan was temporary in its nature, though for an indefinite period, which might determine within the year, or not for two or three years; that the administrator, the defendant, was no party to such lending, nor any way privy to the same, though he afterwards knew of it, and did not object; that the petitioner was sent back to Virginia about last Christmas, to abide the final distribution of the estate; and that such return of the petitioner to Virginia was pursuant to the original intent of such lending (evidence tending to prove which was given by the defendant); that upon such return of the petitioner to Virginia, he was included in the distribution of the personal estate of the intestate, and, in course of such distribution, was allotted and distributed to Ann C. Barron, one of the children of the intestate, after which he, of his own accord, without the knowledge or consent of the owner, left Virginia, came back to Washington, and there filed his said petition,—then the petitioner is not entitled to his freedom, though it turned out that the petitioner was kept in Washington, under the said lending, two or three years.

Verdict for the defendant.

Case No. 1,739.

BOWMAN v. FRENCH.

[1 Cranch, C. C. 74.] [1]

Circuit Court, District of Columbia. March Term, 1802.

PRACTICE—FAILURE TO JOIN IN DEMURRER—JUDGMENT BY DEFAULT.

The defendant will not be ruled to argue a demurrer at the term in which the demurrer shall be joined by him, although the rule to join in demurrer shall have expired before the term.

Misnomer of the defendant was pleaded in abatement. The plaintiff demurred at last term, and laid a rule on the defendant to join in demurrer. The defendant failed to join in demurrer, on the rule day; and Mr. Dorsey, for the plaintiff, now moved for judgment by default on the rule, unless the defendant will argue the demurrer at this term.

THE COURT refused to give judgment; permitted the defendant now to join in demurrer; and obliged the plaintiff to lay a rule on the defendant to argue it at the next term.

CRANCH, Circuit Judge, contra.

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

BOWMAN (HAGGETT v.). See Case No. 5,900.

BOWMAN (LAWRENCE v.). See Case No. 8,134.

BOWMAN (MARIPOSA COUNTY v.). See Case No. 9,089.

BOWMAN (PETERS v.). See Cases Nos. 11,028 and 11,029.

BOWMAN (UNITED STATES v.). See Case No. 14,631.

BOWMAN v. WAGNER. See Case No. 14,174.

Case No. 1,740.

BOWMAN et al. v. WATHEN et al.

[2 McLean, 376.] [1]

District Court, D. Indiana. May Term, 1841.[2]

PARTIES—PROPER PARTIES—DEED — CONVEYANCE OF LAND HELD ADVERSELY — RIPARIAN RIGHTS — NAVIGABLE WATERS — FERRY — NATURE OF GRANT OF ASSIGNEE OF EQUITY — JURISDICTION —DEED—RIGHT—RESERVATION — CONSTRUCTION —LIMITATION OF ACTION—NONRESIDENT—PRINCIPAL AND AGENT—NOTICE TO AGENT.

1. All persons whose interests will be affected by the decree should be made parties, if within the jurisdiction of the court. And, in that case, the want of jurisdiction over them should be stated.

2. Where the proper parties are not made the court will, generally, suspend the decree, and direct that proper parties be made.

3. That persons are unnecessarily made defendants does not oust the jurisdiction as to those who are properly before the court.

4. An objection, that some of the plaintiffs have no interest, can not be made at the hearing.

5. By the common law land held adversely can not be conveyed.

6. The right of a proprietor, bounded by a navigable river, extends to high water mark; if the river be unnavigable, to the middle of the stream.

7. By the common law rivers are only navigable as high as the tide ebbs and flows; this not so in this country.

8. The riparian right is protected as any other right.

[Cited in Conway v. Taylor, 1 Black (66 U. S.) 630.]

9. The right to apply for a ferry license attaches to the riparian proprietor, and this can not be taken from him and given to another without compensation. In principle it is the same right which the land holder has to the soil, or to any benefit appurtenant to the soil.

[Cited in Conway v. Taylor, 1 Black (66 U. S.) 630.]

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

[2] [Affirmed in Bowman v. Wathen, 1 How. (42 U. S.) 189.]

10. The relief will be given in equity, if it be not complete at law.

11. The owner of land bounded by a navigable river may convey the soil, excepting the right of ferry.

[Cited in Chenango Bridge Co. v. Binghamton Bridge Co., 3 Wall. (18 U. S.) 81.]

12. The difference between a reservation and an exception in a grant. The part excepted is not conveyed, but remains in the grantor, and needs no words of perpetuity.

13. The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as a rent or an advowson.

14. In such a case the grantee has a right to use the soil for ferryways, but for no other purpose. And for any obstruction of this right he is entitled to a remedy.

15. A ferry right, by the laws of Indiana, may be assigned.

16. The statute of limitations in Indiana does not run against nonresidents. But the complainants may be barred by lapse of time.

[See note at end of case.]

17. Bowman's right of ferry was reserved, or excepted out of the grant made in 1802. A license to keep a ferry, adverse to Bowman's right, was obtained the same year; and Wathen, the defendant, is proprietor of that and two other ferry rights, equally adverse to Bowman's. And the ferry has been kept up from the time it was first granted. Bowman lived in Virginia, but his agent, who executed the conveyance, resided in Louisville, in sight of the ferry, and often crossed in it. A notice to the agent is notice to the principal.

[Cited in Carr v. Hilton, Case No. 2,437; Goodenough v. Warren, Id. 5,534.]

[See note at end of case.]

18. This adverse ferry was in operation twenty-four years before the decease of Bowman, and twelve years after his decease before this bill was filed. The right asserted by the complainants was of a nature to require peculiar vigilance. And not having taken any step to assert their right, until the filing of this bill, they are barred by the lapse of time.

[See note at end of case.]

[In equity. Bill by Isaac S. Bowman, George W. S. Bowman, —— Brinker, Mary Brinker, Rebecca Bowman, and Albert T. Burnley, against Athanasius Wathen and the mayor and common council of the city of Jeffersonville, to enjoin the use of a ferry, and for an accounting. Dismissed.]

Brown and Switser, for complainants.

Mr. Stevens, for respondents.

OPINION OF THE COURT. The complainants claim a ferry right from Jeffersonville, in Indiana, across the Ohio river to Louisville, in Kentucky, which is in the possession and enjoyment of the defendant, Wathen, who claims one half of it, and which the complainants pray, in pursuance of their right, may be decreed to them. The complainants, except Burnley, claim as devisees of Isaac S. Bowman, and he claims as their assignee. Bowman was attached to the regiment commanded by George Rogers Clark, and to whom the state of Virginia granted one hundred and fifty thousand acres of land, lying northwest of the river Ohio. In the cession of lands to the United States, north of the Ohio river, by the state of Virginia, this tract was reserved. It was located on the Ohio river, at the falls, and includes the city of Jeffersonville. Commissioners were appointed by Virginia, and authorized to allot and convey to the officers and soldiers of the above regiment, according to their respective rights, the above tract. To Bowman was conveyed five hundred acres, on a part of which Jeffersonville now stands.

Bowman was a citizen of Virginia, and, it seems, was never in the territory or state of Indiana. On the 8th of March, 1802, he empowered John Gwathney "to lay off into a town, in any manner he may think proper, one hundred and fifty acres of the above tract, and vest all right and title in discreet persons as trustees of said town. And the attorney was authorized to sell lots, &c., convey to the trustees two acres for a public square, &c., and to do and transact all and any kind of business which may be necessary to carry into effect the foregoing powers." On the 22d day of June, 1802, the plan of the town being made, the attorney conveyed to M. G. Clark and others, trustees of the town, and their successors in office, one hundred and fifty acres, described by metes and bounds, under certain reservations and conditions, among which were the following: "That the said Isaac Bowman shall have, and use for and in his own behalf, whatever right he may now hold as proprietor, to the establishment of one or more ferries." On the plan of the town northeast of Front street, on the river, was left an open space which was marked as commons. On the 12th October, 1802, William H. Harrison, governor of the Indiana territory, granted a license to M. G. Clark, one of the grantees in the above deed, a license to keep a ferry at the town. And on the 2d July, 1807, he granted a license to one Joseph Bowman, also, to keep a ferry at the same place. In 1820 the legislature of Indiana sanctioned the ferry right to George White, originally granted to him. Bowman continued to reside in Virginia until his decease, in 1826. He devised his real estate, in Virginia, Kentucky, and Indiana, in connection with which this ferry right was named, to his children in certain divisions. Under the will the complainants named as devisees took the lands in Indiana, including the ferry right. One of the children of the deceased is still a minor, and they have all continued to reside in Virginia. On the 11th May, 1839, the devisees, for the consideration named, of twenty thousand dollars, conveyed the ferry right, and the lands, &c., in Indiana and Kentucky, devised to them by their father, to their co-complainant, Burnley.

The three ferries, granted as above stated, are now consolidated into one, and the defendant, Wathen, by conveyances from the original grantees, and those who claimed un-

der them, is vested with one half of the interest of the ferry. The persons who own the other half are citizens of Kentucky, and can not be made parties to the suit; and this is assigned, in the bill, as a reason why they are not made parties. From the answer of Wathen, it would seem that the ferry, by the loss of ferryboats, steamengines, &c., has been unprofitable until last year. Various grounds of defence are alleged in his answer, and, also, in the answer of the mayor and common council of the city of Jeffersonville, which will be hereafter considered. In the commencement of the argument the complainants' counsel notify the court, and the respondents' counsel, that, on the present bill, they shall claim the ferry right only. Indeed, this is distinctly avowed in the bill.

It is objected by the respondents' counsel that, by uniting the devisees of Bowman and Burnley as complainants, there is a misjoinder which must be fatal to the right asserted in the present form of proceeding. The objection is not that there is a want of proper parties, but that Burnley having received a conveyance, by deed, of all the interest of the devisees of Bowman to the right in controversy, the devisees are not necessary parties. There are cases in which a want of proper parties may be alleged at the hearing. All necessary parties must be before the court, unless it be shown, in the bill, that they are not within the jurisdiction of the court. And although the court will not dismiss a bill which is defective in this respect, they will suspend the decree, and direct the cause to stand over to bring in the proper parties. Milligan v. Milledge, 3 Cranch [7 U. S.] 220. In the case of Carneal v. Banks, 10 Wheat. [23 U. S.] 181, the court held—"The circumstance that some have been improperly joined as defendants in the bill, can not affect the jurisdiction of the circuit court as to other parties who are properly before it." And in Wilkinson v. Parry, 4 Russ. 272, it was decided that an objection that some of the plaintiffs have no interest can not be made at the hearing.

It must be observed that the right asserted in the bill, whether asserted by Burnley or his co-complainants, the devisees of Bowman, is the same right. Burnley, it is true, claims under a deed, but from the facts stated in the pleading, it would seem that, at the time this deed was executed, there was possession of the land conveyed to which this ferry right is appurtenant. And if, as the defendant's counsel insists, this possession was adverse, the deed to Burnley conveyed no title. It is believed that in Indiana there is no statute which prohibits the sale of pretended titles. But the statute of 27 Hen. VIII. was in affirmance of the common law. And in Co. Litt. 369, it is laid down, if a person out of possession convey land which is held adversely, the conveyance is void. 9 Johns. 55; Partridge v. Strange, 1 Plow. 77; Fite v. Doe, 1 Blackf. 127. Now, although the mere ferry right, which is an incorporeal hereditament, may not be capable of an adverse possession within this principle, except as appurtenant to the land; yet the state of the title was such as to render it prudent, and, as we think, proper, to make the devisees of Bowman co-complainants with Burnley. And there are considerations, independently of this, arising out of the election of the devisees, under the will of their ancestor, as to this ferry right, and other facts connected with their title, which make them necessary parties. But, if this were not the case, the court would permit the complainants, even at the hearing, to strike out the names of the devisees, if necessary to the exercise of jurisdiction. Such an amendment of the bill could not take the respondents by surprize, or subject them to any change in their defence. But if the deed to Burnley be inoperative as a conveyance of the title, the devisees of Bowman would be indispensable parties. If Burnley can set up only an equity, it is necessary for him to make those from whom he claimed such equity parties to the suit. Findlay v. Hinde, 1 Pet. [26 U. S.] 241; Smith v. Shane [Case No. 13,105]. We think that the objection of a misjoinder, as made by the defendants, can not avail them.

The rights of riparian proprietors are so well defined, and have been so fully investigated by the supreme court, that little need now be said to show their nature and extent. In the cases of Cincinnati v. Lessee of White, 6 Pet. [31 U. S.] 431, Barclay v. Howell's Lessee, Id. 498, and Mayor, etc., of New Orleans v. U. S., 10 Pet. [35 U. S.] 662, the doctrine is examined. Where land is bounded by a watercourse these rights attach to the proprietor. And it is immaterial whether the watercourse be a navigable river or a smaller stream; or, whether the proprietor be a corporation or a natural person. In the case of Tyler v. Wilkinson [Case No. 14,312], Mr. Justice Story says—"Prima facie, every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle-thread of the stream." The judge is here speaking of a river which is not navigable, and such is undoubtedly the common law. In the Case of the Royal Fishery in the River Banne, Dav. Ir. K. B. 55, 57, it was resolved, that by the rules and authorities of the common law, every river, where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil. The same doctrine is found in Carter v. Murcot, 4 Burrows, 2162, and in King v. Wharton, 12 Mod. 510; and Sir Matthew Hale, in his Treatise De Jure Maris, &c. Hargrave's Law Tracts lays down the law, generally, that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil; but he admits that such rivers may be un-

der a servitude to the public, and regarded as common highways. This doctrine is fully recognized by Chief Justice Kent, in the case of Palmer v. Mulligan, 3 Caines, 318.

We apprehend that the common law doctrine, as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide. Where a stream, which is clearly not navigable, forms the boundaries of proprietors on each side of it, under the common law, each may claim to the middle of the stream. But this right can not be exercised to the injury of other rights of the same nature. On navigable streams the riparian right, we suppose, can not extend, generally, beyond high water mark. For certain purposes, such as the erection of wharfs, and other structures, for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit. But, in the present case, this inquiry is not important. It is enough to know that the riparian right on the Ohio river extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained, without the consent of the proprietor. He has the right of fishery, of ferry, and every other right which is properly appurtenant to the soil. And he holds every one of these rights by as sacred a tenure, as he holds the land from which they emanate. The state can not, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the power, to appropriate private property for public purposes. And any act of the state, short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative and void. It can afford no justification to the grantee against an action of trespass.

In coming to this conclusion, we have deemed it unnecessary to look particularly into the laws of Virginia, under which the title in question was derived; to the compact between Virginia and the other states, at the cession of the territory northwest of the Ohio, or to the ordinance of 1787. The principles laid down are of common right. In this country they are every where recognized. They belong as well to the civil, as the common law. The title of Isaac Bowman was derived from the state of Virginia, not only before Indiana was known as a territory, but before the organization of the Northwestern Territory. His rights, whatever they were, can have been, in no respect, affected by the direct action of the territorial government, or of the state government, which succeeded it. Where a state grants land, it may impose any restrictions, which shall be deemed proper, on the grantee. But where the grant is without restriction, as in the present case, the grantee holds the land, and all the appurtenances which belong to it. Some of the rights which appertain to the soil are of a public nature, and the use of them are, consequently, subjects of legal control. Of this character is the right of ferry, the right of wharfage, and others which might be enumerated. Any man has a right to keep ferry boats, for his own convenience, upon his own land. But he is under no obligation to afford any amount of accommodation to the public. And, for this, the government is not only authorized, but bound, to make suitable provision. On this ground, licenses to keep ferries are granted, and the grantees are bound to keep suitable boats, give the requisite attention, and, in all other respects, to comply with the requirements of law. In Indiana, and in many other states, the grantee of a ferry is required to give bond and security, for the performance of his duties. His charges are also regulated by law. To protect the grantee in his rights, and remunerate him for the money expended, and the responsibilities incurred, no other person, without a license, is permitted to set up a rival ferry, which shall lessen the profits of the first one. Nor, indeed, can the state consistently, if at all, grant a new ferry, to the material prejudice of an old one, unless the public accommodation shall require it.

The legislature of Indiana have not assumed the right to grant a ferry license, except to the proprietors of lands on the borders of rivers, &c. In 1807 a law to this effect was passed, authorizing the court of common pleas to make the grant. In 1815 a law authorized the county courts to establish ferries on the Ohio river, under the above restriction, and required bond to be given, &c. And, in 1817, the board of county commissioners were empowered to grant licenses, for ferries, to the proprietors of lands on the margin of a river, &c. The third section of this act [Sess. Laws, 292] provided "that when the land on the margin of a river should be a public common of a town, that the board of commissioners might grant a ferry license to any proprietor of land next adjoining the said public common." But, at the same session, a supplemental act was passed, declaring "that nothing in the said 3d section should affect the right of any town or corporation, or the right of any person, proprietor of any town, by reason of any grant of ferry license to a person who was not a proprietor of land on the margin of the river." [Act Jan. 24, 1818; Sess. Laws, 296.] By these acts, the legislature of the state of Indiana has fully recognized the ferry right of the proprietor on the margin of the river, as above stated. And, indeed, the act of 1817, declares that such right shall not be prejudiced by the grant of a ferry license to one who is not a proprietor of lands adjoining the river.

In the argument, it was supposed that the recognition of this principle would operate most injuriously to the public—that it would

be in the power of any proprietor to prevent the establishment of a ferry upon his land; but, it will be observed, that the same principle applies to the establishment of public roads, canals, and almost every description of public improvement. No man's property can be taken, for these purposes, against his will, unless compensation be made. And this is the rule in regard to ferry ways. These, no more than the other real estate of the proprietor can be taken without his consent, unless they shall be taken, and paid for, under the power of appropriation. The respondent's counsel insists that, if the legal right of the complainant, Burnley, be as stated in the bill, he has full and adequate relief at law. There can be no doubt that, where an injury is done to an established ferry, an action at law would be the appropriate mode of redress. But that is not the case made in the bill. What redress can an action at law give to the complainants, should the right, asserted, be sustained? The defendant, Wathen, under color of right, at least, is in possession of the ferry. He claims under the original grantees, and in virtue of a right which has been exercised and sanctioned by public authority nearly forty years. This right has the proprietorship of the soil to support it. The claim in the bill is hostile to this, and, if sustained, must rest upon the reservation in the deed of Bowman, by his attorney, to the original trustees of the town. And, on this ground, the exclusive ferry right, appurtenant to the hundred and fifty acres, is asserted. Since 1802, this right has been dormant. For aught that appeared to the public, or to the owners of the different ferries established at Jeffersonville, it had been abandoned. Under such circumstances, it was the duty of the public authority to provide for the general accommodation. This was done; and we think, under the circumstances, was rightfully done. And now that this dormant ferry right is set up, if its validity be admitted, how can effect be given to it? Not, certainly, by an action at law. This can neither enjoin the defendants, nor transfer their receipts, nor their ferry rights, to the complainants. And, if relief be given, it must be in one of the modes here stated. It is, therefore, clear that the remedy is not at law.

A great number of other questions are made in the answer, and by the defendant's counsel, in argument, more or less important; but they will be passed over, and the great questions in the cause will be considered: and these are, the nature and extent of the ferry right reserved by Bowman, and the lapse of time. This deed was executed by Gwathney, the agent of Bowman. On looking into his authority, which is in writing, and in evidence, there can be no doubt he possessed the power to make the deed. And now we will consider the reservation or exception, as it is called, in the deed. As this is an important point in the case, it may be proper to advert to such parts of the deed as can have any bearing on the question under consideration. The deed conveys to certain persons, named as trustees of the town of Jeffersonville, "and to their successors in office, to the use, interest and purposes, hereinafter expressed, and to and for no other use, interest or purpose, whatever, that is to say: the said John Gwathney, as attorney, in fact, for the said Isaac Bowman, shall have, retain, possess and exercise, the sole, entire and exclusive right and privilege, of making applications of the moneys arising from the sale of the lots of the said town; and shall, also, have and use, for and in behalf of the said Isaac Bowman, whatever right he may now hold as proprietor to the establishment of one or more ferries." The deed then states the boundary of the one hundred and fifty acres, beginning at a stake on the bank of the Ohio river; running thence up the river, and binding thereon, &c. To have and to hold the beforementioned tract, or parcel of land, under the conditions, limitations, reservations and restrictions, before mentioned, and the said public square aforesaid, for the purposes aforesaid, to the said trustees, and their successors in office, forever. Then follows the clause of warranty. In the body of the deed is stated that the attorney had laid off the one hundred and fifty acres in a town, and drawn a plan of it, designating two acres of ground as a public square, with convenient streets and commons, and called it Jeffersonville. These are all the parts of the deed which can have any supposed bearing upon the reservation of the right in question. From the trustees, Bowman received a conveyance for lots 190, 191 and 192, which are bounded on the river, and which were retained by him and passed to his devisees, who have conveyed the same to the complainant Burnley. The title to these lots, however, is, in no respect, connected with the ferry right under consideration. From Front street, to the upper limit of the town, an open space is left, between Water street and the river, which, on the plan of the town, is called "Commons." On these commons is the landing and ferry ways of the defendants. There can be no doubt that this designation, on the plan of the town, and, also, the two acres for a public square in the centre, taken in connection with the deed of Bowman to the original trustees, which deed and plan were recorded, constituted a dedication of the square and the commons to the public. That the trustees could have no succession, they not being incorporated, is no objection to this view. The trustees, or, at least some of them, are believed to be still living. To the purchasers of lots they conveyed titles, as they undoubtedly had the power to do. No act of dedication could be more formal, or more solemn, than the deed and the plat in this case. And, if any confirmation were necessary, the use of the commons and of the

public square for thirty eight years, as such, may be referred to. This public use would, of itself, be evidence of a dedication. On the fact of dedication, there can be no doubt.

It is insisted that the reservation of the ferry right, being inconsistent with the grant, is void. But is it inconsistent with the grant? The commons extended from Water street to the river, and the fee to this space, by the dedication, as completely passed out of Bowman and vested in the public, for the use declared, as if the most formal conveyance had been executed. But, in addition to this, the fee was actually conveyed to the original trustees. The town, then, when it became incorporated, and, indeed, before, was entitled to the use of these commons to the water. But that this use is not at all inconsistent with the use of the commons for a ferry landing, is shown by the fact that they have, from the first, been used as such. The defendants' counsel suggests, that this ferry right can only subsist in connection with the soil. It is a right connected with the soil, and grows out of it, the same in principle as an advowson or rent. It is an incorporeal hereditament, and lies in grant. Co. Litt. 335b. When the ownership of it is not connected with the ownership of the soil no one can have seizin of it as of land. But, still, it is classed with real estate, and is subject to the laws which govern the realty. And so is rent, or an advowson. An advowson appendant may become in gross, by various means. 1. If the manor. to which it is appendant, is conveyed away in fee simple, excepting the advowson. 2. If the advowson is conveyed away without the manor, to which it is appendant. 3. If the proprietor of an advowson appendant, presents to it as an advowson in gross. 1 Dyer, 103; 4 Cruise, Dig. 3. The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea and abstracted contemplation, it is not capable of corporeal seizin or possession. 4 Cruise, Dig. 5. A person having free warren over certain lands, may alien them, reserving the warren. 1 Dyer, 30b, pl. 209. A rent may be reserved upon a grant of an estate in remainder or reversion; for, though the grantee can not distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession. 1 Co. Inst. 47a. Rent may be reserved on a conveyance of lands in fee simple, and this is called a fee farm rent. The statute of Indiana recognizes the right of the proprietors of lands on the margin of the river, and to none others can ferry rights be granted; and, it is supposed, that this limits the right to the grantee of the soil. But this construction of the statute can not be sustained. By the statute, nothing more could have been intended than to rescue, from violation, the right of the riparian proprietor. This right is appurtenant to the soil; but he may convey it, and still retain the fee in the land. And, by such conveyance, the grantee holds the right which the statute was designed to protect. He has the use of the soil for a ferry landing, and for ferry ways, so far as the public accommodation is concerned, as fully and completely as could be exercised by the grantee of the soil; but for no other purpose has he a right to enter upon the soil. Now, it must be perceived, that the right thus possessed, is as much within the policy of the statute, as if it were a fee simple in the soil. Indeed, it is within the letter of the statute. For the grantee of such a right may, in the strictest sense, be considered, for all the purposes of the ferry, "the proprietor of land on the margin of the river." This right, as before remarked, is real estate. It descends to heirs, as such, is subject to dower, and to all the incidents of real property.

We come now to consider the operative words of the reservation. "And (the attorney) shall also have and use, for and in behalf of the said Jacob Bowman, whatever right he may now hold as proprietor, to the establishment of one or more ferries." That this reservation gave to Bowman, during his life, this ferry right, there can be no doubt. We have shown that it may be separated from the fee in the soil, and still be within the policy and language of the statute. But Bowman is now deceased, and the inquiry is, was the right reserved to his heirs? It is admitted that the word heirs is not necessary, in every possible case, in a reservation or grant, to give an estate of inheritance. If the father infeoff the son, to have and to hold to him, and to his heirs, and the son infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple. Co. Litt. 501. When the act of disposal relates to another thing, that thing becomes, in a manner, part of the disposition, and, in such case, the mind is carried to the idea of an heir, as clearly as if the word "heir" had been inserted in the feoffment. 3 Bac. Abr. 534. Where a man, seized of land in fee, made a lease for years, reserving rent to him and his assigns during the term, it was adjudged that this reservation should not determine by the death of the lessor, but the rent should go to the heir. Sacheverell v. Froggatt, 2 Saund. 367; Harg. Co. Litt. note 8, p. 47a; Sury v. Brown, Latch. 99, 100; Vent. 163; 2 Lev. 13. If one coparcener or joint tenant releases all his right to another, it will pass a fee without the word heirs. So if one coparcener grants a rent to the other, for equality of partition, an estate in fee simple in the rent will pass without the word heirs; for, as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word heirs had been used. 1 Co. Inst. 10; 4 Cruise, Dig. 295. But these are exceptions to the general rule, and the cases put can admit of no doubt as to the intention of the parties.

We will now cite cases where the word heirs, in reservations, has been held necessary to constitute an estate in fee simple. If a rent be reserved to the lessor and his assigns, it will determine at his death; for the reservation is good only during his life. So, if a rent is reserved to him and his executors, he having the freehold it will be determined at his death; because the reversion to which the rent is incident descends to the heir. 1 Co. Inst. 47, a; 1 Vent. 161; 3 Cruise, Dig. 319. If one grant lands or tenements, reversions, remainders, rents, advowsons, commons or the like, and express or limit no estate, the lessee or grantee hath an estate for life only. Dyer, 300. A reservation sometimes operates as a grant, but this cannot be the case with an exception. An exception, says Sheppard's Touchstone, 77, is where the grantor excepts something out of that which he has before granted, by which means it does not pass by the grant, and is reserved from the things granted. "And note," says Lord Coke on Littleton 412, "a diversity between an exception, which is ever a part of the thing granted and of a thing in esse, for which exceptio salvo, praeter, and the like, be apt words; and a reservation which is always of a thing not in esse but newly created or reserved out of the land or tenement demised. Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam ratinet sem percum es est et semper fuit." Here Coke states that a reservation is always of something not in esse; but the inaccuracy of this is shown in his own words in a different section. "Reserve," he says, "cometh of the Latin word reservo, that is to provide for store; as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometimes it hath the force of saving or excepting. So, as sometime, it serveth to reserve a new thing, viz.—a rent, and sometime to except part of the thing in esse that is granted." Id. 143a.

The words exception and reservation are used synonymously in grants, and have the same effect. The effect of the deed does not depend upon the use of the one or the other of these terms, but on the facts which they represent. In the case of Greenleaf's Lessee v. Birth, 6 Pet. [31 U. S.] 310, the court say in order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is within the exception is excluded from the grant. Suppose, in conveying to the trustees the one hundred and fifty acres, the attorney of Bowman had excepted, from the operation of the deed, any given number of lots, as designated on the plan of the town, would these lots have passed by the deed? Being excepted, out of the land conveyed, they could not have passed. They would then have remained in Bowman, unaffected by the deed. Of this, it is supposed, no one can doubt. And the only inquiry now is, whether the ferry right reserved is of the same nature, in this respect, as a part of the land. In what does it differ? It is appurtenant to the soil, and constitutes no inconsiderable part of its value. As has been shown it is susceptible of a different ownership from the soil. It is still a right growing out of the soil, and subjects it to the servitude in whosever hands it may come. Although an incorporeal hereditament, in contemplation of law, it is property, real property. It passes by deed—is assets in the hands of heirs, and, in all respects, is subject to the laws which regulate real estate. It is readily admitted if this were a grant to Bowman, the words of the reservation would give him but a life estate. But the right remained in Bowman. He did not part with it; and it remained in him the same as before the deed to the trustees was executed. He conveyed the land to which this right was appurtenant, but he conveyed it charged with the servitude of this ferry right, which he excepted or reserved. If Bowman derived his right from the deed, words of inheritance would have been essential to give him a fee simple. But he has the same ferry right after the land was conveyed as before it. He excepted it out of the deed, and nothing more was necessary to retain the right unimpaired by the conveyance.

It is insisted that a license to keep a ferry is personal, and cannot be assigned. That as the right of the defendant, Wathen, rests upon transfers from the original grantees, and has no other foundation, it must be held invalid. In this respect no difference is perceived between a ferry franchise, the franchise of a tollbridge, a turnpike or railroad, or any other franchise of the same nature. Certain privileges are given by the state, and the grantee becomes bound to afford the proposed public accommodation. It is true, the grant is made in the one case to a private individual, and in the others to corporations. But as it regards any matter of public confidence, it would seem to apply as strongly to the individuals incorporated, as to the grantee of the ferry. But the grantee of the ferry has a right appurtenant to the soil which, by the law, is made an indispensable pre-requisite to a ferry license. Now we have shown that the ownership of this right may be separated from the ownership of the soil; and if this may be conveyed by the grantee before the ferry license is obtained, may it not be conveyed afterwards? And in this conveyance may not the ferry grant be included? The public can have no claim on the grantee beyond the requirements of the law; and it is immaterial whether these are fulfilled by the grantee or his assignee. It is probable that the assignee gives a bond and security, as the law requires, or indemnifies the grantee. There must be some settled practice on this

subject, which has been so sanctioned, as to become a rule of property. However this may be, there would seem to be no doubt, that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to the realty. Where an office is conferred which implies personal confidence and a capacity to discharge public duties, no assignment can be made of it. But this has no analogy to the franchise in question. This question, however, does not depend upon general principles; the statute of Indiana authorizes the transfer of the ferry license, and points out the duties of the assignee. If the ferry shall not be kept up, it may be vacated and annulled on a mode of proceeding authorized by the statute. But the license is granted without limitation, and subject only to the condition that the requirements of the law shall be observed.

The lapse of time is the only question that remains for consideration. The ferry franchise claimed by the defendant, Wathen, originated in October, 1802. This right was sanctioned by the legislature of Indiana by an act passed December, 1820. Another ferry license granted subsequently to 1802, and to a different person, is now, and has been for several years past, by mesne conveyances, vested in the defendant, Wathen, and others, who are not made parties to this suit. Wathen owns one half the interest in the consolidated ferry. This ferry has been regularly kept up, and the requirements of the law observed from 1802 up to this time, making thirty nine years, and nearly thirty eight years to the time of filing the bill. Bowman's deed to the trustees, in which the ferry right was excepted, was recorded by the recorder of Clark county shortly after it was executed. Bowman continued to reside in Virginia until his decease, in 1826, and his devisees still reside there. The agent Gwathney, who executed the deed was, at the time, a citizen of Louisville where he continued to reside many years; being often in Jeffersonville, saw the ferry in operation, and frequently crossed in it. One of the witnesses states, shortly after the town of Jeffersonville was established this reserved ferry right was spoken of; and another witness, some two or three years after, 1826, heard the same right mentioned among the citizens. At this time Wathen was a citizen of Jeffersonville.

Against the operation of the statute of limitations and of lapse of time, the complainants' counsel insist—

First: That the statute does not run against nonresidents.

Second: That time in equity is applied by analogy to the statute, and that it cannot bar the complainants' right as Bowman was not only a nonresident but several of his devisees at his death were infants, and some of them are still minors.

Third. That the ferry right, set up by the defendant, Wathen, was not established by competent authority, and that the sanctions since given to it, were in violation of the rights of the complainants, and were consequently void.

Fourth. That the defendant, Wathen, stands as trustee in relation to the right of the complainants, and that in such a case neither the statute of limitations nor the lapse of time can have any effect.

That the statute does not run against nonresidents must be admitted. It only operates against those who are residents of the state, or who may come within its jurisdiction. And it must also be admitted that by analogy the statute is applied in equity as at law, and that in such cases it does not bar the rights of infants. But time in equity often operates as a bar in a case where, at law, the statute could have no effect. And the case under consideration may illustrate this principle. The lapse of time is open to the defendant as a ground of defence, although by reason of the nonresidence of the complainants the statute could have no effect against them at law. This doctrine is fully established. In the case of Piatt v. Vattier [Case No. 11,117], many authorities on this point are cited. That case was similar to this one. The holder of the title was a nonresident and his right was not barred by the statute. In the case of Marquis of Cholmondeley v. Lord Clinton, 2 Jac. & W. 138, the court say, "At all times courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to state demands, where the party has slept upon his rights, and acquiesced for a great length of time." And this doctrine was sanctioned by the supreme court on an appeal of the above case of Piatt v. Vattier, 9 Pet. [34 U. S.] 416. It is, also, sustained in the following cases: Beckford v. Wade, 17 Ves. 86; Barney v. Ridgard, 1 Con. Cus. 145; Blennerhassett v. Day. 2 Ball & B. 104; Hardy v. Reeves, 4 Ves. 479; Harrington v. Smith [28 Wis. 43]; 1 Brown, Parl. Cas. 95; Kane v. Bloodgood, 7 Johns. Ch. 93; Prevost v. Gratz, 6 Wheat. [19 U. S.] 481; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489; Willison v. Watkins, 3 Pet. [28 U. S.] 44.

Is the franchise of the defendant invalid on the third ground assumed? Was the license granted in 1802 inoperative, and were the sanctions of the legislature subsequently given to it of no effect? The license was first granted by the governor of the territory without any express authority of law. At that stage of the territorial government he was, in connection with the judges, authorized to adopt laws of the states, but not to enact them. No law, it seems, could be found applicable to the public emergency, and a resolution was adopted under which the license, in 1802, was granted. In 1807 the territorial legislature provided "that all ferries now kept by license from the governor, shall be and are hereby declared to be es-

tablished ferries," &c. Another confirmatory act was passed by the legislature the 26th December, 1815. And, afterwards, in December, 1820, the legislature of the state confirmed, by a special act, the franchise under which the defendant claims. It may be proper here to remark that the case cannot be made to turn upon the validity of the defendant's right unconnected with the lapse of time. But this will be more appropriately considered under the next head. The right from the first was, at least, prima facie. And it may be a matter of doubt whether the power exercised by the governor, under the emergency which existed, ought not to be sustained. And this view is greatly strengthened, if, indeed, it be not placed beyond doubt, by the confirmatory acts of the territorial and state legislatures. But it is supposed that the ferry right reserved by Bowman renders the acts of the governor, and of the territorial and state legislatures, inoperative and void. And this upon the ground that private property can not be appropriated for the public use without compensation. Where was this right of the complainants for thirty eight years, while this ferry has been kept up by the enterprise of its owners, and enjoyed by the public? All that could be known of it, by searching the county record, was, that Bowman reserved it in his deed to the trustees. But what evidence was this of his continued ownership? That an individual did not convey an interest, that he might have in land, to A, is no very satisfactory evidence, some twenty or thirty years afterwards, that he had not sold it to some other person. At best it was a right that existed in idea. An abstraction. Something that could neither be seen nor felt. Of which no one could have corporeal possession. And yet this intangible thing, in the estimation of the counsel, becomes the vis major to the power of the territorial government, and the sovereignty of the state. It resists, and effectually resists, all action for the public good. That such can not have been the effect of this ferry right, under the circumstances, is very clear. No such dormant interest, practically abandoned, can be asserted after the lapse of nearly forty years, to nullify the action of the government. If it were not barred by the lapse of time, it could not make the grantees of the government trespassers. Where a case of prima facie right to a ferry license is made out the state, is, in duty bound, to grant a license, should the public convenience require it. And if there be any conflicting right, the owner is bound to assert it in a reasonable time. If he fail to do this the other title is strengthened by time, and may bar that which, at first, was a paramount title.

But is the defendant, Wathen, prohibited from setting up this defence by the relation he bears to the complainants' title? Is he the cestui trust of the complainants, or, did those under whom he claims stand in that relation to Bowman? That the statute does not run against an established and continuing trust is clear. For, in that case, the possession of the trustee is consistent with the right of the cestui que trust. And neither the statute of limitations, nor the lapse of time, can, in such a case, operate in favor of the possession of the trustee. But where his possession is hostile, openly and avowedly hostile, the rule is very different. There can be no stronger case put to illustrate this doctrine, than that of landlord and tenant. On general principles the tenant is not permitted to dispute his landlord's title. Having entered under that title, he can set up no adversary title to protect his possession. And yet if he publicly disclaim his landlord's title, and profess to hold under a hostile title, the statute of limitations will begin to run from the time of such disclaimer. This doctrine is sanctioned in the case of Willison v. Watkins, 3 Pet. [28 U. S.] 47, 48. In that case the court say—"the same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and, generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title." 6 Johns. 272; Blight's Lessee v. Rochester, 7 Wheat. [20 U. S.] 535, 549. Where the trustee denies the title of the cestui que trust the statute will operate. To prevent this the trust must be subsisting. Kane v. Bloodgood, 7 Johns. Ch. 90; Lockey v. Lockey, Prec. Ch. 518; Harmood v. Oglander, 6 Ves. 199; Hovenden v. Lord Annesley, 2 Schoales & L. 630. The right under which the defendant claims, from its origin, has been hostile to that asserted by the complainants. So far as the defendant has become seized of any part of the soil bounded by the river, included in the deed of Bowman to the trustees, it might be contended that he was seized to the use of the complainants. But the claiming and exercising of the ferry franchise, is utterly inconsistent with the right set up under Bowman. They can not both exist. The one necessarily excludes the other; and, by consequence, they are hostile to each other. An uninterrupted possession has been held by the defendant, and those under whom he claims, of thirty nine years—of thirty eight years before the commencement of this suit, and about twenty four years before the decease of Bowman. And what are the circumstances relied on to obviate the effect of this lapse of time? The nonresidence of Bowman, his death, and the infancy of some of his devisees.

As before remarked, nonresidence saves the operation of the statute, but not the effect of time. That Gwathney, the agent of Bowman, who executed the deed to the trustees, and who superintended the sale of the town lots; and especially reserved this ferry right, as attorney, in fact, for Bowman, to be used for him, remained many years a res-

ident at Louisville, after the execution of the deed, is an important fact. He was the special agent of Bowman, as appears from the deed; not only as regards the Jeffersonville property, but of this right in particular. He saw the ferry of Clark in operation in a very short time after the deed was executed; was frequently in Jeffersonville, crossing in the ferry, and it does not appear that he ever remonstrated against its establishment, or attempted to set up the right reserved to his principal. And with the same indifference he daily witnessed the operations of this and the other ferry for fifteen or eighteen years. A notice to the agent is notice to the principal, 13 Ves. 121; 1 Ves. Sr. 62; 1 Term R. 16; Amb. 626; 4 Term R. 66. And the rule here applies with peculiar force. For there is a strong probability that Gwathney reserved this ferry right without any special instructions from Bowman. He was then peculiarly fitted to protect it, and it was his duty to do so. The lapse of time could not more strongly have operated against the complainants' title, had Bowman resided in Louisville instead of his agent.

There is another consideration entitled to great weight, and that is the nature of the right. It was one connected with the public accommodation, and which the owner must have known, unless exercised, might be lost. By the 2d section of the act of the 17th September, 1807, the court of common pleas was authorized to discontinue a ferry if not used for twelve months. The foundation of the right was appurtenant to the soil, but the exercise of it depended upon the sanction of the public authority. Diligence was required, then, not only in procuring the public sanction, but, also, in keeping up the ferry. But nothing was done until a very short time before the bill, in this case, was filed. A demand was then made of the defendant, Wathen, that he would surrender the ferry, and his boats, &c., on the terms stated in the bill. When the ferry was first established, and for many years subsequently, it was not profitable. To some of the proprietors it seems to have been rather a source of expense than profit. And this may be a reason why Bowman's right was not asserted. But now that Jeffersonville has become a thriving city, the country thickly populated, and the city of Louisville a place of great commercial enterprise, the ferry has become profitable. Steamboats are used in the ferry which cost from fifteen to twenty thousand dollars. From morning until night a continued line of travel is passing over it. It has become an object of importance, and an increasing source of wealth.

Neither lapse of time nor the statute operates against infants. And yet if the statute begins to run in the life of the ancestor, it will continue to run after his decease against his minor heirs. And in the case under consideration, after the exercise of this adversary right twenty four years, without molestation during the life of Bowman, it is difficult for the court to close their eyes against the lapse of twelve years which has since occurred. During this period some of the devisees were minors, but the greater part of them were of full age.

Upon the whole, when we consider the nature of this right, its origin, the long residence of Bowman's agent, who reserved it, in full view of the ferry, and the great lapse of time, we are led to the conclusion that no relief can be given to the complainants. They have not, nor did he, under whom they claim, use the diligence which the law imposes for the protection of the right asserted. It is one which, of all others, would seem to impose diligence. Public convenience united with private interest to recommend this course. But both considerations were disregarded. The right has become very valuable. But in the hands of the complainants it has become stale. And such was its character on the decease of Bowman. The bill is dismissed at the complainants' costs.

NOTE [from original report]. This decree, on an appeal to the supreme court, was affirmed January term, 1843. [Bowman v. Wathen, 1 How. (42 U. S.) 189.]

[NOTE. In affirming the decision herein, Mr. Justice Daniel, after discussing the various questions raised by appellants, placed the determination of the court upon the ground that the complainants were barred by lapse of time, and that knowledge of the alleged invasion of complainants' rights was notice to complainants and their devisee, and stated:

["The real question involved touches neither the definition of ferry privileges nor the modes of their enjoyment, but relates exclusively to the propriety of interfering, at the instance of the complainants below, with those rights as they now are and have been enjoyed by the defendants, and of transferring such rights and enjoyment to the complainants themselves.

["Gwathney, the agent, resided in the immediate neighborhood. From his agency in laying off and selling the lots he was necessarily connected with the affairs of the town; and it is shown beyond question that he had knowledge of the existence of the ferry, and had actually used it at an early period after its establishment, though the precise time when is not ascertained. * * * If Bowman, by negligence, or by failure to look after and protect his own interests, permitted the title of another to grow into full maturity, he thereby recognized the force of the principle of the bar by lapse of time, which created a title as complete in equity as would be imparted by an express conveyance. This conclusion follows by regular deduction from all the authorities upon this doctrine of lapse of time. * * * We consider the pretensions of the complainants below (the appellants here) to be, upon every correct view, within the operation of the equitable bar by lapse of time." Bowman v. Wathen, 1 How. (42 U. S.) 189.]

Case No. 1,741.

In re BOWNE et al.

[12 N. B. R. 529; 1 N. Y. Wkly. Dig. 100.][1]

District Court, D. New Jersey. 1875.

LANDLORD AND TENANT — RENT — PAYMENT BY NOTE—LANDLORD'S LIEN—BANKRUPTCY OF TENANT.

1. If a note taken for rent is not paid at maturity the landlord is entitled to all his remedies for the security or collection of his claim, in the same manner as if the note had never been given.

[See Scriba v. Deanes, Case No. 12,559; Bank of U. S. v. Winston, Id. 944; U. S. v. Morrison, 4 Pet. (29 U. S.) 124; Morsell v. First Nat. Bank, 91 U. S. 357.]

2. If a tenant makes an assignment for the benefit of creditors to a trustee who sells the goods on the premises after the commencement of the proceedings in bankruptcy, and turns the proceeds over to the assignee, the landlord is entitled to payment of the rent out of the proceeds.

[See In re Beadle, Case No. 1,155.]

In bankruptcy.

W. S. Dayton, for landlord.

James Buchanan, for assignee.

NIXON, District Judge. John F. Klein has filed his proof of claim against the bankrupt's estate for two hundred and ninety dollars, alleged to be due to him on account of two months' rent ending July 28, 1874, for the premises occupied by the bankrupts at the time of the adjudication of bankruptcy. He claims that he is entitled to be paid in full, out of the proceeds of the sale of the chattels which were in the demised premises at the date of the filing of the petition.

The evidence reveals this state of facts: The bankrupt rented of the claimant the two stores Nos. 27 and 27½ East State street, at the annual rental of two thousand dollars, payable monthly. On the 28th of July, 1874, he took the promissory note of his tenants, payable three months after date, at the First National Bank of Trenton, for two hundred and ninety dollars, on account of the rent for the months of June and July, that sum being the balance acknowledged to be due after allowing for all cash payments previously made thereon. The note matured on the 31st day of October, and was duly protested for non-payment at the close of banking hours on that day. On the morning of the same day, about 10 or 11 o'clock, the claimant caused a distress warrant to be issued, for three hundred and thirty-three dollars and thirty-three cents, the two months' rent due for August and September. A few days afterwards—it does not clearly appear when—the debtors made an assignment of all their estate, under the state law, to one Charles W. Street for the equal benefit of all their creditors. Mr. Street entered upon the possession of the property, being a stock of goods in a gentlemen's furnishing store, of the value of about five thousand dollars, and began to make sale of them as assignee. Before any considerable quantity was disposed of, to wit: on the 9th day of November, 1874, a petition in bankruptcy was filed against Bowne & Ten Eyck, and, on the 10th, an injunction was issued, specifically restraining them, and the sheriff of the county of Mercer, from disposing of or in any manner interfering with the property of the alleged bankrupt. The assignee, Street, was not named in the injunction, nor does it appear from the marshal's return that it was served upon him. Bowne & Ten Eyck were duly adjudged bankrupts on the 24th of November, when a warrant was put into the hands of the marshal, who, on the next day, took charge of the bankrupts' estate. He did not interfere, however, with the proceeding of Mr. Street, the assignee under the state law, who seems, with the tacit acquiescence or understanding of all the parties, to have retained the control of the goods and [illegible] continued their sale until the whole was converted into money. The assignee in bankruptcy, Yard, was appointed on the 29th of December, and the proceeds of the sale, amounting to upwards of five thousand dollars, were paid over to him by Mr. Street.

No serious question is raised but that the bankrupt estate owes the amount claimed for rent. It is true that the landlord took the tenants' note for it, and gave a receipt in full. But the note was never paid, and is still in the hands of the claimant ready to be surrendered, and hence the debt it was given to pay remains due and owing (2 Greenl. Ev. § 520; Burden v. Halton, 4 Bing. 454; Holmes v. De Camp, 1 Johns. 33), and the payee is entitled to all his remedies for the security or the collection of the debt, in the same manner as if the note had never been given (Edwards v. Derrickson, 28 N. J. Law, 39). Has the landlord lost his right to claim a lien on the goods and chattels on the premises for payment of the same? This question must be answered in the affirmative, unless there are some provisions of the bankrupt act which justify or protect the landlord in his inaction or acquiescence in the sale of the property by the assignee. A right to distrain for the rent in arrear arose to the landlord, on the 31st of October, after the maturity and protest of the note which had been given for its payment. The assignment of the property to Street, by the debtors, did not take away this right, as long as it remained on the demised premises. Hoskins v. Paul, 9 N. J. [Law] 110. But if the landlord stood by and saw the assignee make a sale of the goods and chattels from day to day, to bona fide purchasers, without protest or interference, he could not afterwards claim a lien upon the proceeds of sale, nor a right to distrain upon the property after sale and removal. Nix. Dig. tit. "Distress," § 11. But it has long been held that by the clear provisions of the bankrupt act, the assignee in

[1] [Reprinted from 12 N. B. R. 529, by permission. 1 N. Y. Wkly. Dig. 100, contains only a partial report.]

bankruptcy takes the property in the same plight in which it was held by the bankrupt when the petition was filed, subject to all the liens and incumbrances that would have affected it if no adjudication in bankruptcy had taken place. The petition in this case was filed November 9, 1874. The great bulk of the goods and chattels was then on the premises, in the hands of the assignee, Street, and subject to the landlord's lien. The counsel for the assignee insisted on the argument that the landlord has no lien on his tenant's goods for rent due until after the levy of the distress warrant. This is only true in the sense that he cannot follow the property in the hands of a bona fide purchaser without notice of his claim. It is a general proposition that, whenever the law gives to a creditor the right to have his debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of the debt.

The whole question here involved was fully discussed and settled by Chase, C. J., in Re Wynne [Case No. 18,117]. "As we understand the bankrupt act," he says, "all the rights and all the duties of the bankrupt, in respect to whatever property, not expressly excluded from the operation of the act, he may hold, under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed." * * * "Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted. If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States court of bankruptcy." He then quotes the 12th section of the 128th chapter of the Revised Code of Virginia, forbidding all persons claiming an interest in goods from removing them from the demised premises, without paying to the landlord the rent due, etc., not exceeding one year—substantially similar to the 4th section of the landlord and tenant act of New Jersey [Act March 10, 1795; Laws N. J. 187]—and adds: "We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character." Under the authority of that case, and upon principle, I am of the opinion that the landlord, upon the facts proved, is entitled to the payment of his claim as a secured debt, and it is ordered accordingly.

BOWNE (ALEXANDRIA v.). See Case No. 180.

Case No. 1,742.

BOWNE v. ARBUNCLE et al.

[Pet. C. C. 233.][1]

Circuit Court, D. Pennsylvania. April Term, 1816.

COSTS—COLLECTION—ATTACHMENT FOR.

Practice, as to granting an attachment for costs, against the plaintiff and his securities. For such costs as the plaintiff is liable, the court will grant an attachment.

[Cited in Hoyt v. Byrd, Case No. 6,807; Re Stover, Id. 13,507; Goodyear v. Sawyer, 17 Fed. 5.]

This was a rule obtained by the attorney, clerk and marshal, officers of this court, upon the lessees of the plaintiff, and his sureties for costs; to show cause, why an attachment should not issue against them, for their fees in the above suit, and one other, for services rendered to them, and for which they are liable. It appeared that in one of the cases, judgment was rendered against the defendant; and in the other, against the casual ejector, the tenant having refused to enter into the common rule.

Mr. Wallace for the plaintiff [Bowne's lessee] and his securities, showed cause, and contended, for the securities, that according to the form of the recognizance entered into by them, they are discharged from their liability, the plaintiff having succeeded in both actions. The form is, that if the plaintiff does not prosecute his suit to effect, and does not pay the costs of his suit, the sureties will pay the same. As to the plaintiff, he admitted he was liable for such of the fees as the officers might, according to the practice of this state, have required to be paid down, but not for the others. [Rule absolute.]

[For discharge of rule to dismiss a bill of recovery, see Case No. 2,035; for verdict on the trial, see Case No. 1,990; and for award of costs on dismissal of bill of discovery, see Case No. 1,743.]

Mr. Sergeant, for the motion.

Mr. Wallace, contra.

WASHINGTON, Circuit Justice. The recognizance or obligation entered into by the sureties in this case, was given under a rule of court, obtained upon the ground of the residence of the plaintiff being out of this district. The form which has been devised for this purpose, is totally different from that which was contemplated by the standing rule of the court, the object of which was, to secure the officers' fees at all events; leaving the plaintiff to recover them from the defendant, when he succeeded on the trial. According to the form of the undertaking, in this case, it is clear that the securities are discharged from liability; one of the conditions not having taken place, upon which they bound themselves to pay. As to the plaintiff himself, he is certainly liable for

[1] [Reported by Richard Peters, Jr., Esq.]

fees legally due by him to the officers; and the court will enforce the payment of the same by an attachment. The form of the recognizance to be entered into by the securities must be changed in respect to future cases, so as to conform to the intention of the rule of court. Rule made absolute as to the plaintiff.

Case No. 1,743.

BOWNE v. BROWN et al.

[2 Wash. C. C. 271.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

COSTS—WHO LIABLE.

The plaintiff, having recovered at law, the court directed the costs of the bill of discovery, by which the plaintiffs at law were prevented recovering, should be paid by the defendants in the bill, they being plaintiffs at law.

[Cited in Hathaway v. Roach, Case No. 6,213.]

In these cases, where the plaintiff [Bowne's Lessee] has recovered at law against the several defendants, THE COURT decided (PETERS, District Judge, absent) that the costs of the bill of discovery, brought by the defendants for their own advantage, and which, having had its effect, has been dismissed, should be borne by the plaintiffs in that suit. THE COURT did not determine how this point would be, if the plaintiffs had failed at law.

[NOTE. For subsequent proceedings in this cause, see Cases Nos. 1,742, 1,990, and 2,035.]

BOWRIE (CURTIS v.). See Case No. 3,498.

BOWRING v. The EDITH. See Cases Nos. 4,281–4,283.

BOWRING v. The POLAR STAR. See Cases Nos. 4,281–4,283.

BOWSER (LAMB v.). See Cases Nos. 8,008 and 8,009.

BOXES OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of boxes; e. g. "Boxes of Sugar." See Case No. 10,271.]

BOX OF BULLION. See Case No. 17,717.

BOX OF BULLION (WILLIAMS v.). See Case No. 17,717.

BOX OF DRY GOODS (UNITED STATES v.). See Case No. 14,419.

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

Case No. 1,744.

BOYCE v. The PATAPSCO.

[N. Y. Daily Times, July 23, 1867.]

District Court, S. D. New York. July, 1867.[1]

MARITIME LIENS—SUPPLIES.

[A vessel is not chargeable with supplies furnished her in a foreign port, unless they were furnished on her credit, and an apparent necessity existed therefor.]

[See note at end of case.]

[In admiralty. Libel by James Boyce against the steamer Patapsco. Dismissed.]

D. & T. McMahon, for libelant.

A. J. Heath, for claimants.

SHIPMAN, District Judge. This is a suit in rem to enforce an alleged lien on the steamer Patapsco for coal furnished her in the months of February and March, 1866, by the libelant, at Baltimore. It is insisted that the coal was a part of the necessary supplies of the vessel furnished at that port, and that it was furnished on the credit of the vessel. Of the necessity of the coal there can be no doubt. The question in dispute is whether it was furnished on the credit of the vessel.

The steamer was owned by John R. Bacon at the time the article was furnished, but was running in a line owned by the Commercial Steamboat Company, a corporation chartered by the legislature of Rhode Island. This company had an office in New York, and ran their boats between that city and Baltimore. They had exclusive control of the Patapsco, as well as the other boats of their line, and must be deemed, for the time, owners pro hac vice. This company had an agent in Baltimore, who attended to their business there, including the purchase of the necessary supplies for the steamers which were required at that port. The steamers, several in number, had been running on this line for several months, and the agent had been in the habit of purchasing coal for them of different parties, and among others of this libelant. The amount of coal required for each vessel, from time to time, was ordered by the company's agent in writing, the order in each instance designating to which ship the amount called for was to be delivered. The sales were considered to be for cash, but payment on delivery was waived, and the bills presented monthly to the company's agent. This was done as a matter of convenience, and to avoid the multiplication of bills. Purchases of coal had been made of the libelant from time to time, from December, 1865, down to March 24, 1866, the date of the last charge in the account upon which this suit is brought. They were all paid for by the agent up to Feb. 1. The bills were made out to the Commercial

[1] [Reversed by circuit court (unreported). Decree of circuit court affirmed by supreme court in The Patapsco v. Boyce, 13 Wall. (80 U. S.) 329.]

Steamboat Company, but designating the name of the ship to which each parcel was delivered. That delivered in February and March was not paid for, and the libelant seeks to charge the ship.

Now in order to do this the libelant must prove that this coal was furnished on the credit of the ship, and that there was an apparent necessity for resorting to that credit. I think the proof fails on both these points. The libelant dealt, not with the master of the vessel, but with the accredited agent of the company resident in Baltimore. I think that it is clear that he looked to the company generally, and not to the particular ship, for his pay. Again, there is no satisfactory proof of a necessity apparent at the time for resorting to the credit of the ship. There is proof that the affairs of the company were in fact in a state of embarrassment, and approaching the crisis of insolvency. But the proof fails to show that they had not sufficient credit in Baltimore to obtain supplies required for their ships at that port. The fact must be clearly proved before this court can assume that the credit of each ship was or could be resorted to in order to obtain the supplies furnished to such vessel.

The facts in this case, if not exactly the reverse, fall far short of those in the case of Ross v. The Neversink [Case No. 12,079], where I held the boat liable. As I discussed the general question of law involved, upon principle and authority, in the latter case, I do not feel called upon to repeat or enlarge upon that discussion here. Let an order be entered dismissing the libel with costs.

[NOTE. This decree, dismissing the libel, was reversed by the circuit court (case unreported). In affirming the circuit court decision, the supreme court, per Mr. Justice Davis, stated: "It is undisputed that the Patapsco was in a foreign port, and that the coal was ordered for her, specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed, indispensable—to enable her to make her voyage at all. In such a case the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds or the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry. The Lulu, 10 Wall. (77 U. S.) 192. There is no reason to suppose that the master had funds, or the owners of the line credit, or that the libelant was guilty of laches. On the contrary, it is in proof that the company which owned the line of steamships was, at the date of these transactions, hopelessly insolvent, and was borrowing large sums of money on a mortgage of its steamers, away from home, and in the very city where libelant resided. It would be strange if the libelant did not know this condition of things, and, in the absence of proof on the subject, it is a reasonable inference that he did. If he had this knowledge, it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished. The company running the steamers was a distant corporation, of no established name, and without personal liability in case the enterprise recently undertaken should prove a failure; and it is hard to believe that a large and intelligent coal merchant in Baltimore, in dealing with this corporation, intended to renounce his claim against the steamers in case he was not paid. It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash at the lowest market price; and when the libelant waived his privilege of cash on delivery, and put the coal on board the steamship, the presumption of law would be that he thereby gave credit to the steamship, and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port." The Patapsco v. Boyce, 13 Wall. (80 U. S.) 329.]

BOYCE (WILSON v.). See Case No. 17,793.

Case No. 1,745.

In re BOYD.

[2 Hughes, 349;[1] 5 N. B. R. 199.]

District Court, North Carolina.[2] March, 1871.

BANKRUPTCY — ASSETS — BANKRUPT'S RIGHT TO WIFE'S CHOSE IN ACTION—RIGHTS OF ASSIGNEE —FAILURE TO SCHEDULE ASSETS—EFFECT.

1. In May, 1863, a feme sole, being the owner, in her own right, of a chose in action, married, and a suit was instituted shortly thereafter to recover from the debtor in the name of the husband and wife. This suit continued pending until 1868, when the husband, upon his own petition, was declared a bankrupt, and an assignee was appointed and an assignment executed in the usual form. Thereafter the assignee was, upon his own motion, by order of the court, made party plaintiff with the wife, and a judgment was recovered in favor of the plaintiffs. *Held*, that the assignee may proceed to enforce the payment of such judgment by execution, and receive the money when collected—if this be done in the lifetime of the husband and wife—and if collected by him must distribute the same to creditors as the law directs.

2. The assignee is deprived of no right because the bankrupt has failed to schedule such chose in action.

3. Nor [are his rights affected] by the provisions of the constitution in North Carolina, adopted in 1868.

In bankruptcy.

BROOKS, District Judge. In this cause, a case agreed has been submitted under the provisions of the second clause of the sixth section of the bankruptcy act [of 1867, 14 Stat. 521], presenting an important question for the consideration of this court. After the argument of this question at Salisbury at the last special term, some of the authorities cited by the counsel not being acceptable, I was obliged to postpone its further consideration to enable me to make that careful examination of the authorities that the importance of the question demanded.

The facts submitted are as follows: Jane C. Forbes intermarried with William Boyd in May, 1863, she being at that time the owner of a slave that had been taken from

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

[2] [District not given.]

her possession unlawfully prior to the said marriage, by one Rader Winslow, who had sold and converted the same. In September, 1863, suit was commenced in the superior court of Mecklenburg county by Boyd and wife against Winslow for damages for the conversion of said slave. On the 30th day of May, 1868, said Boyd filed his petition in bankruptcy, and soon thereafter was duly declared a bankrupt according to the provisions of the bankrupt act of 1867. Subsequently John Wilkes was duly appointed assignee of said Boyd, and an assignment in due form of all the property and effects of Boyd was made to Wilkes as assignee. At fall term, 1869, which was the trial term of the suit against Winslow, Wilkes, as assignee of Boyd, was made party plaintiff with Mrs. Boyd—without her knowledge or consent—and judgment was recovered for eight hundred and fifty-seven dollars and ninety cents damages, and nineteen dollars and ninety cents costs in behalf of the plaintiffs. The case further states that Boyd did not render any statement of this claim in his schedule, and was discharged as a bankrupt in the year 1869, and the coverture still continues. And on this statement of facts this court is asked to decide whether Mrs. Boyd or John Wilkes, the assignee, is entitled to the money collected on the execution issued on the judgment. If it had appeared that the execution which issued upon their judgment had been paid or in any way satisfied, and Wilkes, the assignee, had received the money, or if by any other means he had actually received the money for the judgment, I do not think there can be any authority found upon which to rest the claim of Mrs. Boyd to the money so received. But it is not stated that Wilkes, the assignee, has ever received the money. Then it is a question respecting the title to a chose in action of the wife that is presented.

It must be remembered that the numerous cases, both English and American, which so well settle the law in regard to the rights of the wife by survivorship to her choses in action, are not direct authorities upon the questions arising in this case, as it will be seen that they are all cases arising between the surviving wife and assignees or creditors of the deceased husband, or cases in which the wife's right to an equitable settlement are presented. And in this case it is the extent to which a husband may proceed during the lifetime of the wife in reducing her choses in action into his possession, and when the aid of a court of equity is not asked to effect that object. And yet a careful examination of the opinions of the learned chancellors in these cases has afforded me material assistance in arriving at a satisfactory conclusion upon the questions submitted in this case.

The facts stated render it necessary to make two principal inquiries: First. What rights did Boyd acquire upon his marriage in 1863 in the chose in action against Winslow? Second. Was any interest in that claim or right of action against Winslow assigned or transferred to or vested in Wilkes, his assignee in bankruptcy, by force of the bankruptcy law? And if any, then the extent or character of such interest?

There are other questions which have been suggested, which may be regarded as rather incidental to these principal questions stated, and which may be considered, and will be necessarily involved in the answers to them. I regard it as having been clearly settled both in England and in North Carolina, prior to the adoption of the provision in the present constitution, that by marriage the husband acquired the right to reduce to his possession his wife's choses in action, and when they were so reduced to possession by the husband during his coverture, such became absolutely his property.

In the case of Bosvil v. Brander, 1 P. Wms. 458, and Pringle v. Hodgson, 3 Ves. 617, the question was between a surviving wife and the assignees of a bankrupt and deceased husband. All that was decided in the first of these cases was, that the wife was not entitled to aid of the court of equity, to take the writing out of the hands of her deceased husband's assignee, though the decision was founded upon a principle that I do not consider correct; that the assignment in bankruptcy so passed the property in the choses of the wife, that no other or further act was required to be performed; and that the right to the debt was so vested in the assignee by operation of law as to defeat the right of the surviving wife. In the latter case Lord Rosslyn lays down the same doctrine broadly: "That the assignee at law has a right to the chose in action of the wife, and the law reduces it into his possession; the bankrupt law gives over all that the husband had or could dispose of to the assignee; the property is vested by law in them, and the question of survivorship is quite laid aside by the bankruptcy." In Miles v. Williams [1 P. Wms. 249], Parker, C. J., in delivering the opinion of the court of king's bench, noticed this point, and expressed himself strongly in favor of the assignees against the claim of the wife. These I regard as extreme cases, and they were very clearly so regarded by the eminent chancellors to whom the same questions were presented afterward for decision.

In the case of Grey v. Kentish [1 Atk. 280] 1 P. Wms. 249, and Gayer v. Wilkinson, 1 Brown, Ch. 50 [note] the same question was decided in favor of the surviving wife against the assignees, and in the subsequent case of Mitford v. Mitford, 9 Ves. 87, Sir Wm. Grant, then master of the rolls, places his decision in favor of the surviving wife upon the same ground, that the chose was not reduced into possession by the husband or any assignee of his during their coverture. If in this case there was presented the claim

of a surviving wife to her chose in action, not actually reduced into possession by her deceased husband, but assigned for a valuable consideration by him in his lifetime, though I would be strongly inclined to favor the wife's claim, yet I admit that the conflict between the very eminent judges before referred to would of itself be sufficient to require a very careful consideration before so deciding. In this case, however, such an assignment is not insisted on, but only such an assignment as the law makes, as incident to the bankruptcy proceedings in Boyd's case; and it is contended that by force of these proceedings Wilkes was vested with all the rights, interests, and estate that Boyd acquired by virtue of his marriage. And in reference to this demand against Winslow, the right to enter upon and continue the prosecution of the suit, and if during the joint lives of Boyd and wife judgment was recovered, to enforce payment of the same and receive the money.

It is quite clear, I think, that at the time the suit against Winslow was instituted, Mrs. Boyd could not have sued and recovered in her own name, or have released Winslow from the claim; and it is clear that Boyd could so far control his wife's interest as to sue as he did sue, or to have released the demand, without and even against consent of his wife. The right of the husband to recover and receive payment during coverture, is not only absolute at law, but exclusive. The wife (although the property is hers) cannot give a discharge. If the debtor pays the money to the wife without the husband's authority, he may be forced to pay it over again to the husband. In the case of Palmer v. Trevor, 1 Vern. 261, this is expressly held. In that case a testator had bequeathed to the plaintiff's wife one hundred pounds, to be paid within six months after his death, and a bill being filed for this legacy, the defence which the executor made was that he had paid the legacy to the plaintiff's wife, and had her receipt for the same. The executor insisted further, that at the time of the making of this will the plaintiff and his wife were separated, which was well known to the testator. But the Lord Keeper North held it to be no good payment, and decreed the legacy to be paid over to the husband with interest. This, at first view, would seem to be an extreme case, but high as the authority is, it is for me to consider now to what extent the law has been changed since that time. Since the decision last referred to, the law on the subject of the wife's chattels, personal, outstanding, or choses in action, underwent an elaborate examination by a learned and industrious judge, Sir Thomas Plummer. In the case of Purdew v. Jackson, 1 Russ. 1, after the most patient examination of the law, that learned judge observes, "that although the nature of the husband's interest is peculiar, yet the law defines it in the clearest manner." Marriage, he says, is only a qualified gift to the husband of the wife's choses in action, upon condition that he reduces them into possession during its continuance. The wife's title is not divested by the marriage. The chose in action continues to belong to her, so that if the husband happened to die before his wife, she, and not his personal representative, will be entitled to it. Reduction into possession is necessary by the husband or by his authority, to defeat the wife's right if she survive him. Yet it was held by more than one eminent English judge, that an assignment by the husband, during coverture, of the wife's choses in action passed the title to the chose to the assignee so effectually that the subsequent death of the husband did not restore the right to the surviving wife, though still uncollected, and that such assignee could sue for and recover the same.

I do not mean to be understood as affirming this principle, but I have been forced to the conclusion that the assignment in bankruptcy vests in the assignee all the rights of the husband to the choses in action of the wife, existing and accruing from marriages contracted before the adoption of our present state constitution. And, as a consequence, the assignee may do all that the husband might do without such assignment, and that this embraces the right to sue for, recover, and receive such choses in action as that in question in this case; and having the right to recover, he must use due diligence in his efforts to collect, and having collected it in the lifetime of the husband, he must distribute the same to creditors as the law provides. It can make no difference in regard to the rights of the assignee, if the chose in action has or has not been placed in the schedule by the bankrupt.

Case No. 1,746.

In re BOYD.

[4 Sawy. 262; 16 N. B. R. 137, 204; 9 Chi. Leg. News, 385; 10 Chi. Leg. News, 1; 6 Am. Law Rec. 311; 4 Law & Eq. Rep. 488.] [1]

District Court, D. Oregon, July 24, 1877.

Circuit Court, D. Oregon. Sept. 4, 1877.

LIEN OF JUDGMENT—DOCKET ENTRY.

1. At common law a judgment was not a lien upon real property; but after the statute of Westm. 2, c. 18, allowed the creditor to take a moiety of the debtor's land upon an elegit, and hold the same until the rents and profits satisfied the debt, it was said that a judgment was such a lien; but even then it could only be made effectual by a levy, which took effect by relation from the entry of the judgment.

2. The lien given by section 266 of the Oregon Civil Code upon the docket of a judgment arises from the docketing and not the judg-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 16 N. B. R. 204, 10 Chi. Leg. News, 1, 6 Am. Law Rec. 311, and 4 Law & Eq. Rep. 488, contain only a partial report.

ment; it is a strict legal right, and must stand or fall by the statute which gives it.

[Cited in Re Estes, 3 Fed. 142.]

3. The docket entry is not a part of the judicial proceeding, which ends with the entry of judgment, and therefore such entry cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket; the latter must be complete in itself. But the whole entry of the docket is to be looked to, and not merely a single item of it, and if from the whole the amount and date of the judgment, the parties to it and the court in which it was rendered appear, the entry will be held sufficient.

4. What should be entered on docket under head, "Amount of Judgment."

5. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.

In bankruptcy.

John Catlin, for assignee.

William A. Effinger and G. W. Yocum, for creditors.

DEADY, District Judge. The questions arising upon the objections to these proofs of debt were heard and submitted together, and will be so disposed of.

On March 2, 1876, Ira Goodnough obtained judgment in the circuit court of the state, for the county of Multnomah, against said bankrupt and A. H. Johnson, for the sum of $7875 in gold coin, with interest on $5500 of the same from January 5, 1876, at one per centum per month in like coin, and $14.80 costs and disbursements. Said judgment was given upon a promissory note made by said bankrupt and Johnson, the latter being in fact a surety thereon. On the same day this judgment was given an entry was made in the "judgment docket" of said circuit court, under appropriate heads, of the date of said judgment, the names of the parties thereto, the date of such entry and under the head of "Amount of Judgment," the following: "Costs, 14.80; face, 7875.00," without any dollar mark or other sign or word to signify or indicate what was the denomination of these figures or what they represented. The entry also contains a head just following the last named, entitled "Rate of interest," under which is written the word "Coin." On the right hand of the docket are three columns, headed respectively, "Appeals, When Taken;" "Judgment of Appellate Court;" and "Satisfaction, When Entered," as provided in section 562 of the Code of Civil Procedure. Under these heads and across these columns is written: "Int. on $7500 part thereof at 1 per cent. per mo. from Jan. 5, 1876." On March 3, 1876, Boyd filed his petition in bankruptcy in this court, upon which he was afterward duly adjudged a bankrupt. On October 4, 1876, Goodnough proved said judgment as a secured debt against Boyd's estate, claiming therein to have a lien, by virtue of the docketing of said judgment, upon all the real property of the bankrupt within the county. The assignee objected to said proof of debt; the objections being: 1. That said judgment was taken and procured in fraud of the bankrupt act; and, 2. That said proof is not sufficient as proof of a secured debt, because said judgment was never duly docketed so as to become a lien upon the bankrupt's property. The creditor answered the objections, and the matter was heard before the register, who found for the creditor upon the first objection and for the assignee upon the second. The question whether the ruling of the register should stand? was then, at the request of counsel, certified into court and argued by counsel.

At common law a judgment for a debt or damages could only be enforced against the goods and chattels and the present profits of the lands of the debtor. But the possession of the lands could not be reached. Afterward the statutes of Westminster 2 (13 Edw. I. c. 18: 2 Co. Inst. 394), gave the creditor the option to take a moiety of the debtor's land upon an elegit, to hold until the rents and profits would satisfy the judgment; and thereupon it was said that the judgment was a lien upon such lands. 3 Bl. Comm. 418; U. S. v. Morrison, 4 Pet. [29 U. S.] 135; Bank of U. S. v. Winston [Case No. 944]; Massingill v. Downs, 7 How. [48 U. S.] 765; Shrew v. Jones [Case No. 12,818]. But this lien only conferred a right to levy upon the land within a year and a day from the rendition of the judgment, to the exclusion of adverse interests therein, acquired subsequently to such judgment; yet when such levy was actually made, it related back to the date of the judgment, so as to exclude all intermediate incumbrances. But subject to this, the judgment debtor had full power to dispose of his property notwithstanding the judgment. The judgment creditor acquired no jus in re, but only a mere power to make his general lien or privilege specific and effectual by an execution and levy upon the property of his debtor. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 443.

Now, the modern statute lien of a judgment, as provided in sections 266–268 of the Oregon Civil Code, is altogether different from this. In the latter case, the lien arises not from the judgment, but the docket thereof. Without the entry in the docket there is no lien. Neither is this statute lien contingent upon the issuing of an execution and a levy. It is absolute, even against a conveyance of the same premises by the judgment debtor. Being a creature of the statute, and not an incident or consequence of the judgment, its existence and validity depend upon a docket entry in conformity with the statute. It is a strict legal right or advantage, and must stand or fall by the statute which gives it. Miama Export Co. v. Turpin, 3 Ohio, 514; Douglas v. Huston, 6 Ohio, 162; Buchan v. Sumner, 2 Barb. Ch. 195; Isaac v. Swift, 10 Cal. 81; Ackley v. Chamberlain, 16 Cal. 183; Bowman v. Norton, Id. 220. True, there must be a valid judgment behind

the docket, or it will be of no avail. But nevertheless, the docket is no part of the judgment or action in which it was given. The docket may be made in every county in the state, and a lien thereby created upon all the lands of the judgment debtor therein. The judicial proceeding which commences with the filing of the complaint, ends with the entry of judgment therein. The docketing of the same is something apart and collateral. It is the ministerial act of the clerk (In re Worthington [Case No. 18,051]), and may, if the law should so provide, be as well done in the office of a recorder or other place where a record of deeds and other transactions affecting real property is made and preserved, as in the clerk's office. Therefore, a defective, ambiguous or insufficient docket cannot be aided by a reference to the judgment or other proceedings in the action. To create the lien, the docket must be complete in itself, must impart all the information which the statute contemplates, without reference to any proceeding which has gone before. Neither is it a mere index or notice to look elsewhere. But it is an independent record of particular facts, authorized for the special purpose of creating and fastening a lien upon the real property of the judgment debtor against all parties subsequent in interest, and therefore must be complete in itself, or it is without effect. Nor is the entry in the docket intended to be a mere notice of an existing and antecedent fact—the judgment. True, the entry must contain certain facts, which presuppose a corresponding judgment. But the direct and ultimate purpose of the entry is not to give notice of the judgment, but to produce a certain legal effect, to wit: a lien upon the real property of the judgment debtor within the county. Therefore, the authorities cited by the counsel for the creditor: Fowler v. Doyle, 16 Iowa, 534; Delavan v. Pratt, 19 Iowa, 431; Markham v. Buckingham, 21 Iowa, 496; and Carr v. Anderson, 24 Miss. 188, which hold that when the judgment entry is obscure or imperfect it may be read in the light of the pleadings and prior proceedings in the case, are not in point. Besides, some of these cases at least trench upon if they do not belong to the class which are said to "make bad precedents," and to be "the quicksands of the law."

Conceding then that this docket entry must stand or fall by itself, it is insufficient upon both reason and authority. The amount of the judgment—the thing, number or value of that which the plaintiff is thereby shown to be entitled to recover of or from the defendant therein—does not appear. This is one of the essentials of the entry. The figures under the head: "Amount of Judgment," 14.80 and 7875.00, do not indicate anything but abstract numbers. As was well said by Mr. Justice Sawyer, upon a similar question in People v. San Francisco Savings Union, 31 Cal. 136: "They are simply numerals—'barren figures'—that are as often employed to indicate anything else that may be numbered as dollars; or if money is indicated, the denominations may be either eagles, dollars, cents or mills." To the same effect is the ruling in Hurlbutt v. Butenop, 27 Cal. 56; Tilton v. Oregon C. M. R. Co. [Case No. 14,055]; Lawrence v. Fast, 20 Ill. 341; and Lane v. Bommelmann, 21 Ill. 147. In the last two cases it was held that a judgment for taxes upon an assessment which, in the valuation column, contained only abstract numbers, without any mark or word to indicate whether they were intended for dollars, cents or mills, was void for uncertainty. The ruling in these cases was followed by the supreme court of the United States in Woods v. Freeman, 1 Wall. [68 U. S.] 399, a case, it is true, from Illinois, but without a doubt or suggestion as to its correctness. In Buchan v. Sumner, supra, it was held that the docket of a judgment in which the Christian name of the judgment debtor was used for the surname and vice versa, was therefore void and of no effect.

Again, it appearing from the proof of debt that this judgment was given for gold coin, it would seem that it should have been so docketed. In a very material sense, the "amount" or value of a judgment depends upon the kind of money for which it is given and with which it may be satisfied. This entry contains a column and head not authorized by the statute, namely: "Rate of Interest," under which the word "Coin" is written, but nothing concerning the rate of interest. The interest which a judgment bears is a part of the amount of it, and in time may become the most material part of it, and therefore it seems that the rate and kind of money in which it is payable are proper, if not essential parts of the docket-entry, under the head: "Amount of Judgment." In providing for the docketing of a judgment, the Code (§ 266) does not specify what particulars it shall contain. But section 562 of the same, which describes the "judgment docket" itself, provides into how many columns the pages of the same shall be divided, and how such columns shall be headed. One of these is: "Amount of Judgment." Under this head it would seem, from the very nature of the case and the prime purpose of the proceeding, there ought to be stated every fact which enters into the value or amount of the judgment, and thereby affects the extent of the lien, which it is the sole object of the entry to create and preserve. Of these facts, in case of a money judgment, the most material are the number and denomination or kind of moneys for which the judgment is given, and the rate of interest and kind of money in which it is payable.

It has been suggested that the entry running across the last three columns of the docket: "Int. on $7500 part thereof at 1 per cent. per mo. from Jan. 5, 1876," reflects

light upon the figures in the column headed "Amount of Judgment," and shows that they were intended to indicate dollars. Assuming that this entry is a legal and proper statement of the fact that 7500 dollars is a "part thereof," the question recurs, a part of what—the judgment? Let the answer be in the affirmative; still it does not show what part of the judgment—whether a third, a fourth or a fifth. The whole of an amount cannot be inferred or ascertained from a part being given, unless the proportion which such part bears to the whole is also given. Because 7500 dollars is said to be a part of a judgment, the whole amount of which is represented by the abstract numerals 14.80 and 7875.00, it by no means follows that the amount of such judgment is only 7875 dollars rather than as many eagles, or any other known denomination of money greater than dollars. If the entry had said 7500 cents was a part of the judgment, by this mode of reasoning it would follow that the whole judgment was only 7875 cents.

But another conclusive answer to this suggestion is found in the fact that this entry as to the "part thereof" is unauthorized and void, and therefore of no effect. The facts concerning the "amount" of the judgment must appear in the column designated for that purpose. The judgment, instead of being given, as it should have been, for the principal and interest then due upon the note, with provision that that sum should be recovered with the rate of interest mentioned in the note, seems to have been given for such sum, and then provision was made that "a part thereof"—$7500—should bear interest from a time anterior to the date of the judgment, to wit: the date of the note; and hence this entry in the docket. A judgment is properly given for the debt and damages, the principal and interest, the whole sum then due. This is a merger of the debt, and thereafter such judgment bears interest or not and at such rate as the statute may provide. Clark v. Goodwin, 14 Mass. 239; Otis v. Wood, 3 Wend. 498.

In considering the question of the sufficiency of this docket, it must be borne in mind that there is no equity upon the part of the creditor which suggests or requires that the court should strain a point to uphold this alleged lien. The lien acquired by a judgment creditor upon the proper docketing of his judgment is an advantage—a preference over other creditors. It is a strict legal right, and must stand or fall by the statute which gives it. This is a controversy between a creditor seeking to establish a legal preference and the assignee representing other creditors equally as meritorious as he. In such a controversy, there are no equities in favor of the alleged preference, but the contrary. The question, whether the judgment is invalid because taken contrary to the bankrupt act, was not discussed by counsel for the assignee, and the ruling of the register upon this point is affirmed, pro forma. If the judgment is not a lien the creditor obtained no preference by it, and therefore it cannot be said to be obnoxious to the act.

On October 20, 1876, the Bank of British Columbia proved, as a secured debt against Boyd's estate, a judgment given against said bankrupt and Johnson, in the circuit court aforesaid, on March 2, 1876, for the sum of $5000 in gold coin, with interest thereon at the rate of one per cent. per month from January 27, 1876, and $14.80 costs and disbursements, and alleged to have been docketed at the same time. The same proceedings took place before the register in regard to this proof as in that of Goodnough's, with the same results. An additional objection, however, was made by the assignee to this proof—that the judgment in favor of the bank was not such as could be enforced against Boyd or his individual property. The judgment in question was given for want of an answer, and provides that the bank recover of both Boyd and Johnson the sum stated, and then provides that "the plaintiff do have execution against the property of said Johnson, and against the joint property of said Boyd and Johnson, to enforce this judgment."

A judgment entry is sufficient without any provision concerning its enforcement, which is regulated by law, unless it be in the case of defendants jointly indebted but not all served, as provided in section 59 of the Code. In this case, both defendants were served, though the entry would indicate that only Johnson was. But it seems reasonable that any restriction or condition that a court may impose upon the enforcement of a judgment, by a provision in the entry of the same, must be taken to be a part of its action in giving the judgment. If the effect is to modify or even nullify the right to recover, it can only be said that so far the court has not given any judgment. A judgment that A. recover $1000 of B., containing a provision that no execution shall issue to enforce the same, may be evidence of a debt, but it is not a judgment that can become a lien upon the property of B.; because section 266 of the Code does not make any judgment a lien by reason of the docket entry thereof only "during the time an execution may issue thereon." Assuming this to be the law of the case, there is no judgment here against Boyd individually, but only one against Johnson and Boyd. But this cannot be enforced against Boyd individually, and therefore it cannot be made a lien upon his individual property. There being no sufficient proper docket entry of either judgment, neither of them became a lien upon the property of the bankrupt; nor is there any judgment in the case of the bank against the bankrupt, individually. Therefore the proof of the debt by Goodnough is allowed to stand as proof of an

unsecured debt for the full amount of the judgment on the day of the filing the petition in bankruptcy; and the proof of debt by the bank is allowed to stand as proof of an unsecured debt for the sum due upon its note on the same day

On petition for review in the circuit court, September 4, 1877, Mr. Justice FIELD delivered the following opinion:

I agree with the district judge that the judgment recovered by Goodnough could only become a lien upon the real property of the bankrupt by its entry in the judgment docket in the clerk's office of the county where the property is situated. This lien is the mere creature of the statute, and to its existence the provisions of the statute must be followed in all substantial particulars. The docket must disclose, among other things, the amount [and date][2] of the judgment [and the court in which it was][3] rendered. Mere numerals, without any indication that they represent dollars, or other denomination of money, are not sufficient. Any omission in this particular cannot be supplied by reference to the record of the judgment. The object of the law is to make the judgment a lien upon the property of the debtor in any county where it is situated; and as such county may be at great distance from the one in which the judgment is rendered, the law contemplates that the docket entry shall impart knowledge of all the facts which a purchaser of the property need ascertain.

But the whole entry of the docket is to be looked to, and not merely a single item of it; and if from the whole the amount and date of the judgment, the parties to it, and the court in which it was rendered appear, the entry will be held sufficient. In this case all the essential particulars are mentioned except one. Neither the word dollars nor the usual mark indicating dollars is used in stating the amount of the judgment. But this omission is supplied by the accompanying entry, which is properly a descriptive part of the judgment, that seven thousand and five hundred dollars of the amount stated as the judgment draws a certain specified interest. The natural and necessary inference is that the balance of the amount expressed by the numerals was also in dollars. In describing the judgment, the statement of the rate of interest which a part of the amount drew was properly made, inasmuch as that exceeded the rate prescribed by statute in the absence of a special agreement upon that subject. It follows that that portion of the decree of the district court which holds that the judgment of Goodnough is not to stand with the assignee as a secured debt, is reversed; and it is ordered that the judgment be taken as a debt secured by the real property upon which it is a lien.

But as to the judgment recovered by the Bank of British Columbia, the case is different. For although a judgment record cannot be resorted to in order to supply the omissions of a docket entry, it may be examined to test the validity of such entry. Looking at the record of the judgment of the bank, we find that it is restrained from enforcement against the separate property of the bankrupt. It cannot for that reason become a lien upon his separate property by its entry in the docket. The decree of the district court as to that judgment is therefore affirmed.

[2] [From 10 Chi. Leg. News, 1.]

[3] [From 16 N. B. R. 204.]

BOYD (BRIGHT v.). See Cases Nos. 1,875 and 1,876.

Case No. 1,747.

BOYD v. BROWN.

[3 McLean, 295;[1] 2 Robb, Pat. Cas. 203.]

Circuit Court, D. Ohio. Dec. Term, 1843.

PATENTS—WHAT IS GRANTED — PRODUCT OF PATENTED MACHINE—RIGHTS OF ASSIGNEE.

1. The exclusive grant in a patent is, the construction and use of the thing patented.

2. Where the right consists in certain instruments by which a bedstead of a particular structure is made, the structure or use of these instruments is prohibited.

[See Simpson v. Wilson, 4 How. (45 U. S.) 709; Goodyear v. The Railroad, Case No. 5,563.]

3. A patentee for a flouring mill of a certain structure has an exclusive right to make and use such mill, but he can claim no monopoly in the sale of the flour he manufactures.

4. The court will not enjoin the sale of a similar article under the same patent, in a particular district assigned to an individual, though manufactured in a different district.

In equity.

Mr. Kenna, for plaintiff.

Mr. Chase, for defendant.

OPINION OF THE COURT. The complainant [Henry Boyd] filed his bill, representing that he is the legal owner of a certain patent right, within the county of Hamilton, in Ohio, for making bedsteads of a particular construction, which is of great value to him; that the defendant, professing to have a right under the same patent, to make and vend bedsteads in Dearborn county, Indiana, which the complainant does not admit, but denies; that the defendant sends the bedsteads he manufactures to Hamilton county to sell, in violation of the complainant's patent; and he prays that the defendant may be enjoined from manufacturing the article and vending it within Hamilton county, &c.

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

The defendant sets up in his answer a right duly assigned to him to make and vend the article in Indiana, and that he is also possessed of an improvement on the same; and he denies that the sales in Hamilton county, complained of by the complainant, are made at his instance, or for his benefit.

A motion is now made for an injunction, before the case is prepared for a final hearing.

On the part of the complainant, it is contended, that, by his purchase of the right to make and vend the article within Hamilton county, he has an exclusive right to vend as well as to make, and that his right is infringed by the sales complained of; that his right is notorious, and is not only known to the defendant, but to all those who are engaged in the sales stated.

If the defendant, who manufactures the bedsteads in Indiana, be actually engaged in the sale of them in Hamilton county, it might be necessary to inquire whether this is a violation of the complainant's right. But, as this fact is denied in the defendant's answer, for the purposes of this motion, the answer must be taken as true, and that question is not necessarily involved.

The point for consideration is, whether the right of the complainant is infringed by a sale of the article within the limits of the territory claimed by complainant. It is not difficult to answer this question. We think that the article may be sold at any and every place, by any one who has purchased it for speculation or otherwise. There can be no doubt that the original patentee, in selling rights for counties or states, might, by a special covenant, prohibit the assignee from vending the article beyond the limits of his own exclusive right. But, in such a case, the remedy would be on the contract, and not under the patent law. For that law protects the thing patented, and not the product. The exclusive right to make and use the instruments for the construction of this bedstead in Hamilton county, is what the law secures, under his assignment, to the complainant. Any one violates this right who either makes, uses or sells these instruments within the above limits. But the bedstead, which is the product, so soon as it is sold, mingles with the common mass of property, and is only subject to the general laws of property.

An individual has a patent right for constructing and using a certain flouring mill. Now his exclusive right consists in the construction and use of this mill; the same as the right of the complainant to construct and use the instruments, in Hamilton county, by which the bedstead is made. But can the patentee of the mill prohibit others from selling flour in his district? Certainly he could not. The advantage derived from his right is, or may be, the superior quality of the flour, and the facility with which it is manufactured. And this sufficiently illustrates the principle involved in this motion. The injunction is refused.

[NOTE. Patent No. 797 was issued to J. Lindlay, June 20, 1838. For another case involving this patent, see Boyd v. McAlpin, Case No. 1,748.]

BOYD (BUTTERFIELD v.). See Case No. 2,250.

BOYD (DAWSON v.). See Case No. 3,667.

BOYD (GALVIN v.). See Case No. 5,208.

BOYD (HARRISON v.). See Case No. 6,133.

BOYD (LOVE v.). See Case No. 8,546.

Case No. 1,748.

BOYD v. McALPIN.

[3 McLean, 427;[1] 2 Robb, Pat. Cas. 277.]

Circuit Court, D. Ohio. July Term, 1844.

PATENTS—ASSIGNMENT—RECORDING—INFRINGEMENT—SALE OF PRODUCT—INJUNCTION.

1. Under the eleventh section of the act of 1836 [5 Stat. 121] respecting patent rights, the patentee may assign any part of his patent so as to vest in the assignee the legal right. By the same section every assignment of a patent right is required to be recorded in three months, from the time of its execution. A failure to record such patent assignment does not forfeit the right of the assignee.

[Cited in Olcott v. Hawkins, Case No. 10,480; Perry v. Corning, Id. 11,004.]

[See Brooks v. Byam, Id. 1,948.]

2. Should the same right be assigned, after the expiration of the three months, to a stranger, the assignee would hold it, whether he had or had not notice of the previous assignment.

[Cited in Olcott v. Hawkins, Case No. 10,480. Questioned in Perry v. Corning, Id. 11,004.]

3. The sale of the product of a patented machine is not an infringement of the patent.

[Cited in Hogg v. Emerson, 11 How. (52 U. S.) 607.]

[See Simpson v. Wilson, 4 How. (45 U. S.) 709; Goodyear v. The Railroad, Case No. 5,563.]

4. But, if the person who sells is connected with the use of the machine, he is responsible for damages and may be enjoined.

[Cited in Hogg v. Emerson, 11 How. (52 U. S.) 607; Potter v. Crowell, Case No. 11,323.]

5. And this may be done where the court have jurisdiction of the person, although the machine may be used beyond the jurisdiction of the court.

In equity.

Mr. Kenna, for plaintiff.

Mr. Storer, for defendant.

OPINION OF THE COURT. In his bill the plaintiff [Henry Boyd] represents that he holds by assignment the exclusive right, within the county of Hamilton, in this state, to make and sell "a new and useful improvement in the machine for cutting screws on the ends for the rails of bedsteads," pat-

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

ented to J. Lindlay [June 20, 1838 (patent No. 797)]. And he charges that the defendant, Henry McAlpin, in connection with one William Brown of Lawrenceburgh, county of Dearborn, and state of Indiana, in disregard of the complainant's right, constructed and has now in operation in the said town of Lawrenceburgh, one or more machines, in all the material parts thereof substantially like and upon the plan and arrangement and contrivance of the machines invented, improved, patented and put in operation by the said Lindlay and described in said letters patent." And the bill prayed for an injunction to restrain the said McAlpin from using said machine or selling the product thereof.

On the filing of the bill a motion is made for an injunction, until the final hearing, &c. And on the argument of this motion it is objected to the defendant's title, that two of the assignments which he claims were not recorded within the time limited by the act of congress, and that they are, consequently, void.

By section 11 of the act of 1836 [5 Stat. 121], the patentee may assign any part of his patent, which assignment shall vest in the assignee the legal right to such part. And the same section provides, "that every such assignment shall be recorded in the patent office, within three months from the execution thereof." In the case of Dobson v. Campbell [Case No. 3,945], Mr. Justice Story held, that under the fourth section of the act of 1793 [1 Stat. 322] "the recording of the assignment was indispensable to convey the right." The words of that section are, "and the assignee having recorded the said assignment in the office of the secretary of state shall, thereafter, stand in the place of the original inventor both as to right and responsibility." After the recording, by the words of that act, the right vested in the assignee; of course it could not vest before the recording. But the act of 1836 affixes no penalty or condition, on a failure to have the assignment recorded in three months. That the assignment takes effect from its date is clear, and if it be not recorded in three months, the act imposes no forfeiture. In this aspect, the question must be considered as between the assignor and the assignee. And it is not perceived how any sound construction of the act can cause the right to revert to the assignor, if the assignee fail to record the assignment within three months. After the expiration of three months, no record having been made of the assignment, if another assignment of the same right shall be made, the last assignment would be valid. The doctrine of notice, as applied to land titles, could not operate in such a case. There is no exception in the statute, as to purchasers without notice. And this seems to me to be the proper effect to be given to the act.

It is insisted that a sale of the thing manufactured by the patented machine, is a violation of the patent. But this position is wholly unsustainable. The patent gives "the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement." A sale of the product of the machine, is no violation of the exclusive right to use, construct or sell the machine itself. If, therefore, the defendant has done nothing more than purchase the bedsteads from Brown, who may manufacture them by an unjustifiable use of the patented machine, still the person who may make the purchase from him has a right to sell. The product cannot be reached, except in the hands of one who is in some manner connected with the use of the patented machine.

There are several patents of mills for the manufacture of flour. Now, to construct a mill patented, or to use one, would be an infringement of the patent. But to sell a barrel of flour manufactured at such mill, by one who had purchased it at the mill, could be no infringement of the patent. And the same may be said of a patented stove, used for baking bread. The purchaser of the bread is guilty of no infringement. But the person who constructed the stove, or who uses it, may be enjoined, and is liable to damages. These cases show, that it is not the product, but the thing patented, which may not be constructed, sold or used. This doctrine is laid down in Keplinger v. De Young, 10 Wheat. [23 U. S.] 358. In that case watch chains were manufactured by the use of a patented machine, in violation of the right of the patentee; the defendant, by contract, purchased all the chains so manufactured, and the court held, that as the defendant was only a purchaser of the manufactured article, and had no connection in the use of the machine, that he had not infringed the right of the patentee.

But in the case under consideration, the bill charges that the defendant, in connection with Brown, constructed the machine patented; and that they use the same in making the bedsteads which the defendant is now selling in the city of Cincinnati. If this allegation of the bill be true, the defendant is so connected with the machine in its construction and use as to make him responsible to the plaintiff. The structure and use of the machine are charged as being done beyond the jurisdiction of the court, but having jurisdiction of the person of the defendant the court may restrain him from using the machine and selling the product. When the sale of the product is thus connected with the illegal use of the machine patented, the individual is responsible in damages, and the amount of his sales will, in a considerable degree, regulate the extent of his liability.

Whether, if the defendant acts as a mere agent of Brown, who constructed the patented machine and uses it in Indiana in making bedsteads, is responsible in damages

for an infringement of the patent and may be enjoined, is a question which need not now be determined. Such a rule would, undoubtedly, be for the benefit of Brown, who, according to the bill, had openly and continually violated the patent in the construction and use of the machine. There are strong reasons why the interest of the principal should, by an action at law, and also by a bill in chancery, be reached through his agent. Injunction allowed, &c.

[NOTE. For another case involving this patent, see Boyd v. Brown, Case No. 1,747.]

BOYD (MOSES v.). See Case No. 9,871.

BOYD (OKELY v.). See Case No. 10,476.

BOYD (SANFORD v.). See Case No. 12,311.

Case No. 1,748a.

BOYD v. The TOWNER.

[Betts' Scr. Bk. 517.]

District Court, S. D. New York. May 7, 1855.

SALVAGE—FAILURE TO COMPLETE SERVICE — PREMATURE FILING OF LIBEL.

[A salvor who undertakes to put a boat in a safe position, and keep her afloat until her cargo is discharged, has no right to compensation until his undertaking is ended, and a libel filed before that time is premature.]

[In admiralty. Libel by James Boyd against the canal boat Towner and 130 tons of coal. Libel dismissed.]

The libel in this case was filed to recover remuneration for alleged salvage services. On the afternoon of September 28, 1854, the boat was lying at the wharf at the foot of Spring street. She had been detained by the claimant, the owner of the coal, for the purpose of storing a quantity of coal in her, until he should need to use it. On putting in the 130 tons it was found that she leaked badly. Efforts were made to keep her afloat, and towards evening an agent of the claimant went to his store to procure hands to unload the coal. While he was gone the person who had been put in charge of the coal by the claimant, without his knowledge, engaged the libellant to take the boat to the foot of Clarkson street, put her in a place of safety and keep her afloat until she could be discharged. This employment was at first for the night, but was continued next morning. The libellant accordingly took the boat to the foot of Clarkson street, and while still engaged in keeping the boat free from water and discharging the coal, he libelled the boat and the coal for his services, and they were taken possession of by the marshal on the 29th of Sept. No one appearing for the boat, she was sold under the process of court, and the proceeds not being sufficient to pay the libellants' claim, he proceeded against the coal. The claimant objected to this libellant's claim, that he was never employed by him, and rendered no service of value; that the demand was not maritime or within the jurisdiction of the court; and that the suit was prematurely brought.

Before INGERSOLL, District Judge.

HELD BY THE COURT that the libellant had undertaken to put the boat in a safe position and to keep her afloat until the coal was discharged, and until that was done he had no right to demand anything for his services; that, the libel having been filed before this was done, the suit was prematurely brought; and the other questions need not be considered. Libel dismissed, with costs.

Case No. 1,749.

BOYD et al. v. UNITED STATES.

[14 Blatchf. 317.][1]

Circuit Court, S. D. New York. Sept. 15, 1877.

INTERNAL REVENUE — DEFINITION — "DISTILLED SPIRITS"—ACTION FOR FORFEITURE—DEFENSES.

1. The term "distilled spirits," as used in sections 3289 and 3299 of the Revised Statutes, includes all spirits which have been distilled, whether they have been subsequently rectified or not.

2. The fact that a person has, in good faith, made advances upon distilled spirits, is no defense to an action for their forfeiture under those sections.

[Error to the district court of the United States for the southern district of New York.]

[At law. Action by the United States against 50 barrels of Cologne spirits. There was judgment for the plaintiff, and Francis O. Boyd and another, claimants, bring error. Affirmed.]

George W. Cotterill, for plaintiffs in error.

Roger M. Sherman, Asst. Dist. Atty., for the United States.

JOHNSON, Circuit Judge. The principal question in this case arises upon the exceptions to the charge of the judge at the trial, declaring the construction and meaning of two sections of the Revised Statutes, numbered 3289 and 3299. The former reads as follows: "All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark or stamp required therefor by law, shall be forfeited to the United States." The latter is in these words: "All distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States." The judge ruled, that "distilled spirits," under each of these sections, meant and included all spirits which had been distilled, whether subsequently rec-

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

tified or not; and to this the claimants excepted. The case was then submitted to the jury, who found for the United States. It is to be assumed that the charge was, in all other respects, correct, since its substance is not stated, and the only exception to the charge is that already set forth. Obviously, distilled spirits do not lose that character by undergoing a subsequent process of rectification, either in the ordinary form of the words, or under the meaning of the term, as employed in section 3248 of the Revised Statutes, where distilled spirits are described or defined. But, nevertheless, if the context made it clear that the term was used in a restricted sense, and in contrast with the term "rectified spirits," it would be the duty of the court to carry out the legislative will. In several of the sections of the chapter in question (chapter 4, tit. 35) the term is unquestionably used in the general sense, embracing all sorts of distilled spirits. For instance, in section 3312: "All stamps required for distilled spirits shall be engraved, in their several kinds, in book form, and shall be issued by the commissioner of internal revenue to any collector, upon his requisition." Each stamp is to have an engraved stub, and a number thereon, corresponding to that on the stamp. The stub is not to be removed from the book, and upon it memoranda are to be made, so as to preserve a perfect record of the corresponding stamp. These provisions are general, and relate to every sort of stamp for distilled spirits, rectified or not. So, in section 3316, which relates to the affixing or cancelling any stamp relating to distilled spirits, provided for by law, and to the affixing, or permitting to be affixed, any such stamp to any cask or package of spirits, of which the whole, or any part, has been distilled, rectified, compounded, removed or sold, in violation of law, it is obvious, that the term "distilled spirits" covers them in all states, rectified, compounded, or only in their first condition. In section 3327, regulating the time of day for the removal of distilled spirits, they are forbidden to be removed from the building in which the same may have been distilled, redistilled, rectified, compounded, manufactured or stored, which plainly includes every kind of spirits which have once been distilled, no matter what other operation they may have been subjected to. In section 3323, it is provided, that all distilled spirits drawn from one and put in another package, shall be regauged; and that the new package shall be marked or branded with the particular name of such spirits, as known to the trade, and with the name and place of business of the dealer or rectifier, as the case may be, and, except where such spirits have been rectified or compounded, with the name of the distiller, &c., and, where they have been rectified, with the name of the rectifier, &c. Various other instances might be referred to, but I think these are sufficient to establish the position, that, in this chapter, the term "distilled spirits" includes that substance in each of its forms, and includes as well rectified as non-rectified spirits, unless, in the particular provision of the law, some repugnancy appears from attributing this sense to the words. Nothing of that sort appears in either of these sections. In section 3289, the marks and stamps required therefor by law, are either those required before rectification, or those peculiar to rectified spirits, according to the fact. But, the command of the section is not complied with when it appears that the marks and stamps have been fraudulently and unlawfully applied, contrary to the provisions of the statute; as, for instance, if it appears that a package bears rectification stamps unlawfully issued in blank, and not filled up by the proper officer, or, if the package appears under such stamps, when, in fact, it has not borne those stamps appropriate to it before rectification. These remarks are, perhaps, not necessary to the decision of this cause, the point raised upon the charge relating only to the question whether distilled spirits include rectified spirits. The other section applies to rectified spirits as well as other distilled spirits, though the proof of their identity, and that they have not been removed according to law, may be difficult, even with the aid of the presumption created by section 3334. U. S. v. 508 Barrels [Case No. 15,113]; U. S. v. 6 Barrels [Id. 16,294].

The only other question which I deem it necessary to advert to, is that urged by the claimants, that they were bona fide purchasers, having made advances in good faith upon the spirits in question. The case of Henderson's Spirits, 14 Wall. [81 U. S.] 44, seems to me to establish that no question of bona fide enters into the case. The forfeiture declared by the act of congress cannot be thus defeated. It is absolute; and it does not lie with the court to modify the severity of the statute, by its ideas of what would be just to the party suffering loss in the particular case. The case of U. S. v. 100 Barrels [Case No. 15,947], decided in the Maryland district, both in the district and circuit courts, does not, as I understand it, upon a view of the plea demurred to, involve anything more than the construction of the statute under which the forfeiture was incurred. That statute extended the forfeiture happening upon a certain fact, to all spirits received by the party guilty of that fact. The plea was, that, at the time of the seizure, the property was owned by the claimant, and not by the person charged with committing the fact creating the forfeiture. This plea was sustained upon demurrer, and the decision only determined that ownership at the time of the seizure, by the guilty party, was necessary to bring the property within the operation of the clause of forfeiture.

The other questions do not seem to me to need any special notice, and the decisions

on them were, in my opinion, correct. The judgment must be affirmed, with costs.

[NOTE. This case in the district court does not appear to have been reported.]

Case No. 1,750.

BOYD v. URQUHART et al.

[1 Spr. 423.] [1]

District Court, D. Massachusetts. May, 1858.

ADMIRALTY—PRACTICE—ATTACHMENT—DECREE.

In a suit in personam, the defendants not being within the district, but their property being attached, and no appearance entered, the decree will not be against the defendants personally, but only against the property attached. If that property consist of specific articles, the court will order a sale. Such sale will be only of the right of the debtor. If the property attached be money in the registry, the decree will be satisfied therefrom.

[Cited in Atkins v. Fibre Disintegrating Co., Case No. 602.]

In admiralty.

Seth J. Thomas, for libellant.

SPRAGUE, District Judge. This is a libel in personam, against the owners of the ship Jane E. Williams, for necessary supplies. Alternative process issued upon the libel, as provided in the second admiralty rule of the supreme court, by which the vessel was attached. At the time of the attachment, she was in the custody of the marshal, by process in rem from this court, to enforce a lien, in a suit for collision. In that suit, a decree having been rendered in favor of the libellant, the vessel was sold by order of court, the proceeds brought into the registry, and the decree satisfied therefrom. The residue of the proceeds, amounting to the sum of $2,205.37, still remained in the registry. The defendants were severally part owners of the vessel; but process has not been served upon them, they not being found in this district. It appears that there is due to the libellant the sum of $469.48, upon the claim set forth in the libel, and his proctor now moves that a decree be rendered against all the defendants, upon default, for that sum, with costs, in the same manner as if they had been served with notice, or entered an appearance, and that execution thereon be issued against them personally, as well as against their property. Ben. Adm. § 460, is cited as an authority to sustain this motion.

The defendants have never been served with process, nor entered an appearance, and are, therefore, not within the jurisdiction of the court; and if the decree asked for should now be rendered, it would not bind them personally. A judicial tribunal ought not to render a judgment which is not binding to its full extent. The property attached is within the jurisdiction of the court, and may be appropriated to the payment of the maritime debt set forth in the libel. If the property attached were still specifically in the hands of the marshal, I should order a sale,—that course being more consonant to sound principles, and modern practice, than the ancient crude procedure of delivering the property itself to the creditor. Such sale, however, I apprehend, would not have the attributes of an admiralty sale upon a process in rem, as notice to all the world is not given in a suit in personam, even where property is attached. A sale, therefore, in such case, although by order of court, will convey only the right of the defendants, and cannot divest liens or other rights, which persons holding them have had no opportunity to protect. The purchaser would take cum onere. In this case, I shall order the amount which appears to be due to the libellant, together with the costs of the suit, to be paid out of the money in the registry. Hall, Adm. 73, 75, 76; Manro v. Almeida, 10 Wheat. [23 U. S.] 473; Clarke v. New Jersey Co. [Case No. 2,859]. Decree accordingly.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Case No. 1,751.

BOYD v. WILSON.

[2 Cranch, C. C. 525.] [1]

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

PAYMENT—EVIDENCE—BANK BOOKS.

The books of a bank, which do not show whether the checks drawn upon it were payable to bearer or to order, nor the names of the persons in whose favor they were drawn, are not evidence of money paid to any particular person.

[See Burch v. Spaulding, Case No. 2,140; Lowe v. McClery, Id. 8,566.]

The books of the Bank of Washington were offered in evidence by the defendant [the administrator of H. M. Wilson], to show that a check for $255, drawn by Wilson, was payable and paid to W. Boyd. J. H. Reiley, the book-keeper of the bank, stated that the bank-books did not show whether the check was payable to order or bearer, nor whether it was payable to the person whose name appears on the books as payee.

THE COURT (nem. con.) in conformity to their decision in the case of Burch v. Spaulding, at Oct. term, 1813 [Case No. 2,140], decided that the books of the bank were not competent evidence of the payment of the amount of the check to Boyd.

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

Case No. 1,752.

BOYD et al. v. WITHERS et al.

[1 Chi. Leg. News, 401.]

Circuit Court, S. D. Mississippi. 1869.

HUSBAND AND WIFE — WIFE'S POWER TO CONTRACT — SEPARATE ESTATE — STATUTES — CONSTRUCTION — DEFINITION OF "FOR FAMILY SUPPLIES OR NECESSARIES."

1. By the common law the wife could not bind herself or render her separate property liable, and it is only by the statute that her rights and liabilities are enlarged and only to the extent specified therein.

2. The statute rendering the separate property of the wife liable for her contracts must be strictly construed.

3. The wife cannot as a general borrower of money bind herself so as to render her separate property liable, no matter for what purpose the money may be afterwards applied.

4. The meaning of the words "for family supplies or necessaries" as used in the statute defined.

At law.

HILL, District Judge. This action of assumpsit was brought by the plaintiffs [Boyd, Coleman, and Graham] against the defendants [Withers and wife], to recover the amount stated to be due upon an account current rendered against them. The declaration alleges that the wife is possessed, as of her separate property, of a plantation, etc.; that the amount stated to be due is for advances in cash, made upon the joint bills of defendants; that the cash so received was used in the purchase of horses, mules, farming utensils, and other necessaries for the plantation of the wife, for necessaries furnished for the wife, and her children, also for their education, etc.; and seeks payment for the sums so advanced, out of the separate property of the wife. To this declaration, the defendants have demurred, and insist, as a cause of demurrer, that a married woman cannot bind herself upon a contract for the loan of money, so as to charge her separate property for payment thereof; this being the main ground of demurrer relied upon, others stated need not be considered.

By the common law, the husband became vested, on the marriage, with the title to all the personal property of the wife then in her possession, or which might be reduced to possession, during the marriage, also to the rents and profits of her real estate, her rights became merged in the husband. Such being the case, he became liable for her obligations incurred before marriage, and he alone became liable for her maintenance and support during marriage, as well as for that of her children by the marriage. Thus the legal relations remained in this state until 1839, when her rights were enlarged by statute [Laws Miss. 1839, p. 72], and again further enlarged by the act of 1846 [Laws 1846, p. 152]. The enlargement of her rights necessarily enlarged her liabilities. These rights and liabilities were further extended by Rev. Code, c. 40, § 5, art. 25, providing that "all contracts made by the husband and wife, or either of them, for supplies for the plantation of the wife, or for the maintenance, clothing, care and support of her slaves, and for the employment of an agent or overseer for their management, may be enforced and satisfaction had out of her separate estate. And all contracts made by the wife, or by the husband, with her consent, for family supplies or necessaries, wearing apparel for herself or children, or for their education, or for household furniture, or for carriage, or horses, or for buildings on her lands or premises, and the materials therefor, or for the use, benefit, or improvement of her separate estate, shall be binding on her, and satisfaction may be had out of her separate property."

By article 26 it is provided "that the wife may be sued jointly with her husband, on all contracts or other matters for which her separate property is liable, but if the suit be against husband and wife, no judgment shall be rendered against her unless the liability of her separate property be first established." This is the first time the question now presented has come before this court, or that of the high court of errors and appeals of this state, so far as I am aware. I have, in addition to the able argument of counsel, searched for adjudications by the courts of other states, having statutes somewhat similar to our own, for something to guide me in determining the decision of this question, but have found nothing. In a case determined at the last term of this court, it was held that where supplies had been furnished the wife for the use of her plantation and family, and money was advanced for their payment, that the promise of the wife to repay the amount advanced would bind her, or, in other words, that the party making the advance was substituted to the rights of the person furnishing the supplies; but this is a case in which money was advanced before the supplies were furnished. By the common law the wife could not bind herself, or render her separate property liable, her legal existence being, during marriage, merged into that of her husband, and it is only by the statute that her rights and liabilities are enlarged, and only to the extent specified in the statute, so as to enable her to enjoy property for the benefit of herself and children, and to preserve and improve its condition. The high court of this state, in the case of Morris v. Palmer, 32 Miss. 278, determined that the wife is not bound by her contracts in carrying on a separate trade or business; and in the case of Berry v. Bland, 7 Smedes & M. 77, that the statute rendering the separate property of the wife liable to her contracts must be strictly construed.

From these and other adjudications, I am satisfied that the wife cannot, as a general borrower of money, bind herself, so as to render her separate property liable, no matter to what purpose the money may be afterwards applied; but whilst this is so, I am equally well satisfied that under the powers conferred by this provision of the Code, when it is necessary to procure money for the purposes mentioned, that she may borrow money and bind herself, and render her separate property liable; but in such case the money may be necessary for the purchase of the articles so stated, and must be so applied, and must be loaned for that purpose, upon the contract and consent of the wife, and upon her crédit, the lender looking to her separate estate for payment. To hold otherwise would in many instances defeat the very object of the law. The party having the required articles, or labor to furnish, might not be willing to do so on a credit, but another might have the money and be willing to advance it; and if done, and the supplies were furnished, or the labor performed, the party so advancing the money would be the very one who furnished the thing needed. The statute uses the words for family supplies or necessaries, wearing apparel for herself or children, or for their education. Money is often found to be a very urgent family necessity to procure supplies,—something which the family needs, and cannot well do without, for food, clothing, medicines; so money may be held to be within the very words of the act. For what purpose can a married woman desire to hold separate property, but for the use and benefit of herself and children; and after food and clothing, what is more dear to the heart of the mother than to see her children well educated? This often can only be attained by sending them from home, among strangers, where the mother has no credit. If she has not the money, how can she obtain it? Only by borrowing it from her friends; and can it be said that she cannot contract for it, and bind her separate property, which she holds in trust for this very purpose?

It will be observed, that so much of the statute as relates to the wife's plantation and slaves, the husband being the general agent of the wife, may bind her separate property by his contract for her, without the condition, that it shall be by her consent; but as to the other purposes, it requires if the contracts are made by the husband, it must be by the consent of the wife. And why? Because she might say that it was his duty, and not hers, to procure the thing needed. It is more necessary that she should consent to be bound for the borrowed money, and that it should be used for the purposes designated; otherwise a profligate, or even imprudent husband, might improperly spend it; hence the lender should be held to take the risk for the application of the funds loaned. This gives ample protection to the wife, and enables her and her children to derive the benefits intended by this provision of the law. Had the provisions of the common law remained unchanged, the estate would have been vested in the husband, who would have been bound to furnish the things needed, and the property would have been liable for the repayment of any funds necessarily borrowed for their procurement. Therefore, either regarding the person advancing the funds for the payment of the necessaries and supplies as taking the place of the one who actually furnishes them, or the money as a supply and necessity, I am satisfied, when so furnished and applied,—and its proper appropriation will be presumed in the absence of other proof,—the wife does bind herself and render her separate estate liable.

The declaration does not aver, that the money was advanced for the purposes specified, but only that it was advanced, and afterwards was so applied. This averment is not sufficient to render her liable in this action, and for this purpose the demurrer must be sustained. The best analogy I have been able to find to the principles above stated is in the case of infants. It has been held that although an infant is bound upon his contract for necessaries, yet if one lends money to an infant, to pay for necessaries, he is not bound for the reason, that he may misapply the funds; but if the money be laid out for necessaries, the lender will be permitted, in equity, to stand in the shoes of the person who furnished them, and if the lender prove that the money was applied to the payment of necessaries, he will in law be entitled to a verdict.

BOYDEN (UNITED STATES v.). See Case No. 14,632.

Case No. 1,753.

BOYER v. HERTY.

[1 Cranch, C. C. 251.][1]

Circuit Court, District of Columbia. July Term, 1805.

BAIL—SURRENDER.

A surrender of the principal will not be received after the return term of the scire facias against the bail, nor will the proceedings be stayed upon producing a discharge of the principal under an insolvent law, at the third term after the return of the scire facias.

Motion to stay proceedings against bail, or to enter an exoneretur. The ca. sa. against [Owen] Roberts was returned "non est," to December term, 1803. On the 7th of Jan-

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

uary, 1804, the law of Maryland was passed to discharge Roberts as an insolvent debtor. On the 27th January, 1804, the scire facias issued against the bail, returnable to July term, 1804, and was returned scire feci. In May, 1804, Roberts was discharged by the chancellor of Maryland.

Mr. Jones, for the defendant. The motion to the court is in lieu of an audita querela, and the court will decide upon equitable principles, and enter an exoneretur, nunc pro tunc. Humphry v. Leite, 4 Burrows, 2107. In Dodson v. King, Carth. 515, in debt against bail, upon their recognizance, they were relieved by having surrendered the principal, after non est returned on a ca. sa. against him, and before the return of the latitat upon which they were arrested. Bail has a right to bring in the principal on the return of the first scire facias executed or the second returned nihil; and although it is ex gratia, yet it has become a rule, and a right. If the principal be released under the bankrupt law of England, before the bail is fixed, an exoneretur will be entered. Cowp. 823; 1 Term R. 624. Bail cannot plead discharge of the principal, to a scire facias, but may show it on motion, in lieu of a surrender of the body. But the death of the principal, after return of ca. sa. against him, will not discharge the bail. Parry v. Berry, 2 Ld. Raym. 1452. In the case of Woolley v. Cobbe, 1 Burrows, 244, the final discharge was not obtained until execution against the bail. So in the case of Walker v. Giblett, 2 W. Bl. 811. In Donnelly v. Dunn, 1 Bos. & P. 448, and 2 Bos. & P. 47, the bail had no right to surrender, when the discharge was obtained, which differs that case from the present. The application is to the equity of the court, and is the customary mode adopted in lieu of bringing in the principal. Martin v. O'Hara, Cowp. 823.

The court will only exonerate where the bail have a right to discharge themselves by surrender. Southcote v. Braithwaite, 1 Term R. 624. But here the principal was discharged and the bail had a right to surrender him at the return of the scire facias.

THE COURT stopped Mr. Key, contra, and said that although the practice has made it law, yet it is still ex gratia, for the rule is well established that if the principal die after ca. sa. returned non est and before scire facias against the bail, yet the bail is fixed. Here the bail was fixed, and although he might surrender the principal at the first term upon the return of the scire facias, (and perhaps at that term the court might have entered an exoneretur while it was in the power of the bail to surrender,) yet the bail having neither surrendered the principal nor produced his certificate of discharge at that term, the application is now too late, this being the third term after the return of the scire facias.

The motion was overruled.

Case No. 1,754.

BOYER v. ROBERTS.

[1 Cranch, C. C. 73.][3]

Circuit Court, District of Columbia. March Term, 1802.

TRIAL—AT FIRST TERM—BY CONSENT.

No civil cause is to be tried, except by consent, unless it has stood one term at issue.

The plea was filed at the last term, but the issue was not made up until the present term.

Mr. Woodward, for the plaintiff, contended that he was entitled to a trial at this term, and cited the act of Maryland of 1763.

Mr. Peacock, for the defendant, moved for a continuance on the rule of the court, that no cause should be forced to trial unless it had stood one term at issue; and on that ground the cause was continued.

BOYER (SHEEPSHANKS v.). See Case No. 12,741.

BOYER (STUART v.). See Case No. 13,553.

BOYER (UNITED STATES v.). See Case No. 14,633.

Case No. 1,755.

BOYER v. The WISCONSIN.

[See Case No. 6,317.]

Case No. 1,756.

BOYER v. The WISCONSIN and The HECTOR.

[23 Betts, D. C. MS. 123; 46 Fed. 864.][1]

District Court, S. D. New York. Feb. Term, 1857.[2]

COLLISION—TOW AND LIGHTER—LIABILITY OF TUG—OF TOW—DAMAGES.

[1. A partially loaded lighter propelled by oars, while moving on slack water at beginning of ebb tide, at a rate of one mile an hour or less, and proceeding to a pier, was met by a tow consisting of a ship lashed to the side of a tug which was making for the same pier. Warning sufficient to have enabled the tow to avoid the disaster was given by the lighter. *Held*, that the tow was liable for the injuries sustained by the lighter.]

[See The Hector, Case No. 6,317.]

[2. A ship towed by a steamer lashed to her side is chargeable for injuries occasioned by her striking, while under way, another vessel.]

[See The Hector, Case No. 6,317; The Carolus, Id. 2,424.]

[3. It appeared that the ship's company had sole charge of her helm and sails, and that directions for the concurrent navigation of both vessels were given by the master of the tug, the

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

[1] [46 Fed. 864, contains only a partial report.]

[2] [Affirmed by circuit court as to The Hector, and reversed as to The Wisconsin, in The Hector, Case No. 6,317, and by supreme court in Sturgis v. Boyer, 24 How. (65 U. S.) 110.]

helm of the ship being employed to aid the common navigation, and that neither vessel had any movement or action separate from the other. *Held*, that both ship and tug were liable for the damage to the lighter as joint tort feasors.]

[Cited in The Express, 46 Fed. 862.]

[See The Hector, Case No. 6,317.]

[4. The direct effect of the collision being to cast the cargo overboard, the vessels were likewise jointly liable for the loss thereby sustained.]

[In admiralty. Libel by Herman Boyer, owner of the lighter Republic, against the ship Wisconsin and the tug Hector for damages sustained by collision. Decree for libellant.]

BETTS, District Judge. This cause having been appealed by the claimants to the circuit court, it is proper to state more fully the reasons upon which the decision was founded than are expressed in the rough notes prepared for the use of the reporter, and communicated to the parties at the time of the decision. The action is brought by the owners of the lighter Republic to recover damages sustained by the lighter and her lading of flour, in their charge as common carriers, by means of a collision on the East river with her on the 15th of October, 1855. The proofs on neither side coincide exactly with the pleadings of the parties who produced them, and are in violent disaccord in the representations of the transaction as between the adversary parties, but I think the gravamen of the suit is supported by a satisfactory preponderance of evidence. The libel alleges that the lighter Republic, with half a load or more of flour on board in barrels, was in possession of the libellants on the 15th day of October, and was on her passage about twelve o'clock at noon, proceeding with said flour, propelled by oars, between pier No. 6, East river, and the foot of Dover street, in this city, at the rate of one mile or less the hour, and had arrived at a point nearly opposite the foot of Dover street, headed towards Dover street pier, still moved at a very slow rate by her oars alone; and when in such position the ship Wisconsin, in tow of the steamboat Hector, lashed to the larboard side of the steamer, came down the river, and was so negligently managed that the jib or flying jibboom of the ship struck the lighter, thereby capsizing her, and rolled her cargo into the water, and the same as well as the lighter was greatly damaged; that at the time of the collision there was no wind of any consequence, the tide was there about slack water, and the day was clear; and that the ship was then in charge of stevedores and not mariners, and was propelled by the steamboat lashed alongside her; that the lighter was in plain sight of the ship and steamboat, and might and ought to have been avoided by them; that every possible exertion was made by those on board the lighter to avoid the collision, by signals and hailing, &c. The libel further avers that the collision was not caused by any fault, neglect or want of care of those on board the lighter, but was caused by negligence, want of care and skill on the part of those in charge of the said tow, in that among other things they were out of the proper place, were incompetently manned, had no proper lookout and disregarded the warnings on the part of the lighter, and did not in due time stop and back the steamboat's engines, or steer the said tow so as to avoid the lighter, as they were bound to have done. Damages are claimed, by reason of the premises, to the amount of $2,100 and upwards.

Separate answers were filed on the part of the ship and the steamboat by different proctors. The owners of the ship deny all knowledge or information respecting various statements of the libellant, and aver others to be falsely alleged, and charge the facts to be that on the said 15th day of October the ship left the pier at the head of Cherry street in the East river in this port, in tow of and securely lashed to the starboard side of the steamboat Hector, between her and the New York shore, and proceeded down the East river for the purpose of mooring alongside the ship William Rathbone, then lying at the foot of Dover street. That the ship during all the time was in the charge of and under the control and management of the captain and officers of the said tug, and at the same time had on board of her the mate, helmsman and a full complement of mariners belonging to the ship, but all under the control and direction of the captain and officers of the said tug. That the tug had also on board a good, sufficient and competent master, officers and crew; that at about noon of that day, the day being clear, the wind blowing a moderate breeze from the west (about a three knot breeze), and the tide setting up the river at the rate of about one mile an hour, the tug, while proceeding down the river with said ship in tow, and at a distance of about 100 yards above the foot of Dover street, and 150 yards from the New York shore, put her helm and the helm of the ship hard aport, and stopped her engine for the purpose of coming at the foot of Dover street. Soon after the lighter was seen from the tow quartering across the river with the current at an angle of 45 degrees and at a distance of about 300 yards from the New York shore, and 400 yards from the tow, and 200 yards outside of the tow (with all sheets off) under jib and mainsail, moving at the rate of about 4 miles an hour. That immediately, therefore, orders were given, and the tug was backed hard, and the helms of the tug and ship both put and kept hard aport, and the tug was kept backing with all the power of her engine till the tow came to a dead stop about 75 yards from the New York shore, about opposite the foot of Dover street, when the lighter, pursuing her course as aforesaid with all sheets off, without any change, and carrying jib and mainsail set, and endeav-

oring to cross the bows of the tow, caught her peak halyards upon the end of the flying jibboom of the ship, and by means of her motion drew herself down upon her side, and caused the collision and injury complained of. That the lighter, from the time of coming in sight of the tow, in no manner changed her course or slackened her speed or did any act whatever to avoid the collision, which collision she might easily have avoided by lowering or dropping her peak halyards according to the usage of vessels in such circumstances; and that the collision occurred solely through the unskillfulness, negligence, fault, and bad management on board the lighter.

The owner of the tug answered for himself, and averred that the steam tug Hector was on the said 15th of October employed by the owners of the ship Wisconsin to tow the ship from the foot of Water street, East river, to the pier or slip at foot of Dover street aforesaid, and that the ship then was, and until towed and made fast to said pier continued, in charge of a skillful and competent captain and crew; that the tug and her crew were merely the motive power to move said ship to said pier, and were subject to and obeyed the orders of the captain and officers in charge of said ship while attached to her, and were subject to and obeyed all such orders, before, at and after the time of the accident or collision mentioned in the libel; and prays a decree of indemnity against the ship for any damages which may be imposed upon the tug by reason of the collision. The answer charges the negligence and misconduct of the lighter, substantially in the terms used in the answer for the ship, to have been the occasion of the collision, and avers that the lighter approached the tug when she was endeavoring to put the ship into her berth by letting her sag into the slip at the foot of Dover street, the helm of the ship being aport, and the engines of the tug stopped, and as soon as the lighter was seen approaching the tow the engine was backed, and continued backing for more than three minutes before the lighter touched the ship, and the ship and tug were perfectly stationary or moving backward from the lighter.

The answers, with the libel, present these issues: (1) Whether the injuries received by the libellant in the collision in question were occasioned without his misfeasance or culpable negligence; (2) whether, if the collision was wrongful in respect to the libellant, the act was a concurrent one of the ship and tug, for which both vessels are responsible in common as well as separately; and (3) whether, in case of recovery, the libellant is entitled to also include in his losses the injury received by the cargo laden on board the lighter, and thrown overboard into the water by reason of the collision.

A thoroughly searching examination of the facts attending the condition, management, and movements of the lighter, the ship and steamboat on the occasion in question was made by the parties on both sides on the trial of the cause. In my judgment the result of all the evidence very satisfactorily exonerates the owner of the lighter from all blamable conduct or neglect on his part, conducing to the collision. She was rightfully pursuing her course to her berth, having no headway beyond what was obtained by use of her sweeps, with a slack water, and gradually subsiding upon a beginning ebb; that all reasonable efforts were made on board her to give notice of her condition to the ship and steamboat, and to work her out of the danger of their approach upon her, and that she was without any means at her control to protect herself from them. This conclusion is not deduced from any balancing and entangled theories of witnesses, but is rested upon the direct and positive testimony of those concerned in or present at the occurrence, and their evidence, in my judgment, proves there was nothing legally exceptional in the management of the lighter, or the acts of omission of those on board her. The competency of the libellant to maintain the action must therefore be deemed established.

The second inquiry demands a consideration of the proceedings by the ship and steamboat, and whether they are chargeable with culpable acts of omission or commission, of a character to render them jointly responsible to the libellant for the injuries he sustained from them. In my opinion the balance of testimony proves the tow was approaching the lighter further out in the river from the New York piers than the lighter, she and the tow aiming to come to nearly at the same point. It was mid-day and there was no impediment in the river to a clear view of the position and course of the lighter by those navigating the tow, and warning was given the tow from the lighter time enough to enable the tow to have stopped her way or diverged from it sufficiently to secure the safety of the other vessel. The differing opinions of the witnesses as to the motion of the tide at the time of collision, and also as to the headway of the respective vessels, seem to be controlled by the fact that the barrels of flour thrown into the river by the upsetting of the lighter floated down the stream. Upon that condition of things it is manifest that the exercise of reasonable diligence and caution on the part of the manager of the tow, when they ought to have been aware they could not prudently attempt to make her berth by going ahead of the lighter, throws upon the tow the responsibility for all damages inflicted upon the latter by reason of continuing that movement. The injured party in case of collision has, as a general principle, a right to hold the vessel which is the direct and immediate cause of the wrong answerable to him for it (The Neptune, 1 Dod. 467;)

and this without regard to the question of the present participation of the owner of the colliding vessel in the culpable acts. When she is in motion in the pursuit of her lawful calling she carries with her the responsibility of her owner for the acts of his agents to whom she is entrusted to the same extent as if she was under his personal directions. Abb. Shipp. pt. 3, c. 1. Nor does it matter whether the propulsion is by the agency of sails or sweeps, or that of steam tugs fastened to her and used to the same end, because the steam power thus applied may be justly regarded only a substitute for other physical means of navigation. Reeves v. The Constitution [Case No. 11,659]; Olc. 258 [The Express, Case No. 4,598]. A ship under towage by a steamer lashed to her side is chargeable for damages wrongly occasioned to another vessel by striking her whilst under way, against her. The Carolus [Case No. 2,424].

The answers filed respectively by the owners of the ship and the tug are in direct conflict upon the question whether the navigation of the tow was under the control of the officers of the one vessel or the other, it being averred for the ship that she was exclusively in the hands and under the command of the officers of the tug at the time of the collision, and asserted on the part of the tug, with equal positiveness, that she was placed under the exclusive orders and control of the ship, and was employed solely for the purpose of supplying the motive power for transporting the ship from one pier to the other, and the tug and her crew were therein subject to and obeyed the orders of the master and officers of the ship alone. It is unnecessary to speculate upon the consequences that would legally follow the establishment of that defence, because, in my opinion, the testimony does not show that either vessel was strictly * * *[3] in the course pursued in its navigation, but, on the contrary, the officers of both took active and efficient parts in directing and controlling the movements of the tow. I am inclined to consider the primary responsibility rested upon the ship, she being the vessel actually colliding upon the lighter; but I also hold the tug was responsible for the direction given the ship through the agency of her officers concurring with those of the ship.

This court decided in the case of The Express [Case No. 4,598], the tow being separated from the tug, and coming in contact with another vessel by her own fault, was liable for the damages thus inflicted in a suit against her alone; and although the decision was reversed on appeal upon a new state of facts proved in the circuit court fixing the fault wholly upon the tug [Id. 4,596], yet that doctrine was explicitly adopted by Judge Nelson. He says: "In all such cases at least there exists a common obligation by the tug and tow to make every reasonable effort to avoid the danger and a common responsibility in case of neglect." In that case the appellate court corrected the decision below, because the liability was imposed by its judgment on the tow when the culpable acts were committed by the tug solely without any faulty concurrence on the part of the tow, upon the declared principle that both vessels were under a common obligation in their respective positions to employ every reasonable effort to avoid damage, as under a common responsibility for it in case of faulty omission to do so. Id. 4,596. The contingency anticipated in that decision comes in this case. The ship and the tug were united together and were moved as one body. The ship's company had sole charge of her helm and sails, and the master of the tug gave directions from her deck, concurrently for her navigation and that of the tug, and the helm of the ship was employed to aid in the common navigation of the two vessels. Neither of the two, as they were connected and conducted, had any movement or action separate from the other, both employed concurrently the means at their command to a common end, and it cannot be said therefore for the ship, if the fact be of any moment in this case, that she did not participate with the tug in any voluntary action producing the collision. The admiralty court in Lower Canada (The John Counter, [Stuart's Adm. 344,] held the steam tug exclusively responsible for a collision of her tow with another vessel, when the tow was hauling by a line clear of the tug, and the damage was caused by the sole fault of the tug, although she did not come in contact with the injured vessel. In The Carolus [Case No. 2,424] Judge Curtis adjudged the colliding ship propelled by a tug answerable for a collision made by her, when the tug was not joined in the suit, without raising a question as to the liability of the ship. In the circuit court of Pennsylvania a distinction is taken, which I do not meet with in any other adjudication, between responsibilities for collisions when small steam tugs are employed to tow large vessels, and large tugs are engaged in towing small craft, barges, etc. In the first class of cases, when injuries occur to other vessels by collision with a large tow through the misfeasance or culpable inattention of the tug, the consequences are made chargeable exclusively upon the ship, the tug being regarded as her servant, or agent, acting under her authority, and that no suit for collision can be sustained against the tug for damages so accruing from collision by her tow. Smith v. The Creole [Case No. 13,033]; The Sampson [Id. 12,280]. The entire navigation and movements of the two vessels is held to be at the risk of the ship. The principles of those rulings would apply to this present case, and would fasten on the ship the lia-

[3] [Missing word or words cannot be supplied from the manuscript.]

bility for the damages inflicted upon the lighter.

I am impressed with the persuasion that the true doctrine subjects both the tug and tow to responsibility to another vessel for injuries inflicted upon it by the joint action of the two by means of their common fault. I am no way convinced that the marine law dispenses either from liability to others for their mutual acts of misfeasance or omission upon navigable waters, as upon that area it is most important to the safe transportation of persons or property, that every vessel propelling herself or another by motive powers within herself, or invoking or using such motive power supplied by another, should be accountable for the consequences of an injurious misuse of such locomotion to the same extent as when she is acting separately and alone. It enures to the general security that the risk of such connection with such extraneous agency shall be imposed upon the parties so employing it, and that those suffering from its use should be entitled to indemnity therefrom against all the actors concerned in the wrong. A case decided in this court in June term, 1855, by Judge Ingersoll, is cited as establishing a different rule, and exonerating the tug and imposing the loss upon the barge in tow on her side when a collision was caused in their movements. Chase v. Creary [Case No. 2,626]. I have obtained a clearer statement of that case from the files of the court, and find that the question mooted in this case could not have appropriately arisen in that. The owners of a lake boat in tow alongside a tug (The Catherine) was met and run against on the East river by another small boat or barge in tow alongside a tug (The Birkbeck), and a collision ensued between the lake boat and the barge, and an action in personam was presented by the libellants against the owners of the Birkbeck and of the tug Catherine, to recover the damage so incurred. The court dismissed the libel as to the owner of the Catherine, and awarded damages against the owner of the Birkbeck. If the points involved in the present case were brought in discussion on the hearing or decision of that case it could have been argumentatively only, and the decision necessarily would not affect the question in issue here.

In my judgment, upon the facts in proof before the court, both the ship and tug were guilty actors in the tort committed upon the lighter, and the libellants are entitled to their recompense from the joint tort-feasors to the amount of the loss so sustained. The loss embraces the damage sustained by the cargo equally with that inflicted upon the vessel. The direct effect of the collision was to cast the flour overboard into the river, subjecting some to immediate destruction and all the residue to greater or less deterioration, and the wrong-doing party is bound to make good the whole loss of the suffering one. Abb. Shipp. 311; The Gazelle, 2 Wm. Rob. Adm. 279; Williamson v. Barrett, 13 How. [54 U. S.] 101. The libellant is accordingly entitled to a decree for a sum sufficient to recompense the injury done the lighter, and also to the cargo on board, with the salvage or expense of recovering the cargo forced overboard. The Narragansett [Case No. 10,020]; The Rhode Island [Id. 11,745].

An order of reference to a commissioner to ascertain and report the damages to be entered.

[NOTE. Decree of the district court affirmed by the circuit court in The Hector, Case No. 6,317, as to the Hector, but reversed as to the Wisconsin, and decree of the circuit court affirmed by the supreme court in Sturgis v. Boyer, 24 How. (65 U. S.) 110.]

BOYINGTON (TUCKER MANUF'G CO. v.). See Case No. 14,229.

Case No. 1,757.

In re BOYLAN.

[1 Ben. 266;[1] 1 N. B. R. 2; Bankr. Reg. Supp. 1; 6 Int. Rev. Rec. 28.]

District Court, S. D. New York. July, 1867.

PRACTICE IN BANKRUPTCY—PARTNERSHIP—SEPARATE PETITIONS.

A firm composed of three persons did business in Cincinnati, Ohio, till April 18th, 1861, when it was dissolved. In June, 1867, one of the partners filed his petition in this court, praying only that he individually might be adjudged a bankrupt, and was adjudged a bankrupt. Thereupon, the two other partners applied by petition, stating that there were no debts of the other partner but copartnership debts, that they themselves resided in Ohio, and owed no debts but those of the partnership, that there were no partnership assets, and that their liabilities were exactly the same as those of the other partner, and praying leave to join in his application, and leave to file their petitions in this court, and that all proceedings on the first petition be stayed till their petition should be disposed of: *Held*, that the thirty-sixth section of the bankrupt act [of 1867 (14 Stat. 534)] applies only to a case where two or more persons who are partners in trade are adjudged bankrupt, and that here only one partner had been adjudged bankrupt; that the petitioners could present a petition praying that the partners which composed that firm be adjudged bankrupt, to the court which, under section eleven of the act, had jurisdiction of such a petition, and, if the other partner should refuse to join in it, the eighteenth general order would apply; that the prayer of the petition must be denied.

[See In re Little, Case No. 8,390.]

In bankruptcy.

BLATCHFORD, District Judge. In this case the petition of Daniel K. Harvey and Thomas H. Boylan shows, that they were copartners with Julius A. Boylan, and carried on business under the firm name of

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

Boylan & Co., at Cincinnati, Ohio, until April 18th, 1861, when the copartnership was dissolved; that Julius A. Boylan, on the 27th of June, 1867, filed his petition in this court for his discharge in bankruptcy, and was adjudged a bankrupt on the 28th of June, 1867; that he has no individual assets except such as are exempt, nor are there any copartnership assets of any kind; that all the indebtedness of Julius A. Boylan is the copartnership debts, as appears by his petition and schedules; that Harvey and Thomas H. Boylan reside in Ohio; that they have no debts except the copartnership debts of Boylan & Co., and their liabilities are for exactly the same amounts and to the same individuals as those of Julius A. Boylan; that they are about to take the benefit of the bankruptcy act, but cannot do so without incurring a large and unnecessary expense if compelled each, individually, to proceed under the act; that the creditors of the firm are one hundred and eighteen in number; and that they would be put to great expense and trouble if compelled to attend the meetings of the creditors of the firm in two different parts of the country as far apart as New York City and Cincinnati, Ohio. The petitioners pray that leave be given them to join in the application of Julius A. Boylan for their discharge in bankruptcy under the act, and that they have leave to file their petitions under the act in this court, and that all proceedings under such petitions be had in this district, and that all proceedings on the part of Julius A. Boylan be stayed until the final disposition of such petitions.

In support of the prayer of this petition reference is made to the thirty-sixth section of the bankruptcy act, which provides "that where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;" and that, "if such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." It is urged that, under these provisions, all the partners of the firm of Boylan & Co., of which Julius A. Boylan was one, can come into this court, without regard to their place of residence or doing business, and ask for their discharges, provided Julius A. Boylan resides or does business in this district and first files his petition here.

The difficulty in the view thus urged is, that Julius A. Boylan has petitioned merely as an individual for his individual discharge, and has been individually adjudged a bankrupt. The thirty-sixth section of the act applies only to a case where two or more persons who are partners in trade are adjudged bankrupt. It would apply to the present case, if, on the petition of Julius A. Boylan, two or more members of the firm of Boylan & Co. had been adjudged bankrupt. The clause of the thirty-sixth section which provides that where "such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case," means, that where two or more petitions are filed in different districts, praying that two or more persons who are partners in trade be adjudged bankrupt, and such partners reside in different districts, the court in which the first in order of time of such petitions is filed shall have exclusive jurisdiction to do what the thirty-sixth section allows and requires to be done in a case where two or more persons who are partners in trade are adjudged bankrupt. That clause has no application to the present case. There has not been any petition yet presented to any court, so far as appears, praying that the partners composing the firm of Boylan & Co. be adjudged bankrupt. Such a petition can be presented by Harvey and Thomas H. Boylan to the court which, under the eleventh section of the act, has jurisdiction of such a petition. If such a petition be presented by them, and Julius A. Boylan refuses to join in it, the 18th rule of the "General Orders in Bankruptcy" will apply to the case.

These views are strengthened by the language of the 16th rule of the "General Orders in Bankruptcy," which provides as follows: "In case two or more petitions for adjudication of bankruptcy shall be filed in different districts by different members of the same copartnership for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and, if such petitions shall be filed in the same district, action shall be first had upon the one first filed." The prayer of the petition is denied.

BOYLAN (RIGGS v.). See Case No. 11,822.

BOYLAN (UNITED STATES v.). See Case No. 14,634.

Case No. 1,758.

BOYLE v. ARLEDGE.

[Hempst. 620.] [1]

Circuit Court, D. Arkansas. April Term, 1849.

LIMITATIONS—NON-RESIDENTS—RUNNING OF STATUTE—FEDERAL COURTS—FOLLOWING STATE DECISIONS—EVIDENCE—LOSS OF DOCUMENT—SECONDARY EVIDENCE.

1. The legislature of Arkansas, by repealing the saving in favor of non-residents, in effect enacts a limitation law as to them from the

[1] [Reported by Samuel H. Hempstead, Esq.]

14th of January, 1843, until which time there was no limitation against them whatever.

[See Lewis v. Broadwell, Case No. 8,319; Society v. Pawlet, 4 Pet. (29 U. S.) 480; Lewis v. Lewis, 7 How. (48 U. S.) 776.]

2. The cases of Dickerson v. Morrison, 1 Eng. [Ark.] 264; Watson v. Higgins, 2 Eng. [Ark.] 475; and Carneal v. Thompson, 4 Eng. [Ark.] 56,—cited and approved. Construction of the act of 14th of January, 1843 (Acts 1843, p. 57).

3. On a writing obligatory, a non-resident had five, and on a promissory note, three years to sue from the 14th of January, 1843.

4. The decisions of the state tribunals, on the construction of their statutes, are uniformly, and as a matter of principle, adopted by the federal tribunals, when passing on these statutes, or when they come under review.

5. These expositions are considered as a part of the law, and become a rule of property.

6. The affidavit of a party of the loss of a paper, and inability to find or produce it, after the use of due diligence, is sufficient to let in secondary evidence of the contents of such paper.

[See Allen v. Blunt, Case No. 217; Nicholls v. White, Id. 10,235; Tayloe v. Riggs, 1 Pet. (26 U. S.) 591.]

[At law. Action of debt by John Boyle against William G. Arledge. Defendant demurred to a replication to his plea, and the demurrer was overruled in part and sustained in part. Plaintiff entered a nolle prosequi as to the counts of the declaration as to which the demurrer to the replication had been sustained. The case was submitted on the issues formed on the remaining count, and plaintiff thereafter took a nonsuit.]

S. H. Hempstead, for plaintiff.

George C. Watkins and J. M. Curran, for defendant.

JOHNSON, District Judge. This is an action of debt, brought by the plaintiff on the 5th day of March, 1847; and in the first count of his declaration, he has declared upon a writing obligatory, executed to him by the defendant, payable on the 25th day of March, 1831; and in his second, third, and fourth counts, upon promissory notes made by the defendant to the plaintiff; the first payable on the 25th of March, 1833; the second on the 25th of March, 1834; and the third on the 25th of March, 1835. The defendant plead the statute of limitations, averring "that the cause of action in the first count stated did not accrue to the plaintiff at any time within five years next before the commencement of this suit; nor did either of the said several causes of action in the second, third, and fourth counts accrue to said plaintiff, at any time within three years next before the commencement of this suit." To this plea the plaintiff replied, that at the time when the several causes of action set out in his declaration accrued to him, he was a non-resident of the state of Arkansas, and from thence until the institution of this suit, continued to be, and was at its institution, a non-resident of the state of Arkansas. To this replication the defendant filed a general demurrer.

The first inquiry is, whether the cause of action in the first count of the declaration, on the writing obligatory, is barred by the statute of limitations of this state? In the case of Watson v. Higgins, 2 Eng. [Ark.] 475, the supreme court of this state held, that previous to the 20th of March, 1839, when the Revised Statutes took effect, there was no statute of limitations of this state, applicable to writings obligatory; and on such causes of action then existing the statute of limitations commenced running from its passage; and in Dickerson v. Morrison, 1 Eng. [Ark.] 264, the same court held, that five years was the time fixed by the act as a bar to actions upon writings obligatory. According to these principles, the defendant's plea, that the cause of action had not accrued within five years next before the commencement of the suit, is a valid plea, and a good defence, if true, to the action, unless the plaintiff has brought himself within one of the exceptions contained in the 13th section of the limitation act. This, however, he has done, by replying that he was and continued to be, up to the commencement of the suit, a non-resident of this state. Rev. St. 528. But this 13th section of the statute of limitations was repealed by the act of the 14th of January, 1843 (Acts 1843, p. 57), and the inquiry arises as to the effect of this repealing statute.

In the case of Watson v. Higgins, before cited, the supreme court of this state have given a construction to the intent, meaning, and effect of this act. They use the following language: "This leads us to inquire into the effect of the repealing statute. Until the time of its passage, there was no limitation as to non-residents. Did the legislature, by repealing the saving in favor of non-residents, remit them back to the time when the Revised Statutes took effect? If such be the case, many causes of action existing at the time of the repealing statute were by that act barred instantly. Such consequences would have been exceedingly unjust, and were surely not designed by the legislature. We conceive that the true construction is, that the legislature, by repealing the saving in favor of non-residents, in effect enacted a limitation law applicable to non-residents; and which took effect from the date of its passage. Hence all causes of action existing in favor of non-residents upon writings obligatory, on the 14th of January, 1843, had five years to run from that date." This doctrine is again affirmed by the same court, in the case of Carneal v. Thompson, 4 Eng. [Ark.] 56, in which the court says: "Previous to the act of the 14th of January, 1843, there was no limitation on causes of action belonging to non-residents. That act being simply a repeal of the exception in favor of non-residents, they had the same time after its passage, for the institution of their suits, as residents had, prior to its enactment,"

and cite the case of Watson v. Higgins, 2 Eng. [Ark.] 475.

This construction of the act of the 14th of January, 1843, is decisive of the question now under consideration. For as the action was commenced on the 5th of March, 1847, five years had not elapsed after the passage of the act of the 14th of January, 1843, within which time the plaintiff had a right to bring his suit upon the writing obligatory. I see no ground to dissent from the construction given to this act by the supreme court of this state; and I adopt it as a correct exposition of the statute. But if I thought it erroneous, still according to the repeated decisions of the supreme court of the United States, it is my duty to receive it as the true construction of the act. In the case of Green v. Neal, 6 Pet. [31 U. S.] 291, the supreme court of the United States say: "This court have uniformly adopted the decisions of the state tribunals respectively, in the construction of their statutes. This has been done as a matter of principle in all cases where the decision of a state court has become a rule of property. In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states. The rights of parties are determined under these laws, and it would be a strange perversion of principle, if the judicial exposition of these laws by the state tribunals should be disregarded. These expositions constitute the law, and fix the rule of property. The decision of this question by the highest tribunal of a state should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because a fixed and received construction by a state in its own courts makes a part of the statute law." Thatcher v. Powell, 6 Wheat. [19 U. S.] 127; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 159, 160; Shelby v. Guy, 11 Wheat. [24 U. S.] 367; Jackson v. Chew, 12 Wheat. [25 U. S.] 162.

On the 14th of December, 1844, the legislature again passed an act concerning the limitation of actions. But it is manifest from its inspection, that it does not abridge the time allowed by the statutes then in force upon causes of action that had then accrued. On the contrary, it enlarged the time and gave to non-residents two years from the passage to bring their suits, although these suits were then actually barred by that or any other act of limitation then in force. Acts 1844, p. 24. Three years being the time limited in the Revised Statutes for bringing suit upon a promissory note, and this suit not having been brought within three years from the 14th of January, 1843, nor within two years from the 14th of December, 1844, the action, as far as respects the second, third, and fourth counts of the declaration, is barred. The replication to the plea to the first count, on the writing obligatory, must be overruled, and sustained to the replication to the second, third, and fourth counts of the declaration founded on the promissory notes. Ordered accordingly.

The plaintiff entered a nolle prosequi to the second, third, and fourth counts, and the case was submitted on the issues formed on the first count of the declaration. One of the issues was, that the obligation was not lost, and to prove the affirmative of that issue, the plaintiff offered to read his affidavit, to show the loss of the obligation, and that he had used due diligence to find it, but without success, and that it was not in the possession, or under the control of S. H. Hempstead, his attorney; to the reading of which the defendant objected.

PER CURIAM. The doctrine is well settled by the supreme court of the United States, in the cases of Riggs v. Tayloe, 9 Wheat. [22 U. S.] 483, and Tayloe v. Riggs, 1 Pet. [26 U. S.] 591, that the affidavit of a party to a suit is competent and admissible, for the purpose of proving the loss of a paper, in order to let in secondary evidence of its contents. The same principle has been followed by the supreme court of Arkansas, in Kellogg v. Norris, 5 Eng. [Ark.] 18. And such is doubtless the prevailing rule on the subject. Davis v. Spooner, 3 Pick. 284; Donelson v. Taylor, 8 Pick. 390; McDowell v. Hall, 2 Bibb. 630; Hamit v. Lawrence, 2 A. K. Marsh. 366; Hart v. Strode, Id. 115. The proof of the loss is addressed to the court, and cannot go to the jury at all; and it therefore becomes in all cases a question for the court to decide, when the loss of a paper is sufficiently proved, so as to let in secondary evidence. A party by his own oath can do no more than prove the loss of the paper. The contents must be proved in a different manner. The affidavit in this case is sufficient to establish the loss, and is admissible for that purpose. The plaintiff took a nonsuit.

BOYLE v. The BREEZE. See Case No. 1,829.

Case No. 1,759.

BOYLE v. HINDS.

[2 Sawy. 527.] [1]

Circuit Court, D. California. Feb. 2, 1874.

PUBLIC LANDS—PERFECT MEXICAN GRANTS—LAND COMMISSIONER — FINAL DECREE AND PATENT — CONCLUSIVENESS.

1. Where the holder of a perfect Mexican grant has presented his grant to the board of land commissioners for confirmation, under the act of congress of 1851 [9 Stat. 631], and had it confirmed, surveyed, and patented, the final decree and patent are conclusive as to the extent of the grant.

2. Where a Mexican grant is presented to the board of land commissioners for confirma-

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

tion, confirmed, finally surveyed, and patented in accordance with the final survey, all questions determined become res adjudicata between the parties to the proceeding and their privies.

3. The proceedings of the board of land commissioners for confirmation of Mexican grants are judicial in their character, and have the same effect as other judicial proceedings.

4. Where the claimants submit to the decree of the board of land commissioners, and no appeal is taken, the decree, final survey and patent in pursuance thereof, have the same force and effect as if the decree had been rendered by the supreme court on appeal, and are conclusive upon the rights of all parties to the proceeding and their privies.

[Cited in More v. Steinbach, 127 U. S. 82, 8 Sup. Ct. 1071.]

In equity. The Mexican government in 1839 granted a rancho called "Estero Americano" to Edward Manuel McIntosh. The grant was for two square leagues, within certain designated boundaries embracing six or more square leagues. It contained the usual provisions for measuring the land, and leaving the surplus to the nation. The grant was approved by the department assembly. Afterward, juridical possession was given by J. P. Leese as first alcalde of the jurisdiction within which the land granted was situated. The juridical possession is in all respects regular and in due form. The juridical possession, instead of being limited to two, embraces at least six square leagues. Prior to 1850 McIntosh conveyed his grant to Jasper O'Farrell, who, in 1852, presented the grant for confirmation; and it was subsequently confirmed to the extent of two leagues only, surveyed and patented —the patent covering about two leagues. O'Farrell took his patent without objection, and placed it on record in the recorder's office of Sonoma county. The land in question lies within the juridical possession given to McIntosh, but without the limits of the final survey, and the patent issued to O'Farrell. Whatever title O'Farrell had under the grant has, since the commencement of proceedings for confirmation, passed to the plaintiff [William Boyle] by proper conveyances. After the issue of the said patent to O'Farrell, in pursuance of the decree of confirmation, the United States issued, in due form, to the defendant [A. B.] Hinds, as a pre-emptioner, a patent to the land in controversy; and he was in possession at the commencement of this action, claiming title under said patent. [Judgment for defendant.]

Parker & Roche, for plaintiff.
George Pearce, for defendant.

SAWYER, Circuit Judge (after stating the facts). The plaintiff claims that McIntosh had a perfect Mexican title, and that it was unnecessary for his grantee, O'Farrell, to present his claim for confirmation; that, his title being perfect, congress had no constitutional power to deprive him of his land in case of his failure to present his claim under the act of 1851. Minturn v. Brower, 24 Cal. 644, is relied on as authority for this position. Under the view I take, it may be conceded that it was unnecessary to present the claim; but the claimant did present his grant, and submit it to examination, and asked its confirmation under the act of congress. The questions as to the genuineness and extent of the grant were litigated between the government and the claimant before a tribunal having jurisdiction to determine them. The grant was confirmed to the extent of two square leagues, and no more. The juridical possession was put in evidence, and the extent of the land to which the claimant was entitled in fact determined. The claimant did not appeal, and the determination became final. He had a right of appeal under the act, and could have gone from court to court, and ultimately had the question directly adjudicated by the supreme court of the United States in that proceeding, whether he had a title to the full extent of the juridical possession or not. The same courts would then have passed upon his title in a direct proceeding to establish his claim to the whole, that are now called upon to determine the same question collaterally. The law afforded him tribunals to determine this very question between him and the United States. The very object of the law was to definitely ascertain what land belonged to Mexican grantees, and what to the United States, in order that the United States might dispose of that which it owned to other parties. The owner of the grant availed himself of the right afforded by the act of congress, and the question between him and the United States was litigated and determined. If he had appealed to the supreme court in that proceeding—a direct proceeding to determine the validity and extent of the grant, the amount of land to which he was entitled under his perfect grant, if it be such—and the supreme court had determined that he must be limited to two leagues, I apprehend that the same question could not be litigated over again collaterally in the same or other courts. The same questions now raised could just as well have been presented then as now. The land commission and the courts on appeal had jurisdiction to determine them. They were embraced within the issues, and actually litigated and determined. The fact that the claimant did not appeal cannot affect the question. If he chose to accept the decision of the inferior tribunal, he is bound by it. Gray v. Dougherty, 25 Cal. 266; Garwood v. Garwood, 29 Cal. 515. Besides, the fifteenth section of the act of 1851 makes the adjudication final between the government and the claimant, and it must be regarded as res adjudicata. The proceedings ending in a decree limiting the confirmee to two leagues are clearly judicial. The survey and

patent but carry out the decree of confirmation. The patent is the final authentic record of the proceeding, and is conclusive evidence between the parties of the extent of the grant and the correctness of the location.

This appears to me to be the result upon authority, as well as upon principle, where the claimant under a Spanish grant, whatever the character of the grant may be, has presented his claim, litigated it with the government in the tribunals provided for the purpose, and had the genuineness and extent of the grant determined. The following authorities lead to this conclusion: Leese v. Clark, 20 Cal. 423, 18 Cal. 571; Teschemacher v. Thompson, Id. 26; Beard v. Federy, 3 Wall. [70 U. S.] 491, 492; Rodriguez v. U. S., 1 Wall. [68 U. S.] 591; Treadway v. Semple, 28 Cal. 655. Judgment must be rendered for defendant with costs, and it is so ordered.

BOYLE (JENKINS v.). See Case No. 7,262.

BOYNTON, In re. See Cases Nos. 8,042–8,044.

Case No. 1,760.

BOYREAU v. CAMPBELL et al.

[1 McAll. 119.][1]

Circuit Court, D. California. July Term, 1856.[2]

EJECTMENT—TITLE TO SUPPORT—DEFENSES—TRESPASS—WHAT AMOUNTS TO—ADVERSE POSSESSION—CHARACTER OF POSSESSION.

1. Where defendants in ejectment show no title, they cannot depend upon the invalidity of the documentary title of the plaintiff, accompanied by possession.

[See Preston v. Bowmar, 6 Wheat. (19 U. S.) 580; Christy v. Scott, 14 How. (55 U. S.) 282; Turner v. Aldridge, Case No. 14,249.]

2. Defendants in entering upon the premises in dispute, whether regarded as "vacant" or "public land," or as land acquired by the government of the United States under a foreign grant, are to be deemed trespassers.

3. Defendants cannot, in a general answer, avail of an objection to the jurisdiction of the court on the ground that the title of plaintiff is merely colorable.

4. "Rodeo boundaries," under the customs and acknowledged usages which prevailed in California, constituted as notorious evidence of the possession of land as the cultivation or fencing in an old, settled country.

[See note at end of case.]

At law. This was an action of ejectment [by Clement Boyreau against Robert Campbell and others], and, a jury having been waived by the parties, was submitted to the court on the law and facts, with a reservation to the parties of the right to except to the rulings of the court in relation to the admission of testimony, as well as to the decisions made upon the law of the case on its merits.

Saunders & Hepburn, for plaintiff.

A. M. Crane and Thompson Campbell, for defendants.

McALLISTER, Circuit Judge. The grant under which by mesne conveyances plaintiff claimed, was alleged to have been lost; and plaintiff called Juan B. Alvarado, who was governor at the time the grant was issued, and who testified that the expediente in an application for land, consists of the petition of the applicant, the orders for information, the decree of concession, and a draft of the title-paper issued to the party. These documents are collected together and preserved in the archives, constituting what is termed the expediente. He further stated, that it depended entirely on the secretary whether he made out the title first and then copied it, or made the draft first, and then drew up the title to be signed. It was part of the mechanism of his office—that in his time it was customary to give a verbal order to the secretary to write out the concessions, and that the secretary sometimes (as in this case) made out a final title without an order of concession signed by the governor. The witness was unable to recollect an instance where the archives showed a decree of concession on a separate piece of paper, where no information was asked for, nor did he know whether any of the expedientes contained more than one draft of the title. He did not remember any case where the governor made any alteration or correction of the title as drawn up. He also stated that he recollected various instances where the concession was presented unsigned to the departmental assembly. In such cases they made no difficulty, provided it was archived. Sometimes the secretary of the assembly, or that of the governor, observed it and had it signed, to regularize the proceedings. He further stated, that it was usual to deliver the title to the petitioner, subject to the approval of the departmental assembly, and afterwards to send the expediente with a draft of the title to the assembly, for their approval; and that he never knew a case where the draft of the title was put in the expediente without the original's having been first delivered to the party, nor where, after the draft was made, the governor refused to sign and the grant was stopped. The witness then, on being shown the expediente, stated that he knew the first paper; that it was the original petition of Estudillo, and was in his handwriting, which he knew. The next paper, the decree of concession, he proved to be in the handwriting of Francisco Arce, at that time first officer of the secretario. The third paper he also stated to have been written by Arce. The writing on the the desino or plan, he stated to be that of Fernandez, an ancient alcalde of San Jose. He added, that he recognized all these papers as the original documents on which the title

[1] [Reported by Cutler McAllister, Esq.]

[2] [Affirmed in Campbell v. Boyreau, 21 How. (62 U. S.) 223.]

issued; and that the plan was not presented by the petitioner, as he was already in the possession of the land, but was made by the prefecture in pursuance of his (witness's) orders, and as a means of obtaining information, and to enable him to decide a dispute between Estudillo and Guliellmo Castro as to boundaries. That, on receiving the map, he called the parties together; but being unable to bring them to an amicable settlement, he sent for Jose Castro, and instructed him to endeavor to settle the dispute, and in case of failure, to report what was just to be done. That Jose Castro, being unable to effect the settlement, gave him a map with a line drawn on it, as that, he thought it just to be established. That the witness accepted this line, and ordered the grant to issue bounded on the east by the Deramadores de Aguas on the side of the high hills, on the west by the bay, on the south by the Arroyo de San Lorenzo, and on the north by the Arroyo de San Leandro. He also stated that the grant contained the usual conditions, and was for a league, more or less, and that there was a special condition that the Indians should not be molested. A paper was then shown to the witness, which he identified as the official note sent to the secretary of the governor when the latter asked for the first plan. He also identified and proved the report of Jose Castro (a document produced from the archives), and stated the marginal order to be in his (witness') handwriting.

R. A. Thompson, one of the late board of land commissioners, swore that he had examined some three hundred or four hundred expedientes. That they did not all contain copies or drafts of the grants. That they frequently varied from the grants delivered to the parties, but, in a majority of cases, not materially; but in some cases they differed on substantial points. That the proceedings, as shown in the expediente, were regarded by the board as affording proof of the existence of a grant. That he never saw any book where the titles were recorded. That one has been mentioned, but that it was not kept up except in the earlier times.

John Saunders, deposed that his professional firm had been employed to prosecute the claim under the Estudillo grant. That with a view to prosecute the same he had received a Spanish paper, signed by Juan B. Alvarado as governor, and Manuel Jimeno as secretary. It was a grant to Joaquin Estudillo, for the ranch of "San Leandro."

Governor Alvarado was recalled, and the original expediente of Estudillo from the archives, was handed to him, and asked if he could identify it, and then testify from his own recollection to the contents of the original grant delivered to the party. To this the defendant's counsel objected, on the grounds: 1. Because the draft was not made by himself. 2. It was not compared by him with the original. 3. Because it is not a record, nor a copy of the original authorized by law to be taken. 4. Because not the best evidence in whose handwriting the grant is. The objections were overruled. Witness Alvarado, on looking at the expediente identified it and recollects it distinctly, and the expediente was admitted as evidence.

R. C. Hopkins was sworn. Stated he was a clerk in surveyor's office; that a book of titles is to be found among the archives, for the years 1834, 1835, 1836. Since that time no such book has been kept or found. This witness identified the expediente as one of the archives.

In order to fortify the testimony in relation to the existence of the original grant, S. G. Tenant was sworn on behalf of plaintiff. He stated that he had seen the original grant in the possession of John B. Ward, about a month after the death of Estudillo, at San Leandro, at the house of the widow of Estudillo; it was signed by Governor Alvarado, whose handwriting was known to witness, and, as witness believes, by Manuel Jimeno. The grant was dated in 1842. Witness was acquainted with the Spanish language.

Jose Berreyesa, another witness, stated that he had seen the original grant to Estudillo in 1843 or 1844, and that the signatures of Alvarado and Jimeno were genuine; that the grant was for the "San Leandro Ranch," for one league square; and witness gave the boundaries of the ranch.

John B. Ward, a witness for plaintiff, was called to prove the loss of the original deed. He was objected to by defendant's counsel as incompetent, having married one of the daughters and heirs of Estudillo. He was admitted by the court to prove the loss. He stated that he had received a grant signed by Alvarado and Jimeno officially, from the professional firm of Saunders & Hepburn, attorneys at law, on 2d September, 1853, at their office in San Francisco, at one o'clock, p. m. That Hepburn & Saunders had been employed professionally by the heirs of Estudillo, to prosecute their claim before the land commissioners; that having been advised by Messrs. Saunders & Hepburn to engage additionally the services of Judge Thornton, he took the grant to carry it to that gentleman's office; on his way there he heard of a squatter difficulty on the opposite side of the bay, in the vicinity of San Leandro, in which a man was killed; that witness hastened across the ferry; that the weather was bad, and witness undertook to pilot the boat; that she was detained all night on the water; that next morning the grant was gone; thinks it must have dropped from his person during the night; he had searched for it in vain, and has never been able to find it. Cross-examined.—Witness had seen the document before he received it from Saunders & Hepburn; it was signed by Alvarado and Jimeno; it had been exhibited to witness by Si-

gnora Estudillo, as her title; it was the same document received by witness from Saunders & Hepburn.

The defendants moved the court to exclude all evidence, oral and documentary, which had been given to prove the existence, loss, or contents of the original grant, on the grounds: 1. Because the grant itself, if produced, would not prove that a legal title had passed to Joaquin Estudillo. 2. Because the grant had not been approved by the departmental assembly. 3. Because there was no official segregation of the land from lands of a like character. 4. Because the title is merely equitable. 5. Because the best evidence of the former existence of the grant has not been produced, the law showing that a record was required to be kept. This motion was overruled; reserving it for the final decision of the court, after all the testimony should have been delivered.

We proceed now to dispose of it. A further examination satisfies us that there was sufficient testimony offered to authorize the introduction of secondary evidence to establish the existence, contents, and loss, of the original grant, and that the best evidence of which the nature of the case permitted, was given for that purpose. As to the objection that the title of the plaintiff is merely equitable because there had been no previous approbation of his grant by the assembly, it is important in considering it to look to the relative situation of the parties. Joaquin Estudillo, under whom plaintiff claims, went into possession of the land in controversy in 1837, which he retained until 1842, when he obtained his grant. From that time he continued to reside upon it until his death in 1852, since which time his widow and family have been in occupation of it. During this long possession he has had a large stock of cattle on the place, and cultivated it to the extent of some three hundred acres in different parts. Such is the title of the plaintiff.

The defendants have given no evidence of title whatever, unless the position they assume be correct. It is, that the land in controversy is part of the public domain, to which they have pre-emption rights. This position cannot be deemed as giving title. The act of 3d March, 1853, entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights, and for other purposes," expressly exempts from pre-emption this very land, claimed as it is "under a foreign grant or title." 10 Stat. 246. The land in dispute, if public land, as contended for by defendants, is so because it was acquired by the United States government by treaty from Mexico. Now, the act of congress of 3d March, 1807, entitled "An act to prevent settlements being made of lands ceded to the United States, until authorized by law," expressly inhibits the entry upon, taking possession of, or settlement on any lands ceded or secured to the United States, by any foreign nation, which lands have not been previously sold or leased by the United States, or the claim to which land has not been previously recognized and confirmed to the person entering, &c., by the United States. 2 Stat. 445. In the case at bar, the defendants pretend to no title whatever from the United States, and we have seen by the act of congress of 3d March, 1853, in special reference to lands in California, the land in controversy, claimed as it is, under the grant of a foreign government, is exempted from pre-emption rights. The defendants are therefore to be viewed as mere occupants of the premises, without pretense of title. As such occupants, they rest the defense of their possession upon the invalidity of the title of the plaintiff. Under this view of the case the court will make every intendment which the law allows, in favor of the plaintiff's title. The ground on which it is assailed is, that the grant under which plaintiff claims, never having received the approval of the departmental assembly, conveyed only an inchoate title. Whether, in fact, such approval was obtained, is matter of evidence. Now, in this case, the grant in terms recites that it is given by virtue of the said grant, and the approbation the party had received from the most excellent departmental assembly. Now, if this recital in the grant be conclusive, there can be no doubt that the fee passed by the grant. If not conclusive, it is prima facie evidence, which must prevail in the absence of all other testimony. The cotemporaneous date of the concession and the grant is relied on by the defendants; but this cannot be held as disproving the positive statement in the grant. Non constat that the assembly was not in session at the time, or an approval of the contemplated grant had not been obtained at some previous session by the governor. The grant, under any view taken of it, comes within the definition of a colorable title, as given by the supreme court of the United States, who say that "color of title is that which, in appearance is title, but which in reality is no title." [Wright v. Mattison], 18 How. [59 U. S.] 56. The grant professes and has on its face all the requisites of a complete legal title, and constitutes at all events colorable title; which, accompanied by possession, will maintain an action against mere trespassers.

In the course of the trial the defendants called the plaintiff, Clement Boyreau, who deposed that he did not know Robert Grimes Davis except in connection with this case. On the 14th November, 1855, at the request of a friend he accepted the transfer of the undivided half of 1-18 of the Rancho de San Leandro, for the consideration of $8,000. He accepted the transfer to oblige a friend; the deed was not delivered to him; it was deposited with his attorneys, Saunders & Hepburn; he had no interest in this pur-

chase himself; a friend requested him to permit the title to be transferred to him, and his attorneys informed him they held the title for him; that it was in their office subject to his disposition; he had never done any act limiting or impairing his title; did not know whether the consideration had been paid by any one; he held the title for a Mr. Touchard; did not give orders personally for the institution of this suit.

The deed to the plaintiff had been previously given in evidence. The defendants now moved to exclude it on the grounds: 1. Because it was merely colorable, and executed solely to give jurisdiction to this court. 2. Because there was no sufficient proof of the delivery of the deed. The objection was overruled, and, the court thinks, correctly. It was contended that a deed merely colorable passed no title to the plaintiff. But we are of opinion that by this deed the legal title was vested in him, and that the ground of objection is, that he is not the real but merely nominal party to the controversy, the real party being a citizen of this state. Had this objection been taken by plea in abatement, it would have been sustained. But the defendants having omitted to interpose it, cannot now avail themselves of the defense. Such has been the ruling of the supreme court, where the citizenship of the parties to the record has been sought to be shown on a trial of the merits, and the same rule applies where a similar fact is attempted to be proved with regard to the real party to the controversy.

The expediente of one William Castro was next introduced by the plaintiff. It was proved to have come from, and to be a part of the Mexican archives in the surveyor-general's office, and contained a copy grant, and desino of a ranch directly bounding on the San Leandro ranch, and was offered to show the line recognized by the Mexican authorities at the time, as the line which on one side bounded the ranch of San Leandro. It was objected to and the objection overruled, as the court thinks, correctly.

The plaintiff then introduced several witnesses to establish what are called the rodeo boundaries of the San Leandro. This was objected to, and the objection overruled. The question as to these boundaries will be discussed hereafter. The genuineness of the grant was assailed by defendants, by the introduction of the testimony of one Marcus Esquilla; who deposed that in the spring of 1849, he had a conversation with the grantee, Estudillo, in which the latter showed witness the title-papers to the rancho, which were not signed, and the reason assigned by Estudillo for their not having been signed was, that the government would not make a grant until he, Estudillo, had effected some settlement with the Indians; that the said papers formed what is called an expediente, and included the form of a grant, which was not signed; that said Estudillo told witness these were all his title-papers. The conversation is alleged to have taken place in the spring of 1849. To discredit this testimony, a witness (Felipe Fierro) was sworn, who deposed that he was well acquainted with Esquilla, and corresponded with him about his business until his death, and subsequently with his brother; that in May, 1850, both Estudillo and Esquilla happening to be in the store of witness, the latter asked, "Who (meaning Estudillo) that gentleman was?" Witness did not introduce the parties. It is evident that if Esquilla did not know Estudillo in May, 1850, he could not have had the conversation with him he swears to, in the preceding year. But still, it is better to view the testimony of the discrediting witness as erroneous as to the time, and consider the fact of such conversation as established by the evidence of Esquilla. Still, the recollection of a witness as to spoken words of several years standing are to be received with caution, when the testimony which has been given of the original grant is considered. The witness may be prepared to swear that a party had said the papers exhibited were all the papers in his possession; still, there may have been misapprehension as to what was said, or in fact all the papers may not have been exhibited.

Again, the reason which the witness assigns as the one given by Estudillo for the non-signature of the grant, to wit, that he had omitted to settle with the Indians, is not in unison with the practice of making grants subject to the Indian rights. It is further contradicted by the fact in this case, that the grant is made to exclude the possessions of the Indians. A previous settlement, therefore, in relation to them, was not indispensably necessary to the issue of the grant. To divest title on such testimony, where the counter evidence is as strong as it is in this case, would be to decide contrary to the weight of evidence. Governor Alvarado swears he issued the grant. The expediente from the archives proclaims, and the long possession of the grantee under it tends to prove, its genuineness. Jose Berreyesa stated that he had seen the original grant in 1843, and proves the signatures of both Alvarado and Jimeno. John B. Ward swears that he had seen the grant, and also proves the signature of Alvarado; and lastly, John Saunders swears to have been in possession of the grant. In view of all the testimony, and acting as jurors, we find that the signatures to the grant have been established.

Having stated the rulings of the court and the objections of counsel thereto, during the trial, we proceed to consider the merits of the case, and the evidence which establishes the possession of plaintiff, and its extent. It is ascertained that long previously to the intrusion of the defendants, the grantee and those who claimed under him had been in possession of the tract sued for; that from

1837 to 1842 the grantee had resided on the rancho known as the San Leandro; he had built a house upon it, resided thereon, and stocked it with cattle; his possession previously to the issue of the grant had not only been recognized, but actually authorized by the Mexican government; and in 1842, when he obtained his grant, the general limits of his land were notorious. It is proved by numerous witnesses that both before and after the grant, the tract he occupied, and was recognized as possessing, was the San Leandro rancho, of which the notorious and undisputed boundaries were the two arroyos of the San Leandro and San Lorenzo, the hills, and the bay, and to have been with his family as notoriously and completely in the occupancy of it as, according to the customs of the country, any Californian could be. He occupied it until his death, in 1852, and stocked it with cattle marked with his brand. No one, save a few Indians, lived on or occupied any portion of his land; and over the whole tract he asserted all those rights which at that time could have been asserted by the proprietor of land in California. He cultivated portions of it, in the neighborhood of his house, and near the San Leandro creek.

In 1842, the witness Valencia, took, by permission of Estudillo, her father-in-law, cattle to pasture on the rancho, which were kept on the tract between the two creeks; and, with the consent of Estudillo, her husband cultivated a portion of the land on the San Lorenzo creek. From the whole tract the cattle of Estudillo were gathered; and on the stock running within its limits he exercised all the rights of ownership. For the purpose of showing the nature and extent of his possession, the plaintiff introduced testimony to establish what are termed the "rodeo boundaries" of his ranch. The nature of these requires explanation. The extensive tracts of land belonging to the former inhabitants of this country were never separated from each other by inclosures. But a small portion of the large extent owned by the rancheros was put under cultivation; and their herds of horses and cattle, in which their principal wealth consisted, roamed at large over the extensive tracts conceded to them by the government. At a certain season of each year, however, the cattle were collected from the limits of the rancho, at a place, usually near its center, called the "rodeo" ground. Here the young cattle were branded with the mark of the owner, and the whole herd were confined for a short period, to habituate them to the spot, and insure their return at the ensuing season. The proof of ownership furnished by the brand on the animals, seems to have been universally respected; and wherever the cattle might wander, they could be reclaimed by the owner. The young, unbranded cattle, which still followed the mother, were recognized as belonging to the owner of the latter; but there were many which had no mark, and having ceased to follow the mother, mingled indiscriminately with the herd. These were called orijanas, and by the custom of the country were deemed to belong to the owner of the ranch on which they were found. In driving, therefore, the cattle to the rodeo, the vaqueros were required to observe scrupulously the boundaries of the ranch, for only the orijanas found within them were considered as belonging to the proprietor giving the rodeo. That these boundaries were generally respected, is proved by several witnesses. To drive cattle, on the occasion of a rodeo, from a neighbor's land being considered, as stated by one of them, "worse than squatting." The observance of the boundaries was not secured by the customs of the country alone; for the neighboring rancheros were always invited to be present when a rodeo was to be given, and attended on horseback to observe the limits from which the cattle were driven, and to reclaim any of their own that might have mingled with the herd. The rodeo boundaries of a ranch, or the limits from within which all the cattle upon it were collected together, thus became generally known; and when, as in the case at bar, they have been recognized and acted upon for a long series of years, they afford the best, if not the only evidence of the limits of an actual occupation, which the habits of the people permitted them to furnish. To exact of proprietors using their lands for purposes so different from those to which we apply them, evidence of actual occupation by inclosures or cultivation of the soil, would be to demand what could never be afforded. There is surely no magic in a fence. In a country where land is owned in small parcels, and usually inclosed, such inclosure affords unmistakable evidence of appropriation and occupancy. When, therefore a right is claimed to have been acquired by an adverse possession without color of written title, the party is restricted to the land the exclusive right to which he has asserted notoriously by inclosing or cultivating it. The fence or cultivation, of themselves, confer no title. They only afford evidence of the intention to assert a right to the land included within them. The same evidence is afforded by an entry on and occupation of a part of a tract of land under color of a written title to the whole. For in that case, a party is deemed to be in possession up to the limits of his deed. But other acts equally significant of the parties' intention (being the strongest that circumstances admit), may have the same effect. Where, by the customs of a country, acts of ownership have been exercised, and the land within certain limits recognized as claimed by those acts. Where the party has used and possessed the land in the only way in which an owner would use and possess it, and as none but an owner would use it; where the limits of the land

to which he thus asserts his rights are notorious, and have been recognized for a series of years, and undisputed,—it seems to us that such facts furnish evidence of a possession as satisfactory as if, according to the customs of an old and settled country, a fence had been built about it; and sufficient to enable a party to maintain his right to it in a court of justice, against intruders who have entered not only without pretense of title, but in open violation of law. In this case, the rodeo boundaries are clearly shown to have been established and recognized by the neighbors of Estudillo, from a period long anterior to the acquisition by the United States of this country. By the ascertainment of these boundaries, the plaintiff has established the actual extent of his actual possession. To fortify the evidence of possession, testimony was adduced to prove that in 1853, shortly after the death of Estudillo, his representatives, who continued to reside on the land, rented a portion of it, about three hundred acres, to one Joseph Demont, who entered into possession. This land was inclosed by a fence, and includes the land upon which one of the defendants, and a portion of the land upon which another, have "settled."

In the same year, and after the encroachments of American settlers had taught them the virtue of a fence, the representatives of Estudillo employed one J. C. Pelton, who, under their direction fenced in several thousand acres, and erected on the land some six or seven houses. The fences and houses have been burnt by accidental fire; and a portion of the land is now occupied by some of the defendants to this action. Recapitulating, then, the evidence as to possession, we find that Estudillo, the grantee, went into possession in 1837. In 1839 he obtained a provisional license to continue in possession, from the governor. That in 1842 he obtained a grant, from the date of which he has occupied and claimed the ranch of San Leandro, with well-known boundaries. That he built a house upon, and cultivated portions of the land. That he had his fields, corrals, and rodeos. That his cattle roamed over it, bearing his brand, and were herded upon it by his vaqueros. That at stated periods, according to the recognized customs of the country, his cattle were driven together from the external limits of the ranch; and that in every way in which a Californian could use land, he exercised acts of ownership over it. That the ranch was recognized as being in his possession; and so notorious was the fact, that an old resident of the country swears, "that it was so fixed in his mind that he was the owner that he took it for granted." After the death of Estudillo, we find his representatives residing upon and claiming the whole of it; and, though intrusions soon commenced, in the hope of retaining it renting a portion of it, and surrounding with fences several thousand acres, portions of which are now "settled" upon as "vacant public lands."

If the foregoing facts do not constitute possession, then no occupancy can be established by a California ranchero; for nothing short of actual inclosure or cultivation would suffice. We consider the evidence sufficient to establish a prior and peaceable possession, and its extent, so as to authorize the plaintiff to maintain this action. The rodeo boundaries have been established so clearly by the testimony, that the plaintiff might have recovered to the extent of them. But he has himself introduced a written title, and to that we must look. The grant calls for the boundaries of the ranch,—the arroyos of San Leandro and San Lorenzo on the north and south; on the west, the bay; and on the east, the derramadores, or springs of water, and from thence a line, southerly, drawn to the San Lorenzo so as to exclude the possessions of the Indians. These limits on the east are considerably within the line of the crest of hills which, according to the testimony, forms the eastern rodeo boundary. But the plaintiff producing this grant, must be restricted to the boundaries thereon designated. At the time of the grant, one or two Indian families inhabited an adobe house on the land at the base of the eastern hills, and had some cultivation near the house, and at a bend of the San Lorenzo, at a point called "Paso Viejo." It is not easy to ascertain what at that time was the precise extent of the Indian possessions. It is practicable, however, to adopt a line which will exclude the land which, under any reasonable view of the evidence, they could have occupied. With the exception of the uncertainty which attends the precise location of this eastern line, the boundaries of the ranch have been ascertained by proof of what we consider as complete possession as could be furnished by any California ranchero. The quantity of land granted to Estudillo was one league, a little more or less. It appears from the testimony, that the actual quantity exceeds that amount but a fraction; and may be deemed to be covered by the words "more or less," inserted in the grant. The complete possession of all the land to the extent of three of the boundaries, and beyond the fourth, is established by proofs. It remains to inquire, after restricting the last-mentioned line to that called for in the grant, which of the defendants are intruders upon it. A stipulation by the parties has been filed, in which it is agreed that the defendants respectively occupy the several tracts designated by their names on a map marked A, to which reference is made. On inspecting this map, we find some of the defendants in the occupancy of land which at the time of the grant was probably in the possession of the Indians. We shall therefore direct a verdict of "Not guilty" against them. Against those who are clearly in possession of land not excluded by the grant by reason of the

Indian possessions, a verdict of "Guilty" must be rendered. We have fixed the line according to the limits as ascertained by the testimony in this case, leaving its precise location to be established hereafter as between the government and the parties interested in its precise location.

The attorneys of the plaintiff will draw the form of a verdict for signature in favor of William Campbell and William Carhart, and against all the other defendants, who, by the stipulation entered into, it is agreed are in possession of the premises.

After the opinion of the court had been read, the counsel for the defendants moved the court to reconsider so much thereof as related to the eastern boundary line of the ranch, whereupon the court, after argument of counsel, took the same under advisement, and afterwards delivered the following, affirming the former opinion of the court:

In this case we have been asked by defendant's counsel to reconsider our views in relation to the location of the eastern line of the San Leandro ranch. The line, as fixed by us, excludes two of the defendants and includes the others; and it is urged that a re-examination by the court may result in so giving the line as to exclude from the operation of the verdict an additional number of the defendants. We have carefully examined this question, and now give the result. We are free to confess that the precise location of the eastern line is not easy of accurate ascertainment. This arises from the difficulty of establishing with precision the exact extent of the Indian possessions at the time of the issue of the grant. The testimony on this point is conflicting; but after a careful review of it our conclusion is, that the possessions of the Indians were confined to the adobe house which they occupied, and its immediate vicinity, and to some cultivated spots of land near the bend of the San Lorenzo creek, at a point known as the "Paso Viejo." Numerous witnesses confine them to those points. One or two of the witnesses testify to a small cultivation almost due west from the springs, and about half a mile therefrom. But this is opposed by many witnesses, and is repudiated by the fact that to run the line so as to take in this isolated spot would be to so distort the line, as we consider it designated on the map, as almost to destroy its identity. The defendants' counsel, in his brief, relies on a line deposed to by one of the witnesses, Ignacius Peralta. That this line was not intended to separate the Indian possessions from the land of Estudillo is evident, because the witness tells us that he knew the ranch of Estudillo in 1840, 1841, 1842, and 1843, and that he knew no line dividing the land of Estudillo from that of the Indians, although the witness had lived for twelve years within two hundred varas of Estudillo. The line which the witness deposes to is evidently a line known in the case as the "longitude line," which, with the "latitude line," were run by the functionary Fernandez for the information of Governor Alvarado. This line of longitude, denominated in the counsel's brief, the "Peralta line," is urged as the line delineated in the desino of Estudillo's expediente, and described in the grant. This line is designated in the grant, using the words into which the original has been rendered by the counsel, "a line on the east by the spillings of the springs that are near the house occupied by the Indians, and on the south by a line drawn from thence to the San Lorenzo so as to exclude the land occupied by the Indians which are located there." Assuming this translation to be correct, there are objections which oppose themselves to the location of this specific line.

1. To adopt it would be taking a part of two lines designated on the desino to form the boundary, viz.: the line of latitude to the springs, and thence leaving that line, to adopt the line of longitude from that point to the mouth of the San Lorenzo creek.

2. Such line must at the springs diverge to the west, and run to the mouth of said creek, instead of running to the creek as called for; this would be to repudiate the creek as a boundary, whereas the desino has written on it all along that creek these words, "Arroyo de San Lorenzo lindero con San Jose;" thus distinctly declaring the line of that creek to be the boundary between the ranch and San Jose.

3. This line would exclude a considerable portion of land intermediate the springs and the creek, which, confessedly, has never been in the possession of the Indians.

4. It is not probable that the grant would call for the creek parallel as it runs to the opposite creek of San Leandro, as the terminus of the line called for, instead of its mouth, if the latter was intended.

These are some of the difficulties which suggest that this longtitude line is not the one designated on the map. There are other considerations, growing out of the grant itself. To arrive at a correct translation of it, we have invoked the aid of competent, skillful, and disinterested persons. The defendants have rendered the words "por la parte del Sud," in the grant as meaning "on the south," equivalent for the southern boundary. Now, we understand these words in the connection in which they are used, to be translated differently; and, further, we consider that by the terms of the grant, the line to be run from the springs of water is to be a straight line. The grant, including the words "por la parte del Sud," calls for the boundary on the east,—the drawings (derramadores) of the springs in the lands occupied by the Indians settled there, from this point in a straight line towards the south, to the Arroyo de San Lorenzo, without including the land cultivated by the

Indians. By this description the line is delineated as a "straight line" from the starting point to the creek, deflecting only so far as to exclude the Indian possessions. Calling for a "straight line," it would seem that a direct one was intended, departing only from a direct line to the extent of excluding the Indian possessions. Now, the line of longtitude would, if adopted, traverse the greatest distance which at any point intervenes between the starting point and the creek, viz. its mouth.

Again, the line called for by the grant is to go south; and the longtitude line, if adopted, would run west from the derramadores to the mouth of the creek. We have seen that the map itself calls for the San Lorenzo as the boundary in terms, and by having in writing on its face along the creek, the words we have quoted. Again, in the report of José Castro to the governor, it is stated that the Mexican functionary Fernandez, had delineated two lines on the desino, one of longtitude and the other of latitude, leaving the selection to his excellency. By his marginal decree, the governor selects the line north and south as the line of W. Castro's land. This line, it is true, was selected some time prior to the grant to Estudillo; but it serves to show the understanding of the government as to the dividing line between the land granted and the adjoining land. This line is not only delineated on the map which accompanies the expediente of William Castro, but is found also on that of the expediente of Estudillo when he obtained the grant for the adjoining land. Governor Alvarado, who issued the grant, swears to the San Lorenzo as the southern boundary. Numerous witnesses depose to the same fact. Ignatius Peralta, one of the defendants' witnesses, states that for a long period he lived in the immediate vicinity of Estudillo, and that during that time the pasturage of Estudillo's cattle extended over the plain up to the San Lorenzo on the one side, and the San Leandro on the other. Durante Valencia, a witness, states that in 1842, with the permission of Estudillo, she cultivated lands on the bank of the San Lorenzo; and another witness, A. C. Smith, deposes that in 1851 Estudillo had forty acres in barley on the same creek. The occupancy of Estudillo up to the San Lorenzo, and its notoriety as the southern boundary, have been established by testimony. These facts, connected with what we consider the correct interpretation of the grant, confirms us in the conclusion that the line approximating to what is termed the adobe line, is the true line; and the most careful examination of the testimony and the language of the grant, have brought us to the conclusion that protection has been afforded to the former Indian possessions by fixing the line designated in the grant as the eastern boundary, by which all the defendants, save Campbell and Carhart, have been brought within the limits of the San Leandro ranch.

NOTE [from original report]. Affirmed [Campbell v. Boyreau,] 21 How. [62 U. S.] 223, on a collateral point. No decision given on the rulings of the court below, on the law and facts of the case.

[NOTE. Affirmed by the supreme court on error without expressing an opinion as to the facts or the law decided by the circuit court, on the ground that none of the questions, whether of fact or of law, decided by the court below, could be re-examined and revised upon the writ of error, for the reason that, by the established principles governing common-law proceedings, no question of law can be reviewed and re-examined in an appellate court upon writ of error, except only where it arises upon the process, pleadings, or judgment in the cause, unless the facts are found by a jury, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court; that the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act, such questions being exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for a decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. Following Guild v. Frontin, 18 How. (59 U. S.) 135; Suydam v. Williamson, 20 How. (61 U. S.) 427; Kelsey v. Forsyth, 21 How. (62 U. S.) 85; Campbell v. Boyreau, 21 How. (62 U. S.) 223.

[By act of March 5, 1865, c. 86, § 4 (13 Stat. 501), the parties or their attorneys may waive a jury in a civil case by filing a stipulation to that effect with the clerk. The supreme court cannot, since the passage of this statute, consider the correctness of rulings at the trial of an action by the circuit court without a jury, unless the record shows a compliance with the statute. Flanders v. Tweed, 9 Wall. (76 U. S.) 425; Kearney v. Case, 12 Wall. (79 U. S.) 275; Gilman v. Illinois, etc., Tel. Co., 91 U. S. 603; Madison Co. v. Warren, 106 U. S. 622, 2 Sup. Ct. 86; Alexander Co. v. Kimball, 106 U. S. 623, 2 Sup. Ct. 86; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296; Boogher v. New York Life Ins. Co., 103 U. S. 96; Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307.

[This act, however, has no application to the district court, and the rulings of that court can only be reviewed by the circuit court where the facts have been found by a jury or agreed on by the parties. Blair v. Allen, Case No. 1,483; U. S. v. 15 Hogsheads, Case No. 15,090; Wear v. Mayer, 6 Fed. 658; Town of Lyons v. Lyons Nat. Bank, 8 Fed. 369; Doty v. Jewett, 19 Fed. 337.]

BRACHEN (SNYDER v.). See Case No. 13,153.

BRACHEO (DOUBLEDAY v.). See Case No. 4,018.

Case No. 1,761.

BRACKEN v. JOHNSTON.

[4 Dill. 518; 15 N. B. R. 106; 5 Am. Law Rec. 461; 3 Month. Jur. 629; 4 Cent. Law J. 9; 3 Am. Law T. Rep. (N. S.) 537; 11 Am. Law Rev. 609; 3 N. Y. Wkly. Dig. 573; 1 Cin. Law Bul. 358.] [1]

Circuit Court, D. Iowa. Oct. Term, 1876.

BANKRUPTCY—ATTACHMENT OF STATE COURT DISSOLVED BY BANKRUPTCY PROCEEDINGS.

1. An attachment of the property of a debtor is ipso facto dissolved if proceedings in bankruptcy are commenced within four months thereafter, upon which the debtor is adjudicated a bankrupt, and a deed of assignment be made. Rev. St. § 5044; section 14 of original bankrupt act [14 Stat. 522].

[Cited in Re Hazens, Case No. 6,285; McCord v. McNeil, Case No. 8,714; Hatfield v. Moller, 4 Fed. 719.]

2. A creditor who proceeds in a state court by a writ of attachment on which he seizes the property of his debtor, and realizes his judgment obtained in such a suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor, appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit, or make any attempt to arrest the attachment proceedings. Wilson v. City Bank, 17 Wall. [84 U. S.] 473, and Eyster v. Gaff, 91 U. S. 521, distinguished.

[In error to the district court of the United States for the district of Iowa.]

This case comes before the circuit court on a writ of error to the district court. The plaintiff in error, as assignee of Browne, a bankrupt, sued the defendant Johnston, for the value of goods seized under a writ of attachment against Browne in favor of Johnston, in the state court, and sold under the proceedings in that case for Johnston's debt. The district court, to which the case was submitted without a jury, made the following finding of facts and conclusions of law, on which it rendered judgment [unreported] in favor of defendant: 1. William P. Browne, the bankrupt, resided at Tama county, Iowa, where also live the parties to this suit. On the 23d of September, A. D. 1872, defendant Johnston commenced suit against Browne, in the district court of Tama county, upon an alleged indebtedness due upon the sale of grain, and sued out of said court in said suit a writ of attachment, which, under the direction and by the personal procurement of the defendant Johnston, was levied upon property described in the petition. 2. That on the 21st day of January, A. D. 1873, and within four months of the suing out of said attachment, a petition in bankruptcy was filed by certain of Browne's creditors, in the United States district court, from whence this suit comes, praying that Browne be adjudged a bankrupt. 3. That on the said 21st day of January, A. D. 1873, Browne was served with the original notice of the suit pending in the state court. 4. That on the 25th day of January, A. D. 1873, the order to show cause in the bankruptcy proceedings was duly issued, was served on the 8th day of February, A. D. 1873; and on the 14th day of February, A. D. 1873, the said Browne was, by order of the court sitting in bankruptcy, duly adjudged a bankrupt. 5. On the 18th day of February, A. D. 1873, Browne, the bankrupt, filed in the district court of Tama county, his answer in the suit brought against him by Johnston, contesting the claim upon which the suit was founded. On the 25th day of February, A. D. 1873, a trial was held in that court, when the issue above joined was found for the plaintiff Johnston, and a judgment rendered in his favor for $2,264.15 and costs, and an order for a special execution to sell the attached property. 6. On the 28th day of February, A. D. 1873, special execution was issued, which, under the direction and procurement of Johnston, was levied upon the attached property as the property of Browne; and afterwards, on the 22d day of March, A. D. 1873, the sheriff, under Johnston's direction, sold the property as belonging to Browne; that Johnston was present at the sale, bid upon some of the property offered, and received from the sheriff the avails of the sale; that the proceeds amounted to $2,349.40, and the costs of the suit and sale were $177.50. 7. That on the same 22d day of March, A. D. 1873, plaintiff was duly elected and qualified as assignee in bankruptcy of the estate of said Browne, and received his deed of assignment as provided by law. 8. That afterwards and previous to the commencement of this suit, plaintiff in error made demand upon said Johnston for a return of said property, which demand was refused and the action commenced. 9. That, at the time Johnston sued out the attachment, he had reasonable cause to believe Browne was insolvent. 10. That the defendant directed the sheriff in the levy of the attachment and execution, and that if Johnston is otherwise liable, his direction and control over the sheriff sufficiently appears.

The court below found as conclusions of law: 1. That the jurisdiction over the property acquired by the state court in the attachment proceedings was not divested by the bankruptcy proceedings. 2. That, under the judgment and order of the state court, the property attached was adjudged to be the property of the defendant in that case, Browne; and that his assignee in bankrptcy is estopped from questioning such adjudication, and that defendant Johnston obtained a good title to the said property under said sale, and that he is not liable to plaintiff in this action for either the property or its proceeds. 3. That the defendant is entitled to judgment for costs in this case against the plaintiff.

The plaintiff sued out a writ of error. [Judgment of the district court reversed.]

H. B. Fouke, for plaintiff in error.
James T. Lane, for defendant in error.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 11 Am. Law Rev. 609, contains only a partial report.]

MILLER, Circuit Justice. The question thus presented to me for consideration is very clear and simple in its statement, but none the less difficult of solution. It is whether a party proceeding by a writ of attachment, and seizing the goods of his debtor, and realizing by judgment and sale under execution the whole or part of his debt, is liable to an assignee in bankruptcy of the debtor, appointed under proceedings instituted in the bankruptcy court within four months of the levy of attachment, though no appearance or defence was made by the assignee in the attachment proceedings, or any attempt to arrest them. I say the question is one not easy of solution, because it occupies debatable ground, in which two important principles of the bankrupt law seem to come in conflict, namely: the principle that no person shall, by a writ of attachment against the bankrupt, obtain a preference for his debt over other creditors, unless issued more than four months before the commencement of the bankruptcy proceedings; and the principle that the state courts are not divested of their jurisdiction of cases pending in them by the initiation of bankruptcy proceedings against one of the parties to such a suit, unless it be brought to the notice of the state court by some appropriate proceeding in that case.

The first principle rests upon the language of section 5044 of the Revised Statutes, which is part of section 14 of the original bankrupt law. It reads as follows: "As soon as the assignee is appointed and qualified, the judge, or, when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same has been attached by mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

The other principle rests upon the fact in this case that no attempt was made, by the assignee or any one else, to bring to the notice of the state court the fact that the debtor had been declared bankrupt, and that it proceeded in its usual course of judgment, and execution of that judgment, without any apparent error or defect of jurisdiction in these proceedings, and upon certain opinions of the supreme court sustaining its right to do so.

If there can be found any middle ground by which both these principles can be left to their just and proper operation, we ought to adopt it in the solution of this case. I think there is such a ground. The two opinions of the supreme court in which the authority of the state courts has been most firmly sustained were probably delivered by myself. I mean the case of Wilson v. City Bank, 17 Wall. [84 U. S.] 473, and the case of Eyster v. Gaff, 91 U. S. 521. But in both these cases the proceedings of the court which were upheld were the exercise of the regular and ordinary powers of the court in rendering a judgment or decree against the party before it. And I still adhere to the doctrine that, if, by the usual process of the court, a plaintiff secures a judgment against the bankrupt, which judgment is of itself a lien, or by virtue of the levy of an execution becomes a lien, before the commencement of the bankruptcy proceedings, that lien must prevail; or when the state court, in pursuance of a jurisdiction invoked before the bankruptcy proceedings commenced, enforces a lien which has by the bankrupt law itself a priority over other creditors, as a mortgage or other specific lien, its proceedings are valid and effectual notwithstanding the commencement of proceedings in bankruptcy while they are pending. But there is a very marked difference in the favor with which such a lien should be regarded and a lien obtained by the extraordinary and summary proceeding of attachment, in which the plaintiff, being made aware of the failing condition of his debtor, takes the remedy into his own hands, and, by an ex parte proceeding, appropriates, by his own volition, the debtor's property to the exclusive payment of his own debt. And it was precisely this proceeding which the provision I have cited from the bankrupt law was intended to prevent, by declaring that all such attachments are dissolved by the assignment of the bankrupt's property, if made within four months next preceding the commencement of the bankruptcy proceedings.

The purpose of the act was to put a creditor who undertook to secure a lien by attachment, in precisely the same condition as one who took a preference or lien by the consent of the debtor. In both cases the creditor proceeded at his own hazard. If the debtor escaped the bankruptcy court for the prescribed time, the preference or lien remained valid. If he did not, it is void absolutely. The language of the section I have cited is very strong in this direction, since to repel the idea that the attachment is merely voidable, it is declared that the making of the deed to the assignee shall, by operation of law, vest title to property in the assignee, and dissolve any attachment made within the four months. I think this was intended to mean that, in the contingency mentioned, the attachment was ipso facto dissolved, and the property attached became freed from the effects of the suit, and that it required no judicial proceeding to restore it to that condition.

This view of the matter does not divest

the court in which the attachment suit is pending of its jurisdiction over the case and the parties. It merely declares that the title to the attached property having been vested, by proper judicial proceeding, in the assignee, the lien of the attachment is at an end. The court can proceed to judgment against the party, and issue its execution. If property liable to it can be found, it can be enforced. If not, it is like the judgment in any other case against a debtor without means. And there is no hardship in this, for the reason that the attaching creditor was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months. This view, I think, reconciles the two opposing principles. It leaves the general jurisdiction of this state court, or any other court in which the attachment suit is pending, unaffected; and it can proceed as if no bankruptcy proceeding had been commenced, and its judgment is valid in every other respect except that the lien on the property is gone. It gives full effect to the purpose of the bankrupt law, that no such attachment shall prevail when instituted within four months before that law is called into operation, and in subordination to which principle the attaching creditor instituted his proceedings. The present case very forcibly illustrates the necessity of adopting this rule, if full effect is to be given to the provision of the bankrupt law, for the finding of facts shows that, though the bankruptcy proceedings were instituted within four months after the levy of the attachment, the assignee was not appointed until the very day the property was sold under Johnston's execution. It was, therefore, impossible that the assignee could have interposed at any stage of the proceeding in the state court, to bring to its notice the bankruptcy proceedings, or to procure an order dissolving the attachment, and the creditors whom he represents were without remedy, notwithstanding the positive declaration of the bankrupt law. I am of opinion that, on the facts found by the district court, the defendant, Johnston, was liable for the value of the goods, as evidenced by the sum for which they sold. The judgment of the district court is reversed, and the case is remanded to the district court, with directions to enter a judgment against him accordingly. Judgment accordingly.

NOTE [from original report.] See McCord v. McNeil [Case No. 8,714]; In re Hazens [Id. 6,285].

BRACKENRIDGE (FRAZIER v.). See Case No. 5,071.

BRACKENRIDGE (PAGE v.). See Case No. 10,661.

BRACKETT (DOWNER v.). See Case No. 4,043.

Case No. 1,762.

BRACKETT et al. v. The HERCULES.

[Gilp. 184.] [1]

District Court, D. Pennsylvania. Nov. 26, 1830.

SEAMAN—WAGES—LIEN ON PROCEEDS OF WRECK —MARITIME LIENS — ADMIRALTY — MONEY IN REGISTRY—DISTRIBUTION.

1. Where a portion of a vessel which has been wrecked, is saved by the exertions of the seamen, brought to the United States, and sold, they have a lien on the proceeds for their wages.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421.]

[See Pitman v. Hooper, Case No. 11,185; The Bowditch, Id. 1,717; The Massasoit, Id. 9,260; Cartwell v. The John Taylor, Id. 2,482. But see The Mary, Id. 9,186; Hainey v. The Tristram Shandy, Id. 5,906; Reed v. Hussey, Id. 11,646.]

2. Where a portion of a vessel which has been wrecked, and the seamen who formed its crew, are both brought to the United States on board of another vessel, the master of such vessel has a lien on the property for the freight, but not for the passage money of the seamen.

[See Foster v. The Pilot No. 2, Case No. 4,980; Pitman v. Hooper, Id. 11,185; The Sailor Prince, Id. 12,218.]

3. Where a surplus remains in court from the proceeds of a sale, made for the benefit of a lien creditor, it may be appropriated in payment of other liens on the original property, but not of debts arising on contracts merely personal.

[Cited in The Fanny, Case No. 4,637; The Panama, Id. 10,703; Remnants in Court, Id. 11,697; Cox v. Murray, Id. 3,304; The Velocity, Id. 16,911.]

[See The Lady Franklin, Case No. 7,983; The Stephen Allen, Id. 13,361; Harper v. The New Brig, Id. 6,090; Gardner v. The New Jersey, Id. 5,233; The L. B. Goldsmith, Id. 8,152; Schuchardt v. The Angelique, 19 How. (60 U. S.) 239.]

4. Where a sum of money in court, has been decreed to be paid to a libellant, the court will not, on application of a creditor, appropriate it to a debt due by the libellant.

5. A contract between a passenger and the master of a vessel for the passage, is a personal contract, not cognisable in the admiralty.

[Cited in Cox v. Murray, Case No. 3,304; The Velocity, Id. 16,911. Disapproved in Stone v. The Relampago, Id. 13,486.]

In admiralty. On the 22d June, 1830, the libellants, who had been seamen on board the American brig Hercules, which was wrecked on the 25th April, 1830, at Tuxpacoalco, on the coast of Mexico, filed their bill against sundry articles saved from the brig and brought into the port of Philadelphia, on board of the schooner Packet, in which vessel the libellants also returned. The libellants claimed the full payment of their wages, and salvage for the articles saved. On the 25th June, the articles in question were sold by the marshal, under an order of the court, for the sum of nine hundred and thirty-four dollars and thirty-six cents. One half of these proceeds were paid, the libellants assenting thereto, to Samuel Baldwin, the own-

[1] [Reported by Henry D. Gilpin, Esq.]

er of the schooner Packet, for bringing the goods safely in the schooner to this port. Out of the remaining half, and also by consent of parties, two hundred and thirty-four dollars and thirteen cents were paid to the libellants. The residue remained in court to await a final decree. On the 26th June, Samuel Baldwin, as owner of the schooner Packet, and Constant Chase, master of the brig Hercules at the time of the wreck, filed claims against the fund remaining in court; both praying that the passage money of the libellants might be deducted from the fund, and paid to the said Samuel Baldwin.

Mr. Grinnell, for libellants.

J. R. Ingersoll, for respondents and claimants.

HOPKINSON, District Judge. The libel in this case, filed on behalf of Joshua Brackett, Frederick Vandefort, Ebenezer Lakeman, Mark Henckle, A. P. Dole, Nicholas Read, Edward S. Carr, and James Wheaton, sets forth: That on the 21st October, 1829, some of the libellants shipped, at the port of Boston, on board the brig Hercules, Constant Chase, master, on a voyage described in the libel, at certain wages also set forth; others of them shipped at Savannah; and one of them at Havre de Grace. That on the 25th April, 1830, the brig, while proceding on her voyage, was wrecked near Guazacoalco, and that certain enumerated articles were saved from the wreck, which have been brought into the port of Philadelphia. The libellants state that they were employed in saving and securing the said articles until about the 28th April, 1830, and arrived at Philadelphia on the 17th June. The prayer of the libel is, that the articles so saved, and now in this port, may be attached; and that a decree be made that the wages due to them be paid thereout. They also claim a salvage on the articles saved.

The claim and answer of Constant Chase, the master of the brig, admits that the libellants were severally shipped on board the brig as they have set forth, and on the voyage described. It is alleged that Frederick Vandefort, Ebenezer Lakeman, and Mark Henckle, left the brig one afternoon without liberty; that they came on board in the evening after dark; that next morning, after orders to go to work, Vandefort and Lakeman refused to do any duty; and that it was necessary to put them in prison. This happened at Savannah. They remained in prison about eleven days, when the vessel was ready to sail. She sailed and arrived at Havre, where she remained about six weeks. At Havre, Vandefort left the brig without liberty about the 1st February, and sprained his ancle while absent, which confined him for thirty days, doing no duty. The respondent paid twelve dollars for his board on shore, and two dollars and twenty-nine cents for his doctor. Sometime in February, Lakeman also was absent without liberty, and in a fight was so injured as to be kept from duty eight days. The brig sailed from Havre on the 2d March for Guazacoalco, where she arrived on the 16th April, and anchored outside of the bar. On the 24th a gale came on, by which she was driven on the beach and wrecked. The materials were got on shore on the 28th. The respondent endeavoured to sell them, but could not. He therefore made an arrangement with the owner of the schooner Packet, to bring the materials to the United States. A copy of this agreement is annexed. The respondent further states, that he applied to the owner of the schooner Packet; stated to him, that the men would die, if they should be left there; and referred him to the men themselves for a contract for their passage, which he understood was made afterwards. He understood Mark Henckle to say, that if he could get away in the schooner, he would give all he had coming to him in the brig. The schooner had six persons, all told, as her crew. The men were brought to Philadelphia and safely landed there. The usual price of a passage on deck is thirty dollars. The answer prays that a deduction may be made from the fund, out of which their wages are payable; and that the amount of the passage money may be decreed to the owner of the schooner Packet.

A claim and answer has also been filed by, or on behalf of, Samuel Baldwin, owner of the schooner Packet. In it he sets forth; that on or about the 16th May last, an agreement was made between him and the libellants for their transportation to the United States; that they came out under that contract and were safely landed in the United States at Philadelphia on the 17th June last. He then prays that out of the fund now under the control of the court, so much may be decreed to him as will pay the amount of the passage money, each of the libellants being charged for himself. The respondent alleges that the possession of the materials has never been parted with, further than to place them in the hands of an auctioneer for sale, subject to the direction and control of the respondent; that he is advised that his lien for freight and passage money remains; and that the said fund is subject to the disposition of this court.

The replication of the libellants admits that they were brought in the schooner Packet from Guazacoalco to Philadelphia; but they deny that any contract for the transportation was made between them and Samuel Baldwin; and they further allege, that they assisted in navigating the schooner on her passage from Guazacoalco.

The contract referred to, made between Captain Chase and Samuel Baldwin, makes no provision for the passage of the crew of the Hercules, but contains the terms on which the latter will bring to the United States the articles saved from the wreck. This con-

tract has been fully complied with, and Samuel Baldwin has received one half part of the proceeds of the sales of those articles, according to the terms of the contract.

The claim of Samuel Baldwin, to be paid for bringing the libellants home, rests on his averment and proof, that an agreement was made between him and them for their transportation to the United States, by which, according to his proof, they were severally to pay him twenty dollars for their passage. Although the evidence in support of this agreement is not explicit or clear, yet, as the demand is altogether equitable in its principle, and reasonable in the amount, I shall consider that the libellants are truly indebted to Captain Baldwin in the sums he claims; that is, twenty dollars each, for bringing them in his schooner Packet from Guazacoalco to Philadelphia. The question for decision therefore is reduced to this point; whether or not, this court is authorised and required to order, that this claim shall be paid and satisfied out of the funds now in court, which proceeded from the sale of the articles brought home in the Packet, and saved from the wreck of the Hercules. On the arrival of the schooner at this port, the articles were landed and put in a storehouse, where they were attached by process from this court, issued on the petition of the libellants, and afterwards sold by the marshal, under the decree of the court. It is a question of law to be decided on settled principles, as I do not find that the precise case has ever been determined.

The original proceeding was a suit by the libellants against the property of the owners of the brig Hercules, for the recovery of wages alleged to be due to them for services rendered on board of the said brig. It is not questioned that they have a lien on this property for their wages. In this suit, such proceedings have been had, that the goods proceeded against were sold by the officer of the court, and the money brought into court to answer the claims of the libellants; here a third party steps in, and gives the court to understand that these libellants are severally indebted to him in a certain amount, and prays the court to satisfy these debts out of the moneys which may be awarded to the libellants, on their claim for wages; that is, the court, in this collateral way, are to try another cause, thus ingrafted on one properly before it; to decide that cause; and to execute their judgment by laying their hands on the money in court, and diverting it from the parties to whom their decree has awarded it, to pay their debts due to a person not a party to the suit in which the money was recovered. If the court may do this, a case can hardly occur in which it could be more justly done than in the present. The libellants have received an essential service from the claimant, whose demand for remuneration is proved to be reasonable; and the refusal to pay it has no warrant in equity or good faith. I am, however, bound to make my decree by the established principles of law, and not by my sense of what is right and just between the parties.

I know of no cases in which this court has undertaken to distribute moneys in court, in payment of a debt of one of the parties to a third person, except where such moneys are what is called surplus, or remnants; that is, money remaining after the satisfaction of the decree, under which and for which the property that produced the money was sold. The law of such cases was well considered in the case of Gardner v. The New Jersey [Case No. 5,233]; and, I believe, has remained as there pronounced, to this period, unimpeached in this district. The vessel was sold on a decree for wages. After payment of the sums adjudged to be paid to the libellants by the decree, there remained in court a surplus or remnant of money, the proceeds of the sales. The master filed a petition, stating, that during the voyage he had expended two hundred and fifty-seven dollars for pilotage, mariners' wages, and other things for the use of the ship. The physician claimed also one hundred and sixty-seven dollars, as due to him for services on board. They both prayed to be paid out of the surplus moneys remaining in court, from the sale of the ship. These claims were good and valid against the owner of the ship, to whom the surplus belonged. The judge says, that when he first came into the court, he had, in several instances, distributed surplus moneys under the idea that he had power to do so. This practice soon involved him in many difficulties and mistakes. He therefore settled some general rules for such cases; and the rule he adopted was, "that it shall appear, that a sum, claimed out of a surplus or remnant, is either of itself or in its origin, a lien on the ship, or other thing out of which the moneys were produced." He justifies going thus far by a reference to the civil law, the English chancery, and even the courts of common law. It seems to me to be an equitable rule, for as by the act of the court, the thing on which the lien rested, has been disposed of and taken from the creditor to satisfy a prior right or lien, it is just, that what shall remain, after that prior right is satisfied, should be appropriated to the subsequent claim and lien. The judge thought that the advances made by the master to mariners, and advances for necessaries in foreign ports, are liens on the ship. If the master pays demands, which were a lien on the ship, he represents the claimants, and the lien continues on the moneys produced by the sale of the ship. But he is of opinion that he could not award, from the surplus, the money due to the master for his own wages, because his contract is clearly personal, made with the owners, and not on the credit of the ship. On these princi-

ples, the judge declared that there was no foundation for the claim of the physician. He says; "if claims or liens are legally attached to things or moneys under the cognisance, or within the jurisdiction of the admiralty, this court has power to decide respecting them. But it does not follow, that claims independent of such things, or moneys produced from them, and mere personal demands on their owners, are within the reason of, or entitled to, the remedy prescribed by this principle." The physician could not have sued in the admiralty for his demand, which is personal on the owners of the ship.

In the case of Wolf v. Summers, 2 Camp. 632, Justice Lawrence says: "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be paid for carrying the man and his luggage."

In the case before the court, the claimant, Captain Baldwin, has been paid for carrying the goods or things, which have produced the money in court; one half for bringing the whole, according to his contract. The passage of the men has no connection, either in fact or in law, or by the terms of his contract, with the transportation of the goods. On the goods, which have been sold by the decree of this court, Captain Baldwin had no claim of any sort. Their freight has been paid, and he was bound to deliver them at Philadelphia, for the use and benefit of the owners, as their property. He now claims the proceeds, not for any demand he has against the articles or the owners of the articles, but for the passage of the sailors, to whom they did not belong, and with whom he had a personal contract for bringing them to the United States. In making this contract he had no reliance on, he gave no credit to, these goods or their proceeds. These articles would not have been answerable, in the hands of the owners, for these debts of the sailors; how then can they be so here? Captain Baldwin could not, on any principle or in any shape, have proceeded against them in this or any other court, for these debts. There never was any lien on them for this demand; they could not have been detained from the owners on this account, who, on paying their freight, according to the contract, would have received them clear of any other charge by the carrier.

Nor has this court any jurisdiction to try and determine this demand. It is strictly a personal contract, not made at sea, nor for any cause cognizable in the admiralty. It must be prosecuted before a common law tribunal, in like manner as any other personal contract and debt. It is true the money now in court belongs to these men, by virtue of the decree of the court; but by what authority can I undertake to pay it to a particular creditor, or to distribute it among all their creditors? In the language of Judge Peters, I should soon "be involved in many difficulties and mistakes," by assuming this office. I must try the case of every creditor preferring a claim.

This is certainly a novel case. No claim like the present has ever before, in my knowledge, been presented to a court of admiralty. It is not a case of surplus and remnants, in which the petitioner, having a claim against the defendant in this court, asks for the money, which shall remain after satisfying the decree of the court in favour of the libellant; such creditor or petitioner, having had a claim or lien on the property, from which the moneys were produced. The peculiar feature of this case is, that the petitioner does not ask for the surplus funds of the defendant, but for the money which has been ordered and adjudged to be paid to the libellants. It is not a case of surplus or remnants to be appropriated in favour of a creditor, having a secondary right in the goods sold, but an application to take from the libellants the money which has been decreed to them, and appropriate it to the payment of one who claims to be their creditor. This is going far beyond any case of surplus and remnants, and has never, I believe, been attempted by any court of admiralty, which, in so doing, would try a cause collaterally, of which directly it could have no jurisdiction. As far as this power of distributing surplus funds has been exercised by the court, I am willing to continue it, but I have no disposition to carry it further. I must dismiss the claim of Captain Baldwin, although I should have been pleased to have done otherwise, as it appears to me to be just and moderate, and the objection to it altogether without equity or good reason.

Decree: That the wages of the libellants be allowed, to be paid according to a settlement agreed on by counsel; and that the claims of Samuel Baldwin and Constant Chase be dismissed with costs.

Case No. 1,763.

BRACKETT v. UNITED STATES.

[Hoff. Land Cas. 85.][1]

District Court, D. California. Dec. Term, 1855.

PUBLIC LANDS—MEXICAN GRANTS.

Objection removed by testimony taken in this court.

Claim for a half-league of land in Marin county, rejected by the board, and appealed by the claimant [Joshua S. Brackett].

William Blanding, for appellant.

S. W. Inge, U. S. Atty., for appellees.

Before HOFFMAN, District Judge.

The claim in this case is for a part of the rancho of Soulajulle, originally granted by

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

Governor Micheltorena to Ramon Mesa. Various other claims have also been made for other portions of the same rancho, and the testimony in this case is by stipulation agreed to be used in those cases as if specially taken and filed in each. This claim was rejected by the board, not on the ground of the invalidity of the original title, but because it did not appear from the mesne conveyances that the land claimed was a part of the original tract granted to Ramon Mesa. The further evidence taken in this court removes that objection, and the only question that remains to be decided is as to the validity of the original grant.

The title given to the interested party is produced, and although the evidence of the signatures of the governor is not as satisfactory as could have been wished, or as we had a right to expect from the facility with which Micheltorena's and Jimeno's signatures could at any moment be proved in this city, yet as no opposing testimony is offered on the part of the United States, I am inclined to agree with the board in considering it sufficient, taken with the other testimony in the case, to establish the authenticity of the grant. Had the district attorney or law agent entertained any doubt of the genuineness of the grant, it is but reasonable to suppose that evidence would have been offered to show that the signatures affixed to the title of the grantee were forgeries. The illiterate character of the witness himself repels the idea that he could have forged the document, and no other person concerned in such a fraud would have trusted the proof of its genuineness to the vague and unsatisfactory testimony of such a witness. But the strongest testimony in confirmation of the claim is found in the facts that the expediente is found in and duly produced from the archives, and that the grantee has occupied and cultivated his land from the time of his grant until the time he sold it to the various claimants now before this court. The conditions of the grant having thus been complied with, and the grant itself appearing to be genuine, there is no obstacle to the confirmation of the present claim, or to so much thereof as may be included within the limits of the original grant.

Case No. 1,764.

BRADBURY v. GALLOWAY.

[3 Sawy. 346; 12 N. B. R. 299; 1 N. Y. Wkly. Dig. 34.][1]

District Court, D. California. June 8, 1875.

BANKRUPT LAW — AMENDMENTS OF JUNE, 1874 — PROCEEDINGS TO REALIZE ESTATE—FRAUDULENT PREFERENCE.

1. Section 10 of the amendatory act [18 Stat. 180], changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect.

[Cited in Tinker v. Van Dyke, Case No. 14,058.]

2. Section 11 of the same act substituting "knowing" for "reasonable cause to believe," if it has any, has no greater retroactive force than the similar provision of the new section 39, and does not affect transactions happening before December 1, 1873, in cases where bankruptcy proceedings were begun before that date.

[In bankruptcy. Action by W. B. Bradbury, assignee in bankruptcy, against James Galloway, to recover assets alleged to constitute a fraudulent preference. Defendant's demurrer to the complaint of the assignee overruled.]

Wm. H. Fifield, for plaintiff.

Joseph Naphtaly, for defendant.

HILLYER, District Judge. The petition for an adjudication of bankruptcy against the bankrupt, Julia Lyons, was filed April 9, 1873, and the fraudulent preference is alleged to have been given January 3, 1873, more than two but less than four months before the filing of the petition.

If the right of the assignee to recover is to be controlled by section 35 of the bankrupt act [of 1867 (14 Stat. 534)] as it stood before the passage of the amendments of June, 1874, the demurrer must be overruled; if by sections 10 and 11 of the amendatory act, sustained. The question presented, therefore, is whether those sections of the amendatory act are retroactive and affect transactions done and proceedings commenced before the passage of the act of June, 1874, and before the first day of December, 1873. The bankrupt, Julia Lyons, was not adjudicated such until July 16, 1874, and the learned judge of this court then held that the case was not affected by section 12 of the amendatory act, because the petition had been filed before the first day of December, 1873. That section is by its terms made applicable to all cases of involuntary bankruptcy commenced since the last mentioned date. On the other hand, section 10, changing the period of four to two months, is by its terms not to take effect until two months after the passage of the act. So far, then, as section 10 is concerned, there is no room for doubt as to the intention of the legislature. The language shows clearly that it is to have no retrospective operation, and is not to affect transactions happening before the time fixed for it to take effect. To give the section any retroactive force is to accuse congress of the absurdity of saying in terms that it should take effect prospectively, when the intention was that it should take effect retrospectively. And it would be idle to fix a time in the future for a provision to take effect if when it did go into effect it was to operate on transactions occurring not only before, but after its passage, and up to the time fixed for its go-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 34, contains only a partial report.]

ing into operation. I have no doubt on this point, and hold that section 10 does not affect transactions past when it took effect, or proceedings commenced before that time. As to such matters section 35 is not repealed or amended. See Singer v. Sloan [Case No. 12,899]. Section 11 of the act of June, 1874, substituting "knowing" for "reasonable cause to believe," in section 35, has no time fixed for going into operation, and according to the general rule takes effect from the time of its passage. It is urged, however, that this suit, brought since the passage of the act of June 22, 1874, though based on acts done before that time and before December 1, 1873, can only be maintained by alleging and proving actual knowledge on the part of preferred creditors that a fraud was intended, and not merely "reasonable cause to believe."

In a case in the eastern district of Wisconsin, like the one at bar, except that the suit by the assignee was begun before June 22, 1874, it was held that the amendatory act did not affect the right of the assignee to sue and recover upon the grounds and provisions contained in sections 35 and 39, as they stood before the amendments. Hamlin v. Pettibone [Case No. 5,995]. In Brooke v. McCracken [Id. 1,932] the bankruptcy proceedings were begun and the preference given after December 1, 1873, and it was held that the amendments to section 35 were not retroactive. The same conclusion was reached by the district court of Michigan, in the case of Van Dyke v. Tinker [Id. 16,849], a case which cannot be distinguished from this. The contrary was held in Singer v. Sloan, supra, upon a case like Brooke v. McCraken.

In compulsory proceedings it has always been held by the bankruptcy courts that sections 35 and 39 must be construed together in reference to suits brought by an assignee to recover from a creditor a fraudulent preference. The amended section 39 provides that the assignee may recover the preferred payment if the creditor had reasonable cause to believe the debtor insolvent and knew that a fraud on the act was intended. But this provision of the amended section only applies to cases of involuntary bankruptcy, begun since December 1, 1873. So that, in the present case, the provisions of section 39 as amended, in regard to knowledge on the part of the creditor, have no application and the bankrupt act would be inconsistent with itself if section 35 as amended should be construed to apply to involuntary cases begun before December 1, 1873, which is this case. It is plain enough that congress meant, in the amendments to section 39, to say that in involuntary cases the assignee might recover the property transferred only when the creditor had the actual knowledge prescribed, when the bankruptcy proceedings were begun after December 1, 1873. In cases arising before that date it would be directly opposed to the expressed will of the legislature, it seems to me, to apply the new rule of evidence touching knowledge on the part of the creditors, or to give to the amendments to section 35, in this particular, any greater retrospective force than the legislature had given to the similar provision of section 39.

There is another provision of law which [hereto, so far as I have read, none of the courts have noticed, yet it] [2] seems to have a direct bearing upon this question. It is section 4 of an act entitled "An act prescribing the form of the enacting and resolving clauses of acts and resolutions of congress and rules for the construction thereof" (16 Stat. 431), now section 13 of Revised Statutes, and reads as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Now, I do not think it can be doubted that a creditor who had received property from his debtor before June, 1874, and under such circumstances that it would be held an unlawful preference under the old section 35, had "incurred" a "liability" under the act to refund it to the assignee of the debtor, which could be enforced by a proper action. If so, there being no express provision in the repealing act extinguishing this liability, the conclusion is irresistible that it still exists, and that the repealed statute is still in force for the purpose of sustaining any proper action to enforce the liability. Whether the amendment requiring proof of actual knowledge, where before proof of reasonable cause to believe was sufficient, is important or merely verbal, is a question upon which very learned judges have differed. In the view I have taken of the other points raised by this demurrer it is unnecessary to decide that question, for whether material or not, it has been held that the amendment does not affect the transactions out of which this suit arises. Demurrer overruled.

BRADBURY (UNITED STATES v.). See Case No. 14,635.

BRADBURY (WARE v.). See Case No. 17,168.

BRADEN (FENTON v.). See Case No. 4,730.

[2] [From 12 N. B. R. 299.]

Case No. 1,765.

BRADFORD v. BOUDINOT.

[3 Wash. C. C. 122.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

EXECUTORS AND ADMINISTRATORS — POWER AND DUTIES — ALLOWANCE OF DEMANDS — EXECUTOR DE SON TORT.

1. Defendant obtained letters testamentary from the register's office in Philadelphia, to a supposed will of W. B., which, on an issue, was determined not to be the will of W. B. In relation to another supposed will, the same determination took place, and letters of administration to the estate of W. B., were then granted to the plaintiff. While the controversy as to the first supposed will was pending, the defendant took possession of the estate of W. B., and went on to administer the same, until the appointment of an administrator pendente lite, to whom the defendant delivered all the effects of W. B. The defendant having received letters testamentary on a will duly proved, was authorized to perform every act proper for an executor to do, notwithstanding the pendency of the question relative to the validity of the will.

2. The defendant was authorized, and it was his duty, (believing the paper to be the last will of W. B.) to support the first probate; and he is entitled to retain out of the estate, the expenses he was put to in that litigation; as also, the usual commissions for managing the estate while in his hands. There is no ground for considering the defendant an executor de son tort, in this case.

In equity. Bill for an account of the personal estate of William Bradford, which had come to the hands of the defendant. The case was, that upon the death of William Bradford, a will was found, in all respects regular, in which the defendant was appointed the executor. He accordingly proved the same in the register's office, and obtained letters testamentary, and possessing himself of the estate of the testator, proceeded to pay and receive debts, and in all respects to discharge the duties of an executor. Not long after the probate, the plaintiff obtained a caveat, (as the bill states;) and the register's court directed a feigned issue to the court of common pleas, to try whether this was the will of William Bradford. This question was finally decided, in the supreme court, not to be the will of said Bradford. A second will was then offered for proof by the executor named in it, which was finally decided not to be the last will; and administration was granted to the plaintiff. During the contest respecting the second will, an administrator pendente lite was appointed, to receive the estate and take care of it, to whom the defendant delivered over all the property not administered. The cause now came on, upon exceptions to the commissioner's report, made under an order of this court. The exceptions were as follows—1. To the allowance made for funeral expenses. The whole amounts to about 500 dollars, and includes the expenses of the widow during the funeral. 2. To other small sums, amounting in all to 215 dollars, having been expended by the defendant for fees, costs, and expenses, in the contest respecting the first will, on which he had obtained letters testamentary. It was contended, that the defendant was to be considered, after the repeal, as an excutor de son tort, entitled to credit only for debts paid. Godol. 50; Burn. Ecc. Law, 610. 3. Exception to the allowance of commissions. The other exceptions, the parties agreed to arrange. [Exceptions overruled.]

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The defendant, having received letters testamentary upon a will regularly proved before a competent tribunal, was authorized to perform all those acts, which an executor has the general power to perform, notwithstanding the pendency of a litigation respecting the validity of the will. The 18th section of the act[2] of this state of the 13th of April, 1791 [3 Laws (Pa.) 34], sanctions all his acts pending the contest, unless where an administrator pendente lite is appointed; which, upon the refusal of the executor, to give security for the faithful execution of the will, the register is authorized to appoint. No such appointment was made in this case, nor does it appear that the defendant refused to give such security.

The defendant was not only authorized, but it was his duty, believing the first will to be the real last will and testament of William Bradford, (which he asserts in his answer he did,) to support the decision of the register in favour of that will; and he was entitled to the aid of the estate, to discharge all reasonable costs and expenses incurred on that account. Upon the same reason, he is entitled to the compensation usually allowed to an executor, for his pains and trouble in the management of the estate, whilst it remained in his hands. The allowance made by the commissioner for funeral expenses, is by no means deemed unreasonable. This is not a question, which in any respect affects creditors; and the whole sum allowed is but a trifle, when taken from the large amount of personal estate which is to be distributed. The exceptions, therefore, are overruled; it being understood that the parties have agreed to settle, amicably, the subjects included under the fourth and fifth exceptions.

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

[2] The act is, "that no appeal from the register's court, concerning the validity of a will, or right to administer, shall stay the proceedings, or prejudice the acts of an executor or administrator pending the same, if the executor shall give sufficient security for the faithful execution of the will;" but in case of refusal, the register is directed to appoint an administrator during the dispute, which shall suspend the power of the executor during that time.

Case No. 1,766.

BRADFORD v. BRADFORD et al.

[2 Flip. 280.] [1]

Circuit Court, W. D. Tennessee. Nov. Term, 1878.

COSTS — SECURITY — PRACTICE IN CASES WHERE PARTIES CANNOT FURNISH PROSECUTION BOND.

A party, who is unable to give security for costs, may, notwithstanding, prosecute his suit if he make an oath that owing to his poverty he is unable to give security, and a respectable attorney shall certify that he has examined the grounds on which it is proposed to bring suit, and is of opinion that it possesses merit, and that the plaintiff is entitled to a recovery.

[Cited in Ferguson v. Dent, 15 Fed. 774; Thomas v. Thorwegan, 27 Fed. 400; The Georgeanna, 31 Fed. 406; The Phoenix, 36 Fed. 272. Overruled in Roy v. Louisville, N. O. & T. R. Co., 34 Fed. 276.]

At law. In this cause, Wm. S. Flippin (G. Gantt was with him,) moved for an order directing the clerk to issue the necessary process which would enable the plaintiff to commence his action. He stated that plaintiff had some time ago brought suit in this court against the defendants, but, being ruled to give other security, had not been able, owing to his poverty, to do so, and that consequently his cause had been dismissed. He now proposed to renew the suit before the twelve months had expired which the law grants to parties litigant, where their causes have been dismissed for other reasons than trials upon the merits. [Motion granted.]

BAXTER, Circuit Judge. There is no statute of the United States requiring plaintiffs prosecuting suits in this court to give bonds for costs. This matter has been regulated by a rule of the court. The rule requires a bond or a deposit of money to secure payment of costs in the event of a nonsuccessful prosecution of the suit. But no provision has been made for suits in forma pauperis. The applicant, now before us, insists that the statute of the state upon this subject is controlling. We do not concur in this opinion. Section 3192 of the Code of Tennessee authorizes any person who will make an affidavit that "owing to his poverty, he is unable to bear the expenses" of the suit he proposes to bring, and that "to the best of his belief," he is "justly entitled to the redress sought," may "commence his action without giving security." The affidavit offered in this case conforms to the requirements of that act. But as already stated, this statute is not imperative upon us. It makes the party proposing to sue, the judge of his right to redress. Such judgment involves the necessity of passing on the law and the facts of the case. Parties are not ordinarily good judges in their own cases. If competent, they may not be impartial. For these reasons we decline to accept the state statute as a rule of this court. But cases may arise possessing merits, in favor of persons too poor to secure costs. For such cases some provision ought to be made. The rule of the English courts adopted and acted on by some of the American courts, commends itself to our judgment as being best calculated to protect this court as well as defendants against frivolous and harassing litigation. If the applicant will supplement his affidavit by the certificate of any reputable attorney of this court, to the effect that he has investigated the case and believes the applicant has a good cause of action, he will be permitted to bring and prosecute his suit in forma pauperis.

HAMMOND, J., concurred.

The following order was entered: "Wednesday, February 12, 1879. Wm. Bradford, Assignee and Surviving Partner, vs. Philip Yancey, Adm'r of Hiram S. Bradford, Dec'd, Alsey Bradford and Robert Morris. In this cause, on motion of plaintiff's attorneys, asking leave to bring this suit in forma pauperis, the court permits the same to be done on condition that the usual oath required under the state law as to insolvency and poverty be first made, and that attorneys of plaintiff shall certify to the fact that they have examined the facts of the case, and find it possesses merit, and they believe that plaintiffs are entitled to a recovery."

NOTE [from original report]. In the admiralty, in cases of persons filing libels being unable to give the required stipulation, it is proper to take an oath like this:

"United States of America, District of West Tennessee—ss. Cary Southworth, being duly sworn, deposes and says that to the best of his knowledge and belief, the allegations in the foregoing libel are true, and that he is entitled to the redress sought by this suit, to the best of his belief, and that owing to his poverty he is not able to bear the expenses of this suit, nor to give the bond and security required. [Signed.] Cary Southworth.

"Acknowledged, subscribed and sworn to by the above named affiant this 4th day of November, in the year of our Lord, eighteen hundred and eighty, before me, at my office, in the city of Memphis, in said district. H. E. Andrews, Clerk of the U. S. District Court for the Dist. of W. Tenn."

On which the order of the judge follows:

"Allow this libel to be filed, upon the plaintiff giving the proper juratory security and taking the requisite oath.[2] November 4, 1880. E. S. Hammond, U. S. District Judge."

The following form has been used in the district court of West Tennessee, for a juratory caution or stipulation. It is believed to contain all that is essential. It must be understood, however, that the judge for said district is expected in all such cases to order the clerk to file the libel before the same shall be actually done, and he refuses in actions of tort to direct attachment to issue against vessels, unless the customary stipulation, with approved security, shall have been given:

"In the District Court of the United States for the Western District of Tennessee. Cary

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [See Thomas v. Thorwegan, 27 Fed. 400.]

Southworth against John D. Adams and James Lee, Jr., Owners of Steamboat Ouachita Belle. In the above named cause, civil and maritime, wherein Cary Southworth is libellant and John D. Adams and Jas. Lee, Jr., owners of the steamboat Ouachita Belle, are defendants: On this, the 4th day of November, 1880, the said Cary Southworth appeared personally, and stipulated in the sum of two hundred and fifty dollars to prosecute this said cause, and to pay all costs and expenses which may be awarded against him herein by the final decree of this court, and in case of appeal, by the appellate court, and to appear on return day of the process in this cause, and on the 4th Monday of November instant; and the said Cary Southworth makes oath that he will appear on those days and as often thereafter as he shall be ordered by the court, and that he will pay all costs and expenses which may be awarded against him. [Signed.] Cary Southworth.

"Sworn to and subscribed before me this 4th day of November, 1880. H. E. Andrews, Clerk."

Judge Hammond has obligingly furnished to the reporter the subjoined note:

The strict practice requires, perhaps, that the oath of the libellant to his poverty shall be supported by other proof of the fact, but I find no American rule that requires more than his own affidavit; and this is in analogy to the practice in other courts where the suitor sues in forma pauperis. But no doubt, by like analogy, if the oath be false, the adversary party may show that fact, and the privilege of suing without a bond for costs would be denied or revoked. It is said by some of the authorities that the juratory caution is disused in modern practice but acts in relief of an indigent suitor by mitigating his bail or exonerating him wholly from giving it. This has been done, no doubt, by rule in some of the districts, notably by rule No. 143 of the eminent Judge Betts; but in the absence of a rule to that effect the works on practice seem to require it. Exemption from giving security does not necessarily mean exemption from liability to pay the costs, and the juratory caution only secures by the oath of the party that liability which exists in courts of law and equity, and generally under the statutory regulations permitting poor persons to sue without security. It may be waived, as the ordinary stipulation with sureties may be, by the adversary party's failure to demand it, but that the proper practice requires it seems clear. Whether the party would be liable for costs, as at law, in the absence of the stipulation by juratory caution may be doubtful under the civil law. The very term, juratory caution, means a stipulation by oath without sureties, and, if it be not required, it is a misnomer to call the proceeding by that name. Under the civil law, cautions with respect to the manner in which they were taken, were: Cautio fide jussoria, (by sureties); Pignoratitia, (by deposit); Juratoria, (by oath); Nude Promissoria, (bare promise).

Where the suitor was excused from furnishing sureties, he was sometimes required to take the oath of calumny, as were also the attorneys or proctors which, besides the averment that the party believed the cause to be just, as is now required in all cases of suing in forma pauperis, contained a further averment that the suit was not instituted in malice; but the forms I have found do not contain this averment. In a note to Strahan's translation of Domat's Civil Law (A. D. 1722) it is said: "As to what the Roman law directed in relation to caution being given by all plaintiffs and defendants for prosecuting and defending the suit, and paying what should be adjudged, either for damages or expenses, this is strictly observed in the high court of admiralty of England." But according to Coote the requirement of a juratory caution is now limited to suits for wages. The bail required is always £30, and the plaintiff must also give the juratory caution. The form of affidavit requires that he shall swear that he has diligently endeavored, but has not been able, to procure any friend or other person to be bail in the sum demanded; that he is not worth the sum to deposit as security, and is willing to give his own bail. With us it is believed the rule is generally adopted in most districts that the libellant in suits for wages and for salvage, where the salvors have come into port in possession of the property libelled, shall not be required to stipulate for costs. Such is the rule in this district, except that when the defendant comes in, if he shows that the libellant is able to give bond, the court will require it as in other cases.

Practically, it is, perhaps, of small importance whether a really indigent suitor gives the juratory caution or not; and it may be that irrespective of the rules of the civil law on the subject, there would always be, under our common law jurisprudence, an implied assumpsit to pay, at least his own costs, in all cases; but the privilege of suing as a poor person does not imply absolute exemption from liability to pay all costs, and as there is danger of imposition by parties able to pay who seek a refuge from the liability by appealing to this indulgence, it is well enough, it seems to me, to follow the strict practice and take the juratory caution in all cases. It is presumed that the civil or admiralty law originally demanded in the juratory caution nothing more than the security of the parties' oath, but in some modifications of it in the Scotch courts, and perhaps elsewhere, the court requires an inventory under oath of the suitor's effects, and these are assigned in security of the sums which the court may decree. It is possible this applies only to that class of stipulations required of a defendant or of a plaintiff to pay damages and not to mere stipulations for costs or expenses of the suit. It seems that the civil law is more cautious and protective in these matters of stipulations to secure parties than the common law. Consult the following authorities: Ben. Adm. 296; Conk. Pr. 463; 2 Conk. Adm. (2d. Ed.) 585; Id., 119, 199; 2 Pars. Adm. (Ed. 1859) 697, 729; 2 Pars. Shipp. & Adm. (Ed. 1869) 417, 479; Betts, Adm. (Ed. 1838) 27; Id., Append. 433; Cootes, Adm. 52, 252; 1 Browne, Civ. Law, 361; 2 Browne, Civ. Law, 357, 411; Clerke, Praxis Adm. tit. 11, 13, 14; 1 Dom. Civ. Law (Strahan Ed. 1722) p. 393, tit. "Cautions," bk. 3, tit. 4; Bouv. Dict. (Ed. 1870) words "Caution," "Caution Juratory," "Juratory Caution," "Juramentum Calumniae;" Polydore v. Prince [Case No. 11,257]; The Edwin, 3 Hagg. Adm. 364; Annotated Rules Mich. Dist. Rule 9, cites The Sophie, 1 W. Rob. Adm. 326; The Volant, Id. 383; The Franz and Elize, Lush. 377; The Peri, Id. 543; The Wild Ranger, Id. 553; The Mary, L. R. 1 Adm. & Ecc. 335; The Great Britain [Case No. 5,736]; Polydore v. Prince, supra; The Arctic, Case No. 509a].

Case No. 1,767.

BRADFORD et al. v. EASTBURN.

[2 Wash. C. C. 219.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PRINCIPAL AND AGENT — RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

1. An action cannot be maintained against the agent, for transactions with his principals through him, unless a specific agreement is

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

made with the agent, that he will be personally liable for the acts of his principal.

2. Where the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent.

At law. This was a special action on the case. The declaration stated, that a certain conversation was had and moved, between the plaintiffs and the defendant, concerning the importation of books and stationary by the plaintiffs, from Longman & Co. of London, for whom the defendant was agent; whereupon, in consideration that the plaintiffs had promised and agreed to receive from the defendant certain books and stationary, on their arrival, and to pay for them at the customary prices, at nine months from the day of shipping them, the defendant agreed that he would order the said books and stationary, to be imported for them from the said Longman & Co., and on their arrival in the United States, he would deliver them to the plaintiffs. That in part execution of his agreement, the defendant caused the said books and stationary to be imported for the plaintiffs; that they arrived in New-York, consigned to the defendant for the plaintiffs; and, although the plaintiffs were ready to perform, &c., yet the defendant did not deliver, &c., but refused, &c.

Plea, the general issue. The evidence on the part of the plaintiffs, was as follows, viz.: A circular letter, signed by Longman & Co., enclosed to the plaintiffs by the defendant, stating the terms on which they would send books and stationery to booksellers in the United States, viz.: at the prices mentioned in a catalogue enclosed, payable at nine months from the shipping of the goods, and stating that all payments and orders were to be made through the defendant, their agent, at New-York. On the 8th of July, 1805, the plaintiffs wrote to Longman & Co., enclosing an order for a parcel of books, which letter they sent to the defendant, with a request that he would forward it to Longman & Co.; and mentioning that they would send a duplicate by some other conveyance. On the 11th of July, the defendant returned an answer, saying, that the plaintiffs' order should be forwarded in a few days. On the 22nd of November, the defendant, by letter, informed the plaintiffs that the goods had arrived, consigned to him, and requested that they will give their note, with an endorser, for the amount, at nine months from the date of the invoice, and give their orders respecting the goods. The plaintiffs refused to give their note, until they should receive the invoice, and examine the goods, so as to ascertain whether they were conformable to order, and the amount was regularly calculated. The defendant refused to deliver the invoice to the plaintiffs, until the note, with the endorser, was given; upon which the plaintiffs abandoned the goods, under a declaration that they should look to the defendant for damages.

Witnesses were examined to ascertain the damages sustained by the plaintiffs.

The court inquired of Mr. Hallowell, for the plaintiffs, if he thought he could, upon this evidence, support his action, which was laid upon a special contract, made with the defendant; whereas it appeared that it was made with Longman & Co., and that the defendant only acted as agent?

Hallowell replied, that although the plaintiffs' letter and order were directed to Longman & Co., yet it is plain, from the agency of the defendant in the business, that the plaintiffs considered themselves as dealing with the defendant personally, and that he was to cause the goods to be imported for, and delivered to the plaintiffs. Upon the merits, he contended, that the condition insisted upon by the defendant, was in violation of the contract, which did not oblige the plaintiffs to give a note, much less an endorser. The plaintiffs being proved to have been a firm of credit and solidity, at the time the goods arrived, and since, the right to stop in transitu could not arise.

Levy, for defendant, insisted that this action would not lie against the defendant. He cited 3 P. Wms. 277. 2 Vern. 221. If the factor declare his principal at the time, he is not personally liable, if he act within his authority. 1 H. Bl. 364, as to the right to stop in transitu.

[Verdict for defendant.]

WASHINGTON, Circuit Justice. This is certainly a very plain case. If the court could discover any difficulty in it, we would ask you to reserve the point of law, which has been raised. But there is no doubt respecting it, and of course it is our duty to say, that your verdict should be for the defendant.

As to the inconveniences stated by the plaintiffs' counsel, if agents in cases of this kind should not be liable, but persons contracting with them should be turned over to their constituents, across the water, the answer is plain. If a merchant here wishes for the responsibility of the agent, let him take the personal engagement of the agent, that the orders sent to his principal shall be complied with. If the agent refuse a personal liability, the merchant can deal with the principal or not, as he pleases. But the question here is, did the defendant enter into the agreement, charged by the declaration to have been made by him, and denied by the plea? There is no other point for you to try; for, however the plaintiffs may have been injured, still, if the defendant did not promise, as he is charged, the remedy cannot be against him. Now it appears to us, that the defendant was nothing more than a channel of communication between

the plaintiffs and Longman & Co. The circular letter, containing the offer to furnish goods, is signed by them; and the answer of the plaintiffs, agreeing to import, is addressed, together with their orders, to them. The defendant is applied to by the plaintiffs, merely to forward their letter, which he promised to do, and which promise he performed.

The goods were not sent to the plaintiffs by Longman & Co., as they had a right to expect, but were consigned to the defendant. It is to be presumed, that the defendant acted under the direction of his principals; but if they or he acted wrong, in refusing to deliver up the goods, except upon a condition not warranted by the contract, they only can be made responsible in this form of action, with whom the contract was made; this was Longman & Co., not the defendant. Your verdict, therefore, ought to be for the defendant. Verdict for defendant.

BRADFORD (FORBUSH v.). See Case No. 4,930.

Case No. 1,768.

BRADFORD v. GEISS.

[4 Wash. C. C. 513.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1825.

PLEADING—ANSWER—SUFFICIENCY OF DENIAL.

It is good cause of exception to an answer, that to the denial that defendant has no knowledge of the facts charged, it is not added "that he had no information or belief" of them.

The plaintiff excepted to the answer, so far as it denied that the defendant had any knowledge of the facts alleged in the bill to which the answer applied, without adding that he had no information or belief of the facts.

THE COURT decided the exception to be well taken, and ordered the defendant to put in a better answer. 1 New. Ch. Pr. 179.

BRADFORD v. HUNT. See Case No. 1,217.

Case No. 1,769.

BRADFORD v. JENKS et al.

[2 McLean, 130.] [2]

Circuit Court, D. Illinois. June Term, 1840.

RECEIVERS — ACTIONS BY IN FEDERAL COURTS—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—NEGOTIABLE INSTRUMENTS — ACTIONS ON—NOTE PAYABLE TO BEARER—WHO MAY SUE.

1. A receiver in the state of Michigan, appointed under the act which provides for the voluntary dissolution of bank corporations, &c., stands in the relation of the assignee of an insolvent debtor.

2. And if such receiver sue in the courts of the United States he must show that the court could have taken jurisdiction, as between the defendants and the bank.

3. Though the note, on which the suit be brought, be payable to the bank or bearer, the receiver can not sue as the bearer of the note, as he does not hold it in that right. He does not own, except as trustee, the property in the note, and did not receive it in the ordinary course of business.

4. A note payable to a payee, named, or bearer, may be sued for, by any person who received it in the course of business, in his own name, in the courts of the United States, without noticing the payee named. The promise to pay, is as much to the bearer, as to the person named.

[Cited in Towne v. Smith, Case No. 14,115; Cooper v. Thompson, Id. 3,202; Halsey v. Township of New Providence, 3 Fed. 367.]

[See Bank of Kentucky v. Wister, 2 Pet. (27 U. S.) 319; Bonnafee v. Williams, 3 How. (44 U. S.) 574; White v. Vermont & M. R. Co., 21 How. (62 U. S.) 575; Halstead v. Lyon, Case No. 5,968; Sackett v. Davis, Id. 12,203.]

5. Quere.—Whether the assignee of an insolvent can sue, in his own name, in a foreign jurisdiction.

[See Holmes v. Sherwood, 16 Fed. 725; Chandler v. Siddle, Case No. 2,594; Brigham v. Luddington, Id. 1,874.]

[At law. Action by Vincent L. Bradford, receiver of the Berrien County Bank, against Levi Jenks and others on a promissory note. Plaintiff's demurrer to plea of defendant sustained.]

Mr. Goodrich, for plaintiff.

Mr. Arnold, for defendants.

OPINION OF THE COURT. The plaintiff, who is a citizen of Michigan, in his declaration, states that the defendants, on the 14th of February, 1838, at Niles, Berrien county, state of Michigan, gave their note, by which they promised to pay the President, Directors & Co. of the Berrien County Bank, or bearer, three thousand dollars, at their bank in Niles, Berrien county, Michigan; the two first as principals, and the others as securities, for value received, twelve months after date. And that afterwards, at Niles, aforesaid, to wit, 1st January, 1839, the said promissory note came into the hands and possession of the said plaintiff, for a good and valuable consideration, by him then and there paid, &c.

The defendants pleaded, that the note did not come into the hands of the plaintiff for any good or valuable consideration, by him then and there paid; nor did the said plaintiff become the lawful bearer and holder of said note, in manner and form, &c. And they say, after the said note became due, to wit, 1st March, 1839, to wit, at Berrien, in Michigan, such proceedings were had; that the said plaintiff became, and was appointed, the receiver of the Berrien County Bank, who was then and there appointed by law to take charge of the effects of said bank, and authorized to receive and collect the same; that the note was a part of the effects, and came to the plaintiff's hands as receiver, and not otherwise. And the defendants aver, that the stockholders of the bank are not all resi-

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

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

dents of the state of Michigan; and that some of them are citizens of the state of Illinois, the same state of which the defendants are citizens, and they pray judgment, &c. Demurrer to plea, &c.

The act of Michigan, referred to, was passed the 15th April, 1839 [Sess. Laws, 94], and is entitled "An act to provide for the voluntary dissolution of corporations, and to prescribe the duties of receivers in chancery, in certain cases," &c. The 10th section provides that "such receivers, when appointed, shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security, hereinbefore required, and shall be trustees of said estate for the benefit of the creditors of such corporations, and for the benefit of its stockholders." And the 25th section provides: "Whenever a receiver of the property or effects of a corporation has been appointed before its dissolution, or afterwards, new suits may be brought, and carried on by such receivers, either in their own names, or in the name of the corporation for which they shall have been appointed; but no new suit shall be brought in the name of a corporation after it shall have been dissolved, or after the expiration of its charter."

The demurrer admits the truth of the plea; but the plaintiff insists that the note, on which the action is brought, is made payable to bearer, and that the plaintiff has a right to bring the action in his own name, having come lawfully into the possession of the note, without stating from whom he received it. In the case of Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 326, the court say: "The other point has relation to the form of the bills, which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But this, also, is a question which has been considered and disposed of in our previous decisions. This court has uniformly held, that a note payable to bearer, is payable to any body, and not affected by the disabilities of the nominal payee." The promise is in the alternative, to pay the person or corporation named, or bearer; and the obligation to pay the bearer, is as strong as to pay the payee, named in the note. These being the original terms of the note, it is unnecessary to aver or prove any assignment or transfer of the note to the holder. It is proper that he should set out, in his declaration, as the plaintiff has done in this case, that the note came into his hands for a valuable consideration. The possession of the note is prima facie evidence that the holder received it in the course of business; and the manner of receiving it, or the consideration paid, need not be proved, unless it shall become necessary from the plea or defence set up by the maker of the note. But, in this case, the plea negatives the presumption, by stating that the plaintiff came into the possession of the note, not in the course of business and for a valuable consideration, but as the receiver of the bank, acting under a special law, and for the benefit of the creditors and stockholders of the bank. He acts as trustee, and not in his own right. The property of the note is vested in him, in his fiduciary character only, the same as an administrator, or the assignees of a bankrupt. Can he, then, be considered as the bearer of the note, in a commercial sense of the term? which is the light in which he must be considered, as having a right to bring the action in his own name. The note, being payable to bearer, passes by delivery; and, any payment made to the bank, or to any prior holder, can not be good, unless made to the holder of the note, and a notice of such payment be given to the person who subsequently receives the note, in the course of business, and before he receives it. In this case, it will not be contended that the defendants may not show a payment to the bank, or any matter of offset, which might be pleaded, if the suit were brought in the name of the bank. From this it appears, that if the suit may be brought in the name of the receiver, he can not be treated as having the right of property in the note, but as a mere agent or trustee for the bank. An executor or administrator can not sue, as such, beyond the jurisdiction which confers his power, unless the laws of the foreign jurisdiction shall authorize him to do so. And why does not this principle apply to the receiver in this case? There seems to be a strong analogy in the two cases. Under the 11th section of the judiciary act of 1789 [1 Stat. 78], no assignee can bring an action in the federal courts, unless, as between his assignor and the defendant, the court had jurisdiction. And this must be shown in the declaration. [Mollan v. Torrance] 9 Wheat. [22 U. S.] 537. This note came into the possession of the plaintiff, not in the course of business and for a valuable consideration, but as assignee, in the manner stated in the plea. And, this being the case, a question arises, whether the declaration is not defective, in not setting forth the assignment.

A case in all respects analogous to the one under consideration, is, where an insolvent assigns his effects for the benefit of his creditors. The legal right to the property is vested in the assignee, and he may sue in his fiduciary character. In the case of Sere v. Pitot, 6 Cranch [10 U. S.] 332, the supreme court decided, that a general assignee of the effects of an insolvent, can not sue in the federal courts, if his assignee could not have sued in those courts. This conclusion is arrived at by the court, on a particular examination of the language and object of the act of congress, which applies to the subject. In the above case the plaintiffs were aliens, but the insolvent assignor

was a citizen of Louisiana; and, as he could not sue in the federal court of Louisiana, the court held that his assignees could not. In this respect, a distinction is made between the assignees of an insolvent, and executors or administrators; for the latter may sue or be sued, if they are citizens of a different state from the other party, although their testators, or intestates, had not this right. [Childress v. Emory] 8 Wheat. [21 U. S.] 642. No distinction can be drawn between the duties and powers of the plaintiff as receiver, or assignee of the bank, and the assignee of an insolvent, which shall place them on different principles in regard to the right of suing in the federal courts. They are both assignees, in law, of the effects of insolvents, and their duties are substantially the same. From this view, the authority cited from Cranch, must be conclusive.

The plaintiff can only sue as assignee; and he attempts to maintain the action in his own name, as the bearer of the note, to whom the promise of payment was originally made. We think this can not be done, in the face of the facts stated in the plea. The demurrer reaches the declaration, and, taking it, in connection with the plea, it appears that the plaintiff has mistaken the right by which he may sue; and that, if the suit be brought by him as assignee, it can not be maintained, as a part of the stockholders of the bank are citizens of Illinois, and were so, when the action was commenced. We are also inclined to think, though it is unnecessary to decide the point, that if the assignee bring a suit for the benefit of the bank, in any other state than that of Michigan, he must bring the suit in the name of the bank. It is clear that, in seeking a remedy in a foreign jurisdiction, he must seek it in pursuance of the recognized forms of procedure in such jurisdiction; and, if there be no authority under which a foreign assignee of an insolvent can sue in his own name, the name of the assignor must be used. 2 Pet. Dig. 685. The demurrer to the plea is sustained.

BRADFORD (JUDSON v.). See Case No. 7,564.

BRADFORD (THOMSON v.). See Case No. 13,981.

BRADFORD (WESTCOT v.). See Case No. 17,429.

Case No. 1,770.

The BRADICH JOHNSON.

[10 Chi. Leg. News (1878) 353.]

District Court, S. D. Alabama.[1]

ADMIRALTY—LIBEL FOR STATE AND COUNTY TAXES—LIEN FOR SUPPLIES—MORTGAGE LIEN—PRIORITY.

1. A claim for state and county taxes assessed against a steamboat, is one arising under state laws, and in which there is no maritime quality or character, and is not the subject of libel in a court of admiralty.

2. Though no lien arises under the maritime law, for supplies and materials furnished a vessel at the home port, and though the state cannot confer jurisdiction upon federal courts, yet it can give a lien for a claim arising out of a maritime contract, and such lien can be enforced in the admiralty courts. The law of Alabama having created a lien upon vessels for supplies and materials furnished in the home port, such a claim outranks a claim under a mortgage, and should first be paid.

[Cited in The Theodore Perry, Case No. 13,879; The Guiding Star, 9 Fed. 524.]

[Reversed in Baldwin v. The Bradich Johnson, Case No. 798.]

[On exceptions to commissioner's report.

[In admiralty. Libel by Edward Baldwin against the steamer Bradich Johnson, J. M. Stone, and J. H. Stone, claimants. Other creditors intervened, claiming liens for seamen's wages, supplies furnished in home and foreign ports, etc. E. B. Lott, tax collector of Mobile county, claimed a lien for taxes, and Charles Cavaroe, Jr., claimed a lien by virtue of a mortgage. There was reference to a commissioner to report a scheme of distribution. Report confirmed.]

W. G. Jones and T. H. McCartney, for exceptions.

J. L. Smith, contra.

BRUCE, District Judge. The first exception which I shall notice is that filed on behalf of E. B. Lott, tax collector of Mobile county, Alabama. It appears that state and county taxes had been levied upon said steamboat, for the years 1876–7, which are unpaid. The steamboat was registered in the city of Mobile, and under the laws of Alabama was there liable for state and county taxes. It is claimed that a tax due to the state which is made a lien upon the property, must from its nature be paramount, and take precedence of all claims due to individuals. It is to be observed, however, that this is a court of admiralty and maritime jurisdiction, and the question arises, can this court take jurisdiction of a claim which has in it no maritime quality or character? True, the claim for state and county taxes due and unpaid is, under the revenue law of the state, made a lien upon the property, but it is not a maritime lien, and the state cannot confer jurisdiction upon this court. The claim is one which is not the subject of a libel in an admiralty court, and the court has no jurisdiction of the claim, and cannot enforce the lien. The claim of the tax collector of the city of Mobile, for taxes alleged to be due the city of Mobile, rests upon no higher ground than the claim for state and county taxes, and these claims are postponed until the maritime claims are paid.

The next exception which I shall notice is that of Charles Cavaroe, Jr., the assignee of a mortgage which was given by the owners

[1] [Reversed by circuit court in Baldwin v. The Bradish Johnson, Case No. 798.]

of the steamboat to secure certain notes for part of the purchase money of said steamboat, which mortgage was duly filed for record in the custom house, in the city of Mobile, as provided by act of congress, prior to the accruing of the claims for supplies and materials furnished, and repairs done at Mobile, the home port of the steamboat. The proposition is, that the mortgage claim outranks the claims for supplies and materials furnished, and repairs done at the home port, and should be first paid. Though no lien arises under the maritime law for supplies and materials furnished, or for repairs done at the home port, as held by the supreme court of the United States, in the case of The Lottawana, 21 Wall. [88 U. S.] 558, yet these claims arising, as they do, upon maritime contracts, are within the admiralty and maritime jurisdiction, and although the state cannot confer jurisdiction on the United States courts, yet it can give a lien for a claim arising out of a maritime contract, and the lien, when thus given, can be enforced in the admiralty courts of the United States. This view of the subject is sustained by the case of The Lottawana, above cited.

The law of Alabama, which creates domestic liens upon vessels, is to be found in chapter 8, § 3465, of the Revised Code, and is as follows: "Section 3465. Lien Declared. A lien is hereby created on all ships, steamboats and other water crafts, whether the same be registered, enrolled, licensed, or not, that may be built, repaired, fitted, furnished, supplied or victualled within this state; for work done, or materials supplied by any person within this state; for or concerning the building, repairing, fitting, furnishing, supplying or victualling such ships, steamboats or other water crafts; and for the wages of the masters, laborers, stevedores and shipkeepers of such vessels, steamboats, or other water crafts, in preference to other debts due and owing from the owners thereof, which said lien may be asserted in any court of competent jurisdiction." It appears, then, that the law of Alabama has created a lien in favor of those who furnish materials and supplies to vessels at the home ports within the state. We have already seen that it is competent for a state to create such a lien in favor of a claim arising out of a maritime contract, and it follows that such a claim outranks a claim under a mortgage, and is to be first paid. In support of the contrary view, the following cases are cited: The John T. Moore [Case No. 7,430]; The Grace Greenwood [Id. 5,652]; The Kate Hinchman [Id. 7,620]. The two latter cases seem to sustain the position taken, but the case of the John T. Moore does not sustain that position, as the following quotation from the opinion of the court will show: "The claims for materials and supplies furnished, and repairs done in the home port, by libellant and others, cannot take precedence over the Moore mortgage and Coyle claim, as such claims were not recorded under the state law, so as to acquire a lien against third persons;" from which language there is a clear implication that if these claims had been recorded, and the state law fully complied with, they would have been entitled to priority. There is the same implication in the case of The Lottawana, above cited; and in the case of The Alice Getty [Case No. 193]—Withey, J.—it is held that mortgage liens are postponed to all maritime claims, whether they arise under the general maritime law or by the local law of the state, a lien is given.

It is to be observed that the law of Alabama, above cited, does not require claims for materials and supplies furnished at home port to be recorded in order to make them a lien against third persons. In this respect the law of Alabama differs from the law of Louisiana and other states. In this case, the state law granting the lien was fully complied with, and therefore these claims for supplies and materials furnished at home port take precedence of the mortgage claim here set up, and are to be first paid. It is so ordered.

Case No. 1,771.

BRADISH v. The FRIENDSHIP.

SHIPPING—EMBEZZLEMENT OF CARGO — CONTRIBUTION BY CREW.

[Cited in Abb. Shipp. 653, note, to the point that all the seamen on a vessel have been held liable to contribution for embezzlements from the cargo, where there was no reason to impute to them any participation in the act or the plunder. Nowhere reported; opinion not now accessible.]

BRADISH JOHNSON, The (BALDWIN v.). See Case No. 798.

BRADISH JOHNSON, The (BROWN v.). See Case No. 1,992.

Case No. 1,772.

In re BRADLEY.

[2 Biss. 515.] [1]

District Court, E. D. Wisconsin. April Term, 1871.

BANKRUPTCY — HOLDER OF FIRM NOTE INDORSED BY INDIVIDUAL PARTNER MAY PROVE AGAINST BOTH ESTATES.

1. A bank having discounted a note made by a firm to one of the partners, and indorsed by him, is entitled to prove the debt against the estate of the firm and of the individual partner.

[Cited in Re Knight, Case No. 7,880; Re Long, Id. 8,476.]

[See Stephenson v. Jackson, Case No. 13,374. Under act of 1841, see In re Farnum, Id. 4,674.]

2. The form of the contract or obligation of the maker and indorser should not prejudice

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the legal rights of a creditor claiming distribution of assets in bankruptcy.

In bankruptcy. The firm of H. C. Bradley & Co., composed of Henry C. Bradley, Henry A. Williams and Charles Campbell, were adjudicated bankrupts in this court on their own petition. One of the debts proven against the firm, and also against Charles Campbell, was a note for $1,000, signed in the firm name, payable thirty days after date to C. Campbell or order, at the National Exchange Bank of Milwaukee, and indorsed to the bank by Campbell. The note, not being paid at maturity, was protested. The debt was proved by the bank both as a debt of the firm and of Charles Campbell. Objection was made by the creditors of Charles Bradley to this last claim, on the ground that the debt was only provable against the assets of the firm. The cashier of the bank testified that the bank frequently loaned money to H. C. Bradley & Co., either on collaterals or on the indorsement of Campbell, which was considered good, and added to the security of the firm. The note was discounted by the bank for the firm of H. C. Bradley & Co. [Objection overruled.]

Palmer, Hooker & Pitkin, for creditors.
Jenkins & Elliott, for assignee.

MILLER, District Judge. It is apparent that the note is a debt of the firm, and that the indorsement created a personal liability of Campbell, and that such was the understanding of the parties when the note was discounted by the bank. The indorsement of Campbell was accepted in lieu of collaterals. The protest and notice bound Campbell as an indorser. The rule in England excluded the double proof of a debt, as claimed in this case, but not with the approbation of the courts of the realm. In several cases the rule was enforced while the judges in their opinions doubted its soundness or propriety. There is no good reason for requiring a creditor to elect of which fund he will claim his dividend.

The bankrupt acts of 1841 [5 Stat. 447] and of 1867 [14 Stat. 535] are similar in their provisions in regard to distribution of assets in cases of bankrupt firms and individuals. The English rule has not been adopted in the United States. In Re Farnum [Case No. 4,674] it is decided by the district court of Massachusetts that under the act of 1841 where a partnership and the individual members thereof were declared bankrupts, a creditor who presented a bill of exchange drawn by the firm and endorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and the separate estate of the partner. The same ruling was made, under the same act, by the circuit court for Massachusetts district. Ex parte Babcock, [Id. 696]; also, Story, Partn. §§ 376, 377. Similar adjudications have been made under the act of 1867. In the case of Mead v. National Bank of Fayetteville [Id. 9,366] the bankrupts had been partners in business, and their indebtedness consisted in part of sundry notes of the firm as maker, with the name of one of the firm on each as indorser. The court, in an elaborate opinion by Judge Hall, came to the conclusion and ordered that the notes were provable both against the firm and each individual indorser. The same principle is decided by Judge Blatchford, of the southern district of New York in Re Bigelow [Id. 1,397].

I think the court has no judicial power to restrict the right of a creditor to pursue the joint and several debtors for the collection of his debt in any manner known to the law. Nor can the mere form of the security or evidence of indebtedness control in respect to the question whether the debt must be proven in bankruptcy proceedings against the partnership, or against the separate estate of one of the firm. The creditor must be permitted to prove his debt according to the contract, and to receive dividends from both joint and individual assets. The objection is overruled.

NOTE [from original report]. Consult In re Knight [Case No. 7,880], where the English rule, in cases where there are no partnership assets and no solvent partner, is approved, and the Massachusetts cases examined.

BRADLEY (ADAMS v.). See Case No. 48.

Case No. 1,773.

BRADLEY v. BOLLES.

[1 Abb. Adm. 569.][1]

District Court, S. D. New York. Nov. Term, 1849.

MARITIME LIENS—REPAIRS AND SUPPLIES.

Work done upon a vessel in the dry dock, in scraping her bottom preparatory to coppering her, is not of a maritime character; and compensation for such labor cannot be recovered in a court of admiralty.

[Cited in Cunningham v. Hall, Case No. 3,481; The Canada, 7 Fed. 122. Cited, but not followed, in The George T. Kemp, Case No. 5,341. Disapproved in The Vidal Sala, 12 Fed. 208, 211.]

Compare the cases of Cox v. Murray [Case No. 3,304]; Gurney v. Crockett [Id. 5,874.]

In admiralty. This was a libel in personam filed by John Bradley against one Bolles, master of the ship William B. Travis, to recover for work done in scraping and cleaning the hull of that vessel. It appeared that the respondent's vessel being in the dry dock for repairs, the libellant was employed by the respondent to scrape her bottom, clear it of barnacles, &c. This work was necessary to prepare the vessel to be coppered. The work having been done, the libellant brought this suit to recover the price agreed on therefor. The respondent objected that the court

[1] [Reported by Abbott Brothers.]

had no jurisdiction over such a demand. [Libel dismissed.]

Alanson Nash, for libellant.
W. R. Beebe, for respondent.

BETTS, District Judge. The services for which the libellant claims to recover in this suit, were not rendered in putting repairs upon the ship, or in doing any thing towards her betterment, which was to continue and run with her. Her bottom was to be scraped and cleared from mud and barnacles. This was shore work, requiring no mechanical skill, and is ordinarily performed by mere laborers, and has no more the character of a maritime service than sweeping or washing the bottom or deck of a vessel would have. Neither the marine law or state statute creates a lien upon a vessel for menial services of that character. The contract or service did not relate to repairs put upon the vessel, or any betterment attached to her and promoting her safety or navigation. Both were preliminary to the reparation intended to be put upon her. Removing impediments to that work by cleaning her bottom, was of the same class of service as taking out of the way any other kind of obstruction to the work, and contains no ingredient raising it in law above the quality of common work and labor. This court has repeatedly held, that contracts of that description do not constitute a lien upon vessels which can be enforced in admiralty. The Amstel [Case No. 339]; The Joseph Cunard [Id. 7,535]; The Harriet [Id. 6,097]. Libel dismissed.

BRADLEY (CHESAPEAKE & O. CANAL CO. v.). See Case No. 2,646.

BRADLEY (COE v.). See Case No. 2,941.

Case No. 1,774.

BRADLEY et al. v. CONNER.

[5 Cranch, C. C. 615.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.[2]

TAXATION—COLLECTION — SALE FOR NONPAYMENT —LANDLORD AND TENANT — RECOVERY OF POSSESSION.

1. A tax-sale of part of a lot in the city of Washington in December, 1835, was held to be void, because the number of the lot, of which the premises in dispute were a part, was not mentioned nor stated in the advertisement of the sale, as required by the charter of Washington of 1820, § 10, and the act of 26th of May, 1824 [4 Stat. 75].

[See note at end of case.]

[See Raymond v. Longworth, Case No. 11,595; Brettaugh v. Coal & Iron Co., Id. 1,846.]

2. If there be a lease for years, with right of reëntry for non-payment of rent, and six months' rent be in arrear, and no sufficient personal property on the premises to countervail the rent arrear, the lessor may, under the statute of 4 Geo. II. c. 28, which is in force in the county of Washington, recover in ejectment, as if he had made a strict demand of the rent, and had entered.

3. But the lessor cannot recover while the lease is in full force; and it is in full force, unless forfeited by the right of reëntry, and the proceeding to serve a declaration in ejectment according to the provisions of that statute; six months' rent being arrear and not sufficient goods on the premises to countervail the rent.

[See note at end of case.]

At law. Ejectment [by Henry Bradley and wife's lessee against Mary Ann Conner] for "a certain piece or parcel of ground in the city of Washington and county aforesaid, and being part of square numbered 906 upon the plan of the said city, beginning for the said part thirty-four feet north from the south-west corner of the said square, at the intersection of L street south, and 7th street east, and running thence on the line of said 7th street east, thirty-five feet north; thence east thirty feet; thence south thirty-five feet; thence west thirty feet to the beginning." On the trial of the cause, it appeared that William Prout, being seized in fee of the premises, on the 20th of February, 1807, demised the same to Joseph B. Parsons for ninety-nine years, renewable forever, at the annual rent of $35, clear of all taxes, etc., with leave to purchase the fee simple upon payment of $196.87, with a clause of reentry for non-payment of rent. Parsons entered under the lease, and continued in possession, paying the rent and the taxes, until his death in 1813, leaving a widow, who remained in possession, and several children, of whom the defendant is one. The widow continued in possession until the death of Mr. Prout in 1823, having previously paid him $100 on account of the purchase of the fee-simple. Some time after his death she abandoned the possession of the premises to the defendant, who took possession thereof, claiming to hold the leasehold estate, with the knowledge and consent of the widow and the other children of Parsons, and paying the rent and taxes. In 1831, by a partition among the children of Mr. Prout, the premises were assigned to Mary Bradley, one of the lessors of the plaintiff, to whom the defendant thereafter paid the rent, but neglected to pay the taxes to the collector, for the years 1831, 1832, 1833 and 1834, amounting to $44.13, and suffered the premises to be sold for that amount, and the expenses of sale by the collector, to one Addison Nailor, who obtained a certificate of purchase, which he assigned to the defendant; but the assignment was afterwards cancelled, and after the expiration of the time for redemption, the said Nailor conveyed the premises to the defendant in fee-

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

[2] [Reversed by the supreme court in Connor v. Bradley, 1 How. (42 U. S.) 211.]

simple, who thence-forth claimed to hold the same as a fee-simple estate in her own right, and adversely to the lessors of the plaintiff. At the time of the commencement of this suit, more than six month's rent was in arrear, and no sufficient goods were on the premises to counter vail the rent arrear. In the collector's advertisement of the sale of the property for the non-payment of the taxes, it is described thus: "To whom assessed. Parsons, Joseph B.; heirs of; square 906; part, and imp. Beginning thirty-four feet from the south-west corner of said square, running thence north," etc., as before stated.

Mr. Bradley, for plaintiff.
Brent & Brent, for defendant.

THE COURT refused to instruct the jury, at the prayer of the defendant, that the plaintiff could not recover upon the evidence given on his part; and at the prayer of the plaintiff instructed the jury, "that if they should be of opinion from the evidence aforesaid, that the heirs of the said Joseph B. Parsons, in the said advertisement named, were not at the time of the publication of the said advertisement the true and actual lawful owners of the premises advertised in their name as aforesaid; that the said square No. 906 had before that time been divided into lots and that the number of the lot, of which the said premises were a part, was not mentioned or stated in the said advertisement, then the said tax-sale of the said premises, was void, and the aforesaid deed from the mayor of the city of Washington to the said Addison Nailor, furnishes no ground for defence in this action."

Verdict and judgment for the plaintiff.

[NOTE. Reversed by the supreme court because of plaintiffs' failure to make a proper common-law demand of the rent, or to comply with the provisions of the statute of 4 Geo. II. c. 28, relative to proof that no distress had been made. The substance of the reasons for reversal are given by Mr. Justice Daniel, as follows: "It is a settled rule at the common law that, where a re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. 1 Saund. 287, note 16, in which are cited 1 Leon. 305; Cro. Eliz. 209; Plowd. 172b; 10 Coke, 129; Co. Litt. 201b; 4 Leon. 117; 7 Term R. 117; and numerous other authorities. See, also, upon the same point, Doe v. Paul, 3 Car. & P. 613, 14 E. C. L. 483, and Roe v. Davis, 7 East, 363. In this case no proof is adduced or even pretended of a compliance with any one of the requisites just enumerated. But this suit is said not to be prosecuted upon rules of practice at the common law, but under the authority of the statute of 4 Geo. II. c. 28, which is in force in Washington county. * * * In Doe v. Lewis, 1 Burrows, 619, 620, the court say that this statute prescribes a method of proceeding in ejectment in two cases, viz.: one in case of judgment against the casual ejector; the other in case of its coming to trial. In the former an affidavit must be made in the court where the suit is depending that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the premises countervailing the arrears then due, and that the lessor had power to re-enter; in the latter (that of a trial) the same things must be proved upon the trial. Therefore it is held that this statute does not extend to cases where there is a sufficient distress upon the premises, and consequently in such cases the lessor must proceed at common law as before the statute. To the same effect is the decision in Doe ex dem. Forster v. Wandlass, 7 Term R. 117. It has been expressly ruled that under the statute of 4 Geo. II. there must be proof that on some day or period between the time at which the rent fell due and the day of the demise there was not a sufficient distress on the premises (Doe ex dem. Smelt v. Fuchau, 15 East, 286); and, further, that evidence must be adduced showing an examination of every part of the premises. * * * 2 Brod. & B. 514, 6 E. C. L. 253. The proofs by the plaintiff in ejectment fall short of the requirements of the statute in the following particulars, viz.: In failing to show that any examination had been made to ascertain what amount of personal property was upon the premises at any time, or that there was any one day or period of time between the accrual of the rent for six months and the date of either demise at which there was a deficiency of personal property on the premises countervailing (to adopt the language of the courts) the arrears then due." Connor v. Bradley, 1 How. (42 U. S.) 211.]

Case No. 1,775.

BRADLEY et al. v. CONVERSE et al.

[4 Cliff. 366.][1]

Circuit Court, D. Massachusetts. May Term, 1876.

EQUITY—PLEADING AND PROOF—VARIANCE—ORIGINAL BILL—REQUISITES.

1. The allegations and proofs, in suits in equity, must set forth and support the same cause of action. A party cannot state one case in his bill of complaint, and make a different one by his proofs.

2. Facts necessary to maintain the suit, and obtain relief, must be stated in the bill. Relief cannot be granted for matters not charged.

3. The bill in this case charged, in effect, that the respondents, being officers of a corporation, undertook, in its behalf, to take up certain of its bonds called Norfolk county bonds, the corporation having deposited with the respondents certain other bonds, called Berdell bonds, upon which to raise money wherewith to buy the Norfolk bonds, and that the respondents charged extortionate commissions on settlement, in violation of their trust and duty. The proofs tended to show the facts to be that the respondents bought up the Norfolk county bonds, and sold them to the corporation at an extortionate rate; that one of the respondents received cash for his interest, and the other part cash and part notes of the corporation, with Berdell bonds at fifty per cent. as collateral; that the collateral had been sold, and not enough realized to pay the notes of the corporation. *Held*, the allegations in the bill, and the facts as exhibited by the proofs on the record, did not agree.

4. No decree can be founded upon matters not in issue between the parties. If the bill sets up a case of fraud, the complainant is not

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

entitled to relief by establishing some one or more of the facts independent of fraud, although the facts might create a case under a wholly distinct head of equity.

5. A party may frame his bill in the alternative, if the title to relief will be the same in either alternative, although the case be presented upon allegations resting on wholly distinct and independent grounds.

In equity. This was a bill charging that the respondents [James W. Converse and Henry N. Farwell], as agents and trustees of a certain railroad corporation [the Boston, Hartford & Erie Railroad Company] to buy up certain mortgage-bonds of the same, had bought many of the bonds at less than their par value and had charged the corporation, on settlement, the full par value of the bonds, and that they had made extortionate charges in the said settlement. The prayer of the bill was that the respondents might be decreed to render an account of all money paid for the bonds; to produce vouchers; that they might be decreed to pay over all money found due the complainants [Charles S. Bradley, Charles R. Chapman, and George M. Barnard] as assignees in bankruptcy of the corporation. Farther details of fact will be found in the opinion, as they become requisite to an understanding of the case. [Entry of decree dismissing bill deferred to enable complainants to move for leave to amend.]

C. S. Bradley and James J. Storrow, for complainants.

B. F. Brooks and M. Storey, for respondent James W. Converse.

B. F. Butler and E. L. Barney, for respondent Henry N. Farwell.

After the first argument, the court made the following order:

CLIFFORD, Circuit Justice. Ordered, that the case be reargued, in writing, on the following questions:—Sufficient appears to show that the bill of complaint proceeds upon the ground that the respondents undertook, in behalf and for the benefit of the railroad company, to take up and pay the outstanding Norfolk County Railroad bonds, and that the railroad company to supply them with funds for the purpose, placed bonds, secured by its own property, in their hands. Instead of that, the proofs show, or tend to show, that the respondents proceeded without authority throughout, and that the bonds used to procure the funds were never placed in their hands by the railroad company. Suppose the theory of the proofs is correct, can the court grant relief under the present bill of complaint?

The following opinion was delivered after the reargument made in compliance with the above order:

CLIFFORD, Circuit Justice. Equity undoubtedly has jurisdiction, in cases of trust and fraud, to compel an account and afford relief: but the rule is well settled, by repeated decisions, that the allegations and proofs in such a suit, whether it be to enforce a trust or to annul a fraud, must set forth and support the same cause of action, or, in other words, a party in such a suit is not allowed to state one case in his bill of complaint or answer, and make another and a different one by his proof,—the rule being that the allegata and the probata must concur in supporting the same charge or ground of relief. Foster v. Goddard, 1 Black [66 U. S.] 518; Boone v. Chiles, 10 Pet. [35 U. S.] 208. Authorities to that effect are quite numerous, and the supreme court has expressly decided that the proofs must be according to the allegations of the parties; and that, if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground of decision, it being well settled that the pleadings in that state of the evidence do not put such matters in contestation. Harrison v. Nixon, 9 Pet. [34 U. S.] 502.

Facts essential to maintain the suit and obtain relief must be stated in the bill, otherwise the defect will be fatal, for no facts are properly in issue unless charged in the bill; and of course proofs are not admissible to establish what is not alleged, nor can relief be granted for matters not charged, even though they may be apparent from other parts of the pleading and evidence, the rule being that the court pronounces the decree secundum allegata et probata. Story, Eq. Pl. (7th Ed.) § 257, p. 245.

Throughout the examination of the questions presented for decision in this case, it should be borne in mind that the complainants are the assignees in bankruptcy of the Boston, Hartford, and Erie Railroad Company, and that that company was duly formed by the union and merger of several other railroad companies previously incorporated and organized, including in the number the Norfolk County Railroad; that the franchises and property of the latter railroad company, before the said union and merger took place, had been mortgaged to certain trustees to secure the payment of bonds issued by the company to the amount of $415,000. Converse, the first-named respondent, was one of the trustees under that mortgage, and it also appears that he and the other respondent, Farwell, were both directors of the bankrupt corporation in which the former company was merged, and that, by the terms of the union and merger, the bankrupt corporation became the owner of the franchises and property of that company, subject to the prior mortgage, and acquired the right, and was bound by law, to redeem the said mortgage, and to take up and pay the said bonds and interest, according to their tenor and effect. Explanations to the same effect are given in the bill of complaint, to show the character of the parties and to describe the subject-matter out of which the

controversy has arisen. Nothing can be plainer, in the judgment of the court, than that these explanations were intended by the pleader as the proper description of the parties, and as preliminary to the statement of the cause of action for which relief is sought.

Having stated that the bankrupt corporation "was bound by law to redeem the said mortgage, and to take up and pay for the said bonds and interest," the complainants proceed to charge "that the said respondents, Converse and Farwell, undertook to do this on behalf of, and for the benefit of, the" bankrupt corporation. That the bankrupt corporation, "to supply the said respondents, Converse and Farwell, with funds for this purpose, placed in their hands bonds of the said" corporation, "secured by a mortgage of all its railroad property and franchises, upon the security and pledge of which the said Converse and Farwell borrowed all the money needed or employed by them in taking up, buying, and redeeming the said bonds." Specific accusations are then alleged against the respondents, which in brief may be stated as follows: 1. That many of the bonds were purchased by the respondents at much less than their par value and interest. 2. That the respondents did not purchase all of the outstanding bonds. 3. That they wrongfully, and in violation of their trust and duty, charged the corporation the full par value and interest upon all of the bonds and interest, also upon all overdue payments of interest. 4. That they wrongfully and falsely, and in violation of their trust and duty to the corporation, and as officers and directors thereof, rendered an account to the company, as if they had advanced and paid the amount, and purchased and paid for the bonds, in the manner and the amount stated in the account. 5. That they should only have charged the amounts paid for bonds actually purchased. 6. That they should not be allowed any sums in excess of what they paid, nor any amount for bonds not actually purchased. 7. They, the complainants, repeat that all the money the respondents expended was raised by a pledge of the bonds of the bankrupt corporation. 8. That the charge of twenty per cent for the money so raised is extortionate, and a violation of the trust and duty of the respondents, and that they hold the same subject to said trust. 9. That they have never truly accounted for the money so received and retained, and that, if they have rendered any such accounts, the same are false and untrue, and, if allowed, the accounts are wrongful and fraudulent.

Annexed to the charging part of the bill of complaint is the prayer for relief, which is as explicit and unambiguous as could well be framed, as follows: 1. That the respondents be decreed to render an account of all money paid for the purchase of said bonds. 2. That they be required to produce proper vouchers and receipts. 3. That they be not allowed and credited any sums except those actually and properly paid for that purpose. 4. That they pay over all sums found due to the complainants as assignees, and for general relief.

Service was made, and the respondent, Farwell, appeared and demurred to the bill of complaint. Hearing was had upon that issue, and the court overruled the demurrer and gave the respondents leave to answer. Pursuant to that leave, the respondent, Converse, on July 29, 1875, filed an answer. He admits that the complainants are the assignees in bankruptcy of the bankrupt corporation, and that the said corporation was the owner of the equity in the railroad and property of the Norfolk County Railroad Company, and that they had the right, and were bound by law, to redeem the said mortgage, and to take up and pay the said bonds and the interest thereon. Superadded to that, he also admits that he was one of the trustees under that mortgage, and that he was chosen one of the directors of the bankrupt corporation at the time therein specified. Elaborate explanations are given in the answer as to the acts and doings of the respondent in taking up a certain portion of the bonds of the Norfolk County Railroad, and of the alleged means employed to accomplish that end. Suffice it to say that those explanations are too extended to be reproduced in this opinion; nor is it necessary, as they affirm in substance and effect the following propositions: 1. That the arrangement between the respondents, to take up the outstanding bonds, did not embrace any undertaking whatever with the bankrupt corporation. 2. That the money used to accomplish the end was mostly obtained by the present respondent upon promissory notes of his firm, which he indorsed and procured to be discounted. 3. That all the bonds, including interest, were taken up, except $6,753.37, which were outstanding in the hands of holders who could not be found. 4. That the full amount of the bonds was paid, except in a few cases, in which concessions were made, to small amounts, for ready money. 5. That the accounts were all duly settled, adjusted, and approved as therein fully set forth and explained. 6. That he never, in any other manner, undertook to take up and pay said bonds or interest, and that no mortgage bonds of the bankrupt corporation were ever received by him for the purpose of raising money to be used or expended in making any such purchases, either as security, pledge, or otherwise. 7. That he did not charge interest except as therein explained; and he explicitly denies that he ever charged the twenty per cent, as alleged in the bill of complaint.

Separate answer was subsequently filed by the other respondent, in which he denies that the said Converse and himself jointly undertook to redeem and take up and pay

for said bonds and interest, in behalf and for the benefit of the bankrupt corporation. These denials are explicit and unconditional, but he admits that he himself made a contract with the corporation to buy up said bonds for the purpose of having them cancelled, so far as the same could be found and purchased; and he also admits that he, in pursuance of that contract, did purchase at par, and in trust, and pay for all the said bonds that were offered to him, and that he received payment therefor in part from the said bankrupt corporation in Berdell mortgage bonds, or in money derived from said corporation. Beyond doubt these admissions are as explicit as the preceding denials, but he also denies that he purchased any of said bonds for less than their par value and interest, or that he failed in any degree to perform his contract, or that he charged any more than a proper commission, or that he owes the corporation any sum whatever on account of the matters charged.

Due settlement of the accounts is also set up, and the respondent avers that his accounts and doings in the premises were fully approved by the directors. Proofs were taken, and by the proofs it appears that the directors, at a meeting held September 17, 1867, elected an executive committee of their board, consisting of John S. Eldridge, Mark Healey, Henry N. Farwell, Henry Thompson, and Thomas E. Graves, with power to do and perform all things this board might do, subject to its approval. Evidence was also introduced by the complainants, that at a meeting of the directors held Oct. 10, 1867, Henry N. Farwell was unanimously elected vice-president of the company, and that the directors voted that the vice-president, with the advice and consent of the executive committee, is authorized and empowered to enter into any contract, and to do all acts and things necessary to take up the mortgage known as the "Norfolk County Railroad Mortgage," and any other mortgage liens on the property of this company, and to do all acts and things necessary to obtain the benefits of the loan from the state of Massachusetts, contemplated by its act of April 27, 1867. Nothing appears in the record to show that the executive committee ever advised or gave their consent to the undertaking of the respondents, set forth in the bill of complainant, or that the proposition involved in the allegation, if any such was entertained by the respondents, ever came to the notice of the executive committee. Instead of that, the clear inference from the whole proofs is that the acts and doings of the respondents, in taking up and paying the said bonds and interest, if they ever jointly made any such purchases, were without any legal authority from the corporation. Frequent reference is made, in the second argument, to the fact that the demurrer of Farwell to the bill of complaint was overruled. Grant it; but the confession does not advance the argument in the question before the court. Such an issue involves the sufficiency of the allegations setting forth the cause of action; but the present question is whether the alleged cause of action is proved, or whether, if it is not proved, the complainants may recover for what they have proved beyond what is alleged in the bill of complaint.

Viewed in the light of what is alleged, the gravamen of the bill of complaint is that the respondents, being officers of the corporation, undertook, in behalf of the corporation, to take up the Norfolk county bonds, the corporation having deposited with the respondents Berdell bonds, upon which they raised the money to accomplish that end, and that the respondents, on settlement, made extortionate charges for commissions, and other matters in violation of their trust and duty as such officers. Taken as a whole, it is plain that such a bill of complaint was not demurrable, but the facts are, as the proofs tend to show, that the respondents bought up the bonds and sold the same to the corporation at an extortionate rate; that Farwell received cash for his interest; and that Converse was paid partly in cash and partly in notes of the corporation, with Berdell bonds at fifty per cent as collateral; that the collateral has been sold, and not enough realized from it to pay the notes of the corporation, the balance of which still remains due.

Careful examination of the case prior to the reargument convinced the court that the allegations in the bill of complaint, and the proofs exhibited in the record, did not agree in regard to the cause of action, and it was for that reason that the order was passed, directing that the question, whether relief can be granted under the present bill of complaint, should be reargued in writing as specified in the order. Faithful compliance with that order is acknowledged by the court. Aided by the arguments, the court will now proceed to determine that question.

Decided cases, almost without number, support the proposition laid down by Chancellor Walworth, that no decree can be founded upon evidence in relation to matters not in issue between the parties. Tripp v. Vincent, 3 Barb. Ch. 614. Courts of equity everywhere recognize and acknowledge the soundness and justice of that rule and none more decisively than the supreme court, as clearly evinced by the language of Marshall, C. J., in a leading case, in which he decided, more than half a century ago, that no rule is better settled than that the decree must conform to the allegations as well as the proofs in the cause. Crocket v. Lee, 7 Wheat. [20 U. S.] 525.

Enough is already remarked to show that the allegations embodying the alleged undertaking of the respondents constitute the essential cause of action set up in the bill of complaint, and that, if those allegations

are disproved, the complainants have no substantial ground to claim any relief. Reject those allegations, and it follows that the bill of complaint states no case for relief on either of the principles of law which the complainants have invoked in the second argument. Clearly not on their first ground, because they have not alleged any alternative claim for compensation. Nor can the bill of complaint be maintained upon the second ground suggested, because the defence is not that they have not prayed for appropriate relief, but that the facts alleged as the ground of relief are not proved. Suppose the proofs would be competent if the allegations were sufficient, still it is contended, and well contended, that the facts which the proofs tend to establish cannot be made the ground of relief, because the facts are not pleaded in the bill of complaint, and because the respondents have never been called upon to make answer to them, or to controvert them by evidence; or, in other words, that relief cannot be claimed on any ground not set forth in the bill of complaint. When the bill sets up a case of actual fraud, and the complainant makes that the ground of his prayer for relief, Chancellor Truro held that he was not entitled to a decree by establishing some one or more of the facts quite independent of fraud, although the facts proved might themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud, originally stated. Price v. Berrington, 7 Eng. Law & Eq. 254.

Equitable relief cannot be granted unless the ground of relief is both alleged and proved. Consequently, Chancellor Cottenham held, in a case where the facts alleged were not proved, and the facts proved were not alleged, that the bill of complaint must be dismissed. Lord Brougham concurred, and remarked that "fraud must be clearly and distinctly alleged, and if so alleged, must also be clearly and distinctly proved, if it is the ground on which parties seek the assistance of the court for equitable relief." Wilde v. Gibson, 1 H. L. Cas. 627, 628. Actual fraud being alleged, and mere neglect of duty being proved, the chancellor held that relief could not be granted, because if the charge proved had been properly alleged, the line of defence might, and probably would have been different, which is quite analogous in principle to the case before the court. Ferraby v. Hobson, 2 Phil. Ch. 258, 259. Exactly the same views are expressed by the same learned chancellor in another case, where he held if a bill is filed making a case of alleged fraud, and the fraud is disproved or not established, the court will not allow the bill to be used for any secondary purpose. Glascott v. Lang, 2 Phil. Ch. 310. Amendments may indubitably be granted, in certain cases, to obviate such defects, but until the defect is remedied, the rule is established, that if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision, for the well-assigned reason that the pleadings do not put them in contestation. Harrison v. Nixon, 9 Pet. [34 U. S.] 502; Gordon v. Gordon, 3 Swanst. 472. Matters other than those alleged may well be dismissed in such a case, for the reason that no such issue is tendered by the complainant, and it is well-settled law that affirmative relief will not be granted in equity upon any ground not made a distinct allegation in the bill, so that it may be put in issue by the pleadings. Voorhees v. Bonesteel, 16 Wall. [83 U. S.] 29; Warren v. Van Brunt, 19 Wall. [86 U. S.] 654. Recovery must be had, if at all, upon the case made in the pleadings, and cannot be had upon any other ground. Grosholz v. Newman, 21 Wall. [88 U. S.] 488. None of these views are intended to controvert the proposition that a party may frame his bill in an alternative form, or that such a bill may be maintained, if the title to relief will be the same in either alternative, although the case is presented upon allegations resting on entirely distinct and independent grounds. Gerrish v. Towne, 3 Gray, 86. Attempt is made in argument to bring the case within that rule, but the court is unhesitatingly of the opinion that the true construction of the allegations contained in the bill utterly forbids the adoption of that theory.

Notice is given by the complainants that they will ask leave to amend in case the decision is adverse to their views, and, in order to give them an opportunity to submit such a motion, the entry of the decree will be deferred. Unless such a motion is seasonably made, the respondents will be entitled to a decree that the bill of complaint be dismissed with costs, but without prejudice.

Case No. 1,776.

BRADLEY et al. v. CONVERSE et al.

[4 Cliff. 375.][1]

Circuit Court, D. Massachusetts. May Term, 1876.

CORPORATIONS—DISSOLUTION—ASSETS—RIGHTS OF CREDITORS — INSOLVENCY — BANKRUPTCY — ENJOINING DIRECTORS — RECOVERY OF ASSETS BY ASSIGNEES—PREFERENCE BY DIRECTORS.

1. Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation.

[See Fisk v. Union Pac. R. Co., Case No. 4,830; U. S. v. Globe Works, 7 Fed. 530.]

2. Courts of equity will enforce the execution of such trusts in favor of the creditors, even when the matters in controversy may not be cognizable in a court of law.

3. Directors will not be permitted by a court of equity to obtain any undue advantage for themselves, to the injury of those for whom they are acting in a fiduciary relation.

[See Coons v. Tome, 9 Fed. 532.]

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

4. A railroad corporation was insolvent, and unable to pay its commercial and business paper, and was largely indebted to the first-named respondent. Measures were devised by the directors to pay or secure that claim without making any corresponding provision for the other creditors. Votes of the executive committee were passed, approving the schedules of claims of the said respondent, who was a member of said committee, and present at the meeting. At a subsequent meeting of the directors, of which the said respondent was one, the action of the executive committee was approved. The road was put into bankruptcy, and the complainants appointed assignees; they brought a bill praying for an account of the funds, notes, and bonds put into the hands of the respondents, and that they should be decreed to pay over to said assignees such sums as might be found due them as such. *Held*, that complainants were entitled to a decree that the votes of the executive committee and of the directors were in fraud of the complainants as assignees of the bankrupt corporation; that the respondents had acquired no valid rights to the funds; and that the respondents be perpetually enjoined from setting up any right to the bonds or funds by virtue of said votes.

In bankruptcy. The complainants [Charles S. Bradley, Charles R. Chapman, and George M. Barnard] were the assignees in bankruptcy of the Boston, Hartford, and Erie Railroad Company, which was duly adjudged bankrupt, and the respondents, Henry N. Farwell, Asa Farwell, and Samuel Hall [Jr.], composed the firm of A. G. Farwell & Co.; Henry N. Farwell was a director in the railroad company from Sept. 12, 1866, to Dec. 20, 1869, and vice-president thereof, and he was a member of the executive committee of the board of directors throughout the same period. All of these allegations of the bill were admitted by the respondents, and they also admitted that Samuel Hall acted as the treasurer of the railroad company from July 17, 1867, to Dec. 21, 1869. The railroad company was insolvent, and the said firm, or the senior partner thereof, held a large claim against the insolvent corporation, as alleged in the bill of complaint and admitted in the answer. Measures were devised by the directors to adjust that claim, and to pay or secure the same, without making any corresponding provision for the other creditors, and the complaint was that the scheme adopted for the purpose was inequitable and unjustifiable. Pursuant to that view, the complainants showed that between the 30th of November, 1869, and the month of December of the same year, the respondents presented to the treasurer and to the executive committee of the corporation certain schedules purporting to be accounts of transactions and dealings between the corporation and the respondents, in their firm, and the complainants charged that the respondents, by said accounts, pretended and claimed that the corporation, on the 1st day of December, 1869, owed to their firm more than $1,000,000, all of which was admitted by the respondents, and they also admitted that the said account was presented at a meeting of the executive committee held on the 8th of December, 1869, at which the senior member of the firm was present as a member of said committee. Complainants also charged that the accounts were reported for approval and that the executive committee passed the following votes: 1. That the schedules showing the accounts of the trustee and the accounts of A. G. Farwell & Co. with the corporation were approved, and that the treasurer was directed to settle with the parties on the basis of said items. 2. That the treasurer was instructed to settle the account of A. G. Farwell & Co. upon the following terms, to wit: give four notes of the corporation for the amount due,—one for $200,000, on demand, and interest; three others in equal amounts, due April, May, and June 1, 1870, interest added at eight per cent, and place as collateral to said notes $700,000, in the Berdell bonds. Votes of the kind, it was admitted, were passed by the executive committee, and that Henry N. Farwell was a member of the committee and present at the meeting, but it was denied that he acted or voted in the matter of the said two votes. Both votes involved matters of importance to those he represented as well as to himself, and inasmuch as he was present and neither did or said any thing to express any dissent to the action of his associates in the committee, it was by the court assumed that he approved of their action, which conclusion was confirmed by the fact that he ever afterwards claimed the benefit of their action in the premises.

Superadded to those accusations, the complainants also charged that the executive committee held another meeting on the succeeding day, the said H. N. Farwell being present as a member thereof, and that they passed the vote following, to wit: Voted, that the treasurer be instructed to draw an order on Baring Brothers for any amount now due, or that may become due, on the $3,000,000 of bonds of the state committed to them for negotiation or sale, in favor of A. G. Farwell & Co., said amount drawn for to be collateral to the claims they hold against this corporation. Taken as a whole, more could not be needed than those votes to perfect the scheme devised to secure the claim of the respondents, unless it should turn out that the executive committee had exceeded their powers. Whether any thing of the kind was suggested or not does not appear, but it does appear that the directors of the corporation, of which H. N. Farwell was one, held a meeting on the 17th of the same month, and that said H. N. Farwell was present at that meeting as a director. Two votes were passed at that meeting, which it is important to consider: 1. Voted, to approve all the doings of the executive committee shown on their records. Before the second vote was passed, the resignation of H. N. Farwell was presented by the clerk, but the resignation was not accepted, and it was voted to lay the same on the table.

Subsequently the second vote referred to, was passed as follows: 2. Voted, that the treasurer be instructed to draw an order on Baring Brothers & Co., in favor of A. G. Farwell & Co., for any amount due to, or that may be in their hands to the credit of this company, growing out of any sale made, or that may be made, of the scrip delivered to this company by the state, under the act of May 27, 1867, over and above eighty per cent sterling on said bonds, such amount, when received, to be collateral to, or as payment on, the claims of said Farwell & Co. against this company. Positive instructions are therein given to the treasurer to draw the described order, and the record shows that the said Hall, on the 17th of the same December, pretending to act as treasurer of the corporation, in pursuance of the preceding votes, executed and delivered to the respondents, composing the firm of A. G. Farwell & Co., the negotiable promissory notes of the corporation, payable to the order of the said firm, as specified in the said vote of the 8th of December, and also delivered to the said respondents the $700,000 of bonds described in said vote. A correct description of the said four notes is given in the before-mentioned vote; and the records also show that the said Hall, pretending to act as treasurer of the corporation, on the same day delivered to the respondents an order in writing, directing Baring Brothers & Co. to pay to A. G. Farwell & Co. any amount due or that may hereafter become due to, or that may be in their hands to the credit of, this company, growing out of any sale made, or that may be made, of the scrip delivered to this company by the state, under the act of May 27, 1869, over and above eighty per cent sterling on said bonds, and charge our (the said company's) account, to which he affixed the signature of the railroad company by himself, as treasurer of the same. [Decree for complainants.]

[For decision overruling demurrer to bill, see Case No. 1,779.]

C. S. Bradley and J. J. Storrow, for complainants.

B. F. Brooks and M. Storey, for respondent James W. Converse.

B. F. Butler and E. L. Barney, for respondent H. N. Farwell.

CLIFFORD, Circuit Justice. Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of creditors, even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees, but courts of equity will not permit such managers, in dealing with the trust estate, in the exercise of the powers of their trust, to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in a fiduciary relation. Exact equality of benefit may be enjoyed, but the trustees are forbidden to protect, indemnify, or pay themselves at the expense of those who are similarly in relation to the same fund. Authorities to show that the relation between the directors of a corporation and its stockholders is that of trustee and cestui que trust, are very numerous, as sufficiently appears from a recent opinion of this court, delivered by the circuit judge, to which it may be added that creditors, in certain cases, are preferred even to stockholders, for the reason that the latter, as constituent members of the corporate body, are regarded in certain respects as sustaining the same relation to the former as that sustained by the corporation. Barnard v. Farwell [Case No. 1,002]; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. [74 U. S.] 411.

Proof of the most satisfactory character is exhibited in the record, that H. N. Farwell was, after date of the several votes, and prior and subsequent thereto, one of the directors of the corporation and a member of the executive committee, and the proof is equally satisfactory that the corporation, for a long time before, was and is utterly insolvent and bankrupt, that it had failed, refused, and been unable to pay its commercial and business paper, and was, as charged in the bill of complaint, insolvent in fact, and bankrupt, within the meaning of the bankrupt act. Charges of this kind are very distinctly made in the bill of complaint, and the complainants also charge that the corporation, at the date of those votes, did not have in their possession any personal property other than those bonds and that fund, except what was embraced in and covered by the Berdell mortgage, which was and is for an amount much greater than the value of the property therein mortgaged, and that the corporation was otherwise largely indebted,—all of which, as the complainants allege, was at all times well known to the respondents. Based upon these several considerations the complainants allege and charge that the said bonds were so transferred, and that the said fund was so assigned, and that both were by the respondents received, in fraud of the creditors of the bankrupt corporation, and that the bonds and the fund, by force of section 14 of the bankrupt act, and otherwise, and by force of the principles upon which courts of equity act, became and are vested in the complainants as the assignees of their estate in bankruptcy, as alleged in the bill of complaint. Due demand of the bonds and fund is alleged, and the same having been refused, the complainants pray for a decree that the bonds may be returned, and that the assignment of the fund may be set aside, cancelled, and declared void, and made over to the complainants as such assignees, and that the respondents may be enjoined from making any sale or transfer of any of said bonds,

or of any part of said fund, or from demanding, collecting, or receiving any moneys thereon, and for general relief.

Service was made, and the respondents appeared and filed an answer. Attempt is made by the respondents, in the answer, to avoid all responsibility for what is charged, upon the ground that Henry N. Farwell did not vote to approve the claim of the respondents at the meetings of the executive committee, or to direct the four notes to be given, or to place the $700,000 of Berdell bonds as collateral security to the notes, or to direct the treasurer to draw the order in favor of A. G. Farwell & Co. on Baring Brothers & Co. for the fund in their hands, and that he did not vote at the meeting of the directors to approve the doings of the executive committee, or to instruct the treasurer to draw that order on Baring Brothers & Co. for the balance of the fund in their hands.

Enough has already been remarked to show that H. N. Farwell was present at all those meetings in his official character, both as a member of the executive committee and as one of the directors, which is fully admitted by the answer; as for example, the answer admits that said account was presented at a meeting of the executive committee of said corporation held on the 8th of December, 1869, at which said Henry N. Farwell was present and a member of said committee . . . that after due consideration and examination of said account the said executive committee passed the two several votes set forth in said bill of complaint . . . and the respondents admit that at another meeting of the executive committee, held on the 9th of said December, the respondent Henry N. Farwell being present, and a member thereof, the third vote of said committee set out in said bill of complaint was passed. Admission is also made in the answer, that Henry N. Farwell was present as a director, at the meeting of the directors held December 17, 1869, and that at said meeting it was first voted to approve all the doings of said executive committee shown on their records, and that the resignation of said Farwell as director was at that meeting presented by the clerk, not accepted and laid on the table, as alleged in the bill of complaint, and that thereafterwards the fourth vote of the board of directors, as set forth in said bill of complaint, was passed. Appended to each of those admissions is the allegation that the said Henry N. Farwell did not vote or act in relation to the particular matter constituting the charge made by the complainants. His presence, therefore, in the one case as a member of the executive committee, and in the other as one of the directors of the corporation, is proved beyond all doubt, and it is equally certain that he did not do or say any thing in opposition to those votes, and in view of the whole case the court is of the opinion that it must be held that he approved or fully acquiesced in each of those several votes. Unless those votes can be upheld as valid, it is clear that the defence to the bill of complaint, so far as respects the Berdell bonds, must fail, as the answer presents no other sufficient basis to support the transfer. Suppose that is so, still the respondents claim to hold the Baring fund, upon the ground that, at the same time and as a part of the same transaction with their receiving the notes of the corporation and the assignment of the Berdell bonds, it was agreed that they should procure and place in the hands of the treasurer of the state $100,000 Berdell bonds other than those placed in their hands as collateral, which they pretend in their answer to have subsequently done. Such a statement in the answer requires proof to sustain it, but the proofs exhibited in the record show that it is not true. Instead of that, the agreement, which is signed by Farwell, and not by the firm, bears date December 2, fifteen days before the treasurer executed and delivered the four notes as directed by the executive committee, and it appears that he never procured and placed the bonds as stipulated in the agreement. Converse and Maynard signed the same paper, each agreeing to procure and so place $50,000 of said bonds for the same purpose, and it appears that they afterwards refused to perform the agreement unless H. N. Farwell would give them his guarantee, but the record shows that their refusal to do as they had agreed was made to the new treasurer, and that he was not appointed until four days after the vote directing the execution and delivery of the said four notes, and consequently that their refusal to give up their bonds could not have been known at the date of that vote.

Much reference, however, to the details of the evidence is unnecessary, as the testimony of H. N. Farwell shows conclusively that the matter of the required guarantee was not suggested until long after the votes of Dec. 17, and proves to the entire satisfaction of the court that the allegation of the answer under consideration is not true. Other suggestions were made in argument by the respondents as grounds for retaining the said assigned fund, but inasmuch as they are not set up in the answer, nor supported by the proofs, they may be overruled without further remark. Equitable claims of a general character are also set up in the answer, to the said bonds and the said assigned fund, but the allegations are too indefinite and vague to be the proper subjects of legal adjudication. Suffice it to say, that none of the defences set up in the answer can be sustained, and that the same, one and all, are overruled. Complainants are entitled to a decree that the votes of the executive committee and of the directors, set forth in the bill of complaint, were in fraud of the complainants as assignees of the bankrupt corporation, and that the respondents acquired no valid rights under the same to said bonds

or said assigned fund in the hands of Baring Brothers & Co., and that said respondents be perpetually enjoined from setting up any right, title, claim, or interest, in or to said bonds and fund, by virtue of said votes or either of them.

Case No. 1,777.

BRADLEY v. CURRIER.

Circuit Court, D. Massachusetts. 1848.

FRAUDULENT CONVEYANCES—FEDERAL COURTS.

[1. Cited in Whetmore v. Murdock, Case No. 17,509, to the point that it is only where a demand has been transferred to a foreign resident, to whom it did not belong originally, that jealousies should be indulged of a design to evade the state insolvent system, and a close scrutiny made into the truth of the transaction, and where juries might be expected to lean against plaintiffs.]

[2. Cited in Moan v. Wilmarth, Case No. 9,686, to the point that it was the design of congress, in the acts of 1839 and 1841 (5 Stat. 341, 410), that the federal courts should conform to the laws of the respective states as regards imprisonment of private debtors, thus allowing the individuals to have their rights settled on like principles in both state and federal courts, but by a tribunal supposed to be more impartial when the action is between a citizen and a nonresident or foreigner, and is brought in a court of the United States.]

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

BRADLEY (DOBBINS v.). See Case No. 3,944.

Case No. 1,778.

BRADLEY v. ELIOT.

[5 Cranch, C. C. 293.][1]

Circuit Court, District of Columbia. March Term, 1837.

JUDGMENT—RENDITION AND ENTRY—CORRECTING DOCKET.

If, after judgment, an entry be made on the clerk's docket intimating that the judgment is for the use of a third person, the court will not interfere to order it to be stricken out after the term in which the judgment was rendered.

An action was entered at April term, 1821, in the name of W. A. Bradley, for the use of E. B. Caldwell, against Samuel Eliot, Jr., who confessed judgment at the return term of the writ. On the 17th of December, 1835, the clerk wrote in the margin these words: "Use of the Bank of Washington, says J. Hellen, Esq., 17th December, 1835."

R. S. Coxe, for the plaintiff, moved the court to order those words to be stricken out or erased from the docket, they having been written without the authority of the court.

THE COURT (THRUSTON, Circuit Judge, absent) refused to interfere, and discharged the rule.

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

Case No. 1,779.

BRADLEY et al. v. FARWELL et al.

[Holmes, 433.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1874.

CORPORATIONS—DISSOLUTION—ASSETS—RIGHTS OF CREDITORS—BANKRUPTCY—RECOVERY OF ASSETS BY ASSIGNEES—PREFERENCE BY DIRECTORS.

1. The directors of an insolvent corporation, while it is under their management, hold the position of trustees of its assets for the benefit of its creditors, and, if themselves creditors, cannot secure to themselves any preference or advantage over other creditors.

[Cited in Corbett v. Woodward, Case No. 3,223; Hills v. Stockwell & Darragh Furniture Co., 23 Fed. 437; Lippincott v. Shaw Carriage Co., 25 Fed. 586; Adams v. Kehlor Milling Co., 35 Fed. 435.]

2. A transfer of the assets of an insolvent corporation, according to vote of its directors, to a partnership of which one of the directors is a member, made more than six months before proceedings in bankruptcy against the corporation, as payment of, or security for a debt due the partnership from the corporation, to the prejudice of other creditors, may be set aside, and the property so transferred recovered, in a suit in equity for that purpose brought by the assignees in bankruptcy of the corporation.

In equity. Bill by [Charles S. Bradley, Charles R. Chapman, and George M. Barnard] the assignees in bankruptcy of the Boston, Hartford, and Erie Railroad Company, to recover property of the corporation alleged to have been transferred to the defendants [Henry N. Farwell, Asa Farwell, and Samuel Hall, Jr.], then partners, to secure a claim of the partnership against the corporation, in pursuance of votes of the board of directors of which the defendant Farwell was a member, after the corporation had become insolvent, and in fraud of its creditors. The defendants filed a general demurrer to the bill. The material facts of the case are stated in the opinion. [Demurrer overruled.]

C. S. Bradley and J. J. Storrow, for complainants.

It is well settled that the managing officers and directors of a corporation hold relations of trust towards the individuals interested, and that the rules of courts of equity with regard to the administration of trusts apply to such officers. They are not trustees in the narrow sense of being intrusted with the legal title to property. They are intrusted with large general powers of control and management. It is with regard to the exercise of these powers that their character and responsibilities are similar to those of trustees, and that the law of trusts applies. Benson v. Heathorn, 1 Younge & C. Ch. 343; Bowes v. City of Toronto, 11 Moore, P. C. 518, 522; European & N. A. R. Co. v. Poor, 59 Me. 277; Heath v.

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

Erie R. R. [Case No. 6,306]; Dodge v. Woolsey, 18 How. [59 U. S.] 341; Hayes v. Kenyon, 7 R. I. 142. The cardinal doctrines relating to all fiduciary relations, and particularly to the powers and duties of corporation managers, are, that the trust shall be exercised; (1) in good faith and honesty; (2) in furtherance of its true purpose; (3) in no respect for the personal advantage of the trustee.

In this case it is clear; (1) that two of the defendants, while holding positions of trust, received an advantage, not only in preference to, but to the exclusion of, other persons similarly situated with reference to the property of this corporation; (2) that this property was transferred from the corporation to them by means of the exercise of those powers of control and management which had been intrusted to them in common with others; (3) that they were not only cognizant of, but as such trustees actively participated in, that exercise of the trust powers which gave them this private gain.

The question is, whether, when a corporation has become insolvent, it is competent for the directors to transfer to one or more of their number, who are creditors, all the assets of the corporation substantially, to the entire exclusion of other creditors. The doctrines of equity already stated answer this question. Curran v. Arkansas, 15 How. [56 U. S.] 304; Koehler v. Black River Falls Iron Co., 2 Black [67 U. S.] 715; Drury v. Cross, 7 Wall. [74 U. S.] 299; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Paine v. Lake Erie R. Co., 31 Ind. 353; Gaslight Imp. Co. v. Terrell, L. R. 10 Eq. 168, 176; Sykes' Case, L. R. 13 Eq. 255; Gilbert's Case, 5 Ch. App. 559. This is a bill in equity; and repeated adjudications in England have established that contracts between a corporation and its directors, which are good at law and under the express provisions of the joint-stock companies' act of 1845 and 1862, are invalid in equity, upon the principles of the law of trust as administered in chancery. Foster v. Oxford, W. & W. Ry. Co., 13 C. B. 200; Wordsw. Joint-Stock Co. (Ed. 1865) Append. p. 128; Id., p. 159; Aberdeen Ry. Co. v. Blakie, 1 Macq. 461; Southampton Dock Co. v. Southampton Harbour & Pier Board, L. R. 14 Eq. 595.

Benj. F. Butler, for defendants.

The bill nowhere sets out that the bonds and assignment, or either, now are, or at the time of demand or filing of the bill were, in possession of the defendants. Nor in what the alleged fraud against creditors consists, or the means or intent with which it was done, except the fact of insolvency of the road at the time of the transfer of the securities. Nor that the defendant Farwell acted or voted in the meetings of the executive committee, or at the meeting of the directors, upon the claim or in the matter in which he was interested; and the recital as to his and Hall's connection with the road would seem to be only for the purpose of inferentially affecting defendants with the knowledge of the insolvency of the bankrupt at the date of the transaction, although that is alleged afterwards specifically.

The question presented by the demurrer is; Are there any such allegations of fact as show a fraud upon the creditors by Farwell & Co., either at common law or within the provisions of the bankrupt act? The bill does not deny that A. G. Farwell & Co. were bona fide creditors of the bankrupt in a much larger amount than the collateral security received, but admits the same; does not deny the regularity of the meeting at which the accounts between the parties were settled, or the proper auditing of those accounts, but admits the same. The case, then, is presented of a transfer of property more than nine months before the petition in bankruptcy, by the bankrupt while insolvent, as security to a creditor having then present claims, the security being less in amount than the indebtment of the insolvent, without any allegation of contemplated bankruptcy. Taking the strongest view of the transaction, such a proceeding was only a preference by an insolvent debtor of one of his creditors. It is submitted that such preference is not void or fraudulent at common law. This is believed to be so well settled as not to need citation of authorities. Hale v. Allnutt, 36 Eng. Law & Eq. 383. Such preference is not against the bankrupt law. To constitute a fraudulent preference under the bankrupt act, and voidable by the assignees, it must be shown to have been made within four or six months of the filing of the petition; that it has been made with a view to give a preference; that the debtor must be in fact insolvent; that the person receiving the conveyance must have reasonable cause to believe the debtor insolvent; and that the conveyance was made in fraud of provisions of the bankrupt act, and in view of contemplated bankrupt proceedings. Contemplation of bankruptcy is settled to mean something more than insolvency. The act of the bankrupt in making the preference must be voluntary, and not made under pressure of demand from the creditor. Such preferences have always been held to be involuntary where made either by threat of suit by the creditor, or where payment has been requested with the present ability of the creditor to bring suit. The time of four months, fixed by the thirty-fifth section of the bankrupt act, during which all preferences made by the bankrupt are void; and conveyances made for a like purpose by the bankrupt, being insolvent or in contemplation of insolvency, within six months before filing a petition, with the limitation that such transfer or conveyance is made with a view to prevent his property coming to his assignee or being distributed under the act, is an exclusion of all pay-

ments or transfers made under like circumstances before the time limited by the act. Otherwise, the words of limitation would be valueless.

SHEPLEY, Circuit Judge. This case is presented on demurrer to the bill in equity. The complainants allege that the Boston, Hartford, and Erie Railway Company, a corporation duly established by law, was, upon the second day of March, 1871, duly adjudicated a bankrupt, upon a petition in bankruptcy duly filed, before the district court of the United States for the district of Massachusetts sitting in bankruptcy, on the twenty-second day of October, 1870. The bill alleges the appointment of the complainants as assignees, and their acceptance of and qualification under the trust; that the defendants, Henry N. Farwell, Asa Farwell, and Samuel Hall, Jr., composed the firm of A. G. Farwell & Co.; that Henry N. Farwell was a director in the Boston, Hartford, and Erie Railroad Company from July 17, 1867, to Dec. 21, 1869, and vice-president thereof, and a member of the executive committee of said board of directors; that between the thirtieth day of November, 1869, and the ninth day of December, 1869, the defendants presented to the treasurer and the executive committee of said corporation an account of certain transactions between the defendants in their firm of A. G. Farwell & Co., and the corporation, claiming therein and thereby an amount due to them from the corporation of over a million dollars; that said account was presented at a meeting of the executive committee on the eighth day of December, 1869, at which meeting the defendant, Henry N. Farwell, was present as a member of the committee; that at said meeting the executive committee voted "nem. con." to approve the accounts of A. G. Farwell & Co. with the corporation, and directed the treasurer to settle with them on the basis of said items, and also voted to instruct the treasurer to settle the account of A. G. Farwell & Co., thus approved, by giving four notes for the sum of two hundred thousand dollars each, one on demand, and three others on time, with interest, and to place as collateral to said notes seven hundred thousand dollars in Berdell bonds. The bill further charges that a meeting of the executive committee was held on the ninth day of December, 1869, Henry N. Farwell being present as a member thereof, at which meeting a vote was passed instructing the treasurer to draw an order on Baring Brothers for any amount due, or that may become due, on the three millions of bonds of the state of Massachusetts by the corporation committed to them for negotiation or sale, in favor of A. G. Farwell & Co., said amount drawn for to be collateral to the claims said Farwell & Co. held against the corporation; that subsequently at a meeting of the directors, said Farwell being present as a director, it was first voted to approve all the doings of the executive committee shown on their records; that then the resignation of said Farwell as director was presented but not accepted, and it was voted to lay the same on the table; that then a vote was passed instructing the treasurer to draw an order on Baring Brothers & Co. in favor of A. G. Farwell & Co., for any amount due, or that may be due, in their hands to the credit of the company, growing out of any sales made or that may be made of the scrip delivered to the company by the state of Massachusetts, under the act of May 27, 1867, over and above eighty per cent sterling on said bonds, such amount when received to be collateral to, or as payment of, the claims of Farwell & Co. against the company; that, on the seventeenth day of December, Hall, one of the defendants, acting as treasurer of said corporation, in pursuance of the foregoing votes, and having no other authority, executed and delivered to the firm of A. G. Farwell & Co. the notes specified in the vote of Dec. 8, 1869, and delivered also to them the seven hundred thousand dollars of bonds described in said vote, and also a draft on Baring Brothers & Co. for the proceeds of the sale of the scrip delivered to the company by the state of Massachusetts over and above eighty per cent sterling on said bonds. The bill further charges, that from and after the first day of January, 1869, until after all said acts before charged, the said Henry N. Farwell was, and continued to be, and acted as, a director in said company, and as a member of the executive committee, and attended a meeting of said committee on the eighteenth and a meeting of the directors on the twentieth of said December; that on the thirtieth day of November, 1869, and long prior thereto, and ever since, the said corporation was and has been utterly insolvent and bankrupt, and did not pay, and was unable to pay, and has not since paid, its debts; and that for a period of more than fourteen days prior to said day it had failed, refused, and been unable to pay its commercial and business paper, and was insolvent in fact, and bankrupt within the meaning of the bankrupt act of the United States. The bill then charges that between the first and seventeenth days of December, 1869, the corporation was largely indebted, and had no personal property except the bonds aforesaid and the funds in the hands of the Barings, except such as was mortgaged for more than its value. By reason of all which it is alleged that the transfers and assignments aforesaid were made and received in fraud of the creditors of said bankrupt corporation, whereby it is alleged, by force of the fourteenth section of the bankrupt act and otherwise, and by force of the principles by which courts of equity act, the same became and now are vested in the complainants.

The case presented in the bill is that of a transfer or attempted transfer by the direct-

ors of an insolvent corporation to one of their own number, as security for a debt due to him from the corporation, of all the available assets of the corporation, more than nine months before the petition in bankruptcy. The time which elapsed after this preferential payment to one creditor before the commencement of the proceedings in bankruptcy exceeds the time limited in the thirty-fifth section of the bankrupt act, during which all preferences made by the bankrupt are voidable. The transfer cannot therefore be declared void under the provisions of that section. If the transaction was, as contended on the part of the defendants, nothing more than a preference by an insolvent debtor of one of his creditors, such preference is not void or fraudulent at common law, and, with no other element of trust or fraud in the case, will not be set aside by a court of equity.

The real issue presented for the consideration of a court of equity in this case is, whether the managing officers and directors of this insolvent corporation held such a relation of trust to the funds of the insolvent corporation for the benefit of creditors and all persons and parties interested, that, according to the principles applied by courts of equity to cases of like trusts, they are to be held guilty of a breach of trust by securing an advantage to themselves not common to the other creditors, and by providing for the payment of a debt, or a large part of the debt, due to a director from the assets of the corporation, to the entire exclusion of the payment of any and all other debts due from the corporation.

Courts of equity were established for the purpose, among others, of enforcing the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law. Such courts will not permit trustees, in the exercise of the powers of their trust or in dealing with the trust estate, to obtain any benefit or advantage for themselves to the injury or prejudice of those for whom they are acting in the fiduciary relation, or to protect, indemnify, or pay themselves at the expense of those who are similarly situated in relation to the fund. The trustee is an agent acting for others, and he cannot be permitted to act adversely to his principals. To guard against the hazard of abuse of the trust and to remove the trustee from temptation, the rule in equity permits the cestui que trust at his own option, and without showing essential injury, to set aside the transaction where the trustee is both vendor and vendee, upon the ground that, however innocent the purchase may be in the given case, it is poisonous in its consequences.

The relation between the directors of a corporation and its stockholders is that of trustee and cestui que trust. Butts v. Wood, 38 Barb. 188; York & N. M. Ry. Co. v. Hudson, 19 Eng. Law & Eq. 365, 16 Beav. 485; Scott v. Depeyster, 1 Edw. Ch. 513; Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 85; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586; European & N. A. R. Co. v. Poor, 59 Me. 277; Benson v. Heathorn, 1 Younge & C. Ch. 343; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; Aberdeen Ry. Co. v. Blakie, 1 Macq. 461. As directors are intrusted with the general management and control of the affairs and property of the corporation, this management and control must be exercised by them in the character of trustees, and subject to responsibilities under the law of trusts imposed upon those who have assumed, and are consequently under obligation faithfully to execute, a trust. They are not merely trustees for the stockholders. Without considering their duties and obligations in other respects to the state, the community, and other parties interested who may resort to courts of law or equity to compel a faithful performance of their trust, we need now only consider, in the case of an insolvent corporation, what their relation is to the creditors of the corporation and to the funds available for the payment pro tanto of corporate debts. In case of the insolvency of a corporation, its assets become a trust fund for the benefit of creditors while under the management of its officers. In Curran v. Arkansas, 15 How. [56 U. S.] 307, Mr. Justice Curtis, delivering the opinion of the court, speaking of an insolvent banking corporation, says: "The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, that may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of other than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has often been decided, and rests upon the plainest principles."

Was the property of this insolvent corporation transferred to Farwell & Co. under such circumstances as relieved it from the trust in favor of the creditors? Unquestionably the transaction cannot be considered as a breach of trust or as a constructive fraud, merely on the ground that it was a preference of one creditor over the other creditors of the corporation. Simply on the ground of such a preference the transaction is not subject to be impeached at common law, or, under the circumstances of this case, under the provisions of the bankrupt act. If Farwell & Co. take this property charged with a trust in favor of the creditors which a court of equity will enforce, it is not upon the ground that as creditors alone, in their capacity as creditors, they were preferred creditors, but on the ground that, in the trust relation they held to the corporation

and its funds, they could not equitably, by virtue of that relation, and in the exercise of the trust powers, secure for themselves such a benefit, advantage, and preference over other creditors with like claims, as any other creditor who stood in no trust relation to the fund might legally and equitably secure. In the case of Koehler v. Black River Falls Iron Co., 2 Black [67 U. S.] 720, where the directors of a corporation in embarrassed circumstances had secured debts due to three or four of their own number to the prejudice of other creditors, Mr. Justice Davis, in delivering the opinion of the supreme court of the United States, says: "Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation. In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees." In Drury v. Cross, 7 Wall. [74 U. S.] 299, where directors of a corporation had secured, with the property of the corporation, the debts upon which they were liable as indorsers, by a conveyance which operated to deprive all the other creditors of any security, the court say: "The transaction which this case discloses cannot be sustained in a court of equity. The conduct of the directors of this railroad company was very discreditable and without authority of law. It was their duty to administer the important matters committed to their charge for the benefit of all parties interested, and in securing an advantage to themselves not common to the other creditors they were guilty of a plain breach of trust. To be relieved from their indorsement they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management with absolute fidelity to both creditors and stockholders, they nevertheless acted with a reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed."

That a court of equity will not suffer an injury to the creditors or stockholders, resulting from such a breach of trust on the part of the directors, to pass without a remedy, is well settled in the most carefully considered decisions of courts of equity, both in England and this country. York & N. M. Ry. Co. v. Hudson, 19 Eng. Law & Eq. 361; Charitable Corp. v. Sutton, 2 Atk. 404; Gas Light Imp. Co. v. Terrell, L. R. 10 Eq. 168; Gilbert's Case, 5 Ch. App. 559; Sykes' Case, L. R. 13 Eq. 255; Hodges v. New England Screw Co., 1 R. I. 340; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Nathan v. Whitlock, 3 Edw. Ch. 215, 9 Paige, 152; Hightower v. Thornton, 8 Ga. 493; Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513; 2 Story, Eq. Jur. § 1252; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610.

Such a result necessarily follows when it is admitted that the directors of a corporation are trustees, and that in case of an insolvent corporation the property of the corporation, while under the management of these trustees, is a trust fund for the benefit of creditors. The fiduciary relation between the directors and the creditors being established, and the fact that the trustees in dealing with the trust fund have secured to themselves a benefit or advantage over the creditors, or a benefit or advantage to themselves as creditors over and above the other creditors, taints the transaction and invokes the aid of a court of equity to see to the right execution of the trust. Not that the trustees cannot prefer one creditor to the others at common law and outside of the provisions of the bankrupt act, but that, in equity, a trustee cannot contract with himself as he may with third parties. If he exercises in his own favor the powers he may rightfully exercise in favor of another, the court does not stop to inquire whether he gained or lost. It is enough that the beneficiary is dissatisfied with the transaction for the court to set the transaction aside without requiring the beneficiary to prove actual loss or actual fraud. The principles applicable to such cases are well stated in the case of European & N. A. R. Co. v. Poor, above cited. In that case, Chief Justice Appleton says: "It is not that in particular instances the sale or the purchase may not be reasonable, but, to avoid temptation, the agent to sell is disqualified from purchasing, and the agent to purchase, from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The cestui que trust may confirm all such sales or purchases, if he deems it for his interest. The affirmance or disaffirmance rests with him; and the trustee when buying trust property from, or selling it to, himself, must assume the risk of having his contracts set aside if the cestui que trust is dissatisfied with his action."

It is true that the directors do not hold the title to the corporate property in trust. The title is in the corporation; but their power of management, disposition, and sale is a trust power, and the same principles apply to the execution of trust powers as to the dealings with trust estates. In Sawyer v. Hoag, Mr. Justice Miller, speaking of the doctrine that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation as a doctrine of modern date, very pertinently adds: "When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business,

it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." The doctrine, however, is not a modern doctrine in courts of equity. What is of comparatively modern date is the application of old and well-settled doctrines of equity applicable to the exercise of trust powers and duties to the new state of facts growing out of the rapid development of corporations. As new trusts are created, courts of equity apply to the modern trusts the ancient principles applicable to all trusts in the same manner as, when railways and telegraphs were first constructed, courts both of law and equity applied to railway and telegraph companies the same principles they had previously applied to like corporate bodies.

The vast increase of corporate property and the immense accumulation of corporate liabilities at the present time, and the consequent dependence of both stockholders and creditors upon the fidelity with which the managers of these corporations exercise the powers of their trust, would seem imperatively to require that the salutary rules so rigidly enforced by courts of equity in other cases of fiduciary relation should not be relaxed in this class of cases, where the trust powers are of such magnitude and the consequences of a breach of trust so disastrous. Especially in the case of insolvent corporations are the acts of the managing officers to be free from the imputation of having been influenced by the consideration of any interests adverse to those they are bound only to regard. Standing in a fiduciary relation, as it were at the bedside of a dying patient, if they are subsequently found in possession of a portion of his effects, they must show title by a conveyance untainted by the exercise of that power which the trust relation gave them to influence the disposition made by the decedent of his property in their favor and to the prejudice of others having equal claims to the inheritance. If it be claimed, as it seems practically in some cases to be claimed, that directors occupy a position where they have an opportunity and a right to protect first their own interests, the answer to be given is the one which was given to a similar claim which was set up in defence in the case of Gaslight Imp. Co. v. Terrell, previously cited. There the court answered that a preference to a creditor who was a stranger was only an undue preference, while the preference of a director who was also a creditor introduced the added element of a taint of fraud and a breach of trust. The court add: "Suppose that the director had been a partner of a creditor who required to be paid, and he got the benefit of the payment through his partner, would anybody doubt that there was a tincture of fraud in his getting the benefit by means of undue preference? It is the directors who make the order for the payment. I am of opinion that this fact only makes the case worse, and compels this court to direct the whole transaction to be set aside.

The acts complained of in the bill were acts of the directors when one of the partners affected by them was present and acting as a director, and either co-operating, or consenting, or acquiescing, in the acts charged. They were such acts as, upon the principles hereinbefore stated, could be treated as void by the corporation or the creditors if they did not deem it for their interest to acquiesce in the action of the directors. This right which the beneficiaries of the fund had to set the transaction aside is one which is vested in the assignees. "The statute is full of authority to him (the assignee) to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt." Sawyer v. Hoag, 17 Wall. [84 U. S.] 620. Demurrer overruled.

[NOTE. For decision upon the merits, see Bradley v. Converse, Case No. 1,776.]

Case No. 1,780.

BRADLEY v. FROST et al.

[3 Dill. 457.][1]

Circuit Court, D. Minnesota. 1875.

BANKRUPT ACT—ATTACHMENT—SALE OF PROPERTY UNDER STATE PROCESS—LIABILITY OF SHERIFF AND JUDGMENT CREDITOR TO THE ASSIGNEE IN BANKRUPTCY.

1. A sheriff who sold on execution property previously attached by him by virtue of a judgment of a state court, which made it his duty to sell this specific property, leaving him no discretion, and who in good faith paid over the proceeds of the sale to the judgment creditor, without actual notice of proceedings in bankruptcy commenced after the attachment, but before the judgment and sale, is, it seems, not liable as in trover to the assignee in bankruptcy.

[Cited in Conner v. Long, 104 U. S. 233.]

2. In such a case, the creditor receiving the proceeds of the sale may be compelled to pay the amount thereof to the assignee in bankruptcy, by an action in the federal court.

[Cited in McCord v. McNeil, Case No. 8,714.]

In bankruptcy. The plaintiff [Newton Bradley] is the assignee in bankruptcy of the St. Paul Lumber Company; the defendants are the sheriff [James C. Frost] and [Charles H. Rhines] a judgment creditor of the bankrupt. The action is in the nature of trover to recover the value of certain personal property seized and sold by the sheriff, the proceeds whereof were paid over to the judgment creditor. The facts are these: July 22, 1875, the creditor sued the St. Paul Lumber Company in the state court and attached the property in question. August 25,

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

petition in bankruptcy filed against the St. Paul Lumber Company. September 6, judgment entered in the state court against the attachment defendant (the St. Paul Lumber Company), but without any special order to sell the attached property. September 17, writ of execution on the judgment levied by the sheriff on the property theretofore attached. September 23, the original judgment plaintiff (Parker) assigned the judgment to the defendant Rhines. September 8, the St. Paul Lumber Company was adjudicated a bankrupt on the creditors' petition of August 25, and on September 29, the register's deed of assignment to the plaintiff was executed and delivered. October 4, the sale of attached property was made by the sheriff, and the proceeds paid over on the execution to Rhines. This was done without actual notice of the bankruptcy proceedings. No application was made by the assignee at any time to the state court. After the sale by the sheriff and payment of proceeds to the judgment creditor, the assignee in bankruptcy made a written demand (October 15) on the sheriff for the property, but not for the proceeds thereof, and afterwards brought this suit against the sheriff and the assignee of the judgment who received the proceeds of this sale, to recover the value of the property, alleging, however, that it sold for its full value, and not seeking to recover any more than it brought at the sheriff's sale. The case came before the court on a motion by the plaintiff for judgment on the defendants' answer, which set up the foregoing facts. [Motion granted in part.]

H. L. Williams, for plaintiff.

Lochran, McNair & Gilfillan, for defendants.

DILLON, Circuit Judge. 1. The suit in the state court was commenced and the writ of attachment levied on the property of the debtor before the proceedings in bankruptcy were commenced, and judgment was regularly obtained two days prior to the time when the debtor was adjudicated to be a bankrupt. The adjudication of bankruptcy, however, preceded the issuing of the execution. When the assignment was made to the plaintiff, the title to the property vested in the assignee and related back to August 25, when the proceedings in bankruptcy were commenced. No question is made as to the regularity and validity of the judgment, and it is admitted that by the laws and practice in Minnesota, property attached is held under a general judgment, and that it was the duty of the sheriff having an execution issued on the judgment to sell the attached property the same as if the judgment of the court had specially directed this to be done. Rev. St. Minn. p. 468, § 139. Accordingly the property was sold by the sheriff on the execution, and the proceeds paid over by him to the judgment creditor, without actual knowledge of the proceedings in bankruptcy. As respects the sheriff, the case is to be treated as one in which the attachment was rightfully levied in the first instance and the property thereby brought within the possession of the state court by being in possession of its officer. Johnson v. Bishop [Case No. 7,373.]

The judgment rendered by the state court, so counsel concede, bound the property attached to the same extent as if it had by the court been specially so ordered, and the sheriff, when the execution on the judgment was in his hands, was bound to sell the property attached, the same as if the writ of execution had specially commanded this to be done. This he did, and made the sale, and paid over the proceeds to the judgment creditor, before actual knowledge of the proceedings in bankruptcy. Under these circumstances, it admits of great doubt whether the sheriff can be held in this action for the value of the property sold (Johnson v. Bishop, supra; Buck v. Colbath, 3 Wall. [70 U. S.] 334, 343), and, as at present advised, I shall deny the motion for judgment against him; reserving the case for further consideration, if necessary, on this point.

2. As respects the judgment creditor who received the proceeds of the sale, I am of opinion he is liable. The effect of the adjudication in bankruptcy and the subsequent assignment to the plaintiff, was to dissolve the attachment (section 14 of the bankrupt act [of 1867; 14 Stat. 522]), and to transfer the title to the attached property to the plaintiff, as of the date of the commencement of the proceedings in bankruptcy. The attachment being dissolved, the rights of the judgment creditor, as respects the assignee, must rest upon the sale under the execution, and the rights under the levy of the execution, if any were acquired, were divested by the subsequent deed of assignment to the plaintiff. The title to the property at the time of the sale was wholly in the plaintiff, and the judgment creditor has no greater right to the proceeds of the sale than the bankrupt had in the property, that is to say, no right whatever.

If the plaintiff so elects he may have judgment on the pleadings against Rhines for the net amount he received of the sheriff. If he does not so elect, his motion for judgment on the pleadings will be denied, and he may contest the facts set up in the answer.

(The plaintiff elected to take judgment for the amount received of the sheriff.)

Judgment accordingly.

NOTE [from original report]. See Townsend v. Leonard [Case No. 14,117].

BRADLEY (HARRIS v.). See Case No. 6,116.

Case No. 1,781.

BRADLEY et al. v. HEALEY.

[Holmes, 451.] [1]

Circuit Court, D. Massachusetts. Jan. Term, 1875.

BANKRUPTCY—SECURED CREDITOR—PETITION FOR SALE OF SECURITY—POSSESSION OF RECEIVERS.

The district court has no jurisdiction of a summary petition by a mortgagee of property of a bankrupt against the assignee in bankruptcy, for sale of the mortgaged property before the bankruptcy proceedings and always since in the possession of, and claimed by, receivers appointed by a state court, not parties to the petition. The title to such property must be settled by regular proceeding at law or in equity.

[Cited in Bowen v. Christian, 16 Fed. 731.]

[See Davis v. Railroad Co., Case No. 3,648.]

[In equity. Bill by Charles S. Bradley and others against Mark Healey to review orders of district court. Order to take testimony rescinded, and further proceedings on petition for sale stayed.]

J. J. Storrow and John C. Gray, Jr., for complainants.

Curtis & Reed and B. F. Thomas, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity invoking the exercise of the supervisory power of this court over certain orders of the district court, made on the petition of Mark Healey, praying that the amount of a note held by Healey should be found by the court to be due to him from the bankrupt, the Boston, Hartford, and Erie Railroad Company, and that an estate mortgaged by the bankrupt to secure said note should be sold free of liens, and this debt paid out of the proceeds; and for general relief. The assignees in bankruptcy appeared and answered this petition. They denied the validity of Healey's mortgage, and alleged that a bill in equity, previously commenced, was pending in this court, in which they claim a large sum as due from the petitioner to the bankrupt corporation, and call for an account of his dealings with the corporation. They also allege that the trustees under the Berdell mortgage claim title to the mortgaged premises, and they claim that they ought not to be required to litigate any question concerning said property until all the parties interested in the litigation should be brought before the court. The trustees under the Berdell mortgage also appeared by counsel, without making themselves parties to the proceedings, and claimed an interest in the property in question, and objected to the sale.

It appears, and is admitted, that at the commencement of the proceedings in bankruptcy and at the time of the adjudication, the mortgaged premises were not in possession of the bankrupt and did not pass into the actual possession of the assignees, but were in possession of receivers appointed by the supreme court of Massachusetts.

Under these circumstances the district court has no jurisdiction to entertain a summary petition against the assignees of the bankrupt for the sale of property not now or ever in the possession of the assignees, but in the possession of parties claiming title and not parties to the petition. It was not the intention of congress to deprive parties claiming property of which they were in possession, of the usual processes of law in defence of their rights. The supreme court, in Smith v. Mason, 14 Wall. [81 U. S.] 419, held that strangers to the proceedings in bankruptcy not served with process, and who have not voluntarily appeared and become parties to such litigation, cannot be compelled to come into court under a petition for a rule to show cause. In Knight v. Cheney [Case No. 7,883], after a most elaborate and exhaustive examination into the extent and limitations of the powers and jurisdiction of the district courts when sitting in bankruptcy on petition, the court decided that the district court does not possess the power to order, in a summary way, the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person claiming title. See, also, Marshall v. Knox, 16 Wall. [83 U. S.] 556; In re Bonesteel [Case No. 1,627]; In re Casey [Id. 2,495].

It is apparent that, if adverse claims to property could be decided by the summary action of the district court, not only would the party claiming adversely to the assignee be deprived of a trial by due process of law, but he would be without appeal. It is contended on the part of Healey, the petitioner, that the possession of the receivers in this case was the possession of the bankrupt, and that the assignees were constructively in possession of the property at the commencement of the proceedings in bankruptcy. It is claimed, therefore, that the doctrine of the cases in the supreme court does not apply. But the possession of the receivers was, even constructively, only the possession of the bankrupt, or of the trustees under the Berdell mortgage, as the one or the other might make out title to it; and the decree of the state court gave possession to the trustees under the Berdell mortgage. The title of the bankrupt has not been established as against the Berdell mortgage, and cannot be by the district court, as they are not parties to this proceeding. The title to this property cannot be settled in this summary proceeding before the district court, but only by regular proceedings at law or in equity. Under the present petition the district court cannot order a sale of the property free from liens or incumbrances.

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

One of the prayers in Healey's petition is, that the court should find the sum named in the note and mortgage to be due to him, the validity of the note and mortgage being disputed by the trustees. The court proceeded to hear testimony as to the validity of the note and mortgage. The assignee subsequently filed a petition setting forth the nature of their claims in set-off against Healey, and alleging that these claims would require an examination into the accounts between Healey and the corporation, and praying that they should not be required to go into evidence as to these matters of set-off.

The district court undoubtedly had jurisdiction to determine in a summary proceeding any controversy of this kind arising between the bankrupt and a creditor who claimed a debt or demand against the bankrupt under the bankruptcy. But inasmuch as the principal object of the petition was to obtain an order for the sale of the mortgaged property, which the court has not jurisdiction to order under this petition; and inasmuch as a bill in equity is now pending between the parties, in which the whole question of the validity of the mortgage and the rights of set-off claimed is at issue; it seems to be an unnecessary and burdensome expense upon all parties, and one without any practical, beneficial result to either party, to take the same testimony and try the same issue in the summary proceeding, which testimony is being taken, and which issue is to be tried, on the bill in equity already pending. The order of the district judge directing the taking of testimony in relation to the validity of the mortgage and set-off is rescinded, and further proceedings on the petition for sale are to be stayed until the further order of this court.

BRADLEY (HUDSON v.). See Case No. 6,833.

BRADLEY (HUSSEY v.). See Case No. 6,946.

Case No. 1,782.

BRADLEY v. KNOX et al.

[5 Cranch, C. C. 297.] [1]

Circuit Court, District of Columbia. March Term, 1837.

NEGOTIABLE INSTRUMENTS — PROTEST — LIABILITY OF REMOTE INDORSER—ACTIONS ON—WITNESS—COMPETENCY OF IMMEDIATE INDORSER.

1. An action at law will not lie by an indorsee against a remote indorser of a promissory note, made and indorsed in Virginia, although made payable at the North-West Bank of Virginia by whose charter notes "made negotiable" at that bank are put upon the footing of bills of exchange; and although it should be put in circulation as a negotiable instrument, and deposited in the bank for collection, before it became payable, and should be regularly protested and regular notice given to the parties.

2. An intermediate indorser of such a note is, therefore, a competent witness to invalidate the note.

3. The rule that a party to an instrument shall not be permitted to discredit it by his testimony is applicable only to mercantile negotiable paper, which a promissory note, made and indorsed in Virginia, is not.

At law. Assumpsit by [W. A. Bradley] an indorsee against a remote indorser of a promissory note, made by Reddick McKee, agent of the Wheeling Cotton Manufacturing Company, dated at Wheeling, March 22, 1834, at 60 days, for $4,000, payable to the order of Richard Simmes at the North-West Bank of Virginia, without defalcation, for value received, and signed "R. McKee, agent Wheeling Cotton Manufacturing Company;" indorsed by Richard Simmes, Knox & McKee, M. Nelson, and W. B. Atterbury. The note was regularly demanded, and protested, and due notice given to the defendants. The defendant, McKee, was taken; but the other defendant, Knox, was not.

Upon the trial of the issue against McKee, Messrs. Brent & Brent, counsel for the defendant, moved the court to instruct the jury, "that if they shall believe, from the evidence, that the note was made and indorsed by the defendant, in the state of Virginia, and was made payable at the North-Western Bank of Virginia, in the said state, then the plaintiff is not entitled to recover in this action against the defendant as indorser of the said note."

Which instruction THE COURT (THRUSTON, Circuit Judge, not sitting in the cause) gave; it appearing that there were several intermediate indorsers between the plaintiff and the defendant. See 5 Rand. 40, 45; Id. 335; and 4 Leigh, 116. And see, also, the charter of that bank in 1817, by which notes "made negotiable" at that bank are put upon the footing of bills of exchange.

Mr. Bradley, for the plaintiff, then moved the court to instruct the jury, that if, from the evidence, they should be of opinion, that the said note was made payable at the North-Western Bank of Virginia, and put into circulation as a negotiable instrument, and that it was deposited in the said bank before it became due, and was given to take up and renew, and used to take up and renew a note for a similar amount drawn and indorsed by the same parties, and that, when it became due, demand of payment was regularly made at the said bank and refused, and that the said note was regularly protested, and notice thereof given to the indorser, then the plaintiff is entitled to recover.

Verdict for the defendant.

The plaintiff took a bill of exceptions, but has not prosecuted a writ of error.

[NOTE. For determination of an action on the same note against the maker, see Bradley v. McKee, Case No. 1,784.]

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

Case No. 1,783.

BRADLEY v. LILL.

[4 Biss. 473.][1]

Circuit Court, N. D. Illinois. March Term, 1861.

NEGOTIABLE INSTRUMENTS — NATURE AND REQUISITES—NOTE PAYABLE IN EXCHANGE—COMPUTATION OF EXCHANGE — FEDERAL COURTS — AUTHORITY OF STATE DECISIONS.

1. The fact that a note is made payable in exchange does not prevent its being a promissory note, even though the rate of exchange is not specified.

2. The exchange, like interest, is an incident to the principal sum, and the rate is subject to proof; but when the proof is in, then the amount is a matter of computation.

3. On a commercial question this court is not bound to follow the decisions of the state supreme court, especially when contrary to the opinion of the mercantile community and the general opinion of the profession. Case of Lowe v. Bliss, 24 Ill. 168, disapproved.

[Cited in Edwards v. Davenport, 20 Fed. 763.]

4. The Illinois statute of February 12, 1857, does not apply to a contract where no rate of interest is fixed by agreement.

At law. This was an action [by Henry Bradley against William Lill] upon the following promissory note: "$2,583.51. Chicago, Ill., Sept. 30th, 1859. One year after date, I promise to pay to the order of myself, two thousand five hundred and eighty-three dollars and fifty-one cents in exchange at the office of Messrs. Ashley & Norris, No. 52 Exchange Place, New York. Value received. (Signed) William Lill. (Indorsed) William Lill."

[On demurrer to the declaration] the objection was taken that, being a note made in Illinois, although payable in New York, the note was governed by the act of the legislature of this state of Feb. 12, 1857, though the note did not on its face bear interest. It was also objected that the exchange was an uncertain and indefinite sum, and that a recent decision of the supreme court of this state, Lowe v. Bliss, 24 Ill. 168, rendered it inoperative as a note.

The statute referred to is as follows: "Where any contract or loan shall be made in this state, or between citizens of this state and any other state or country, bearing interest at any rate which was or shall be lawful according to any law of the state of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States, or in the city of London, in England, and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the state or country where the same shall be made payable." 1 Gross' St. c. 54, § 13; Rev. St. 1874, p. 615, § 9.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[Demurrer overruled.]

Davenport & Wilder, for plaintiff.

Scates, McAllister & Jewett, for defendant.

DRUMMOND, District Judge. The statute of Feb. 12th, 1857, does not apply to this case, because that contemplates a case where there was an amount of interest fixed by the agreement of the parties, in which event, if the rate was legal according to the laws of Illinois, the contract might be enforced, notwithstanding the money was made payable in another state or country, and the rate of interest greater than there allowed.

This court has always held that the fact that a note is made payable in exchange, does not prevent its being a promissory note, and with all due respect to the supreme court of this state, I cannot concur in the opinion expressed in the case of Lowe v. Bliss, recently decided. 24 Ill. 168.

An instrument of writing by which A, at Chicago, promised to pay B within a certain time one thousand dollars with the current rate of exchange on New York at maturity, is a promissory note, notwithstanding the rate of exchange was not specified. I admit that under the general law a note must be payable absolutely, in money. In the example given a thousand dollars was the sum payable; the exchange, like interest, was an incident merely to the principal sum, and it was not the less on that account an agreement to pay a fixed sum. If a note be executed in England, payable "with interest," and a suit be brought on it here, the amount of the verdict or judgment is not a mere matter of computation, but proof must be introduced of the rate of interest in England, and the amount of the verdict or judgment, even after the proof is made, is greater or less, depending upon the fact whether the verdict is rendered to-day, next week or next year, the amount of interest increasing regularly by efflux of time; but when the proof is in, and the time established, then the amount becomes a matter of computation. So, when the proof as to exchange is in, and the time fixed, then also the amount is a matter of computation. In the one case the principal amount and the time and rate fixed by evidence, control and determine the aggregate sum, and equally so in the other. If this suit were brought in the courts of this state, being a note payable in New York, the amount for which judgment would be rendered would have been ascertained, not from the face of the note itself, but by evidence before the court or jury of the law of New York as to interest. It would be only when that was done that the amount could become a matter of computation.

This court, therefore, till overruled by the supreme court of the United States, adheres to the view that it has always taken of this

point, that an instrument of this kind is a promissory note. This is a commercial question, and this court is not bound to follow a decision of the supreme court of this state on this branch of the law; the more especially when it is contrary to the opinion of the whole mercantile community, as shown by uniform practice, and contrary also to the general opinion of the profession. Demurrer overruled.

NOTE [from original report.] The decision in the case of Lowe v. Bliss, above referred to, was made by a divided court, and with reference to the statute of Illinois concerning negotiable paper, and was afterward commented upon in the case of Bilderback v. Burlingame, 27 Ill. 338, in which case it was further held, that an instrument admitting a certain sum to be due, which may be paid in merchandise at a fixed price, becomes an absolute money demand, on failure of the payee to deliver the merchandise when it is called for. A note expressed to be payable with current rate of exchange, at the place where it is drawn and is to be discharged, is payable in coin, and there is no rate of exchange connected with it. The words, "with current rate of exchange," in such a note, are without significance. Hill v. Todd, 29 Ill. 101; Clauser v. Stone, Id. 114. Where the note provides "the current rate of exchange to be added," it is not a valid promissory note, even for the principal amount in the note. Philadelphia Bank v. Newkirk, 2 Miles, 442..

Case No. 1,784.

BRADLEY v. McKEE.

[5 Cranch, C. C. 298.] [1]

Circuit Court, District of Columbia. March Term, 1837.

EVIDENCE—COMPETENCY—PROCEEDINGS OF CORPORATION—NEGOTIABLE INSTRUMENTS—EVIDENCE—BURDEN OF PROOF—CORPORATIONS—OFFICERS AND AGENTS—DISSOLUTION—USURY—WHAT CONSTITUTES.

1. The proceedings of a corporation aggregate may be given in evidence against a party, not a member of the corporation, although there should be no evidence that such notice of the meeting, as the charter requires, had been given.

2. A promissory note, signed by A. B. as agent of an incorporated manufacturing company, does not, upon the face of it, import a personal obligation; and it is not incumbent on the defendant to show his authority to make such a note; nor the extent of his powers; nor that the money was applied to the use of the company; nor that he declared it was for their use; the burden of proof, in such case, is upon the plaintiff.

3. If, at the date of the note, or at the time it became payable, the company had ceased to do business as a company, the corporation was not thereby dissolved, nor the defendant thereby rendered personally responsible upon the note; and if, after the making of such note, the corporate property was sold by the company, who ceased to do business as a corporation, and the stockholders made a distribution of the effects of the corporation, and apportioned the debts due by the company to be paid by such individual stockholders, the corporation did not thereby cease to exist, but was capable of being bound by such a note.

4. If it was the usage and custom of the banks and exchange-brokers in that part of the country where the note was made and indorsed, to discount such paper at one per cent. for sixty days, and to charge an additional premium of from a half of one per cent. to one per cent. for exchange on eastern paper, when such paper was loaned, and to charge the like discount and premium for the renewal of the notes given therefor; such a transaction, if bona fide and not intended as a cloak for usury, is not usurious.

5. Whether the transaction was bona fide, and not intended as a cloak for usury, is a question of fact to be left to the jury under all the circumstances of the case.

6. If a note be given by a person, bona fide, as agent of an incorporated manufacturing company, for a loan of money to the company, and the same was known to the person who discounted it, at the time of his discounting it, the agent is not personally liable upon the note.

At law. Assumpsit [by W. A. Bradley] against [Reddick McKee] the maker of the note mentioned in the preceding case, which was in this form: "Wheeling, March 22d, 1834. Sixty days after date, I promise to pay to the order of Richard Simmes, at the North-Western Bank of Virginia, $4,000, without defalcation, for value received. R. McKee, Agent Wheeling Cotton Manufacturing Company. $4,000." Indorsed: "Richard Simmes, Knox & McKee, M. Nelson, W. B. Atterbury."

Upon the trial, Mr. Brent, for the defendant, contended that he was the regularly appointed agent of the Wheeling Cotton Manufacturing Company, incorporated by the legislature of Virginia, and, as such, authorized to make the note; that it was made for the company, and legally bound them; and that it was not his private, individual act. Rathbon v. Budlong, 15 Johns. 1. Mr. Brent offered to read to the jury the minutes of the proceedings of a meeting of the company, (proved by a witness to be such,) at which the defendant was appointed agent.

Mr. Bradley objected that the books of the company are not evidence against a stranger. Starkie, Ev. pt. 2, p. 298. That there was no evidence that ten days' notice of the meeting had been given, as required by the charter.

Mr. Brent, contra, relied upon the opinion of the supreme court of the United States, in the case of Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 69; that the law "presumes that every man, in his private and official character, does his duty until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, omnia praesumuntur rite et solemniter esse acta, donec probetur in contrarium." "That persons acting publicly, as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter," &c.

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

The court overruled the objection, and permitted the evidence to go to the jury.

Mr. Brent, for the defendant, then offered to read to the jury the deposition of M. Nelson.

Mr. Bradley, for the plaintiff, objected that the witness was one of the intermediate indorsers, and could not be permitted to discredit the note which he had indorsed. Caton v. Lenox, 5 Rand. [Va.] 32.

Mr. Brent replied that the rule was only applicable to mercantile negotiable paper, which this court has just decided this note not to be. Blagg v. Phenix Ins. Co. [Case No. 1,477]. And the plaintiff had cross-examined the witness, and therefore cannot now object to his competency. Harrison v. Courtauld, 1 Russ. & M. 428.

The court overruled the objection, and the deposition was read.

Mr. Bradley then contended that the note is not, on its face, a company note, but purports to be the individual note of the defendant; and that the burdon of proof is on him to show his authority to bind the company by such a note. White v. Skinner, 13 Johns. 308, 311; Randall v. Van Vechten, 19 Johns. 60.

Mr. Brent, contra. The plaintiff produces a note signed by the defendant, as agent of the company, and the defendant proves that he was their agent; the burden of proof is now on the plaintiff to show that the defendant is personally liable. Theo. Ag. 333; Wyman v. Gray, 7 Har. & J. 409; 2 Kent, Comm. 614. Whereupon, Mr. Bradley, for the plaintiff, moved the court to instruct the jury that the note upon which this suit is brought imports, upon its face, a personal obligation, and the defendant is personally liable therefor, unless they shall find, from the evidence, that the defendant was authorized to bind the Wheeling Cotton Manufacturing Company by such contract, declared their names, and professed to act for them in the execution of it; and signed the same in pursuance and performance of his said authority. Which instruction the court refused to give.

Mr. Bradley then further moved the court to instruct the jury, that the said corporation is but an agent, exercising only delegated authority; that all agents appointed by it must act within the object and scope of the charter of the said company; that the appointment of such sub-agent must be clearly proved, and the extent of his powers, in the particular matter, clearly defined; and if the jury shall be satisfied, by the evidence, that the promissory note, in the declaration mentioned, was given for a loan of money, they must further find that it was for a loan of money to the said company, for its corporate objects, and that the defendant was fully authorized to obtain such loan, and to bind the said company, by his signature to the said note, and declared, or it was understood between the lender and such agent, that it was for the use of the said company; otherwise, the defendant is personally liable. Which instruction the court also refused to give.

Mr. Bradley then further moved the court to instruct the jury, that, if from the evidence they shall be of opinion, that on the 22d day of March, 1834, or at any time before that day, or before the 24th day of May, 1834, the Wheeling Cotton Manufacturing Company had ceased to do business as a company, or had sold all the property of the company, and ceased to do business as a company or corporation, then the said corporation was dissolved, and the defendant is personally and individually responsible on the note upon which this suit is brought. Which instruction the court also refused to give.

Mr. Bradley then further moved the court to instruct the jury, that, if from the evidence they shall find, that, in the summer of 1834, after the making of the said promissory note, the corporate property of the company was all sold by the said company; that the said company ceased to do business as a corporation, and the stockholders therein made a distribution of the effects of the said corporation, and apportioned the debts due by the said company, to be paid by such individual stockholders, then there is nobody in esse which can be sued as the principal or which the defendant, as agent, could make responsible by the signature to the said note, and he, the defendant, is personally responsible therefor. Which instruction the court also refused to give.

Mr. Bradley then further moved the court to instruct the jury, that if from the evidence they shall be of opinion, that, in the years 1833 and 1834, and for a long time before, it was the usage and custom of the banks and exchange-brokers, in that part of the state of Virginia in which the town of Wheeling is, to discount paper at and after the rate of one per cent. for sixty days; and, in addition thereto, to charge a premium for exchange on eastern paper, varying from an half to one per cent. when eastern paper was loaned; and also to charge the same discount and premium for the renewal of the notes given therefor; and that the said transaction was bona fide, and not intended as a cloak for usury, this case was not usurious. Mr. Brent, contra, cited New York Firemen's Ins. Co. v. Ely, 2 Cow. 705. But the court gave the instruction.

Mr. Bradley then moved the court to instruct the jury, that, if they shall be of opinion from the evidence that the consideration given for the promissory note upon which this suit is brought, was a loan negotiated by William B. Atterbury to the Wheeling Cotton Manufacturing Company, by Reddick McKee, agent thereof, or by any other person acting on behalf of the said

company; and that the terms of the said loan were one per cent. for sixty days' discount for forbearance, and one half per cent. for exchange on eastern funds; and that such was the usage and custom of the banks and exchange-brokers in that part of the country where the said loan was made, in the years 1833 and 1834; and that the same rate of discount and premium, or commission, was charged upon each renewal of such loans, then the said contract was bona fide, and not usurious. Com. Usury, 133–135. Which instruction the court refused to give.

Mr. Brent, for the defendant, then moved the court to instruct the jury, that upon the whole evidence the plaintiff is not entitled to recover in this action, even if the defendant had no authority to bind the company. Which instruction the court refused to give. But upon the motion of the defendant's counsel, instructed the jury, that if they believe from the evidence that the note, on which this suit is brought, was given by the defendant bona fide as agent for the Wheeling Cotton Manufacturing Company, for a loan of money to the said company, and that the same was known to the said Atterbury at the time he discounted the said note, the plaintiff is not entitled to recover in this action. New York Firemen's Ins. Co. v. Ely, 2 Cow. 703.

Mr. Brent, for the defendant, cited Theo. Ag. 303, 337; Long v. Colburn, 11 Mass. 97; Ballou v. Talbot, 16 Mass. 461; Harper v. Little, 2 Greenl. 14; 2 Kent, Comm. 631.

Mr. Bradley cited 2 Liverm. Prin. & Ag. 247; Buffum v. Chadwick, 8 Mass. 103; Odiorne v. Maxcy, 13 Mass. 178; Batty v. Carswell, 2 Johns. 48; Thacher v. Dinsmore, 5 Mass. 299.

Verdict for defendant. The plaintiff took bills of exception, but has not prosecuted a writ of error.

[NOTE. For determination of an action on the same note by an indorsee against a remote indorser thereof, see Bradley v. Knox, Case No. 1,782.]

BRADLEY (MONROE v.). See Case No. 9,713.

Case No. 1,785.

BRADLEY et al. v. REED et al.

[12 Pittsb. Leg. J. 65; 2 Pittsb. Rep. 519.]

Circuit Court, W. D. Pennsylvania.

INJUNCTION — PROCEDURE — WAIVER OF NOTICE — WASTE — INJUNCTION TO PREVENT — VENDEE IN POSSESSION — MORTGAGOR IN POSSESSION — TENANT IN COMMON — DISSOLUTION — LACHES.

1. Notice, previous to motion for an injunction, required by 5th section of the act of congress, 2d March, 1793 [1 Stat. 334], may be waived by appearance and filing answer.

[See Marsh v. Bennett, Case No. 9,110; Thayer v. Wales, Id. 13,871.]

2. As a general rule in the practice of courts of equity, nothing can be read on such motion but the answer, and if the answer denies the equity of the bill, the injunction will be dissolved.

3. Waste is an exception, upon the ground that an irreparable mischief would ensue, and the court will interpose to prevent it.

4. To show waste, affidavits are admissible, even after answer filed.

5. A court of equity will not permit a vendee in possession, with the great bulk of the purchase money due and unpaid, to cut and take away timber, and thus diminish the security of the vendor.

6. So also, an injunction lies against a mortgagor in possession, to stay waste. The court will not suffer him to prejudice the security.

7. Since the statute of Westminister II., giving one tenant in common a legal remedy against his co-tenant, courts of equity have interposed to prevent waste and preserve the corpus of the estate until partition.

8. Pending a bill in equity, one tenant in common will not be permitted to strip the land of its timber. It is an injury recognized by law, and the remedy by injunction is applicable to every species of waste.

9. Courts of equity will dissolve an injunction where it appears that the complainant has been guilty of intentional delay in prosecuting his cause.

In equity. This is a bill [by James Bradley and others against William Reed and Joseph Hyde and others] claiming title to eleven thousand acres of land in Elk and Jefferson counties, and praying an injunction to stay waste. The land is of great value on account of the timber. The injunction was granted on filing the bill. Respondents' counsel moved to dissolve it. [Motion denied.]

Marshall & Purviance, for the motion.
Geo. P. Hamilton, contra.

McCANDLESS, District Judge. Although this injunction issued without the previous notice, required by the 5th section of the act of congress of 2d March, 1793 (Brightly, 256), it was admitted, at the argument, that the irregularity was cured by an appearance and filing the answer. What we have now to consider, is not the question of title, which has been elaborately and ably argued, but whether, with the lights before us, we would grant a preliminary injunction.

This is an application by one tenant in common charging his co-tenant with waste. As a general rule in the practice of courts of equity, nothing can be read on such a motion but the answer. If the writ has issued, and the answer, when filed, denies the equity of the bill, the injunction will be dissolved. But there are many cases where this rule does not prevail. Waste is one of them; and the exception to the rule is upon the ground, that an irreparable mischief would

ensue, and the court will prevent that irreparable mischief by its interposition. 2 Pars. Eq. Cas. 96. The affidavit of Mr. Lucas was received, not to prove title, but waste; and this, according to the uniform current of decisions, was admissible. As to who has the better title is to be determined when the proofs are in, and upon the ultimate hearing. At present, the affidavit is only material in this, that it shows by a letter from Reed to Breedin, dated the 24th May, 1864, "that I, (the respondent) have employed hands to cut timber, upon the warrants, not embraced in the lease to Rhines and Carman."

Assuming that the answer exhibits such an equitable title, as would authorize a chancellor to decree a specific performance, the respondent is a vendee in possession, with the great bulk of the purchase money due and unpaid. A court of equity will not permit him to diminish the security of his vendor until he is paid. The principal part of this is the mortgage for $40,000, presently due, and the mortgagee could intervene, as Chancellor Kent says, in 2 Johns. Ch. 148, against a mortgagor in possession to stay waste. The court will not suffer him to prejudice the security. Independent of this, although at common law one tenant in common had no legal remedy against his cotenant for waste, since the statute of Westminister II. (13 Edw. I. c. 33), giving such redress, courts of equity have interposed to protect the corpus of the estate until partition. As was said in Hawley v. Clowes, 2 Johns. Ch. 122, "Lord Eldon admitted the propriety and necessity of this power in the court between tenants in common where the waste was destructive to the estate, and not within the usual and legitimate exercise of power."

Here is a bill filed, claiming, not partition, but title. By the respondents' answer, they are admitted tenants in common and "pending the suit, it appears extremely fit, that the tenant in common in possession should not be permitted to strip the land of its timber." The peculiar value of the land in controversy is the timber, and if between this date and the final hearing, the respondents were permitted to fell trees, convert them into lumber, and raft them to market, it would greatly diminish that value. It is, therefore, an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury. And this remedy is peculiarly proper pending a bill to try the title to this very land. This injunction must therefore be continued until further order. But the complainants are admonished that the court will, on motion, dissolve it, if it appears in the future that they have been guilty of intentional delay in prosecuting their cause. 1 Eden, 145; 4 Wash. C. C. 174 [Read v. Consequa, Case No. 11,606].

The motion to dissolve the injunction is overruled.

Case No. 1,786.

BRADLEY et al. v. RICHARDSON et al.

[2 Blatchf. 343;[1] 23 Vt. 720.]

Circuit Court, D. Vermont. Nov. 27, 1851.

CORPORATIONS —ACTIONS — INJUNCTION — RIGHTS ENFORCED AND WRONGS PREVENTED — RELIEF AGAINST JUDGMENT — GROUNDS — ASSUMPSIT — MONEY HAD AND RECEIVED — CORPORATIONS — OFFICER AND AGENTS—CONTRACTS — FACTORS—LIABILITY TO PRINCIPAL—LIABILITY OF PRINCIPAL FOR ADVANCES.

1. Where corporate rights and interests are affected in any way wrongfully and injuriously, those rights and interests, generally speaking, and unless some special ground be shown, must be asserted and defended, both at law and in equity, in the corporate name.

[Cited in Newby v. Oregon Cent. Ry. Co., Cases Nos. 10,144, 10,145.]

2. It is not sufficient for a debtor, or for those who are entitled to assert his rights, in order to induce a court of equity to relieve against a judgment at law, to show that the debtor was wrongfully deprived of an opportunity of making a defence in the suit at law, unless a defence, apparently, would have been available. To entitle them to an interposition of a court of equity in their behalf it must appear that the judgment is unjust and inequitable, and ought not to be enforced.

3. Where property of a debtor, which is subject to an attachment in a suit pending at law, is sold to one to hold in trust for certain creditors of the debtor, and a judgment is rendered in the suit at law, and the creditors for whose benefit the purchase was made institute proceedings in equity to be relieved against the judgment so obtained, alleging that it was unduly obtained and for too large an amount, the court will not inquire merely whether the judgment was just and equitable as between the parties to it, but whether it includes claims or demands not covered by the action, or not due and payable at the commencement of the action, or which, by a proper application of payments or credits, will appear to have been paid and satisfied, and were, therefore, not existing legal claims; and, unless the judgment appears to be wrong in some of these particulars, and consequently to have been rendered for more than the property ought to have been charged with, the plaintiffs will have no ground of complaint, whatever may have been the manner in which the judgment was obtained.

4. R. B. & Co., a copartnership, acted, by mutual agreement, as the selling agents of the Burlington Mills Co., a manufacturing corporation. The copartnership of R. B. & Co. was dissolved, and a new firm constituted, under the same style and consisting in part of the same members. The new firm assumed and continued the business of the old firm, acting as the selling agents of the corporation under the same agreement which existed with the old firm. The corporation, by its treasurer, requested the new firm to pay and adjust the balance due from the corporation to the old firm and charge it, in their account, to the corporation. They did adjust it accordingly, and the old firm credited the corporation with the amount of the balance, as received of the new firm, and rendered their account to the corporation balanced by the credit in full: Held, that it must be inferred that this balance was discharged by the payment of money or what was equivalent thereto; that the corporation thereby became debtors to the new firm for the amount; and that it might be recovered by them, in an action for money had and received or for money paid and advanced.

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

5. The treasurer, not being merely the keeper of the money of the corporation, but empowered by the directors to borrow money in the name and for the use of the corporation, and having a general authority given him by the by-laws to pay the debts of the corporation: *Held*, that he had sufficient authority to give the assent of the corporation to the transaction by which the balance due to the old firm was thus paid.

6. Held, also, that it could not be objected against the validity of the transaction that the treasurer was a member both of the old and the new firm, that fact being fully known to the corporation.

7. An account having been rendered to the corporation, stating the balance, the payment of it and by whom it was paid, and no objection having been made at the time or afterwards, until a suit was commenced against the corporation by the new firm to recover the amount due to them: Held, that the transaction must be deemed to have been acquiesced in by the corporation.

8. The undertaking of a factor is merely to answer for the solvency of the buyer of the goods, or rather to guaranty to the principal the payment of the debt due from the buyer. He becomes liable to pay to the principal the amount of the purchase-money, if the buyer fails to pay it when it becomes due. And his undertaking is not collateral, within the statute of frauds, but is an original and absolute agreement that the price for which the goods are sold, or the debt created by the sale of the goods, shall be paid to the principal when the credit given on the sale shall have expired.

9. If the factor has agreed that he will advance to a certain amount upon the goods consigned to him, to that extent his advances may be treated as payment in advance of so much towards the goods, and, so far, the one may be set off against the other. But all moneys advanced on account beyond the amount agreed to be advanced upon the goods will constitute a present legal debt, for which he will have a present legal right of action.

10. If the principal procures and has the benefit of the advances, he is thereby precluded from objecting to them as not answering the agreement, whatever may be the form in which they are made.

11. If the factor commences a suit at law against the principal, to recover the unpaid balance due to him for his actual advances, having previously made sales of goods upon a credit not yet expired, and being at the same time liable upon acceptances and bills for the principal not yet matured, he is entitled to have the avails of the sales, as they become due, applied in satisfaction of the additional advances which he is compelled to make upon such bills and acceptances as they become due, and cannot be required to apply such avails in satisfaction of his present legal claims existing at the commencement of his suit.

In equity. This was a motion for an injunction, predicated upon a bill filed by [Harry] Bradley and others against [Andrew J.] Richardson and others, to stay execution of two judgments amounting together to the sum of $51,992.04, recovered by Richardson and others, at the October term of this court in 1851, against the Burlington Mill Company, a corporation established under an act of the legislature of Vermont, for the manufacture and sale of woollen goods. [Denied.]

William W. Peck and D. A. Smalley, for plaintiffs.

Lucius B. Peck, for defendants.

PRENTISS, District Judge. I have taken time to read the bill and papers filed in this case, which are uncommonly voluminous and contain a great variety of statements and facts, because I thought it unfit and was unwilling, whatever might be the inclination of my mind at the hearing, to decide a matter of so much importance to the parties, without first examining carefully every paper connected with it, as well as the authorities referred to by the counsel on the argument.

The bill may be considered in a threefold aspect; as presenting a right in the plaintiffs to relief, first, as stockholders in the Burlington Mill Company; secondly, as creditors of the mill company; and, thirdly, as cestui que trusts under the purchase of the property attached in the suits at law, made by Hill as their trustee, subsequent and subject to the attachments, he having deceased, and there being no personal representative competent to sue here in his right.

As stockholders simply, there would be much difficulty, on the statements made in the bill, in the plaintiffs' maintaining it. As such, they are not personally or individually responsible for the judgments recovered against the mill company; nor have they, in that character, any interest whatever in the property which was attached and is liable to be taken to satisfy the judgments. Where the corporate rights and interests are affected in any way wrongfully and injuriously, those rights and interests, generally speaking, and unless some special ground be shown, must be asserted and defended, both at law and in equity, in the corporate name. Now, the bill does not state any fraud or collusion with the judgment creditors, on the part of the mill company; but, on the contrary, it alleges that the judgments were obtained without the consent and against the will of the company and were a fraud upon the company. In this aspect of the case, it would seem that the company, in its corporate name, would be the proper party to seek relief against the judgments.

On the general ground of being creditors of the mill company, without some special interest, it would be equally difficult for the plaintiffs to maintain their claim to relief. What right has one creditor to interfere in a suit, or, indeed, in any transaction, between his debtor and another creditor, unless he has some specific interest in property which is to be affected thereby? In the case of a fraudulent judgment, creating a lien on property, or a fraudulent conveyance of property, the party seeking relief against either must show an interest in the particular property, by levy of execution, purchase or otherwise. But, whatever rights the plaintiffs may be supposed to possess as stockholders or creditors, it is not sufficient for them, nor would it be for the mill com-

pany, to show that the latter was wrongfully deprived of an opportunity of making defence in the suits at law, unless, apparently, a defence would have been available. To entitle them to the interposition of a court of equity in their behalf, it must appear that the judgments are unjust and inequitable and ought not to be enforced. If the proceedings of the stockholders and directors at Boston, dismissing the attorneys from the suits and consenting to judgments being rendered, were irregular and invalid, as is alleged, on account of the meetings being held out of this state, the attorneys, instead of withdrawing from the suits and suffering judgments to pass sub silentio, should have objected to the proceedings at the time, and submitted the question as to their validity and binding force to the consideration and decision of the court. But the judgments, it is to be observed, were not obtained, certainly not altogether so, without a hearing and without a defence. A hearing had been had upon the merits before a tribunal whose opinion, considering how the tribunal was constituted, ought to command at least as much respect, to say no more, as that of a jury. The actions, by agreement of the parties and order of court, had been submitted to the determination of referees mutually chosen by the parties. The referees had heard the parties, made an award and reported the award to the court, stating the facts and grounds upon which it was made. Exceptions were filed to the report, raising certain questions of law on the facts stated; but no exception was taken or is now taken, on account of partiality or misbehavior in the referees. It was, therefore, only the questions or points of law thus raised, that could be heard or re-examined by the court. Beyond these questions, no hearing was to be had, nor is it now urged that any could or should have been had. All else was settled; for, of the facts the referees were the exclusive judges. If the referees decided these questions rightly, and committed no mistake in point of law, the judgments are right, and there surely can be no reason in equity why the plaintiffs, in their general character of stockholders and creditors, and upon that general ground alone, should be allowed to disturb the judgments. In the case of Nason v. Smalley, 8 Vt. 118, the object of which was to enjoin a judgment at law alleged to have been fraudulently obtained, Phelps, J., said: "Although the judgment may have been obtained in such a manner that it ought not, in itself considered, to bind the complainants, yet it would be idle to interfere, if the debt thus in fact established be just and equitable, or if the party must be left at liberty to prosecute anew, and a court of law would be compelled hereafter to render a like judgment." This is good sense and sound doctrine, well expressed, and nothing can be added either to its force or significancy.

But, it is in the third aspect of the case, if in any—as cestui que trusts under the purchase made by Hill of the property attached, and as interested in the purchase as creditors, in the manner stated in the bill—that the plaintiffs are entitled to come into a court of equity and ask relief against the judgments. This relief they will be entitled to, if the case calls for relief, whether the judgments were rendered with or without the consent of the mill company; and, in this view, so far at least as concerns the question of title to relief, the manner in which the judgments were obtained, further than there being in fact no hearing in court, or the validity or invalidity of the proceedings of the stockholders and directors in Boston in relation thereto, is unimportant. I may observe, however, that whatever fraud is charged upon the directors, either in act or in motive, on account of those proceedings, is positively and fully denied by their affidavits, leaving no ground, if any existed before such denial, for the imputation to them of intentional wrong.

The bill states that the purchase by Hill was made subject to the attachments, and in trust for the plaintiffs and others, creditors of the mill company, which is alleged to be insolvent, in order to secure or satisfy them as far as might be, for notes, called three-fifths notes, executed by them to raise money for the use of the company. It is stated that the cestui que trusts were to share in the purchase in proportion to the amount of notes so by them respectively executed; that the whole amount of notes executed was about $120,000; and that the amount executed by the plaintiffs was about $23,000, giving them, therefore, an interest in the purchase equal to about one-fifth part. It appears that most of the other cestui que trusts have given their assent to the judgments, and are willing that they should be satisfied out of the property. Under such circumstances, the other cestui que trusts being content, it would seem that the claim of the plaintiffs to relief, if they have any claim, would be limited, and the measure and mode of relief adjusted and regulated by the amount of injury, if any, wrongfully resulting from the judgments to their particular personal interest in the property. As the purchase by Hill comprehended the whole property attached and the whole interest in it, except what was a legal subsisting charge upon it by virtue of the attachments, the inquiry is, not merely whether the judgments are just and equitable as between the parties to them, but whether they include claims or demands not covered by the actions, not due and payable at the commencement of the actions, or which, by a proper application of payments or credits, will appear to have been paid and satisfied, and were, therefore, not existing legal claims. This opens an examination into the merits of the judgments; and, unless they

shall appear to be wrong in some of these particulars, and consequently are for more than the property ought to be charged with, the plaintiffs have no ground of complaint, whatever may have been the manner in which the judgments were obtained.

The actions were commenced the 21st and the attachments made the 22d of May, 1849; and the purchase by Hill, in trust for the plaintiffs and others, was made June 13th, 1850. The actions contained counts on several promissory notes, and counts for money had and received, money laid out and expended and money lent and advanced. The actions, as we have already seen, and, I may add, nothing but the actions, by mutual consent of the parties and order of court, were, in proper and regular form, submitted to a reference; and, upon the report made by the referees, stating specially the grounds of their award, or rather the claims and facts in the case, the judgments complained of were rendered. The report is set forth at length in the plaintiffs' bill, and the statement of facts in it is neither denied, impugned nor questioned. Being made a part of the bill, for the purpose of presenting the merits of the controversy between the parties in the suits at law, and being treated by the bill as the basis upon which the objections to the judgments rest, we must look into the report to see whether the judgments subject the property attached to a greater charge than it was legally and properly liable to under the attachments. The bill, aside from what is alleged as to the manner of obtaining the judgments, which seems not to be essential to the purpose of the bill, beyond showing that they were rendered without any actual hearing or consideration by the court, puts the case upon this ground, narrowing down the merits to the particular questions arising from the report.

The questions raised as to the binding effect of the promissory notes upon the mill company, on account of the form in which they were executed and the purpose for which two of them were made, it is unnecessary to consider; because, all the claims that were allowed, if allowable at all, were admissible under the general counts in the actions.

It appears from the report, that the dealings between the judgment creditors and the mill company originated in an arrangement under which the former were to receive and sell, on an allowance of commissions and other charges, the manufactured goods of the latter, guaranteeing the sales of the goods and advancing thereon, in cash and acceptances and notes, as used in the course of dealing, to the amount of three-fourths of their value. It also appears that the agreement on the part of the judgment creditors was at all times fully performed; and that, at the commencement of their actions, they had paid for the avails of all the sales of goods which had matured up to that time, and had also advanced, in cash and the payment of matured notes and acceptances, the sum of $149,062, over and above all matured sales and moneys received—the unmatured notes and acceptances being to a still much larger amount, and greatly exceeding the unmatured sales, as will be hereafter more fully seen. Such appears to have been the state of the account between the parties at the commencement of the suits, as reported by the referees. According to their finding, there was a balance then due the judgment creditors, for over-advances, of $149,062; and, such being the report, that sum must be taken to have been legally and properly recoverable by them at that time in the suits, unless it shall appear that claims were allowed which ought not to have been allowed, or payments or credits disallowed which ought to have been allowed.

We are not called upon to go into an examination of all the items in the accounts between the parties, but only of such, as we have before remarked, as raised some question of law which appears to have been presented by the report for the consideration and opinion of the court. The matters of fact, upon which the questions arise, appear to be fully and distinctly stated; and, from these and other details in the report, I am free to say, that the proceedings of the referees, after a careful and somewhat critical examination of them, appear to me, as far as I can see, to evince no other purpose than that of a just performance of duty.

It appears that items in the account of the judgment creditors, very considerable both in number and amount, being objected to, were disallowed, and that several claims set up by the mill company, though objected to, were allowed. The only items of any importance in the account of the judgment creditors which were allowed against objections made to them, except one, which deserves a distinct consideration and will be presently mentioned, were for commissions and charges on goods sold, money paid, for the salary of the mill company's treasurer, and money paid, at the request of the company, for extra interest in raising money for its use, to enable it to meet and pay its accommodation drafts. These claims, on the facts stated in the report, do not appear to have been improperly allowed; and, as to the amount which ought to have been allowed upon them, that was a matter entirely within the province of the referees, and is not the subject of re-examination, at the instance of the plaintiffs or any one else, unless upon the ground of misconduct or gross partiality. We come, then, to the item just alluded to, of $46,912, charged by the judgment creditors who compose the present firm of Richardson, Burrage & Co., for money paid by them in discharge of a balance due from the mill company to the old firm of Richardson, Burrage & Co. The two firms are dis-

tinguished in this way: The old firm consisted of three partners; the new firm consists of four, two of the old partners and two new ones. The old firm was a large stockholder in the mill company, owning, it is stated, one-third of the whole stock, and acted, during its existence, under a mutual agreement, as the selling agent of the mill company. The new firm assumed and continued the business of the old firm, acting as the selling agent of the mill company under the same agreement, in place of, and under the same name and style borne by, the old firm. The facts in relation to the item in question, as stated in the report of the referees, are these: The mill company, by its treasurer, requested the new firm, in other words, the judgment creditors, to pay and adjust the balance due the old firm and charge it, in their account, to the mill company. They did adjust it accordingly, and the old firm credited the mill company with the amount of the balance as received of the judgment creditors, and rendered their account to the mill company balanced by the credit in full.

On the facts thus stated, the transaction had the assent of all the three parties, and by it the mill company was discharged from its liability to the old firm, so that the latter had no longer any right of action against it; and, can there be any doubt that the mill company became a debtor to the judgment creditors for the amount, or that the amount might be recovered by them in an action for money had and received or money paid and advanced? If the transaction were to be considered rather as a transfer or assignment of the demand than as extinguishing the old debt and creating a new one, and the consideration paid had been something other than money, it would seem to bring the question as to the form of action, the demand being for money advanced, within the principle adopted in Wilson v. Coupland, 5 Barn. & A. 228, recognized and confirmed in Wharton v. Walker, 4 Barn. & C. 163. But, on the facts stated, it must be taken that the original debt was satisfied by actual payment and therefore extinguished; and, from the acknowledgment of payment in general terms, it must be inferred that it was discharged by the payment of money or of what was equivalent thereto.

It is said that the treasurer had no authority to give the assent of the mill company to any such transaction, or to bind it in any such way. But the treasurer was not merely and simply the keeper of the moneys of the company, according to the ordinary definition of such an office. He was its fiscal agent for other purposes. He was empowered by the directors to borrow money in the name and for the use of the company; and was not the transaction in question, in substance and effect, if not in form, a borrowing of money for the use of the company? Besides, in addition to other duties, such as purchasing the materials to be used in manufacturing, directing the kinds of goods to be manufactured, and receiving all moneys due from agents and others, he had a general authority, given him by the by-laws, to pay the debts of the company; and, could he not pay a debt, or enter into an arrangement for the payment of a debt, in the manner in which this was done? It appears to me that, in regard to this, no serious doubt can be entertained.

It is also said that the treasurer was a partner, and therefore interested, both in the old and the new firm. So he was, and was so known to be by the mill company, not only when it appointed him treasurer, and when it afterwards refused to accept his resignation of the office, but also when it made the firms its selling agents. With this knowledge, the company could not be allowed to object, and, if so, no one else can object, that his connection with the firms disqualified him to perform the proper functions of treasurer in this or any other matter in which they might have an interest growing out of the agency. If he had not so acted, the agency could not have been executed, but must have been discontinued, and the purpose of the contracting parties have been defeated. But, there was nothing in this particular transaction that was wrong, in itself considered, or at all prejudicial to the interests of the mill company. It was simply a transfer of indebtedness from the old to the new firm, making the latter, instead of the former, whose place and business it had succeeded to in the agency, the creditor of the company.

But, it is also to be remembered, as a fact not without its effect upon the question, that an account was rendered, stating the balance, the payment of it and by whom the payment was made. The account was rendered the 30th of September, 1848, and, no objection being made to the account as stated and balanced, the transaction may be deemed to have been acquiesced in. This is the rule of law in matters of account of a commercial nature, if not in matters of account in general; and there is no reason why it should not apply to a private corporate body engaged in trade and conducting its affairs through the instrumentality of officers and agents, as well as to individual natural persons carrying on similar business and transacting it either in person or through the agency of others. It may be added, that the equity of the claim is very apparent. The referees examined the account of the old firm, and found the balance which was paid it to have been justly due.

It is further insisted by the plaintiffs, that the judgment creditors had, previous to the commencement of their suits, sold on credit a large amount of goods consigned to them by the mill company, and that the amount of these sales, although the credit given upon them had not then expired, should have been

allowed in payment or satisfaction of the claims composing the balance found then due. It appears that sales had been so made to the amount of $148,695; that the sales matured at different times from the 19th of July, 1849, to the 18th of January, 1850; and that the sales were credited in account, stating the times when due. It also appears that the judgment creditors had, previous to the commencement of their suits, given notes and accepted drafts for the mill company, to the amount of $198,824, payable at different times from the 23d of May to the 11th of October, 1849, and that the notes and drafts, although not matured, were charged in account, mentioning, as in the case of the sales, the times of their maturity. It is evident that this mode of keeping the accounts, on the one hand crediting sales before matured, and on the other charging notes and acceptances before due and payable, or before paid, was merely for the sake of convenience and accuracy, and to present the transactions as they occurred, in an intelligible form, and could not accelerate or in any way alter the legal liability of either party.

The judgment creditors were factors, selling goods for the mill company on commission; and it becomes a material question, whether a factor, in the case of a sale by him of goods on credit, is, as the plaintiffs contend, instantly or immediately liable to the principal for the amount of the sales; or in other words, whether the principal has any legal right of action against the factor until the credit has expired. Whatever doubt may have once existed on the subject, I think the question is now settled, by judicial decisions and the opinions of eminent commentators on the law, both in England and in this country. It is established, that the undertaking of the factor is merely to answer for the solvency of the buyers of the goods, or, rather, to guaranty to the principal the payment of the debts due from the buyers. He becomes liable to pay to the principal the amount of the purchase-money, if the buyers fail to pay it when it becomes due. This is the effect and whole extent of his engagement. The doctrine is so laid down in all the adjudged cases, with few exceptions, and is recognized as the true doctrine by Chancellor Kent in his Commentaries, and by Judge Story in his treatise on Agency. And I think it necessarily must be so, if the factor has authority to sell on credit, as he indisputably has, and if the principal may maintain an action against the buyers of the goods, which has been often adjudged and is nowhere denied. Some confusion has arisen on this subject from the decisions on the question whether the undertaking of a factor is a contract within the statute of frauds, and so must be in writing. The better opinion is, that it need not be in writing; that, though a guarantee, it is not a collateral engagement, but an original and absolute one, that the prices for which the goods are sold, or the debts created by the sales of the goods, shall be paid to the principal when the credit given on the sales shall have expired. Thus, in a note summing up the law on the subject, in 1 Am. Lead. Cas. [2d Ed.] 659, 660, it is said, that the contract is an absolute engagement by the factor, that the debts for which the goods are sold "shall be paid at the time they are due, or, in other words, that they shall be cash in the principal's account, at the time they are due." The plaintiffs insist that the lex loci must govern the decision of this question; and, to show the law of the place where the contract was made and executed, they cite the case of Swan v. Nesmith, 7 Pick. 220. In that case, the question was, whether the undertaking of the factor was within the statute of frauds. The court held the liability to be original, and that a guarantee of that nature need not be in writing. But they expressly admitted that, when the goods are sold upon credit, the liability of the factor is not fixed until the time of payment arrives. The case, therefore, so far as it has any application to the present question, is an authority against rather than for the plaintiffs. But, if it was otherwise, it could not be allowed to prevail against the general and what I conceive to be the established rule of commercial law. In Swift v. Tyson, 16 Pet. [41 U. S.] 1, it is laid down, that the true interpretation and effect of contracts and other instruments of a commercial nature, in suits in the courts of the United States, are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

From what has been said, it follows that the judgment creditors, at the time of the commencement of their suits, were not chargeable for the sales of goods made by them before that time, but due and payable at different times afterwards, beyond the amount, at any rate, of what they were bound by their agreement to advance upon them. To that extent, the advances might be treated as payment in advance of so much towards the goods, and so far the one might be set off against the other. But all moneys advanced on account, beyond the amount agreed to be advanced upon the goods, would constitute a present legal debt, for which there would be a present legal right of action. We have already seen the extent of the difference existing in favor of the judgment creditors at the commencement of the suits, between the amount of sales then matured and the amount of moneys then actually advanced, and also between the aggregate of unmatured sales and the aggregate of unmatured notes and acceptances. It does not appear what portion of the advances stipulated to be made was to be in ready money, and what portion in notes and acceptances on time; but, it is to be inferred from the report, that the ad-

vances were made, both in point of form and time, according to the calls of the mill company, and in such manner as suited its wants and wishes. If the company procured and had the benefit of the advances, it is thereby precluded from objecting to them as not answering the agreement, whatever may have been the form in which they were made. Considering the unmatured notes and acceptances, therefore, as satisfying the agreement as to advances upon the unmatured sales, the judgment creditors had, at the commencement of their suits, arising from over-advances, an actual unpaid and unsatisfied balance due them from the mill company of $149,062, which they then had a legal right to sue for and secure by attachment of the property of the company. Indeed, upon any adjustment, or any appropriation of the advances to the sales, not directly at variance with the agreement and the practical construction put upon it by the acts of the parties, the balance at that time would greatly exceed what was ultimately recovered in the suits.

But, it is said that, when the sales in question matured, if not before, especially when the money was received upon them, they operated as payment of so much of the claim for which the suits were brought, and should be so treated. Whether this be so or not will be readily seen by recurring to the facts. The money on these sales became due at different times from the 19th of July, 1849, to the 18th of January, 1850. On the credit of these sales, the judgment creditors had, previous to the commencement of their suits, given notes and accepted drafts for the mill company, not only amounting to a sum much larger than the amount of the sales, but payable at different times from the 23d of May to the 11th of October, 1849, much earlier than the money on the sales would become due. For these notes and acceptances, the judgment creditors had a lien on the goods and, of course, on their proceeds. Was it not, therefore, legal, as well as just and equitable, that the money arising from the sales should be applied, as it became due, in satisfaction of the advances the judgment creditors were obliged to make in payment of the notes and acceptances as they fell due? The application was so made; and I have no doubt that it was in accordance both with the usage in such cases and with law. The referees, it appears, allowed all payments made by the mill company, arising from sales or otherwise, down to February 15th, 1851, when the accounts between the parties closed, deducting from the sales, advances, commissions, and other proper charges upon them; and it was by the allowance of such payments, and the withdrawal by the judgment creditors of their claim for three-fifths notes, that the balance due them at the commencement of their suits was reduced down to the sum recovered by the judgments. In this way, the balance of the subsequent account between the parties was ascertained and allowed, not to the prejudice but to the benefit of the plaintiffs.

I have thus noticed, in a summary way, all the material facts and points connected with the merits of the case; and, upon consideration of the whole, I am of opinion, that the plaintiffs have no claim in equity to have the property relieved, either wholly or partially, from the lien created by the attachments, or from the enforcement of the lien by execution of the judgments, and, consequently, that the injunction moved for ought not be granted. Motion denied.

Case No. 1,787.

BRADLEY v. SOUTH CAROLINA PHOSPHATE AND PHOSPHATIC RIVER MIN. CO.

[1 Hughes (1877) 72.][1]

Circuit Court, D. South Carolina.

PUBLIC LANDS—GRANTS—EXCLUSIVENESS.

1. The act of assembly of South Carolina, of March 1st, 1870, "gives and grants" to the persons it names, "the right to dig, mine, and remove," for twenty-one years "from the beds of the navigable streams and waters within the jurisdiction of the state, the phosphate rocks and the phosphate deposits" contained therein, and requires the grantees to pay the state one dollar per ton for every ton removed, requiring a deposit of $500 in cash as a license for, and a bond in the penal sum of $500, to be filed, conditioned for the faithful payment of the amounts accruing to the state. *Held*, on a bill of injunction brought by the grantees against the defendants, a company subsequently chartered by the legislature, with similar rights and powers to those conferred upon the complainants by the statute of 1st March, 1870, that the complainants derived no exclusive privilege from the act first in date, and that the injunction must be refused and the bill dismissed.

[Cited in State v. Coosaw Min. Co., 47 Fed. 226.]

[See Rice v. Minnesota & N. W. R. Co., 1 Black (66 U. S.) 360.]

2. This case distinguished from that of Massot v. Moses, 3 S. C. 168; and assimilated to that of Doe v. Wood, 2 Barn. & Ald. 724.

[In equity. Bill by William L. Bradley against the South Carolina Phosphate and Phosphatic River Mining Company for injunction. Dismissed.]

BOND, Circuit Judge. The bill in this case alleges that on the first of March, 1870, the general assembly of the state of South Carolina passed an act, entitled "An act to grant certain persons therein named, and their associates, the right to dig and mine in the beds of the navigable waters of the state of South Carolina, for phosphate rocks and phosphate deposits" [Sess. Laws, 381]. The act, by its first section, "gives and grants to the parties therein named, and to such other

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

persons as they may associate with them," the right to dig, mine, and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the state of South Carolina, the phospate rocks and the phosphate deposits; and requires by its second section that they should pay the state one dollar per ton for every ton of such deposits or rock removed; and the third section of the act requires that the grantees file a bond in the penal sum of $500, conditioned that they should make proper returns of the amount of phosphatic deposits removed, and that they should pay into the treasury, before commencing business under said grant, the sum of $500 as a license fee. The bill alleges the compliance of the parties with the terms of the grant, and asserts that by such compliance there was granted to the complainant and his associates the phosphate rocks and deposits themselves contained in the navigable waters of the state for the term of twenty-one years, and that by virtue of said act they have exclusive right to dig, mine, and remove such deposits. The bill shows that, notwithstanding this, the general assembly on March 9th, 1871, by virtue of an act entitled "An act to charter the South Carolina Phosphate and Phosphatic River Mining Company" [Sess. Laws, 688], granted to the persons therein named, and their associates, the right to dig and mine in the beds of the navigable streams and waters of the state for phosphate rocks and phosphate deposits, upon much the same terms as had been required in the first-named act. Under this second act the last-named company had proceeded to remove phosphates from the beds of the navigable waters in disregard of the exclusive right of the complainant. The prayer of the bill is for subpoena and an injunction in the usual form.

The answer denies the exclusive right claimed by the complainant, and also the right of the complainant, Bradley, to sue in his own name, who does so merely upon an allegation that he, as a stockholder in the South Carolina Company, had requested his associates in the company to litigate the matter in controversy, and upon its refusal had brought suit himself.

The question to be considered, which is decisive of the case, is whether or not the grant to the complainant's company, by the act of March 1st, 1870, is a grant of an exclusive right to dig, mine, and remove the phosphatic deposits in the beds of the navigable waters of the state. The terms of a grant which are claimed to confer an exclusive right must be clear and explicit, and without ambiguity must plainly express the intention of the parties. The grantees can claim nothing which is not clearly given by the act. The grant of the right to dig for and remove the phosphate rocks in a particular place, is the grant of an incorporeal right. It is the grant of a right to be exercised upon the soil of another, to exercise which without permission would be a trespass in the grantee, and unless there be words in the grant which clearly express the intention of the parties to convey the whole body of the mineral to be dug and removed, it does not convey a corporeal hereditament, or any right in the soil itself. But even were the words "the right" to be held prima facie to grant an exclusive right, other words of the act of March 1st, 1870, clearly show that this was not the intention of the legislature when it passed that act. The grantees are not required by the act to pay for all the phosphate rocks in the beds of the navigable waters a gross sum, but are to pay the sum of one dollar per ton for every ton which they shall dig, mine, and remove, which, it seems to us, is conclusive that this was not a sale of all the rocks, but was a sale of so much as the grantees should choose to mine and remove at that price. And when the second section of the act of March 1st, 1870, provides that the grantees, before commencing, shall pay a license fee of $500 for the privilege granted, it clearly shows that it was the intention of the legislature to grant a mere incorporeal right, and that the title to the phosphate rock was in the grantee only upon digging and securing it. Under the complainant's construction, he might hold possession of all the phosphate rocks of the state for twenty-one years without having paid one cent for them to the state, for he is to pay nothing before commencing business, and by the terms of the act it is at his option whether he will ever begin to dig or mine.

This case is easily to be distinguished from the case of Massot v. Moses, 3 S. C. 168, which is relied upon by complainant in support of his claim to an exclusive right. In that case the court found words which gave the exclusive right. The grantor "sold and conveyed" the right and privilege of mining and removing all the minerals which the grantee himself found, or which were discovered by any other person, upon the land. The grantee paid a sum in gross equivalent to the value of all the minerals supposed to be on the land. The court held that the words "that may be found by any person or persons, or contained in any part of the land," excluded the grantor himself, and showed an intent to convey an exclusive right; and this, taken in connection with the fact that the consideration paid was an entire sum upon the delivery of the deed, established the intention of the parties. But in the case before us there are no words used which, by implication, could exclude the grantor. There is no sale or conveyance, and no consideration paid, which could possibly be held to be the gross value of the phosphatic rocks in the beds of the navigable waters of the state. It seems to us that this case falls precisely within the rulings of Doe v. Wood, 2 Barn. & Ald. 724. The

grantees, under the act of March 1st, 1870, can claim nothing, as we said before, which is not clearly granted by it. They cannot take anything by implication. Nothing passes but what, in explicit language, is given, and when the intention of the legislature is doubtful, the act must be construed against the grantees. We think the injunction must be refused and the bill dismissed.

BRADLEY (STEAM-PACKET CO. v.). See Case No. 13,333.

Case No. 1,788.

BRADLEY v. TOCHMAN.

[1 Hayw. & H. 263.][1]

Circuit Court, District of Columbia. May 17, 1847.

ATTORNEY AND CLIENT—DISBARMENT.

1. The profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him.

2. The discretion to remove or suspend an attorney or counselor ought to be exercised with great moderation and judgment, and the power to remove or suspend is one which ought to be exercised with great caution, and upon good and sufficient grounds.

The complainant submitted the following points:

In Burr's Case, pages 14 and 15 [Ex parte Burr, Case No. 2,186]: "The court has power to punish for any ill-practice attended with fraud and corruption, and committed against the obvious rules of justice and common honesty. * * * Is not the respectability of the court in some measure connected with that of the bar? A regard to the purity of the administration of justice demands that the bar should be pure and honest, and if possible highly honorable. The members of the bar in this country act in the double capacity of attorneys and counselors. As counselors the court reposes in them great confidence. It cannot doubt their honor and integrity, and it is the duty of the court to see that they conduct themselves in such a manner as to deserve their confidence." The Case of Brounsall, Cowp. 829, decides the principle that the court will strike from the rolls an attorney who, by his conduct, although not official, has shown himself not to be a fit person to be an attorney. The same doctrine prevails in Virginia. In Leigh's Case, 1 Munf. 481, Judge Rown says: "None are permitted to act as such (attorneys) but those who are allowed by the judge and certified by the court of the county of their residence to be persons of honesty, probity and good demeanor." In the Case of James A. Porter (U. S. v. Porter [Case No. 16,072]), of this court, the court says: "It is the duty of the court to see that the members of the bar maintain the purity of character of that profession, which Lord Mansfield has justly said should be free from all suspicion. It is bound to discountenance and to punish every direct attempt by any of its officers to obstruct the due administration of justice, and there are standing at this bar gentlemen of high and honorable character for legal science, and for moral and professional integrity, to whom we should do injustice if we compelled them to associate with men of an opposite character."

OPINION OF THE COURT. On the 24th March, 1847, Mr. Joseph H. Bradley an attorney and counselor of this court, filed a paper purporting to be a complaint against Gaspard Tochman, also an attorney and counselor of the court, the substance of which complaint, as I understand it, is: That Mr. Tochman, after having agreed to unite with Messrs. Bradley and Fendall in the prosecution of the claims of the heirs of General Kosciusko, and to share equally the compensation which they might receive therefor, and having been informed of and acquiescing in an arrangement to procure, with the aid of Mr. Bodisco, the Russian minister, a power of attorney to Mr. Fendall and such other person as he might associate with himself, except Mr. Tochman, whom Mr. Bodisco could not recognize on account of his political offences in Poland, endeavored to defeat that arrangement by letters written by him to Mr. Bodisco and to some of the heirs of General Kosciusko. In support of this charge Mr. Bradley produced a copy of Mr. Tochman's letter to Mr. Bodisco, of the 18th of January, 1847, and of Mr. Bradley's letter to Mr. Tochman, of the 9th of January, 1846, informing him of the proposed arrangement to obtain the power of attorney to Mr. Fendall.

Mr. Tochman, in his answer, avers and charges that he never did, as is alleged, agree to the suggestions contained in Mr. Bradley's letter of the 9th of January, 1846, and refers to sundry documents and papers filed with his answer.

The question whether he did agree to the suggestions contained in that letter is a question of fact which we do not deem necessary to be decided by the court in the present state of the case, because, if he did so agree and afterwards refused to be bound thereby, such refusal might not imply such misdemeanor and moral obliquity as would justify the court in expelling him from the bar; and if he did not so agree he has not been guilty of a violation of good faith in endeavoring to defeat that arrangement. The whole ground of our jurisdiction in such a case is the power and authority we have to expel an attorney or counselor of the court for misbehavior. If his offence be not such as would justify his final expulsion, or at

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

least a temporary suspension of his functions, and if the charge, as made, do not amount to such an offence, the court, as we think, ought not to go into an investigation of the matter, because it would lead to no practical result. It is true that the court may reprove and censure an attorney or counselor for conduct not amounting to such a misdemeanor as would justify his expulsion or suspension; but in cases of this inferior grade, we ought not, perhaps, to act in a summary way when the parties aggrieved can have adequate relief in the ordinary course of law. So far, then, as regards the charge of Mr. Tochman for violation of the arrangement made by Messrs. Fendall and Bradley with Mr. Bodisco, the court does not deem it necessary to pursue the investigation further, but will leave it to the parties themselves, the clients, to make their own arrangements, as to the powers they may think proper to give to their attorneys.

Another ground of complaint by Mr. Bradley in his statement is that the letter to Mr. Bodisco contains averments which he says "are in the main absolutely untrue, so far as his action is detailed." In that letter of the 18th of January, 1847, Mr. Tochman says: "Under my control then, and through my exertions only, the right of the heirs is already established to the whole fund, and had Messrs. Fendall and Smith done their duty, had they not permitted Mr. Bomford to collect the money of the estate and to speculate therewith, we could receive now the whole fund without any further litigation;" and in the same letter Mr. Tochman says: "It is to be expected, and cannot surprise neither your excellency nor the government of his majesty, that if the power of attorney, intended to supersede me, comes and be made use of, I shall defend my rights by all possible means. Let us then suppose that the present administration shall refuse to interfere on my behalf in this controversy, because the heirs of Kosciusko are the subjects of his majesty and within his exclusive power, my course would be to sue Messrs. Fendall and Bradley to set aside their power of attorney, as obtained by undue means and contrary to law." These extracts contain the strongest grounds of the complaint of Mr. Bradley against Mr. Tochman in this part of the case.

It will be perceived that he does not, in that letter, charge Messrs. Bradley and Fendall positively and directly with obtaining a power of attorney by undue means, but says "if the power of attorney comes and be made use of he shall defend his rights by all possible means; and that his course would be to sue Messrs. Fendall and Bradley to set aside their power of attorney as obtained by undue means and contrary to the law." It seems to us that this, at most, can only amount to a threat by Mr. Tochman, that if the power of attorney comes and be acted upon his course would be to use lawful means to set it aside on the ground that it was obtained by undue means. It is not a direct averment that undue means were or had been used, but that he should, on that ground, attempt to set it aside. He does not state what were the undue means by which the power of attorney, if made, would be obtained, nor that those means would be fraudulent; but that if obtained, it would be obtained "contrary to law." Although Mr. Tochman did not, in his letter to Mr. Bodisco, state what the undue means were, yet we think it appears on the face of Mr. Bradley's complaint, and the documents which he had adduced in support of it, that Mr. Tochman considered the application of Messrs. Fendall and Bradley to Mr. Bodisco for his official aid in procuring a power of attorney to them, to the exclusion of Mr. Tochman, as undue means, to which he alluded in his letter to Mr. Bodisco. In its most inflamed sense it may amount to an accusation that they were uniting with the Russian government to oppress him by operating on the fears of his clients to exclude him from the conduct of their suit. We assume the charge to be gratuitous and groundless, as we have no doubt it is; still we must look at Mr. Tochman, as he represents himself to be, an exile from his native country for his political opinions, and make some allowance for the suspicions which would occupy his mind at the interference of Mr. Bodisco to exclude him from the case. He may have accused wrongfully, untruly, yet not wilfully.

In the case of Ex parte Burr, 9 Wheat. [22 U. S.] 529, the supreme court says: "The profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him." And again, the discretion, to remove or suspend "ought to be exercised with great moderation and judgment." And again, "the power is one which ought to be exercised with great caution."

The court feels it their duty to maintain the respectability of the bar among themselves, but it does not perceive in the conduct of Mr. Tochman such plain intentional misconduct as to call for the summary jurisdiction of this court in the present case.

Case No. 1,788a.

BRADLEY v. TRAMMEL.

[Hempst. 164.] [1]

Superior Court of Arkansas. Jan., 1832.

PROMISSORY NOTE — ASSIGNMENT — NECESSITY OF INDORSEMENT—ACTION ON—DEFENSES.

1. Under the statute of assignments (Geyer's Dig. 66), making all bonds, bills, and promis-

[1] [Reported by Samuel H. Hempstead, Esq.]

sory notes for money or property assignable, to authorize an assignee to sue in his own name, a note must not only be assigned and made over, but must be indorsed. Delivery without indorsement is not sufficient.

2. An indorsement is a written assignment on the back of the note, in the absence of which the holder, neither by statute nor the common law, can maintain an action against the promisor in his own name.

3. The statutes 3 & 4 Anne, c. 9, placing notes on the footing of inland bills of exchange, cited, and various cases in connection with them commented on.

4. The maker of a note may set up the same defence against it in the hands of an assignee, that he might make if it were held by the payee.

[Action by John M. Bradley against Nicholas Trammel on a promissory note. The defendant demurred to the declaration, and the demurrer was sustained,]

Before JOHNSON and ESKRIDGE, Judges.

JOHNSON, Judge, delivered the opinion of the court.

This is an action of debt, brought by Bradley against Trammel, on the following promissory note: "For value received, I promised to pay John G. Jackson, or bearer, the sum of eight hundred and ninety dollars, six months after date. Witness my hand, this 17th of July, 1824. Nicholas Trammel." The assignment of the note is set out in the declaration in the following terms: "That the said John G. Jackson afterwards transferred and delivered the said note to the said plaintiff, Bradley, who thereby then and there became, and still is, the lawful bearer thereof, and entitled to demand and receive the said sum of eight hundred and ninety dollars from the defendant, Trammel."

The defendant has filed a general demurrer to the declaration, and the question presented is, whether the plaintiff can maintain this action in his own name. If he can, it is in virtue of the assignment of the note to him by Jackson, to whom it was executed. And if the assignment set out in the declaration is such as is required by our statute, there can be no doubt that the plaintiff is entitled in his own name to maintain the action. Our statute is in the following words: "All bonds, bills, and promissory notes, for money or property, shall be assignable, and the assignee may sue for them in the same manner as the original holder thereof could do. And it shall and may be lawful for the persons to whom the said bonds, bills, or notes are assigned, made over, and indorsed in his name, to commence and prosecute his action at law, for the recovery of the money mentioned in such bonds, bills, or notes, or so much thereof as shall appear to be due at the time of such assignment, in like manner as the person to whom the same were made payable, might or could have done." Geyer's Dig. 66. It will be perceived that the statute makes all bonds, bills, and notes assignable, and authorizes the person to whom a bond, bill, or note is assigned, made over, and indorsed, to sue in his own name, in like manner as the payee or obligee might have done. Taking the whole of the acts together, it is manifest, that to enable the assignee to sue in his own name, the bond, bill, or note must be assigned, made over, and indorsed. A bare assignment and making over by delivery, without an indorsement, is not sufficient, because the statute requires the bond or note to be indorsed to enable the assignee to sue in his own name. To dispense with an indorsement, which is a written assignment on the back of the note (Instone v. Williamson, 2 Bibb, 83), and permit the assignee by delivery merely, to bring the action in his own name, would be to dispense with one of the plain and positive requisitions of the statute. How is the assignment set out in the present declaration? "That the said Jackson transferred and delivered the said note to the plaintiff, who thereby became the lawful bearer thereof." This may be true, and still the note may not have been indorsed: and the action cannot be maintained under our statute in the name of the assignee unless he is also the indorsee. The conclusion, then, to which we have arrived is, that the plaintiff cannot maintain this action by virtue of our statute authorizing the assignment of bonds, bills, and promissory notes.

Can he maintain the action according to the principles of the common law? Stewart Kyd, in his treatise on Bills of Exchange and Promissory Notes (page 18), makes the following remarks: "A promissory note may be defined to be an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer at large; and at first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsable over, within the custom of merchants, to any other person, by him to whom it was made payable; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action, within the custom, against the person who first drew and subscribed the note; and that, within the same custom, even the person to whom it was made payable could not maintain such action. But, at length, they were recognized by the legislature, and put on the same footing with inland bills of exchange, by 3 & 4 Anne, c. 9; made perpetual by 7 Anne, c. 25." In the case of Walmsley v. Child, 1 Ves. Sr. 341, Lord Chancellor Hardwicke says: "Where a note is payable to him or bearer, the bearer of the bill or note has not such a property as that he can maintain an action at law in his own name, but it must be in the name of the payee or his representatives." Chancellor Kent, in his Commen-

taries (volume 3, p. 73), says: "It was a question much discussed before the statute of Anne, whether notes were not, by the principles of the law-merchant, to be held as bills, and Lord Holt vigorously and successfully resisted any such attempt." In the case of Nicholson v. Sedgwick, 1 Ld. Raym. 180, decided seven years before the statute of Anne, the plaintiff brought an action of assumpsit, and in his declaration averred that the defendant made a note in writing, by which he promised to pay one Mason, or to the bearer thereof, £100; that Mason delivered the note to the plaintiff for £100 in value received, and that for the non-payment of this £100 by the defendant, the plaintiff brought this action, and upon a motion in arrest of judgment, the court held that the action could not be brought in the name of the bearer but that it ought to be brought in the name of him to whom the note was made payable. And the same point was resolved in the cases of Horton v. Coggs, 3 Lev. 299, and Hodges v. Steward, 1 Salk. 125, 12 Mod. 36. These cases are directly in point, and if regarded as authority, are decisive of the present question. The case of Clerke v. Martin, 2 Ld. Raym. 757, decided in the first year of Queen Anne, was an action on the case, and one count in the declaration was upon the custom of merchants, as upon a bill of exchange, and showed that the defendant gave a note, by which he promised to pay to the plaintiff or his order. Upon a motion in arrest of judgment, Lord Holt decided against the action, and said: "This note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law and invented in Lombard street, which attempted in these matter of bills of exchange, to give laws to Westminster Hall." Justice Gould concurred with him in arresting judgment. In the subsequent cases of Burton v. Souter, 2 Ld. Raym. 774, and Williams v. Cutting, Id. 825, it was held by the same court that promissory notes were not negotiable, within the custom of merchants. These adjudications are clear and explicit in affirming the doctrine, that according to the principles of the common law before the statute of Anne, promissory notes, whether payable to certain persons or order, or to a certain person or bearer, were not negotiable, so as to enable the assignee to sue upon them in his own name. Ashurst, J., in Carlos v. Fancourt, 5 Term R. 485, says: "Before the statute of Anne, promissory notes were not assignable as choses in action, nor could actions have been brought on them because the considerations do not appear on them; and it was to answer the purposes of commerce that those notes were put by the statute, on the same footing with bills of exchange." In Norton v. Rose, 2 Wash. [Va.] 248, Judge Roane says: "It is admitted that, on the principles of the common law, a chose in action is not assignable; that is, the assignment does not give to the assignee a right to maintain an action in his own name." Judge Carrington, in the same case, observes: "That in England notes of hand were not assignable until 3 & 4 Anne, so as to enable the assignee to bring a suit at law in his own name. Courts of equity were, of course, resorted to, when the maker of the note was not precluded from setting up any equitable defence which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them on the same footing of negotiability with bills of exchange. But the judges still considered them merely as the evidence of debt. At length the statute of Anne was procured, conformably with the wishes of the trading part of the community, making them assignable in like manner as bills of exchange. The likeness thus strongly sanctioned by legislative authority, produced similar decisions in cases where their negotiability was concerned." If, however, promissory notes were negotiable and assignable, and stood upon the footing of inland bills of exchange, according to the principles of the common law, adopting in this respect the lex mercatoria, why was it deemed necessary on the part of the merchants, to apply to parliament for the enactment of a statute raising them to the dignity of mercantile instruments? If the repeated adjudications of the king's bench, enlightened and adorned, as it then was, by the transcendent genius of Chief Justice Holt, were known to be erroneous, and contrary to former precedents, why did not the merchants, always a wealthy class of the community, make a different appeal, and before the lords in parliament, reverse and annul the erroneous judgment of the king's bench? They, however, acquiesced in these decisions. They were well aware that as they were attempting to innovate upon the rules of the common law, which forbid the assignment of a chose in action, they never could obtain the reversal and annulment of judgments pronounced in accordance with principles which had been settled for ages. They made a different appeal, and obtained an act of parliament of 3 & 4 Anne, c. 25, "giving like remedy on promissory notes as used on bills of exchange," and for the better payment of inland bills of exchange, to the following effect: "Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and

that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same. Therefore, to the intent to encourage trade and commerce, which will be very much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, that from the first day of May, 1705, all notes in writing made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually intrusted by him or them to sign such notes by him, her, or them, whereby such person or persons doth or shall promise to pay to any other person or persons, his, her, or their order, or to bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable; and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange, and that the person to whom such sum is by such note made payable may maintain an action for the same in the same manner as they might do on an inland bill of exchange, made or drawn according to the custom of merchants, against the person who signed the same; and that any person to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the person who signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange."

The recital in this act of parliament is almost conclusive evidence of the settled doctrine, that at common law promissory notes were not negotiable, nor assignable, so as to authorize the assignee to bring the action in his name. To maintain the doctrine that a promissory note, payable to a person named or bearer, was negotiable and assignable before the statute of Anne, the counsel for the plaintiff has mainly relied on two cases; one of them decided by the king's bench, in England; the other by the supreme court of New York. The first is the case of Grant v. Vaughan, 3 Burrows, 1518, and was an action on the case, brought by Grant, who inserted two counts in his declaration; one upon an inland bill of exchange, the other upon indebitatus assumpsit for money had and received to his use. The writing relied upon by the plaintiff is thus described by the reporter: "The defendant, Vaughan, gave a cash note on his banker, to one Bicknell, or husband of a ship of his, which note was directed to Sir Charles Asgell, who was Vaughan's banker, and was worded thus: 'Pay to ship Fortune, or bearer so much.'" Bicknell lost this note, which came into the hands of the plaintiff, for a full consideration by him paid without notice of its loss by the original owner. The court gave judgment for the plaintiff, who brought the action as bearer, and no doubt correctly. In the first place, the writing was in fact an inland bill of exchange; and secondly, if it was not a bill of exchange, but a promissory note, the statute of Anne had been long previously enacted, which placed it on the same footing with an inland bill of exchange. This decision cannot, then, be regarded as authority upon the present question, and all that fell from the court bearing upon it, is to be received as extrajudicial. It is true, that Lord Mansfield and Mr. Justice Wilmot, in discussing the case, clearly intimate an opinion that promissory notes, payable to J. S. or bearer, were negotiable before the statute of Anne, and controverts the decisions made by Lord Holt. But these doctrines of Lord Mansfield and Justice Wilmot, who are justly ranked among England's most talented and distinguished judges, are not to outweigh the numerous authorities directly upon the present question, which have already been cited. The case of Pierce v. Crafts, 12 Johns. 90, decided by the supreme court of New York, was an action of assumpsit on two promissory notes, payable to William Douglass, or bearer, and the bearer, Crafts, was allowed to maintain the action in his own name. But in New York the statute of Anne had been reenacted. So that this case also is no authority upon the question presented by the case at bar. Judge Platt there seems to indicate an opinion that these notes were negotiable, independent of the statute of Anne. This opinion is, however, extrajudicial, not called for by the case before him, and is not entitled to consideration as authority.

Our legislature has not deemed it expedient, like the parliament of England, to make any other interest bend to that of commerce. Our condition is essentially different, and a different policy has been wisely pursued. There are other interests which equally deserve the protection of the laws. Agriculture may be justly regarded as the great interest upon which the prosperity and happiness of this community mainly depends. With the statute of Anne before them, our legislature have not thought proper to make promissory notes assignable in like manner with inland bills of exchange. It has thought it consistent with the principles of justice, as well as with the dictates of enlightened policy, to permit the maker of a bond or note to set up the same defence against it in the hands of the assignee, that he could make against it in the hands of the obligee or person to whom he gave it. In other words, that the assignment of the note is not to operate to the prejudice of its maker, unless he, by his own consent, destroyed his equity or waived his rights. And why

should the assignment of a note affect the rights of the obligor or maker of the note? If it is tainted with fraud, or the consideration has failed, or a right of offset existed, why should the assignment or transfer of it to another have the effect of precluding these just defences to an action brought to recover the amount of the note? Is it not consistent with the principles of natural justice, that the assignee should stand in the shoes of the assignor and take the note, subject to all the equities and legal defences which existed against it in the hands of the assignor? This is the principle upon which courts of chancery have uniformly acted in permitting the assignment of a chose in action.

For these reasons, we are clearly of opinion that the demurrer ought to be sustained.

BRADLEY MANUF'G CO. (DORSEY REVOLVING HARVESTER RAKE CO. v.). See Case No. 4,015.

Case No. 1,789.

BRADLY v. MARINE & R. PHOSPHATE MIN. & MANUF'G CO. OF SOUTH CAROLINA et al.

[3 Hughes, 26.][1]

Circuit Court, D. South Carolina. April Term, 1879.[2]

CORPORATIONS—OFFICERS AND AGENTS—PURCHASE OF INDEBTEDNESS OF BY PRESIDENT—CONTRACTS BETWEEN CORPORATION AND OFFICER — RECEIVERS—POWERS — QUESTIONING VALIDITY OF ACT COLLATERALLY—NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—FEDERAL COURTS—JURISDICTION—ASSIGNEE OF NEGOTIABLE INSTRUMENT.

1. The president of a corporation may with his own means (the company being embarrassed and without funds to do so) purchase the past due outstanding bond of the company, and hold the same as against the company. Otherwise if he purchase with the funds or credit of the company.

[See Combination Trust Co. v. Weed, 2 Fed. 24.]

[See note at end of case.]

2. A corporation may make a valid contract with its president, renewing, extending, and increasing the rate of interest upon its own past due bond, held by him, the contract being a fair and equitable one.

[See Combination Trust Co. v. Weed, 2 Fed. 24.]

[See note at end of case.]

3. The validity of a receiver's act in selling or exchanging the property in his possession as such receiver will not be questioned in a collateral suit in another court. The court whose officer he is, having approved his accounts, discharged him, and cancelled his bond, must be assumed to have authorized as well as approved the sale.

[See note at end of case.]

4. The bond in this suit, though originally given by one citizen of the state of South Carolina to another, after the renewal agreement of May 13th, 1874, became commercial paper, and the same passed from hand to hand by delivery; and having passed into the hands of the plaintiff, a citizen of Massachusetts, he may maintain suit thereon in this court. It does not fall within the prohibition of the 11th section of the judiciary act of 1789 [1 Stat. 78].

[See White v. Vermont & M. R. Co., Case No. 17,559, 21 How. (62 U. S.) 577.]

[See note at end of case.]

[In equity. Bill by William L. Bradly against the Phosphate Company, George W. Williams & Co., Pelzer, Rogers & Co., and others. Decree for complainant.]

On the 28th day of December, 1872, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, one of the defendants, obtained from William J. Gayer, receiver of the bank of the state, a loan of twenty thousand dollars, and to secure the payment thereof, executed the following bond: "State of South Carolina, Charleston County. Know all men by these presents, that we, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, are held and firmly bound unto William J. Gayer, receiver, in the sum of twenty thousand dollars, with interest thereon, at the rate of ten per cent. annually, payable semi-annually, to be paid on the first day of July next ensuing the date hereof, for which payment well and truly to be made, we, the said company, do hereby bind ourselves and our successors firmly by these presents. . In witness whereof the said company have caused their seal to be hereto affixed the 28th day of December, A. D. 1872. We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of said company, and that the same is issued under and pursuant to the provisions of section thirty-nine of chapter sixty-four of the General Statutes." This bond was not paid at maturity, but lay along without renewal, the company paying the interest, until April 2d, 1874, when C. C. Puffer, receiver, (successor to William J. Gayer, receiver), sold and delivered said bond to one A. J. Coe, who purchased the same at the instance and with the means ($30,000 of the capital stock of said Marine and River Phosphate Mining and Manufacturing Company) of D. T. Corbin, then president of the Marine and River Phosphate Mining and Manufacturing Company of South Carolina. The receiver indorsed said bond as follows: "In consideration of the sum of twenty thousand dollars to me in hand paid, and by order of Judge Graham, I hereby assign this bond to bearer." Coe delivered said bond to Corbin, president of the defendant company, who informed the company that further time for payment of said bond would be given on condition that the interest be advanced to the rate of twelve per cent. per annum, payable quarterly. The proposition was submitted to the board of directors of the company, who agreed to

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

[2] [Affirmed in Marine, etc., Phosphate M. & M. Co. v. Bradley, 105 U. S. 175.]

said proposition, and directed that the following be written upon said bond, which was accordingly done, and the signature of the president and treasurer with the seal of the company attached, to wit: "In consideration of further forbearance on the part of the holder of this bond till the first day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promise, waiving all set-off or other defence, to pay this bond to bearer on the first day of January, A. D. 1875, with interest at the rate of twelve per cent. per annum, from the first day of April, A. D. 1874, payable quarterly; and should said bond not be paid on the first day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned till paid."

The other defendants named are sued as stockholders, who are jointly and severally liable under the general incorporation act of South Carolina, under which the defendant company was organized, for the debts of the company contracted before the full amount of the capital stock is paid in. This section 22 of the statute is as follows: "The members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock, fixed and limited by the company in manner aforesaid, is paid in, and a certificate thereof made and recorded as prescribed in the following section."

Section 36 of said act, relative to the collection of an execution against the company and stockholders, is as follows: "When the stockholders of such a company are liable to pay the debts of such company, or any part thereof, their property may be taken therefor on an order of attachment, or on execution issued against the company for such debt, in the same manner as an order of attachment and execution issued against them for their individual debts."

BOND, Circuit Judge. This cause came on to be heard upon the pleading, and the testimony taken and reported by James E. Hagood, special master. The substantial facts in the cause seem to be that the defendant company is a corporation under the laws of the state of South Carolina, was organized under the act entitled "An act to regulate the formation of corporations," approved December 10th, 1869, which act was subsequently amended by act of March 9th, 1871. These acts were subsequently embodied in the General Statutes of South Carolina, in chapter 64, commencing on page 357. The capital stock of this corporation was fixed and limited at five hundred thousand dollars, and the same divided into five thousand shares, of one hundred dollars each. There has been paid in of said capital stock but two hundred and fifty thousand dollars, or fifty dollars per share. It is admitted that at the date of the filing of the bill in this cause, Louis D. Mowry was the owner and holder of seventy-five shares of said capital stock in said company; that F. J. Pelzer, F. S. Rogers, Wesley G. Muckenfuss, and Thomas S. Inglesby, constituting the firm of Pelzer, Rogers & Co., were the owners and holders of one hundred and seventy-six shares of said capital stock in said company, and that George W. Williams, William Birnie, Joseph R. Robertson, James Bridge, Jr., Frank E. Taylor, and Robert S. Cathcart, constituting the firm of George W. Williams & Co., were the owners of one hundred and twenty-eight shares of said capital stock in said company. These persons named were made, with the said company, defendants in this action, have answered, and are now before the court.

The cause of action in this case grows out of the unpaid portion of a bond, executed by the defendant company on the 28th day of December, 1872, in the sum of twenty thousand dollars, to William J. Gayer, receiver. This bond, it appears, was given for ($20,000) money loaned by said Gayer to the said company. Said bond was payable on the 1st day of July following the date thereof, with interest at the rate of ten per cent. per annum. In said bond is the following covenant: "We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of said company, and that the same is issued under and pursuant to the provisions of section 39 of chapter 64 of the General Statutes." The said bond was duly recorded in the office of the register of mesne conveyances for Charleston county, South Carolina, on the 3d day of January, A. D. 1873. Said bond was not any portion of it paid at maturity by said Marine and River Phosphate Mining and Manufacturing Company of South Carolina, but was allowed to lie along without change or renewal (the said company paying the interest thereon) until some time in March, 1874, when C. C. Puffer, receiver, successor of William J. Gayer, receiver, demanded payment of said bond. At the time of said demand for payment of said bond, said company was in some financial embarrassment, and was not in possession of funds to pay the same. In consequence of this embarrassment, D. T. Corbin, who was then president of the company, induced one A. J. Coe to enter into negotiation with said C. C. Puffer, receiver, with the view to purchase said bond, he, said Corbin, furnishing said Coe, from his own private property, the means (three hundred shares, or $30,000 of the capital stock of said company) to effect such purchase. The bond was purchased by Coe from C. C. Puffer, receiver, and the same was delivered to him. This sale and delivery of said bond was effected about the middle of April, 1874. Soon after its purchase said A. J. Coe assigned and delivered said bond to said D. T. Corbin, in consideration of the thirty thousand dollars of stock

advanced by him to said Coe to purchase said bond. After said bond thus came into the possession of D. T. Corbin, he informed the board of directors of said company that the company could have further indulgence in the payment of said bond if they would renew the same, and pay the regular bank rates of interest thereon, twelve per cent. per annum, and pay the same quarterly. Thereupon the board of directors, on the 13th day of May, 1874, directed the following indorsement to be written upon said bond, to wit: "In consideration of further forbearance on the part of the holder of this bond, till the 1st day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promises, waiving all set-off, or other defence, to pay this bond to bearer on the 1st day of January, A. D. 1875, with interest at the rate of twelve per cent. per annum, from the 1st day of April, A. D. 1874, payable quarterly; and should said bond not be paid on the 1st day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned, till paid." The said bond continued in the possession of D. T. Corbin from this time forward till June, 1877, when he sold and delivered the same to the complainant, William L. Bradly, of Boston, Massachusetts. Up to January 1st, 1877, said D. T. Corbin collected and received the interest as it fell due on said bond under the renewal agreement of May 13th, 1874; and in December, 1876, he collected and received from the company ten thousand dollars in money, on account of the principal due on said bond. It thus appears that there is due and unpaid upon said bond the sum of ten thousand dollars, with interest thereon at the rate of twelve per cent. per annum, payable quarterly, from the 1st day of January, A. D. 1877.

The defence to this action made by the defendant company is, first, that said bond was "paid" by the $30,000 in stock of said company, which said C. C. Puffer received therefor from A. J. Coe. As to this defence, it is sufficient to say, that there is no evidence that shows that said purchase of said bond by A. J. Coe was intended as a payment thereof. That none of the parties to this transaction—Puffer, Coe, or Corbin—so understood it, but the very reverse; and further, the consideration paid, although it was $30,000 of the capital stock of said company, was not the property of the company, but the private property of D. T. Corbin. It is not pretended that the company paid or furnished the means to pay said bond at the time C. C. Puffer parted with the same to A. J. Coe, in April, 1874; and the only basis for the claim of payment is the entry made in the final accounts of C. C. Puffer, receiver, made to the court of common pleas for Charleston county, in which it appears that this bond is accounted for as "paid" by the transfer to him of three hundred shares of stock in the Marine and River Phosphate Mining and Manufacturing Company of South Carolina. That this entry is not technically correct is shown by the admitted fact that the company furnished no means to pay the bond then, and neither did Corbin or Coe purchase on behalf of the company. This entry is explained by Mr. Puffer as his method of recording the transaction, and it meant, so far as the fund in his hand as receiver was concerned, that the bond was exchanged for said $30,000 of stock. But it may be further remarked, that neither Corbin or Coe, as far as appears, was a party to the said entry in Puffer's account as receiver, and that entry, hence, does not conclude them. There is, therefore, no ground for asserting that said bond was or has been paid by or for the defendant company.

A further defence is made that D. T. Corbin was, at the time of the purchase of said bond from C. C. Puffer, the president of the defendant company, and as such president he was incapacitated to speculate in the paper of the company, and so forth; and all benefit and advantage arising from said purchase of said bond by him inured to the benefit of the company, and so forth. This defence set up, if sound in principle, which it is not, does not appear to have sufficient basis of fact to rest upon. It is not alleged in the pleadings or proved by the evidence of the defendants that D. T. Corbin paid less than twenty thousand dollars in value for said bond, and hence there is no ground for saying he speculated in the sense of making profit out of the paper of the company. So far as appears, he paid a full price for the bond; and it still further appears that he entered into the transaction to protect the credit of the company, and to save it from embarrassment, because the company was not in funds at the time to pay the bond. If D. T. Corbin, as the president and agent of the company, had purchased said bond with the funds or credit of the company, said transaction would now be held to have been made for the benefit of the company, without doubt, and the company would be entitled to any benefit or advantage, if any, accruing therefrom. But as the transaction was made with his own means, and because the company had no means with which to make it, the bond became his own private property just as much as the private property was his that he exchanged for it. There was nothing in his position, as president, that forbade the purchase of this bond if he chose to make it.

But it is further said, that the renewal indorsement put upon the said bond by order of the board of directors, on May 13th, 1874, was null and void, because said board was not aware at the time that said D. T. Corbin was the holder of said bond, and the same was in fraud of the rights of stockholders. As to this defence it may be again said it

has no sufficient basis of fact to stand on. In the renewal of said bond in the form that it was done, the board of directors obtained an indulgence in the postponement of the day of payment from D. T. Corbin precisely as they would have done from anybody else not connected with the company. It is not shown that there was any fraud on his part, or that any wrong was done by him to the company or stockholders. So far as said indorsement is concerned, it was evidently more to the advantage of the company than it was to Corbin. What did they receive by it? Six months and a half delay in the payment of their bond, which was then nearly two years past due. What did they give for that indulgence? They increased the rate of interest on said bond two per cent.,—that is, promised to pay the then current bank rate of interest. They simply agreed to pay Corbin for his money what they would have been compelled to pay anybody else, or just what anybody else would have paid him. It is impossible to maintain that such a transaction was a fraud upon the company or its stockholders. As to the facts alleged that the directors of the company did not know at the time they made the indorsement of May 13th, 1874, upon the bond, that D. T. Corbin, their president, actually owned and held the bond, it is disputed. Mr. Reuben Tomlinson, then treasurer of the company, says they did know it. That he knew all about it, and so did most if not all the directors; that he conversed with them about it, and that it was regarded as extremely fortunate for the company that the bond had fallen into friendly hands, and so forth. It seems to me quite immaterial how the fact is, and quite as favorable to the plaintiff if the directors did not know that Corbin held the bond as it would be if they did know it. If they did not know it then it must be assumed that they were not influenced by the fact in taking the action that they did, that they acted impartially and as if dealing with a stranger—just as they should have acted.

As to the validity of the new contract of May 13th, 1874, renewing and extending said bond, there is no ground for questioning it. It was a bona fide transaction, made by the board of directors of the company with D. T. Corbin, then a director and president, by which the company got further time for payment upon their valid outstanding past due bond. The bond being past due, Corbin was entitled to have the same paid at once. The extension of the bond, therefore, by him may be regarded as a loan to the company. That any officer of a corporation may make a valid loan to it there is no doubt. Something has been said about a want of authority in C. C. Puffer, receiver, to sell and transfer said bond. This authority, if he had any, was derived from the court of common pleas for Charleston county, whose officer he was. If there was no authority to make the sale, then that court should deal with the receiver and his bondsmen. But it appears that the sale and transfer of said bond has been approved by the court of common pleas for Charleston county, and Mr. Puffer, as receiver, and his bond, have been discharged. This court must, therefore, assume under the circumstances that Receiver Puffer had ample authority to make the sale and transfer of said bond. His authority cannot now be questioned in this collateral action in this court. The plea to the jurisdiction interposed in this cause by special permission after the defendants had answered, and the case was at issue, is overruled. By the terms of the indorsement of May 13th, 1874, put upon the bond by the defendant company, the said bond became commercial paper, and the same passed from hand to hand by delivery. It does not, therefore, fall within the prohibition of the 11th section of the judiciary act of 1789. The authorities upon this point are ample, and it is unnecessary to discuss them.

The result is, that the plaintiff is entitled to a decree against the defendant company in the sum of ten thousand dollars, with interest thereon at the rate of twelve per cent. per annum, payable quarterly, from January 1st, 1877, to the present time. The defendants named as stockholders are, by the charter of the company, jointly and severally liable for the said sum, and the execution decreed against the company may, by the terms of the charter, be levied upon their property or the property of either of them. The plaintiff is also entitled to have the lien of the bond upon the property of the company foreclosed, and the property sold to pay and satisfy the sum now found to be due. A decree will be entered in accordance with this opinion.

[NOTE. Affirmed by the supreme court, on the grounds, that the endorsement on the bond was in effect a negotiable note, notwithstanding that the bond itself was sealed; that, being such a negotiable instrument, it was excepted out of the prohibition of Act March 3, 1875, § 1; and upon the further grounds, as stated by Mr. Justice Matthews, that the title of the plaintiff below to the bond sued on could not be assailed for want of authority in the receiver to transfer it, even if such a defense was open to the obligors, for it sufficiently appeared that the transaction, if not previously authorized, was subsequently confirmed by the court. Nor did the relation between Mr. Corbin and the company at the time of the transaction furnish any defense either at law or in equity. The relation, undoubtedly, was one of a confidential and fiduciary character, but there seems to be no ground in the evidence to challenge the good faith with which the business was conducted. The bond of the company was purchased from the receiver with his own means, and not those of the company. The value paid, so far as the testimony discloses, was full; and every step, when taken, was made known and assented to by the directors of the corporation. The transaction was legitimate in itself, and beneficial to the company, and the dealing was not by the president with himself, but with the corporation in fact, represented and acting by other directors, with full knowledge of all the facts. The defense of payment was suggested by the cir-

cumstance that the receiver, after parting with the bond in exchange for the stock, reported it as paid in that way. So far as the fund in his hands was concerned, it might be so treated; but the company and its stockholders must be conscious that they have no right so to consider it. Marine, etc., Phosphate M. & M. Co. v. Bradley, 105 U. S. 175.]

BRADSHAW (GRIFFITH v.). See Case No. 5,821.

BRADSHAW (HOLMES v.). See Case No. 6,635.

Case No. 1,790.

BRADSHAW v. KLEIN.

[2 Biss. 20;[1] 1 N. B. R. 542 (Quarto, 146; 7 Am. Law Reg. (N. S.) 505; 1 Am. Law T. Rep. Bankr. 72; 15 Pittsb. Leg. J. 433.]

District Court, D. Indiana. May Term, 1868.

BANKRUPTCY—FRAUDULENT CONVEYANCE BY BANKRUPT.

1. An assignee in bankruptcy can maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors previous to the filing of the petition; in such case he represents the rights of the creditors.

[Cited in Re Wynne, Case No. 18,117; Bean v. Brookmire, Id. 1,170; Cady v. Whaling, Id. 2,285; Re Estes, 3 Fed. 142; Jones v. Smith, 38 Fed. 381; Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 835.]

2. Such action is not limited by the provisions of the 35th section, but only by the general statute of limitations.

[Cited in Hall v. Wager, Case No. 5,951.]

In bankruptcy. This was a bill in chancery filed by William A. Bradshaw, assignee of Armstead M. Klein, a bankrupt, against Henry Klein and others. The bill charges that the bankrupt, before the passage of the bankrupt act, transferred certain property to one John A. Klein, without consideration, for the purpose of defrauding the bankrupt's creditors; that said John A. Klein, without consideration, transferred the same to the defendants, who now claim title thereto; and that the bankrupt has ever retained and now retains possession of said property. And it prays that the property be made assets in the assignee's hands for the benefit of the bankrupt's creditors. Defendants filed a general demurrer. [Overruled.]

Mr. Ritter, for complainant.
Mr. March, for defendants.

McDONALD, District Judge. The only question made in support of the demurrer is this: Can the assignee of a bankrupt maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors? In support of the demurrer, it is argued that the assignee takes such right of action only as the debtor had before he was adjudged a bankrupt; and that as he could not have sued before the adjudication to recover property conveyed by him in fraud of his creditors, so his assignee cannot, afterwards, maintain such action.

There can be no doubt that a transfer of property made with intent to defraud creditors, is valid as between the parties to it, and that the seller, having delivered over the possession of the property, cannot recover its possession. To such a case the maxim applies, that in pari delicto potior est conditio possidentis. And it is true that the 14th section of the bankrupt act [of 1867; 14 Stat. 522] transfers to the assignee all the rights of property and of action previously held by the bankrupt. But does the assignee represent the rights of the bankrupt and his rights only? Does he not also represent the rights of the creditors.

It is very clear that, but for the adjudication of bankruptcy, the creditors might subject to the payment of their debts property conveyed by their debtor in fraud of their rights. But now, since he is adjudged a bankrupt, this right is taken away from them. The law will not allow them to sue at all for their debts. And if the assignee cannot maintain an action to have the fraudulent conveyance set aside, and the property subjected to the payment of debts due to creditors, there can be no remedy whatever in such a case. To so decide would altogether defeat the operation of the statutes against fraudulent conveyances in all cases of bankrupt debtors. For if the ground assumed in support of the demurrer be tenable, then a failing debtor may to-day transfer all his property with intent to defraud his creditors, and six months hence be adjudged a bankrupt, without any power in any person to reduce the property thus fraudulently conveyed, to assets for the payment of his debts. Courts ought to be very reluctant to indulge a doctrine fraught with such consequences. Under the bankrupt act of 1841, the supreme court of Mississippi has, indeed, held this doctrine. But I have no hesitation in pronouncing that decision erroneous. A very high authority, Judge Curtis, under the act of 1841, decided differently. He held that "there is a broad distinction between a bill by the bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property for the benefit of the very interest sought to be defrauded. The ground of refusing relief to the author of the fraud is a principle of public policy, which forbids the court to be auxiliary to a plan for evading the law, and depriving the creditors of their just and legal rights. But where the assignee sues, the case is reversed—to grant the relief is to act in accordance with these rights of creditors and in opposition to the contemplated fraud; while to refuse it would be to aid in its perpetration." Carr v. Hilton [Case No. 2,436].

If, as Judge Curtis held, under the act of 1841, the assignee might maintain an action to set aside a fraudulent conveyance made

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

before that act was passed, the reason for allowing such an action, under the bankrupt act of 1867, is much stronger. The act of 1841 merely provided, as the present act provides, that the bankrupt's title to all his property should vest in his assignee, with the right to sue for the same. 5 Stat. 442, 443. But the bankrupt act of 1867 goes a step further, and in the 14th section declares that "all the property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee." Counsel for the defendant insist, however, that the 35th section of the act modifies the language of the 14th section above cited, and limits the right of action to set aside fraudulent conveyances to four or, at most, six months. But I cannot assent to this construction. I think the provision above cited from the 14th section relates to the state statutes against fraudulent conveyances, and to these only; and that the 35th section of the bankrupt act has no reference to those statutes, but is only intended to reach frauds on the bankrupt act. The two sections relate to different subjects; neither of them, therefore, can be construed as explaining, modifying, or limiting the operation of the other.

On the whole I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations. The demurrer is overruled.

NOTE [from original report]. Consult Goodwin v. Sharkey [5 Abb. Pr. (N. S.) 64]; In re Gregg [Case No. 5,797]; Allen v. Massey [Id. 231]; Davis v. Anderson [Id. 3,623]; In re Metzger [Id. 9,510]; Foster v. Hackley [Id. 4,971].

Case No. 1,791.

BRADSHAW v. The SYLPH.

[2 Betts, D. C. MS. 58.]

District Court, S. D. New York. 1841.

ADMIRALTY — PLEADING — LIBEL — AMENDMENT — SHIPPING — TITLE TO VESSEL — SALE BY PART OWNER — RIGHTS OF POSSESSION — JOINT INTEREST — SALE BY PART OWNER — RATIFICATION — ADMIRALTY — JURISDICTION — MATTERS OF ACCOUNT.

[1. A libel for possession of a vessel should unequivocally state the extent of libelant's interest, and that he was owner at the time of filing the libel.]

[2. Where a defect in that particular arises from accidental omission, the court will allow an amendment.]

[3. The sale of an entire vesel by one part owner in common does not authorize his co-owner to treat the sale as a tortious conversion.]

[4. A part owner to not exceeding one moiety of a vessel cannot, by suit in admiralty, demand the entire possession or sale of the vessel, in invitum against his co-owner. The Orleans v. Phoebus, 11 Pet. (36 U. S.) 175, followed.]

[5. A joint interest in a vessel is a tenancy in common, carrying with it the privileges and limitations of that interest at common law.]

[6. A bona fide sale by a part owner of a vessel, not accompanied by a bill of sale, is binding upon a co-owner who has previously authorized a sale, or has accepted part of the purchase money.]

[7. In admiralty a party cannot have remedy for matters of account unless upon the basis of an adjusted and recognized liability.]

[In admiralty. Libel by William D. Bradshaw against the schooner Sylph (Elizabeth Anna Houseman, claimant), to recover possession of the schooner. Libel dismissed.]

On the 16th of November, 1835, the schooner was sold at auction in this city, as a wreck, and was bought in by Wm. R. Kincaird, for the sum of $320. Kincaird advanced $175 of the purchase money, and the libellant $145. The auctioneer's bill of parcels was made out to Bradshaw and Kincaird as joint purchasers. On the 30th April, 1836, the custom house enrolment to B. and K. was made out. Bradshaw subsequently advanced various sums of money for refitment of the vessel, and she was run by Kincaird as master, and accounts of expenses run and earnings were at different times stated and adjusted between the parties. On the 21st April, 1837, she was arrested on admiralty process in behalf of seamen, in this port, and that night the master (K.) clandestinely absconded with her, and took her to Indian Key, Florida, and then sold her to Jacob Houseman for a valuable and full consideration, which was paid at the time. The vessel was barratrously brought to this port by her master and crew from Florida, early last July, was arrested by the crew on a claim of wages, and was discharged by this court on the final hearing of that cause, Sept. 21, 1841 [Case No. 17,740].

On the 20th July the libel was filed in the present case. It avers the joint purchase between K. and libelant, and libelant's advance of large sums of money for the use of the vessel, which have not been repaid him, and her abduction by Kincaird and sale, without his knowledge or consent, and prays she may be restored to his possession, or that she be sold, and the proceeds be paid him or such part as he may be entitled to receive. The answer and claim alleges that the vessel was purchased by Jacob Houseman in his lifetime, May, 1837, of Kincaird, bona fide, and for a full consideration; that the libelant was not a part owner; that Kincaird was sole purchaser at the auction sale, and had libelant's name inserted in the papers to secure his loan of $145, part of the purchase money; that the loan was made after K. had actually purchased the vessel, and for the purpose of satisfying the bid; that libelant authorized a sale of vessel by

Kincaird, and approved of it when sale was made known to him, and denies jurisdiction of the court to take an account as between libelant and Kincaird.

PER CURIAM. If the testimony of Kincaird is legally admissible in the case, and he is entitled to credit, the libelant has not a scintilla of equity to support his action, and, if he prevails in it, must succeed by force of technical rules alone. As the competency of this witness is denied, and his credit is also assailed on the part of the libelant, it may suffice to consider the cause as it stands upon the pleadings and other proofs without discussing the questions touching the admissibility or effect of Kincaird's testimony.

Regarding this as a possessory action, the libel is insufficient in substance in two particulars, so that no decree could be rendered in that behalf upon the pleading as it now stands: "It does not aver what extent of interest was acquired by the libelant, whether the equal moiety, or one only in proportion to his advances, that is, as of 145 to 175; and moreover it is equivocal upon the libel whether the right as owner is not set up, as a resulting trust, and as arising merely from the balance of advances and amounts being in favor of the libelant; but what is more essential, it omits to aver that the libelant was an owner of the vessel at all when the libel was filed. Assuming that these omissions are accidental, and can be rectified by the party, the court would undoubtedly allow the proper amendment to be made; and therefore it is necessary to look into the case as proved, and determine whether there is in it a right to this remedy under any form of pleading. One part owner has a clear power to sell his interest in a vessel, and his purchaser becomes vested with his entire right and title thereto (Jac. Sea Laws, 37, note; 1 Molloy, 310); nor does the sale of the entire vessel by Kincaird, they being tenants in common, impart to libelant a right to treat the sale as a tortious conversion of the common property (4 East, 122–126). This right was in early times allowed to be exercised in a qualified manner only. Abb. Shipp. 76; 2 Casdats del Masa, 72, c. 55. Now, however, ships are regarded merely as chattels, and subject to like laws of ownership and disposition. Hilt. pt. 2, c. 1, § 265; 4 Johns. Ch. 611; 20 Johns. 671. The evidence in this case justifies the assumption that a bill of sale was executed, and therefore, at least, as to the share of Kincaird, no question can arise as to the necessity of that document as evidence of title to a vessel. The purchase was by an American citizen resident in Florida, and, though the states and territories are foreign to each other in many transactions of a commercial nature (12 Pick. 483; 15 Wend. 527; 4 Wash. C. C. 87, 153 [Lonsdale v. Brown, Cases No. 8,493, 8,494]; [Buckner v. Finley] 2 Pet. [27 U. S.] 586), still vessels enjoy a common character and privilege in every American port, without regard to the owner's domicile ([Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1; 3 Cow. 714). The libelant's action is accordingly to be considered as if brought while the title remained in Kincaird, and it is to be decided upon the question whether a part owner to not exceeding one moiety of a vessel can, by suit in admiralty, demand the entire possession or sale of her in invitum against his co-owner.

This proposition in both its terms was directly raised for adjudication in the district court of Pennsylvania. After great fullness of argument by the bar and bench, the court decided that an equal part owner could not take the vessel out of the possession of his co-owner, nor could he have a sale of her by order of a court of admiralty. Davis v. The Seneca [Case No. 3,650]. The case went by appeal to the circuit court, and was there heard upon amended pleadings and new proofs. The opinion of the court was rested upon one branch of the proposition,—the power to decree a sale of the vessel. The decision of the court was, that it was competent for a court of admiralty to order sale of a vessel, on application of one half owner, the other disagreeing thereto, when both owners wished to employ the vessel, but refused to unite either in the selection of a master or the voyage to be performed. 18 Am. Jur. 486 [Davis v. The Seneca, Case No. 12,670]. The new proofs introduced in the circuit court no other way varied the case below than in showing more explicitly that the joint owners could not agree in the employment of the vessel or appointment of master. If this judgment is a correct exposition of the law of the case, it will, as it should, receive the most respectful consideration in this court, even if it is not a decision authority in itself over this tribunal. Judge Washington admits that his opinion was very different when the case was opened, and that he had entirely concurred in that pronounced by the district judge. His views of the law seemed to have changed on a more mature consideration of the article in the marine ordinance of Louis XIV., deemed applicable to the question, and which he regards as the only authority meeting the case of two equal owners, both being willing to employ the vessel, and disagreeing as to the mariner; and he adopts the conclusion that in such case a sale must be ordered by the court, or there would be an utter failure of justice.

If it be admitted to be the right and duty of this court to examine the decisions of circuit courts, other than the one immediately its superior, and to be governed by them as by those of the English admiralty, at the present period only, when the principles on which they rest are concurred in, or it be the duty of every district court to regard the decisions of each circuit as

paramount in authority over its own opinions, yet I consider the principle governing the proceeding sanctioned by Judge Washington now definitely settled by the supreme court, and adverse to his view of the law. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. The court defines its jurisdiction in respect to part owners, and asserts that it cannot be applied to direct a sale of a sea vessel upon any dispute between them as to her employment. The application was on behalf of a minority owner, but the rule as laid down embraces both sections,—majority and minority owners,—and excludes the power of the court to decree a sale at the instance of either. The interests of the larger share holders, which may (as in the case before the supreme court) absorb all to a particular part of the property, cannot be less deserving the protection of admiralty than a mere moiety interest. Every difficulty and hazard in respect to the enjoyment of their rights (which Judge Washington considered as exacting a judicial sale in favor of a half owner) would exist in an increased degree, under like circumstances, with them. There might be no useful employment for the vessel, and she be wasting away by expense and decay on their hands. The use to which the minority owner would put her, if turned over to him, might not only be without advantage to them, but threaten the most serious injury to the property. Nevertheless, no considerations of conveniency or protection, however imperative, can mollify the doctrine. That abides inflexibly, and takes from a court of admiralty all prerogative to order a sale of the vessel as a method of relief.

The decision, in my opinion, therefore, by negativing the authority of the court over the question in its least and largest extremes, disposes of it also in respect to any intermediary shape. But it may deserve a moment's consideration to ascertain if the authority relied upon by Judge Washington really demands the construction put upon it; at least to the extent of holding that an equipoise of opposing ownerships will always give this court jurisdiction to decree a sale of the vessel. A joint interest in vessels is not regarded in our law a partnership. It is a tenancy in common, carrying with it the privileges and limitations of that interest at common law. Jac. Sea Laws, 37; Abb. Shipp. 68, and note. As an incident to such tenancy, the possession of one part owner lawfully acquired can never be divested by the other. Smith, Merc. Law, 106, 107. The master, being part owner and in possession, can retain the vessel as against his co-owner, because possession will turn the scale when the legal rights are in the balance. Id. 107. It must, moreover, be noticed that a joint purchase of a vessel with intent that one owner shall act as her master renders his possession part of the mutual contract, and accordingly his equities are decidedly stronger to retain than those of his co-owner to take possession, and a court, in disturbing that arrangement, must necessarily decree adverse to the agreement between the parties and that upon which the right as part owner, has existence. Abb. Shipp. 69, 70. The interference of admiralty courts, accordingly, at the instance of owners, to assign the vessel to some in exclusion of others, always proceeds upon the assumption that neither owner is actually using or holding her. Smith, Merc. Law, 107.

Does, then, the provision of the French ordinance apply to a case when the inception and continuance of the joint ownership contemplated that one equal part owner should also be master and managing owner? The sixth article of the ordinance declares, that neither party can compel his associate to proceed to a decreed sale of a vessel owned in common unless the opinions of the owners are equally divided upon the undertaking of some voyage. The translation of the ordinance in the ancient sea laws, as by the circuit court, differs only in terms from the above. Licitation, rendered in both instances as sale merely, imports in the French law a judicial sale, and that the sea laws translate the common ownership to import a partnership. The Code de Commerce incorporates this ordinance of Louis XIV. and the preceding one (fifth) almost in terms. The method of obtaining the sale is the same as in cases of partnership effects (Code de Comm. § 4, tit. 3; Code de Proc. Civ. lib. 1, tit. 8), and there is strong reason for the argument that the whole provision is exclusively municipal. The French law, following the course of the Roman, allows a separation of effects held in common by means of an appropriate action. 6 Pothier, 608; 12 Pothier, 217. It is so regarded in the compilation of sea laws, from which Judge Peters extracted his publication (2 Pet. Adm. Append. vi.), as these two ordinances are both omitted there. Intrinsically there is nothing in the provision giving it claim to become a continual rule more than might be presented by numerous other regulations in the same Code which are invariably regarded as strictly municipal and peculiar to the French jurisprudence. Abbott discusses the topic at large (part 1, c. 3), but nowhere recognizes this ordinance as part of the general maritime law. Lord Holt holds it to be the result of the English adjudications, that the court of admiralty has no power to decree a sale of a ship at the instance of part owners. Part 2, c. 1, pp. 24, 25. No case is cited in the circuit court where this ordinance has been recognized and applied out of France; and if it has become a part of the general maritime law, there is, by its instrumentality, infused into that Code a doctrine anomalous in its nature and strongly contravening the principle upon which admiralty courts administer relief in relation to the rights of

part owners. Admiralty exercises its extraordinary prerogative in rem, to ensure the employment of vessels so as most efficiently to promote the purposes for which such property is created, and a joint ownership of it contracted (Duston v. Hebden [Pond v. King] 1 Wils. 191; 1 Hagg. Adm. 306); and not even the court of chancery will exercise any jurisdiction of that character, regarding that of admiralty as the most efficacious and salutary. Under the proposed administration of the rule, admiralty courts become mere municipal tribunals. They may be invoked to sever interests made joint by contract, and annihilate, by sequestration and sale, property only common for objects of navigation. According to the ordinary acceptation of the powers of the court, such property comes under its jurisdiction in this behalf merely as a means of assuring its maritime use and employment. It is not intended to discuss the rule indicated by the circuit court further than to ascertain if it establishes in this court a clear jurisdiction to arrest a vessel and decree her sale at the instance of one half owner, under any circumstances of inconveniency or disagreement between the proprietors as to her employment. I cannot think it demonstrates an authority of that character. The inquiry is not irrelevant in this case, for, although the libel sets up no state of facts bringing the equity of the party within the purview of that decision, yet, should an amendment be proffered to that effect, the court must be prepared to act upon its admission or rejection.

Admitting, then, that, the conveyance of the vessel being made jointly to the libelant and Kincaird, it is to be assumed that each acquired an equal interest in her, and that this action is to be adjudged as if prosecuted against Kincaird, I am of opinion, upon the facts and circumstances before detailed, that the libelant has no right to demand the exclusive possession of the vessel (1 Hagg. Adm. 346, note), and that no authority is shown in this court to order her sale at his instance. There are other noticeable features of the case, however, which would bar this action if the difficulty of jurisdiction could be surmounted. Upon the testimony of Hatfield, it must be implied that Kincaird had full authority from the libelant to sell the vessel. If a written power was necessary, that could also be presumed. If the purchaser cannot enforce by an action in court his right to a vessel, without showing a bill of sale as evidence of his title, yet the vendor, after receiving a full consideration, and having made delivery of a vessel, by himself or agent, could no more in admiralty than in chancery reclaim the property because a full paper title had not accompanied the sale. Accordingly, it being proved that the vessel was bought bona fide; that the libelant gave a previous authority to the master to sell, or, after the sale was reported to him, ratified it by accepting part of the purchase money, he can never be allowed to allege its nullity because a full documentary title did not accompany the sale, or because he had not given a written authority to make it. This result follows upon the libelant's own proof. If the evidence of Kincaird is received, it would place the right of the claimant on still stronger grounds of equity and law.

Again, the stress of the libelant's case is, that he is largely in advance for the services of the vessel, and that the vessel should be made answerable in this court for the reimbursement of those advances. This allegation is controverted by the claimant and upon the proofs. The accounts between the associates are not liquidated. The papers presented, setting forth particulars of accounting, would not be conclusive evidence, and there are circumstances developed upon their face strongly tending to discredit their integrity in some particulars. Unless upon the basis of an adjusted and recognized liability, a party cannot in this court have remedy for matters of account. That is a firmly settled limitation to admiralty jurisdiction. If, then, the libelant cannot recover possession of the vessel, he cannot, in this court, claim, as against her or her proceeds, the satisfaction of his outstanding unliquidated demands upon the final winding up of the dealings in regard to her joint ownership. Without, then, examining the questions of the competency of Kincaird, or placing the decision of the cause in any respect upon his testimony, the libelant has failed, in my opinion, establishing a case of which this court can take cognizance, and his libel must be dismissed, with costs.

Case No. 1,792.

BRADSTREET v. HERAN.

[1 Abb. Adm. 209.] [1]

District Court, S. D. New York. April Term, 1848.[2]

SHIPPING—CARRIAGE OF GOODS—FAILURE TO DELIVER—QUARANTINE — BILL OF LADING — CONSTRUCTION — USAGE AND CUSTOM —VARYING BY PAROL PROOF — CONCLUSIVENESS — RIGHTS OF CONSIGNEES.

1. The owners of a vessel are excused from fulfilling the engagement of a bill of lading to deliver the cargo at a specified port, by the interposition of sanitary or prohibitory laws controlling them in that respect; for the contract to deliver will be construed as subject to all restraints of government.

[Cited in Wells v. Maine Steamship Co., Case No. 17,401.]

2. A usage of consignees at a particular port to receive shipments during the quarantine season, at the quarantine grounds, as being a compliance with the engagement of the bill of lading to deliver at such port, is valid; and the bill of lading should be construed with reference to it.

[1] [Reported by Abbott Brothers.]

[2] [Affirmed in Bradstreet v. Heran, Case No. 1,792a.]

3. As between the original parties to the bill of lading, its statements respecting the condition of the goods at the time they are laden on board, may be explained or rectified by parol proof.

[Cited in The California, Case No. 2,314; Robinson v. Memphis & C. R. Co., 9 Fed. 139; The T. A. Goddard, 12 Fed. 177; The Querini Stamphalia, 19 Fed. 125.]

4. But as against assignees of the cargo upon a valuable consideration, the rule is clear that the master and owner are concluded by the representations of the bill of lading.

[Cited in The Pietro G., 39 Fed. 368.]

5. Consignees are entitled to a reasonable opportunity to ascertain whether goods delivered to them correspond in quantity and condition with the description given in the shipping documents, and the liability of the master and owner remains undischarged during such period.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 138.]

[6. Cited in Kennedy v. Dodge, Case No. 7,701, Holyoke v. Depew, Id. 6,652, and The Ciampa Emilia, 39 Fed. 127, to the point that a shipper may recoup damages from the freight money.]

In admiralty. This was a libel in personam, by John A. Bradstreet, master of the bark Lowell, against David Heran and others, members of the firm of Heran, Lees & Co., to recover a balance of freight due. [Decree for respondents.]

The libel showed that the libellant took on board the Lowell, at the port of New Orleans, 507 bales of cotton, consigned to the defendants at this port, and that the cotton was brought hither and duly delivered to the respondent; and the libel claimed a balance of $1,756.02, freight due. The bill of lading was in the following terms: "Shipped in good order and well conditioned, by M. D. Cooper & Co., on board the bark called the Lowell, whereof ——— is master, now lying in the port of New Orleans, and bound for New York, to say, 507 bales of cotton, one bundle containing samples, &c., and are to be delivered in the like good order and condition at the port of New York, (dangers of seas excepted,) unto Messrs. Heran, Lees & Co., or to their assignees, &c. July 6, 1847."

Edwin Burr, for libellants.

Luther R. Marsh, for respondents.

BETTS, District Judge. Two objections in bar of this action were relied upon by the defendants. First, that the cotton was not delivered at the port of New York, in fulfillment of the shipping contract. Second, that the cotton, when delivered, was not in good order and well conditioned.

The vessel arrived in the port of New York during the latter part of July, and under the laws of the state was subject to quarantine at Staten Island. The cotton was there discharged on board of lighters employed by the respondents, and was taken to Brooklyn, where it was received and stored by them. It was not only proved that vessels from New Orleans, at that period of the year, were prohibited by law from landing cotton in the city of New York, but also that it was the established usage for owners and consignees to receive their shipments at the quarantine, as being delivered pursuant to bills of lading engaging to make delivery in New York. In either point of view, these facts defeat the obligation. The owners of the ship are excused from fulfilling their engagement to deliver their cargo in the city, by the interposition of sanitary or prohibitory laws, which control them in that respect; as the contract to deliver will be construed to be subject to all restraints of government, and that risk consequently falls upon the shipper. The case of Morgan v. Insurance Co. of North America, 4 Dall. [4 U. S.] 455, is an authority upon this point. In that case the cargo was shipped from Philadelphia for Surinam, August 7, 1799, at which time the colony of Surinam was in possession of the Dutch. The vessel arrived in the river Surinam the 17th of September following, but meantime the colony had been conquered by the British forces. Permission was obtained from the British commander for the vessel to go up the river to the town of Paramanto, which she did, and lay in the harbor for a week; but the British officers absolutely refused permission to land any article of the cargo whatever, excepting the provisions, whereupon it was brought back to Philadelphia. The supreme court of Pennsylvania held that under these circumstances freight was earned. Chief Justice Stillman says: "The owner of the ship has been in no fault whatever. When he took the goods on freight, there was an open commerce between Philadelphia and Surinam; the goods were carried to the port of delivery; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it but the prohibition of the British government. It is not like the case of a vessel which is prevented from entering the port of delivery by a blockading squadron, for there the voyage is not performed, and it is impossible to say certainly that it would have been safely performed if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo should in this case be considered as the business of the consignee. That being established, it follows that the freight was earned." But furthermore, it is proved in the case that it is the established usage of this port for owners and consignees to receive delivery of their shipments made at the quarantine during the quarantine season, as being a compliance with the engagement in the bill of lading to make delivery in New York. Such a usage is valid, and the bill of lading should be construed in reference to it. Gracie v. Marine Ins. Co. of Baltimore, 8 Cranch [12 U. S.] 75. Upon these grounds I am of opinion that, independently

of the alleged acceptance of the goods by the respondents, their defence, so far as it rests upon the first point taken, cannot be maintained.

But upon the second ground of defence, viz.: that the cotton, when delivered, was not in good order, it seems to me that, as the case stands, the respondents are not made responsible for the freight. It was contended, on the part of the libellant, that the consignees were in fact the shippers of the cotton—it having been furnished to the vessel by their agent. This fact, if it had appeared in evidence, would have had a most important bearing; because, as between the original parties, the representation of the bill of lading as to the condition of the cotton at the time it was received, might undoubtedly be explained or rectified,[3] (Abb. Shipp. 324,) and so, in that aspect of the case, the libellant might have shown, as was attempted, that the damage to the goods was received before they were laden on board. But the suggestion that the respondents in fact shipped the cotton on board through agents, is wholly unsupported by proof. They therefore cannot be regarded as the shippers or owners of the cotton, but must be treated as consignees; and they prove by their bookkeeper, that on the receipt of the bill of lading, they made the shippers an advance of $21,000 on the cotton, before its arrival in this port. The whole property became thereby, according to the mercantile law, pledged to them for the security of their advance, and they are entitled to demand it as described in the bill of lading, in solido. or its equivalent, of the shipowner; his lien for freight being first satisfied. Nor it is necessary to aver such advance in the answer, in order to be entitled to prove it. The pleadings on both sides allege that they are consignees, and they have a right to show the extent of their privilege or lien on the consignment. The rule of law is clear, that the master and owner are concluded by the representations of the bill of lading, as between themselves and third persons entitled to the cargo as assignees upon a valuable consideration. Portland Bank v. Stubbs, 6 Mass. 422; Abb. Shipp. 323. Nor can the court regard the suggestion that the cotton is amply sufficient to repay the respondents their advances, and also to satisfy the freight. I am furnished with no evidence showing the fact to be so. It is accordingly unnecessary to inquire what rule of law would govern, if such a state of facts existed.

There would be a serious difficulty in receiving testimony on the part of the libellant, in the present shape of the pleadings, showing that the cotton was injured by country damage[4] when laden on board, if the suit had been brought by the shipper. The libel avers that it was shipped in good order and well-conditioned. The answer admits that fact. Accordingly, independent of the effect and operation of the bill of lading making the same assertions, it would be against the well-settled principles of admiralty proceedings to receive evidence contradictory to the averments and admissions of the pleadings on the same point.[5]

The libellant, under the pleadings and bill of lading, was bound to deliver the cargo of cotton to the respondents in good order and well-conditioned; and it being fully proved on their part, that when delivered to them it was damaged by water and injured to an amount greater than the balance of freight unpaid, they are entitled to withhold that freight, either by way of recoupment of damage, or upon the ground that the libellant cannot maintain an action on the contract, without showing that its requisitions have been fully complied with on his own part. The Nathaniel Hooper [Case No. 10,032]; Jordan v. Warren Ins. Co. [Id. 7,524]; Caze v. Baltimore Ins. Co., 7 Cranch [11 U. S.] 358; McAllister v. Reab, 4 Wend. 483, affirmed 8 Wend. 109.

The delivery to the respondents in lighters, to unlade the ship, cannot be regarded such an acceptance of the cotton, on their part, as to conclude them from showing that it did not conform to and fulfill the stipulations of the bill of lading. It is not usage, nor in most instances would it be practicable, for consignees to inspect and examine shipments when delivered from the ship. A reasonable opportunity must be allowed, after packages and bales come into their possession, to ascertain whether they correspond in quantity and condition with the shipping documents, and the liability of the master and owner remains undischarged during that period.

The damage complained of in this case was not external and exposed to view when the goods were landed, but to its chief extent was internal, and only discoverable by opening and separating the contents of the bales. The disbursements and charges on the part of the respondents in making such examination were $261.40, which sum they

[3] See the case of Goodrich v. Norris [Case No. 5,545], where the right of the shipowner, in an action by the shipper, to explain the statements in the bill of lading respecting the quantity of goods received, is considered. See, also, on the admissibility of evidence to explain the bill in other respects, the case of Manchester v. Milne [Id. 9,006], where it is held that a variance between the quantity of the cargo delivered and that receipted for, may be explained by evidence showing it to be the result of an inaccurate mode of measurement employed; also, Zerega v. Poppe [Id. 18,213], decided January, 1849, where it is held, that notwithstanding the acknowledgment that the goods are received in good order, the carrier may, as against the owner, show that the injury to the goods was occasioned by insufficiency in the cask, case, &c. in which they were packed.

[4] Dealers in cotton are accustomed to call damage received by cotton while it is yet in the country where it is grown, as contradistinguished from such as is received on board ship, country damage.

[5] See Davis v. Leslie [Case No. 3,639.]

insist they are entitled to retain from the freight. The libel admits payment of the residue of the freight, and only demands this balance. Under the facts in evidence I think that they cannot enforce the payment. Decree for respondents, with costs.

Case No. 1,792a.

BRADSTREET v. HERAN.

[2 Blatchf. 116.][1]

Circuit Court, S. D. New York. Oct., 1849.[2]

SHIPPING—CARRIAGE OF GOODS—BILL OF LADING—CONSTRUCTION—"IN GOOD ORDER AND WELL-CONDITIONED"—RIGHTS OF THE PARTIES—OF BONA FIDE PURCHASERS.

1. Where a bill of lading of bales of cotton describes them as "in good order and well-conditioned," those words have reference to the external condition of the cotton, and import that it was in good shipping condition at the time it was received on board of the vessel, but do not warrant the internal condition of the cotton in the bales.

2. Where cotton in bales was shipped at New Orleans for New York, and the master of the vessel gave a bill of lading for the cotton as "in good order and well-conditioned" when received on board the vessel, and it was in bad shipping condition when it arrived at New York, a large part of the bales being old and rotten, and badly torn and damaged, and the cotton being consequently soiled and damaged by exposure, and it appeared that the effects of this damage upon the external state of the cotton were developed at New Orleans before it was shipped: Held, on a libel in personam, in admiralty, by the master against the consignees of the cotton, to recover the freight, that, as the damage to the cotton exceeded the freight, the libel must be dismissed.

3. Held, also, that as the consignees had made large advances upon the cotton on the faith of the representation in the bill of lading, that it was shipped "in good order," their security, as bona-fide purchasers, ought not to be lessened or impaired by permitting the master to contradict that representation.

4. Held, also, that as the cotton might have been sold for an excess beyond the advances, sufficient to cover the freight, the consignees were entitled to it in the condition described in the bill of lading, as security for their advances, without regard to the fluctuations of the market, or to sales to be made at any particular state of it.

In admiralty. John A. Bradstreet, master of the bark Lowell, filed a libel in personam in the district court, against Heran, Lees & Co., of New York, to recover a balance due him for freight on five hundred and seven bales of cotton shipped by that vessel from New Orleans to New York, and consigned to the respondents. The libellant had signed a bill of lading for the cotton on its shipment, which admitted that it was received on board the vessel at New Orleans "in good order and well-conditioned," and stipulated that it should be delivered "in the like good order and condition at the port of New York, the danger of the navigation only excepted." The respondents, who had advanced a large amount upon the cotton on the faith of the bill of lading, set up, in answer to the libel, that the cotton was not delivered at New York in good order and well-conditioned, and that the damage to it exceeded the balance of the freight. The district court held that the libellant was responsible to the respondents for the damage to the cotton, and, that being proved to equal the balance of freight claimed, the libel was dismissed. [Case No. 1,792.] The libellant then appealed to this court. [Decree of the district court affirmed.]

Edwin Burr, for libellant.
Oscar W. Sturtevant, for respondents.

NELSON, Circuit Justice. It is admitted that the words, "in good order and well-conditioned," in the bill of lading, have reference to the external condition of the cotton, importing that it was in good shipping condition at the time it was received on board of the vessel, but not referring to or warranting the internal quality or condition of the cotton in the bales. The question, therefore, is, whether the damage sustained by the cotton arose from defects in the bagging of the bales or the manner of securing them from external injuries while being transported, or existed in the shape of external damage, at and previous to the loading of the cotton on ship-board, having been occasioned by its exposure to rain or wet, without proper protection, or by any other ill usage in its interior transportation before it reached the ship, and which was readily visible on inspection; or whether the damage was occasioned by the internal bad condition of the cotton, which was invisible to the eye at the time of shipment, and could only be detected by cutting and inspecting the bales.

The damage to the cotton was what is called "country damage," which results often from the bad condition of the cotton when it is baled, or from its exposure to bad weather, or from ill usage in its interior transportation, and is not discoverable from an inspection of the bales at the time of shipment. Upon the question, from what the damage in this case arose, the testimony is somewhat conflicting; but it establishes generally, that the cargo was in bad shipping condition when it arrived and was delivered at New York, and that a large part of the bales were old and rotten, and badly torn and damaged, and the cotton therein consequently broken and disordered, and to some extent soiled and damaged by exposure in the shipment and delivery. The picker, who overhauled some two hundred of the bales and put them in order, states, that the cotton was in bad order; that some of the bales were rotten; that several had burst open for want of proper ropes; that others had the bagging torn; and that a portion of

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

[2] [Affirming Case No. 1,792.]

the bagging was old and rotten, and a portion damaged by wet. What is termed "country damage" arises, in many instances, out of the condition of the cotton at the time it is baled, being wet, or not properly fitted for transportation, and is invisible to the eye on inspection at the time of shipment. But, in this case, the weight of the evidence shows satisfactorily that the effects of the "country damage" upon the external state of the cotton were developed at New Orleans before the cargo was put on board, and that the master was negligent and inattentive to its shipping order in this respect or he would not have accepted it as "in good order and well-conditioned." The voyage was but some twenty days—a period of time hardly sufficient to account for the condition of the bales at the time of their delivery at New York, on the ground of concealed "country damage." On this ground, therefore, the decree of the court below should be affirmed.

The consignees made large advances upon the cotton, on the faith of the representation in the bill of lading that it was shipped in good order. They were justified in doing so, and their security should not be lessened or impaired by permitting the master to contradict his own representation in that instrument. It might be otherwise if the question arose between the master and the owner of the cotton. The question of damage might, in that case, be well limited to that accruing in the course of the voyage, notwithstanding the bill of lading. But the respondents stand in the light of bona-fide purchasers, who become such on the faith of the representations of the master. It is true, that it may be shown that the cotton could have been sold for an excess beyond the advances, sufficient to cover the amount in controversy. But that does not satisfy the principle; for the respondents were entitled to the cargo in the condition described in the bill of lading, as security for their advances, without regard to the fluctuations of the market, or to sales to be made at any particular state of it. Decree affirmed.

Case No. 1,793.

BRADSTREET et al. v. NEPTUNE INS. CO.

[3 Sumn. 600; 2 Law Rep. 262; 2 Hunt, Mer. Mag. 508.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1839.

JUDGMENT—FOREIGN ADMIRALTY SENTENCE—COLLATERAL ATTACK—CONCLUSIVENESS—MARINE INSURANCE—LOSS—SEIZURE AND CONFISCATION.

1. Where the proceedings in a foreign tribunal are in all respects unexceptionable, the allegations of facts, as occurring in those proceedings, are, in general, conclusive on the parties. But if the defence be, that the proceedings were not merely irregular and illegal, but were founded in a positive fraud, they are not conclusive on the parties; but they may be disproved by evidence aliunde.

[Cited in Magoun v. New England Mar. Ins. Co., Case No. 8,961; The E. W. Gorgas, Id. 4,585.]

2. The sentence of a foreign court of admiralty and prize in rem is, in general, entirely conclusive on all parties in interest, and for collateral purposes.

[Cited in Cushing v. Laird, Case No. 3,509; Windsor v. McVeigh, 93 U. S. 279; Cushing v. Laird, 107 U. S. 80, 2 Sup. Ct. 204.]

3. Semble, that no sound distinction can be made between a sentence pronounced in rem by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceedings in rem.

[Cited in Windsor v. McVeigh, 93 U. S. 279.]

4. But this rule proceeds on the ground, that the court, pronouncing the decree, had jurisdiction over the cause, and that the thing was either positively or constructively in its possession, and submitted to its jurisdiction.

[Cited in The Trenton, 4 Fed. 661.]

5. In respect to the jurisdiction of courts of prize, acting in rem, the courts of other nations are competent to inquire into and ascertain whether there has been any excess of jurisdiction; but the judgments of municipal courts, when the res is in possession of the sovereign, must, ordinarily, be conclusive upon all foreign tribunals.

[Cited in Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 8 Sup. Ct. 1374.]

6. But in all cases, where the sentence of a foreign court in rem is sought to be held conclusive on the parties, it must appear, that there have been proper judicial proceedings, upon which to found the decree, and that there was some personal or public notice of the proceedings to the parties in interest.

[Cited in Burnham v. Webster, Case No. 2,179; The Globe, Id. 5,484; Mathewson v. Sprague, Id. 9,278; Harris v. The Henrietta, Id. 6,121; The N. W. Thomas, Id. 10,386; In re Shepard, Id. 12,753; Windsor v. McVeigh, 93 U. S. 279; The Ann, 8 Fed. 927; The J. W. French, 13 Fed. 922. Applied in Sabariego v. Maverick, 124 U. S. 293, 8 Sup. Ct. 478.]

7. Therefore, where a vessel was seized and confiscated by the courts of Mexico, and it appeared by the record of the proceedings, that there was no suitable allegation of the offence, in the nature of a libel, and there was no statement of facts ex directo, upon which the sentence professed to be founded: *Held*, that the proceedings were not conclusive as to the existence of the laws of Mexico, the jurisdiction of the court, and the cause of seizure and condemnation.

[Cited in Windsor v. McVeigh, 93 U. S. 279.]

8. Where a policy of insurance contained a clause that the "insurer shall not be liable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war:" *Held*, that a seizure made bona fide, (however unfounded in fact), upon reasonable grounds, would be a legal and justifiable cause of seizure and detention, within the purview of the clause.

[See Church v. Hubbart, 2 Cranch (6 U. S.) 187.]

At law. This was an action [by Simon Bradstreet and others] on a policy of insurance on the schooner Gardiner of Gardiner, and the declaration alleged a loss by seizure, &c. The defendants admitting, that the vessel was seized by the Mexican government,

[1] [Reported by Hon. Charles Sumner. 2 Hunt, Mer. Mag. 508, contains only a partial report.]

averred, that she was so seized, and was detained and finally condemned on account of a violation of the revenue laws of Mexico, and to prove this averment, they produced a transcript of the record of the proceedings of the court against the vessel. The plaintiffs denied the existence of any such alleged law, or that any breach of any law was committed, or that the court had jurisdiction; and insisted, that the record was false, and that the vessel was confiscated and condemned arbitrarily and unjustly, and without a trial or an opportunity on the part of the master to make a defence or to examine witnesses.

The questions submitted to the court were:

First. Does the record conclusively prove the existence of a law, or the jurisdiction of the court; or that the seizure, detention, and condemnation aforesaid, were on account of the violation of the revenue laws of Mexico, so that the plaintiffs are estopped from shewing that no such violation of law took place?

Second. Can the plaintiffs by law traverse the allegations in the record, that the master of the vessel was summoned to appear and defend his rights, and that the condemnation took place, after he had appeared in court, and been heard; and, if he can by law traverse these allegations, is the record still sufficient conclusively to prove such a seizure as will discharge the underwriters?

It was agreed by the parties that the case might, under the direction of the court, be sent to a jury to settle any facts which might be in controversy, in regard to which the record was not conclusive, on motion of either party. The policy, transcript of the record, and certain depositions were in the case, and were submitted to the court. The record of the proceedings in the Mexican tribunals consisted of a letter from the commissioner of the custom-house to the administrator of the custom-house of the department of Tobasco, dated Frontera, April 18, 1837; a letter from the latter to the district judge of that department; an order to summon the captain of the schooner, the attorney-general, and the administrator of the custom-house to appear at a hearing at St. Juan Baptista on the 28th of April, 1837; a return, that the citation had been served on these individuals; a record of the sentence, condemning the schooner; a statement of the refusal of the captain to sign the proceedings, and the proceedings respecting the sale of the vessel. The more important of these documents are referred to at length in the opinion of the court.

[Jury trial ordered.]

F. C. Loring, for plaintiffs.

B. R. Curtis, for defendants.

STORY, Circuit Justice. This is the case of an action on a policy of insurance underwritten by the Neptune Insurance Company "for three thousand dollars on the schooner Gardiner of Gardiner, at sea or in port, for and during the term of one year, commencing the risk on the twenty-eighth day of September, 1836, at noon." There is a clause in the policy as follows: "It is agreed, that the insurers shall not be answerable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the law of nations." The declaration alleges a loss by seizure of the government of Mexico during the term, for which the schooner was insured. The statement of facts, upon which the cause has been argued, admits the seizure; and the defendants contend, that the seizure and the subsequent condemnation of the schooner were on account of a violation of the revenue laws of Mexico. And to establish this defence, they produce an authenticated transcript of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. The plaintiffs deny the existence of any such alleged laws of Mexico, or that any breach thereof was committed, or that the court passing the decree had any jurisdiction; and they insist, that the vessel was confiscated and condemned arbitrarily and unjustly, and without any trial, or any opportunity on the part of the master to make any defence, or to examine any witnesses.

The questions submitted to the court are: First; whether the record of the proceedings is conclusive as to the existence of the laws of Mexico, the jurisdiction of the court, and the cause of seizure and condemnation; so that the plaintiffs are estopped from controverting them, and shewing that there has been no violation of the revenue laws of Mexico. Secondly; can the plaintiffs by law traverse the allegations of the record, that the master of the vessel was summoned to appear and defend his rights, and that the condemnation took place after he had appeared in court and been heard? And if by law they can traverse these allegations, then is the record still sufficiently conclusive to establish that the seizure was such as will discharge the underwriters?

Supposing the proceedings before the Mexican tribunal to be in all respects unexceptionable, my opinion is, that the allegations in those proceedings, as to the appearance of the master before the court, and his being heard before the decree of condemnation, would be conclusive on the parties, and would not be traversable or re-examinable in the present cause. But if the defence be, that the proceedings were not merely irregular and illegal, but were founded in a posi-

tive fraud; and that in point of fact, the whole record was but a tissue of false accusations and false statements and false proofs, made up to cover the fraud in which the seizing and prosecuting parties were all confederate, I should think, that evidence was admissible to show that the master never was summoned, never did appear, and never was heard before the condemnation, in order to establish pro tanto the fraud. I know of no case, where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation. But it would require the strongest evidence to establish such a defence, by testimony not only of the highest order, but also free from any, the slightest, suspicion of interest or bias.

But to pass to the consideration of the first point made at the bar. I do not meddle with the question, what is or ought to be the effect of a foreign sentence in personam; for that may be thought to be governed by some considerations not applicable to proceedings in rem. See, among other cases, Houlditch v. Donegal, 8 Bligh [N. S.] 301. That the sentence of a foreign court of admiralty and prize in rem is in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, not only as to the direct matter of title and property in judgment, but also as to the facts, on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in the courts of England and the courts of the United States. It is sufficient on this subject to refer to the cases of Croudson v. Leonard, 4 Cranch [8 U. S.] 434; Rose v. Himely, Id. 241; and Hudson v. Guestier, 6 Cranch [10 U. S.] 281. It does not strike me, that any sound distinction can be made between a sentence pronounced in rem by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding in rem. In each case the sentence is conclusive, as to the title and property, and it seems to me, that it must be equally conclusive as to the facts, on which the sentence professes to be founded. This I think is the settled doctrine in England and in the courts of the United States. It is a just result from the whole reasoning in Rose v. Himely, 4 Cranch [8 U. S.] 241; The Mary, 9 Cranch [13 U. S.] 126, 142–146; and Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246.

Such is the general rule. But still it proceeds upon the ground, that the court, pronouncing the decree, had jurisdiction over the cause, and that the thing was either positively or constructively in its possession, and submitted to its jurisdiction. Even in cases of prize, if the vessel has never been captured at all, or if after capture she is rescued or recaptured, so that she is no longer under the dominion or possession of the captors, the sentence of a court of prize, professing to condemn her, would be a mere nullity. In respect to municipal seizures, the same rule must apply. The property must either be seized or be brought within the territorial jurisdiction, or at all events must be in the possession or under the control of the seizors, so as to be positively or constructively subjected to the dominion of the seizing sovereign, and his tribunals; otherwise the sentence pronounced will be a mere nullity, founded in usurpation. In respect to the jurisdiction of courts of prize acting in rem, as they are courts sitting under the law of nations, the courts of other nations are competent of themselves to inquire into and ascertain whether there has been any excess of jurisdiction, or not, without any resort to the laws of the particular country where the tribunal is established. But in respect to municipal courts, acting in rem, but deriving their authority solely from the territorial laws of the sovereign, they are and must, from the nature of the case, be presumed to be the best judges of the nature and extent of their own jurisdiction, and of its just and legitimate exercise. Their judgment, therefore, affirming that jurisdiction, must ordinarily be conclusive upon all foreign tribunals, subject, however, to this reserve, that the res is either within the territory, or is positively or constructively in the possession of the sovereign or his officers, so that the jurisdiction can, according to the law of nations, rightfully attach in such tribunals. I say ordinarily conclusive, because no foreign court can be permitted to sit as a court of errors to revise the decisions of municipal courts in the exercise of the jurisdiction conferred on them by the municipal laws. That would be to assume the final interpretation of those laws. But this doctrine again must be understood with its proper limitations, that the tribunal is recognised by the sovereign of the country as competent to act in the premises; which competency may be conclusively established from the express recognition of the sovereign, or his silent acquiescence in its decrees.

There is another element, which, it seems to me, constitutes an essential ingredient in every case, where the sentence of a foreign court in rem is sought to be held conclusive, as to the title to the property, and as to the facts, upon which it professes to be founded. That element is, that there have been proper judicial proceedings, upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law; but that there should be some certain written allegation of the offence, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents may know.

what is the offence, with which they are charged, and may have an opportunity to defend themselves, and to disprove the charge. It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that the charges, on which the condemnation is sought, shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more in common sense and common honesty than the sentence of the tribunal, which first punishes, and then hears the party—Castigatque, auditque. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and it is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings in rem, that some specific offence is charged, for which the forfeiture in rem is sought, and that due notice of the proceedings has been given, either personally, or by some public proclamation, or by some notification or monition, acting in rem, or attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon ex parte statements without their appearence, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs.

The opinion of Lord Ellenborough in Buchanan v. Rucker, 9 East, 192, contains much doctrine applicable to cases of this sort, although that case was a proceeding in personam, against a person, who had never been within the jurisdiction. But the case of Sawyer v. Maine F. & M. Ins. Co., 12 Mass. 291, 295, is directly in point. The supreme court of Massachusetts there held, that as it did not appear that any libel was filed, any monition issued, any hearing had, or that any of the formalities had taken place which are necessary to give a conclusive operation to the decrees of foreign courts, the sentence in that case (by a court of admiralty) was not to be deemed conclusive, even if it were admitted to be any evidence at all. The court added, that for aught that appeared from the copy of the proceedings, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed without any regard to the substantial requisites of a judicial inquiry. I entirely agree to the doctrine here promulgated. If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice. If they choose to proceed without any written charges of the offence, (for that is what I understand to have been meant by the supreme court of Massachusetts in using the word "libel" in the case above cited), without any monition in rem, or notice to the parties, or those, who represent them, without any hearing upon the facts, and without giving the party an opportunity to contest the charges, or to know, what in particular those charges are; it is but just, and conformable to the rights of other independent nations, to disregard such sentences, as mere mockeries, and as in no just sense judicial proceedings. Such sentences ought to be deemed, both ex directo in rem, and collaterally, to be mere arbitrary edicts, or substantial frauds.

Similar principles were recognised and maintained by the supreme court of the United States in The Mary, 9 Cranch [13 U. S.] 126, 142, 144. The court there said, that the reason, why the whole world are ordinarily held to be bound by the decree of a court of admiralty in rem, is, because every person, having any interest in it, may make himself a party and appeal from the decree. But the court added: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of the individual be bound by a judicial sentence, he shall have notice express or implied of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all, who have an interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those, who have an interest in it, to guard that interest by persons, who are in a situation to protect it."

Let us now see how far these principles have any just application to the present case. In the first place, it is perfectly clear that the tribunals of Mexico, having jurisdiction in rem, had a complete jurisdiction in this case; for the schooner was at the time within the territorial districts of that government. In the next place, the jurisdiction of the particular court, being dependent upon the municipal law, and affirmed by the court itself, would seem to be conclusive upon

all foreign courts, especially as the record furnishes evidence that its decree in this very case was adopted by the government through its proper officials. In the next place, it is stated in the record that the master of the vessel was summoned (and he was the proper representative of the vessel in a proceeding in rem in the absence of the owner), and that he appeared, and was admitted to make defence before the court. So far there seems no difficulty in the case.

The real difficulty in the case is the total want of any libel, or allegation in the nature of a libel, containing specific charges of the offence for which the confiscation was sought. We do not know precisely whether the offence intended to be charged was a fraudulent importation of goods in the schooner contrary to law, or the want of some general manifests, the nature and objects of which were stated, or the want of a specific manifest of the two boxes of medicines, containing a full description of the particular contents of these two boxes. In this respect we are left to mere inference and conjecture. The only documents which contain any statements on the subject, to serve in the place of a libel, are a letter under date of the 18th of April, 1837, from the commissioner of the custom-house, addressed to the administrator of the custom-house in the department, in which the writer says: "I annex three particular manifests belonging to two boxes medicines (no copies of these manifests were put in the record), which arrived in the American schooner Gardiner, Captain E. B. Freeman, coming from New York in ballast, and consigned to Don Pedro Nuel Pailleb. The general manifests I do not send, on account of the said captain's alleging, that he is entirely ignorant of the contents of the said boxes, for which reason he makes none, although they have been repeatedly demanded of him in presence of the collector, and also of the commander of the line, that in case this defect is proved, it may not be said to be from want of notice, or from any bad faith on the part of the commissioner. I send you, therefore, the only documents he has delivered to me. The said boxes remain on board the said vessel under thirteen seals for security, until the administration determine, what shall be done with them; since there is no occasion for the vessel to proceed to the capital, the captain having written to the consignee to attend there, and see what is to be done in the business. I annex another document attested by the Mexican consul, that the vessel had been cleared with the customary formalities of the port, together with a rate of the provisions, and a declaration of the said captain, but without a certificate of the measurement of said vessel, the captain of the port not having measured, which, however, shall be forwarded to you as soon as done. All which I make known to you, to serve as occasion may require." This is the whole of the letter. It is a mere official letter addressed by one public officer to another. It contains a mere narrative of certain facts. It makes no charge whatever against the vessel, as being forfeited by any act or omission. It alludes to no seizure, and proceedings against the vessel. It is mere advice; and can in no just sense be deemed a libel, or document in the nature of a libel. It wants not merely the form of a judicial proceeding for a forfeiture, but its very essence. Looking at this letter alone, no person could ever conjecture, that the facts stated therein, authorized, if true, a forfeiture of the vessel, and were so charged in order to enforce the forfeiture. The next document is a letter addressed by the administrator of the custom-house to the district judge of the department, under date of the 21st of April, 1837, in which he says: "I have just received from the commissioner of the custom-house at the principal bar, a communication under date of the 18th instant (the foregoing letter), which I annex, respecting the want of general manifests, with which the American schooner Gardiner, Captain B. Freeman, coming from New York, has arrived at that port, presuming that the other documents, which he has brought, and which I have before me, are in due form of law. All which I communicate to you, that you may determine what seems to you fit of right." This is the whole letter. It contains no accusation, asserts no offence chargeable upon the vessel, and asks no forfeiture. These are the only papers upon which the district judge proceeded to summon the captain to appear before him to defend his rights. I think it would violate all notions of the administration of public justice to call them a libel, or an allegation in the nature of a libel, or an accusation on which to found a decree of forfeiture against the vessel.

The record then goes on to state the summons and appearance of the captain and the proceedings before the judge as follows: "In virtue of the foregoing order, appeared at the appointed hour before this tribunal, the administrator of the custom-house, attorney general, and the captain of the American schooner Gardiner, to attend the hearing thereby ordered; and the present proceedings being read, and the judge having explained the object of this hearing, which was made known to the said captain through his interpreter, Don Andreas Mandilas, the said captain represented, that on his arrival at Frontera, he delivered to the commissioner of this custom-house, Don Juan Rosalind Vega, three particular invoices, a note of the provisions of his vessel, and a clearance of the custom-house of the port whence he sailed, but did not deliver the general manifests, not having brought them on account of being ignorant of the contents of the two boxes he had on board. And the said documents having been exhibited to him for rec-

ognition, he said they were the same he had mentioned. The administrator and attorney general represented, that the captain, being convicted by his own confession of having brought the aforementioned boxes, without the requisite manifest, conformable to the laws relating to the matter, they demanded, that the penalty be imposed upon him, which those laws prescribed for those, who do not submit to them; and which being heard by the judge, he said, that in conformity to the demands of the aforesaid functionaries, and to what is prescribed in article 7th of the law of November 16, 1827, and the decree of March 31, 1821, he must and did declare subject to the penalty of confiscation the American schooner Gardiner, with all her appurtenances, ordering in consequence, that the said schooner be brought to this capital, where, after appraisement notice to the supreme government, agreeably to the final disposal in such case, communicated under date of May 7, they should proceed to a sale at public auction, provided no appeal be interposed within the legal term to prevent. Whereupon the session was concluded, the present being signed by all in presence of the judge and notary, which I certify." It farther appears by the record, that the captain refused to sign the foregoing sentence, declaring, that he would not condemn himself. No appeal was interposed; and the execution of the sentence was subsequently directed to be carried into effect.

Now, certainly, the sentence does purport on its face to decree a confiscation of the schooner, and to be pronounced in conformity to what is prescribed in certain municipal laws of the government referred to by their dates. But these laws are not set forth in haec verba, so that we are utterly ignorant of their contents. What the particular facts or grounds of the confiscation were, is not stated by the judge in the sentence, although certain facts and grounds are stated in the demand of confiscation made in the representation (apparently oral) of the attorney general and the public administrator, viz. that the two boxes were by the confession of the captain brought into port without the requisite manifests, and therefore were subject to the penalty prescribed by the laws; and hence it may be inferred, arguendo, that the judge adopted their statements, and pronounced his sentence upon that foundation. But it is not so said. And I do not understand, that in construing a foreign sentence, which is to be held conclusive in rem, as to the facts and grounds of the sentence stated therein, this court is bound to make out such facts and grounds by argument, and inference, and conjecture. The facts and grounds ought to appear ex directo, in order to estop the parties in interest from denying or questioning them. I agree with the doctrine of Lord Ellenborough in Fisher v. Ogle, 1 Camp. 418, that courts of justice are not bound to fish out a meaning, when sentences of this sort are produced before them. Whatever points the sentence professes ex directo to decide, they are bound to respect, and admit to be conclusive. But if the sentence be ambiguous or indeterminate as to the facts on which it proceeds, or as to the direct grounds of condemnation, the sentence ought not to be held conclusive; or the courts of other countries put to the task of picking out the threads of argument, or of reasoning or of recital, in order to weave them together, so as to give force or consistency or validity to the sentence. The doctrine in Calvert v. Bovill, 7 Term R. 523, and Christie v. Secretan, 8 Term R. 192, seems to me on this point entirely correct and satisfactory. In Maley v. Shattuck, 3 Cranch [7 U. S.] 458, 488, it was said by Mr. Chief Justice Marshall, in delivering the opinion of the court, that the sentence of a foreign court of admiralty has never been supposed to evidence more than its own correctness; and consequently has never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. The same rule applies to the decrees of municipal courts, where the decree is general, and does not profess to proceed ex directo on any particular facts stated in the decree.

On the whole, therefore, for the reasons already stated, I strongly incline to hold, that for the want of some suitable allegation of the offence, in the nature of a libel, and for the want of any statement of facts ex directo, upon which the present sentence professes to be founded, it is not conclusive evidence against the plaintiffs in the present suit. But it does not appear to me necessary to rest the decision in the present case wholly on this ground. There is a clause in the policy, that "the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The question of the true interpretation of this clause came before the supreme court of the United States in the case of Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 496, 516, 517, 518. It was there held, that to bring a case within the clause, as an exception to the liabilty of the insurers, it is not necessary, that there should be a legal or justifiable cause of condemnation; but that it is sufficient, that there is a legal or justifiable cause of seizure and detention for or on account of a supposed illicit or prohibited trade. If, therefore, there was a seizure or detention bona fide made upon a reasonable ground, such, for example, as if there was a well founded suspicion of such illicit or prohibited trade, or probable cause to impute or to justify further proceedings and inquiries, that would be a legal and justifiable cause of seizure and detention within

the purview of the clause. On the other hand, if there was a mere lawless seizure or detention under the pretext of illicit or prohibited trade, and it was utterly unfounded, and without any reasonable cause of suspicion, and was used merely as a pretence to cover an intentional fraud or tort, then the seizure or detention was not such as is contemplated in the clause.

That there was a seizure in this case admits of no doubt; for there was a proceeding in rem, whether regular or irregular is of no consequence, and a confiscation adjudged in rem. The property was within the territory, in the possession and under the control of the government officers. Physical force actually applied is not indispensable to constitute a seizure or detention. It is sufficient, if the property be potentially within the reach, and subject to the process of the government. Thus, an embargo laid on vessels in a port is not less real, as an arrest, seizure, or detention, because it is unaccompanied with a physical force put on board to prevent a departure from the port. The restraint may be, and is, just as operative, if there is a moral force, and power of immediate action, which subdues resistance. There is a complete subjection or deditio to the local sovereignty, when it has the means and capacity and will immediately at hand to enforce obedience to its orders.

The seizure and detention were also, as it appears to me, clearly and avowedly made for and on account of a supposed illicit or prohibited trade; that is to say, a trade carried on, or attempted to be carried on, without the proper documents or manifests required by law. No other cause is assigned or pretended. I do not say, that there was any just ground of condemnation. It is sufficient, if there was a just and reasonable ground for the proceedings on account of the supposed illicit or prohibited trade. The only question, then, open for consideration, is, whether the accusation of the asserted illicit or prohibited trade was a mere cover and fraudulent pretence for a wanton trespass and aggravated wrong in known violation of law and right, or was bona fide made, however unfounded in fact. If the latter, the insurers are exonerated; if the former, then they are liable for the loss. In short, the question comes to this, whether the whole proceedings were knowingly and intentionally fraudulent, without any reasonable suspicions to justify them. If the condemnation was without any hearing, or opportunity of hearing, on the part of the captain, before the court, every presumption of mala fides must be materially strengthened.

It appears to me, that the question of fraud, or not, is completely open as a matter of fact for the consideration of a jury under all the circumstances of this extraordinary case. Before that question can be properly disposed of, it will probably be found necessary, in addition to other evidence, to have the Mexican laws, on which the condemnation is supposed to have been founded, before the court, so that the point of probable cause of seizure for defect of the proper manifests may be more fully presented, in explanation of the res gestae, to repel or confirm the suggestion of fraud. Trial by jury ordered.

BRADT, In re. See Case No. 5,993.

BRADY v. AMERICAN STEAMSHIP CO. See Case No. 10,945.

Case No. 1,794.

BRADY v. ATLANTIC WORKS.

[4 Cliff. 408;[1] 10 O. G. 702; 2 Ban. & A. 436.]

Circuit Court, D. Massachusetts. Sept. 29, 1876.[2]

PATENTS—APPROPRIATION BY THE UNITED STATES—INFRINGEMENT—INJUNCTION — PLEADING AND PROOF.

1. Inventions secured by letters-patent are property, and are as much entitled to protection as any other property consisting of a franchise.

[See Star Salt Castor Co. v. Crossman, Case No. 13,321; Smith v. Elliott, Id. 13,041.]

2. Private property cannot be taken for public use without just compensation, and the provision is as applicable to the government as to individuals, except in cases of extreme necessity, in time of war, and of immediate and impending public danger.

[See Cammeyer v. Newton, 94 U. S. 225; James v. Campbell, 104 U. S. 356.]

3. In such cases of the seizure, or appropriation of private property to public use, the officer in the public service is not a trespasser; but the government is bound to make full compensation to the owner of the property appropriated.

4. Allegations, in an answer, that the plans and specifications of the alleged infringing machine were furnished by a government agent, and that he was the real inventor of the machine, and not the patentee, must be proved before they can constitute a valid defence to a charge of infringement.

[Cited in Herring v. Nelson, Case No. 6,424.]

5. In the United States, the sovereign power of government, cannot use an invention patented under the federal laws, or authorize third persons so to do, without the license and permission of the patentee or owner of the patent.

[See Campbell v. James, Case No. 2,361; Colgate v. International Ocean Tel. Co., Id. 2,993; McKeever v. U. S., 14 Ct. Cl. 396; Fletcher v. Blake, 26 Lawy. Ed. Sup. Ct. Rep. 156; Hubbell's Case, 5 Ct. Cl. 1; Burns v. U. S., 4 Ct. Cl. 113, affirmed 12 Wall. (79 U. S.) 246.]

6. The patent law in this country secures to inventors, for a limited period, the exclusive right to their inventions in the United States.

7. Contractors of the government of the United States derive no power in a case like the

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

[2] [Final decree reversed by supreme court in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225.]

present, by virtue of their contract, to take the property of private individuals without their consent, or apply the same to fulfil their contract obligations.

In equity. This was a bill [by Edwin L. Brady against the Atlantic Works] founded upon letters-patent of the United States for certain improvements in dredging-boats. The chief defence was that the respondents had built the alleged infringing boat under a contract with the government, and that they could not therefore be restrained from so doing. The question of injunction was deferred for further consideration. Decree for an account.

J. S. Abbott, for complainant.

This case is really defended by the United States government; and it is claimed in defence that the right of the government is paramount to the plaintiff's. Whatever may be the law in England, that is not the law of the United States. Const. U. S. art. 1, § 8; Act Cong. July 4, 1836. "No right under the constitution and laws having been reserved to the United States government to use a patent without license of the patentee, when the government uses a patent, the proper department should allow reasonable compensation for its use." 9 Op. Attys. Gen. 135. At the hearing on motion for a preliminary injunction in this case, Mr. Justice Clifford took the same view, and held that the government had not the right to use this patent. The defendants are therefore liable, precisely as though they had contracted to build the "Essayons" for a private individual. They were the real contractors of the "Essayons." They furnished all the labor and materials required. The government became liable for nothing, excepting to pay the defendants the stipulated price for the vessel, on her delivery to and acceptance by the government; and with the further exception that, inasmuch as the government furnished the plans and specifications involving infringement of plaintiff's patent, it incurred an equitable, if not a legal liability, (which it has assumed by undertaking the defence in this case,) to protect the defendants, and to pay the amount which the plaintiff may recover against them because of their infringement. The defence therefore rests on no better ground than it would in a case brought by plaintiff against the government to recover for use of his patent in the court of claims; where judgments have been rendered against the government for similar claims by other patents.

Lothrop, Bishop & Lincoln, for respondents.

This is a proceeding in substance to restrain the United States from building a vessel designed and to be used for the purpose of dredging the mouth of the Mississippi river. The vessel was designed by officers in the engineer corps of the United States army, acting under orders from the war department. The nominal defendants are the mere instruments employed by the government to carry out its design and construct the vessel. They have agreed, by their contract, to build the vessel for the United States, according to specifications and plans furnished by the war department, and under the direction and supervision of a United States officer. The vessel is to be built in the same way the monitors and many other vessels were built during the war. Upon this, we say:—Even if the plaintiff's patent is a valid one, and if the construction of the "Essayons" is such as would otherwise constitute an infringement of it, —which we deny,—the United States, by its grant to the plaintiff of the privileges conferred by the patent, has not excluded the use of the thing patented by itself. The nature of the grant of a patent right by the sovereign power is not such as to exclude its own use of the thing granted. Feather v. Queen, 6 Best & S. 257. The nature of a patent right granted by the government is that of a prohibition to any of its subjects, except the patentee, from using the invention. It extends no further, and is not intended to deprive the government itself of its use. Even if this position be not correct, and assuming all that the plaintiff claims, i. e. a valid patent, infringement, and that the grant of a patent-right excludes the use of the thing patented by the sovereign power, still the present proceeding cannot be maintained.

This is a bill in equity to prevent the use of the thing patented; the object sought is restrained by injunction; if obtained, it will be an injunction against the United States as completely as if it were so in form. The operations of the government in war and in peace cannot be stopped in this mode. The United States cannot be prevented from building monitors for service in the war, or from building dredge-boats to be used at the mouth of the Mississippi river, by an injunction issued against the Atlantic Works, the agent, and means employed to build them. If the operations of the government could thus be interfered with in these instances, they are liable to be stopped at all times, in any matter, by the claim of a patentee. We submit that a bill in equity seeking for an injunction, whose object and result must be to prevent the use of the article claimed as patented, and thus to thwart the operations of the government, cannot in such a case be maintained; but that a patentee (assuming that his claims in all other respects are made out) is confined for relief either to,—petition to the court of claims, or, action at law against the officer or agent committing the tort. The difference between proceedings in equity to restrain the use of the thing patented and an action at law seeking damages, in such a case, is that the former puts

its power upon the designs of the government to prevent their accomplishment, and interferes to prevent the government from carrying out its plans, while the latter affords compensation without such interference. While the justification of a superior officer will constitute no defence to an action at law for an act committed by him, for which he would otherwise be liable. Little v. Barreme, 2 Cranch [6 U. S.] 170; Mitchell v. Harmony, 13 How. [54 U. S.] 115. The fact that the superior authority, under whose command an act is to be done, is the government; and that the act itself is an exercise of the proper powers of government will prevent the court from attempting to interfere with the act itself, or to restrain it by judicial process. The building of the vessel in question was an exercise by the United States of its governmental authority and power; and while it may be admitted that such an act will not prevent the recovery of whatever compensation any person should receive for any damages he may have sustained, it cannot be contended that it authorizes the imposition of judicial authority to prevent it. The judicial department of the government will not thus interfere to prevent the action of the executive department. The case of U. S. v. Burns, 12 Wall. [79 U. S.] 246, does not conflict with the principles above stated. That was a petition in the court of claims seeking compensation from the United States for the use of a patented article, and the decree was in favor of the petitioner. The case simply decides that the petitioner might have reimbursement in that mode. It is no authority for the proposition that the executive department of the government may be restrained, in operations of the necessity of which it alone must be the judge, by the judicial department. We refer the court to cases of Mississippi v. Johnson, 4 Wall. [71 U. S.] 475; and especially as being directly in point, and as containing a full discussion of the authorities and a very clear statement of the correct doctrine, to Gaines v. Thompson, 7 Wall. [74 U. S.] 347. The language of the court in the latter case, on pages 351, 352, both as to mandamus and injunction, is especially in point.

CLIFFORD, Circuit Justice. Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or exclusive right or privilege is granted. Seymour v. Osborne, 11 Wall. [78 U. S.] 533. Holders of letters-patent enjoy, by virtue of the same, the exclusive right and liberty of making and using the invention therein secured, and of vending the same to others to be used, as provided by the act of congress passed for the purpose. 16 Stat. 201. Private property, the constitution provides, shall not be taken for public use without just compensation, and it is clear that that provision is as applicable to the government as to individuals, except in cases of extreme necessity, in time of war, and of immediate and impending public danger. Exigencies of the kind do arise where the prohibition does not apply to the public, and in such cases it must be conceded that the officer in the public service is not a trespasser, but it is equally true that the government is bound to make full compensation to the owner. Mitchell v. Harmony, 13 How. [54 U. S.] 134; U. S. v. Russell, 13 Wall. [80 U. S.] 627.

Letters patent [No. 72,360] [3] for a new and useful improvement in the construction of boats for dredging under water were granted to the complainant on the 17th of December, 1867, as appears by the original patent annexed to the bill of complaint. Nothing is suggested to show that the patent is not regular in form, and the complainant alleges that the respondents are making and constructing a dredge-boat of the same construction as that described in his specification, and which is an infringement of his patent, and he prays for an injunction and for an account of all such gains and profits as they, the respondents, have received by their unlawful and wrongful acts and doings. Proofs were taken and hearing was had, when the respondents requested leave to amend their answer. Leave to that effect having been granted, and new proofs taken, the cause is now submitted, with additional briefs, to the court, upon the pleadings as amended, with all the proofs in the cause. Redress for the unlawful use of a patent cannot be obtained unless the party seeking it alleges and proves that he is the original and first inventor of the improvement, and that the patent has been infringed by the party against whom the suit is brought. Both of those allegations must be proved, but it is well-settled law that the patent, if regular in form, and introduced in evidence, affords a prima facie presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement. Under such a rule nothing is here open for examination except the question of infringement and the defences set up in the answer. Seymour v. Osborne, 11 Wall. [78 U. S.] 538.

Considered together, the answer and the amendments thereto may be regarded as setting up the following defenses:—

1. That the complainant is not the original and first inventor of the improvement.

2. That M. D. McAlester furnished the plans and sketches of the described dredging-boat, and that he was the real inventor of the improvement; that the said McAlester was the sole inventor of the same, and that the complainant fraudulently, wrongfully, and falsely represented himself as the original inventor, and that the patent was

[3] [From 2 Ban. & A. 436.]

wrongfully and inadvertently issued in ignorance of the facts, and is wholly inoperative and void.

3. That the dredging-boat in question was built and completed under the inspection and supervision of an officer of the United States, according to the plans and specifications furnished by the government of the United States; and that the said plans and specifications were the result of the said officer's own study, observation, and experience, and that to the extent that said plans and specifications were original in any particular, he was the author and inventor of the same.

Superadded to that, the respondents also allege that in building the said dredging-boat, and in following the said plans and specifications, they were the mere agents and executive hand of the federal government, which was the real constructor of the same, all the work thereon having been done under the immediate supervision, and in obedience to the orders, of the said government, and in conformity with the plans, specifications, and directions "which the said government furnished."

Two claims are set up by the patentee:—1. A dredging-boat, constructed with a series of water-tight compartments, so proportioned and arranged that, as they are filled with water, the boat shall preserve an even keel, and the dredging mechanism be brought into action without any adjusting devices. 2. He claims the combination of the "mud fan" attached to a rigid shaft, and a boat containing a series of water-tight compartments, so adjusted as to cause the boat to settle on an even keel as the compartments are filled with water, and also a pump for exhausting all the water from the compartments.

Reference is made to the drawings as making part of the specifications, and the patentee states that the excavator consists of a strong boat, propelled by one or two propellers placed in the stern. Two propellers are preferred, as affording greater power, and rendering the boat more manageable when steering in crooked channels. Steam engines of ordinary construction are employed to drive the propeller in the usual manner. Near the bow of the boat is placed another steam engine, to drive what the patentee calls the "mud fan," which projects from the bow of the boat and in front of the same, and is formed by a set of revolving blades, turned like those of the propellers, by a shaft passing through what is called a stuffing box in the specification. The blades for this purpose are shaped somewhat like those of a propeller, but the patentee states that they are sharper on their fronts, and less inclined on their face. These blades, he says, should extend about two feet below the bottom of the boat, their object being to displace the sand and mud on the bottom by their rapid revolution, and by stirring them up to mix the same up with the water so that they may be carried off by the current, to which he adds, that the "mud fan" assists the propellers to draw forward the boat as well as to stir up the mud and sand. All the engines, it is represented, may be driven by one set of boilers, placed midships, and in order that the "mud fan" may be brought in contact with the bottom, the patentee states that he constructs the boat with a series of water-tight compartments, placed in the bow and stern, and on each side of the centre, midships, into which the water may be permitted to flow, through pipes, so as to sink the vessel to the required depth, the compartments being so placed and proportioned that the vessel shall sink with an even keel, by which the effective action of the "mud fan," the propellers, and the steering apparatus, is preserved, leaving the boat manageable at any depth of water. Such is the general description of the boat, to which it is added, that a large pump, driven by the engine, is connected by pipes with all the compartments, so that the water may be pumped out when necessary to raise the boat. Argument to show that the invention was designed as an improvement in constructing a dredging-boat, and the apparatus to render such a boat an effective machine for that purpose, is unnecessary, as the proposition is supported by every line of the descriptive part of the specification.

Two suggestions are made, as tending to show that the complainant was not the original and first inventor of the improvement. 1. That its construction and mode of operation are the same as the dredge-boat Enoch Train, previously constructed, and publicly used in 1859, for the purpose of deepening the channel at the mouth of the river Mississippi. 2. That Gen. M. D. McAlester made the original plans and specifications described in the patent, and that he is the author and inventor of whatever is new and useful in the patented improvement.

Much discussion of the first suggestion is unnecessary, as it is quite clear that the evidence introduced by the respondents is not sufficient to show that the Enoch Train embodied the same construction and mode of operation as the patented improvement. Instead of that, the clear inference is, that it did not, and of course it is not sufficient to overcome the prima facie presumption that the patentee is the original and first inventor of what is secured to him by his patent. Nor is the proof introduced to support the second suggestion sufficient to warrant a finding, either that the person named made the plans and specifications, or that the complainant surreptitiously obtained the patent. Allegations, like those in the answer, that the plans and specifications were furnished by the agent of the government, and that the agent named was the inventor of the improvement, require to be proved before it can be admitted that they constitute a valid

defence to the charge of infringement. They are not proved in the case before the court, and consequently the defence must be overruled. Both propositions therefore are rejected, and the finding of the court on both of those points is in favor of the complainant. Suppose that is so, still the respondents insist that they worked under the federal government, and that the nature of a patent right is such that the sovereign power may use it at pleasure, or authorize third persons to use it for the public benefit. Support to that view is certainly found in the authority cited by the respondents, and perhaps it may be assumed that such is the rule in the parent country. Feather v. Queen, 6 Best & S. 283.

By that case it is decided that the patent prohibits all of the subjects of the sovereign, except the patentee, from using the invention, but that it extends no further, and is not intended to deprive the government itself of the use of the invention. Patents in that country are monopolies, granted by the sovereign, and may be granted or refused in the royal discretion. Power to legislate upon the subject in this country is conferred upon congress by the constitution, by securing for limited periods to inventors the exclusive right to their discoveries. Congress has legislated, and the provision is, that persons who have made inventions of the kind specified in section 24 of the patent act [1870], may "obtain a patent therefor." 16 Stat. 201. Every patent shall "contain a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the said invention or discovery throughout the United States." Section 22, p. 201. Language so explicit and unambiguous admits of no exception, even if it would be competent for congress to reserve such a right to the government. Such an exception is not made, and cannot be implied. Conclusive support to that proposition is found in a recent decision of the supreme court (U. S. v. Burns, 12 Wall. [79 U. S.] 252), where the court say, speaking of an invention made by an officer of the United States, and secured by letters-patent, that "the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor, or making compensation to him." Nothing can be plainer than that proposition, for two reasons: 1. Because the invention, when thus secured, is property, and as such, is entitled to the same protection as any other property. 2. Because private property cannot be taken for public use without just compensation except in cases of extreme necessity, in time of war, or of immediate and impending public danger. Nothing of the kind is shown in this case, and of course the case falls directly within the prohibition.

Sufficient appears to warrant the conclusion that the respondents were employed by the government to build a dredge-boat, but contractors of the government derive no power in a case like the present, by virtue of their contract, to take the property of private individuals without their consent, and to use and apply the same in fulfilling their contract obligations. Such a contractor may be the agent of the government to build a ship or dredge-boat, but he is not the agent of the government to seize and appropriate whatever materials he may select to fulfil his obligations. Infringement is impliedly admitted, and the other defences set up in the answer are overruled. Were infringement not admitted, still the proofs are sufficient to sustain the bill of complaint, which is all that need be said upon the subject.

Decree for an account. The question of an injunction is deferred for further consideration.

[NOTE. The master to whom the matter was referred for the purpose of taking an account of the profits received by the defendants from the infringement reported the sum at $6,604.82. Both parties excepted, but their exceptions were overruled, and a final decree, in accordance with the report, was rendered October 9, 1878, with costs; and from this both parties appealed to the supreme court, where Mr. Justice Bradley rendered an opinion reversing the decree of the circuit court, with instructions to dismiss the bill of complaint, holding that the letters-patent granted to the complainant below were invalid for want of novelty and invention; the placing of a screw for dredging at the stem of a boat, though qualified by the natural incidents and adjuncts of its application, being a principle not sufficiently substantial for patenting. Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225.]

Case No. 1,795.

BRADY v. ATLANTIC WORKS.

[3 Ban. & A. 577;[1] 15 O. G. 965.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—INFRINGEMENT—MEASURE OF DAMAGES—INTEREST ON PROFITS.

1. Gains and profits are the proper measure of damages in equity suits, except in certain cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the infringer.

2. Actual profits made by the infringement, are the profits which the complainant is entitled to recover, excluding those made in the construction of such portions of the infringing machine as are not embodied in the patented mechanism.

3. Interest on profits will not be allowed.

[See Mowry v. Whitney, 14 Wall. (81 U. S.) 620; Silsby v. Foote, 20 How. (61 U. S.) 378, reversing Case No. 4,919; Parks v. Booth, 102 U. S. 96; Littlefield v. Perry, 21 Wall. (88 U. S.) 205; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 Sup. Ct. 5.]

[4. Cited in Roberts v. Walley, 14 Fed. 169, to the point that a witness will not be compelled to disclose the names of persons whom

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

the opposite party may desire to call to disprove the case of his adversary.]

[On exceptions to master's report.

[In equity. Bill by Edwin L. Brady against the Atlantic Works to enjoin the infringement of letters patent No. 72,360, issued to complainant December 17, 1867, for improvements in dredging-boats, and for an accounting. There was a decree for an account (Case No. 1,794), and a report by the master to whom the matter was referred, to which report both parties excepted. Exceptions overruled, and decree confirmed.]

John S. Abbott, for complainant.

Geo. P. Sanger and R. R. Bishop, for defendants.

CLIFFORD, Circuit Justice. Gains and profits are the proper measure of damages in equity suits, except in certain cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent. Examples of the kind may be mentioned as falling within the exception where the business of the infringer was so improvidently conducted that it did not yield any substantial remuneration beyond expenses, and cases where the products of the patented improvement were sold by the infringer greatly below their just and market value, in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product. Birdsall v. Coolidge, 3 Otto [93 U. S.] 69. Redress was sought by the complainant, at a preceding term, for the infringement of a patent granted to him for a new and useful improvement in the construction of boats for dredging under water, as more fully set forth in the prior opinion of the court. Hearing was had, and the court entered a decretal order in favor of the complainant, and sent the cause to a master to compute and report the amount of the profits made by the respondents. Due report was made by the master, with the exceptions of each party to the same, which are the subject of the present investigation.

Exceptions of a general character taken by the complainant are three. (1.) Those that relate to allowances made by the master for general expenses, of which there are five in number. (2.) Extra charges were allowed by the master to the respondents for work done and materials furnished in constructing the dredge-boat, to which the complainant excepted. (3.) Interest was not allowed by the master upon the sum reported as profits, and the complainant excepts to the ruling of the master in that regard.

(1.) Complainant's exceptions as to the general expenses of their business, properly chargeable to the same, in the construction of the dredge-boat. Such expenses both parties agree should be allowed, but they differ widely as to the mode in which they should be computed and ascertained. Difficulty, it seems, attended the investigation, and the master took the calendar year or years in which the work was done, to which the complainant objected, and insisted that the calculation should only cover such portion of such year or years in which the respondents were actually engaged on the work. Had the complainant's theory been adopted by the master, the calculations would have been much more intricate and embarrassing, nor had he before him the requisite statistics to enable him to follow and verify the theory. Profits, beyond all doubt, are the proper measure of compensation in this case, and it is equally certain that the burden of proof is upon the complainant to show what the amount is that he is entitled to recover. Masters charged with that duty may examine the respondent, and, if necessary, inspect his books, but it is incumbent upon the complainant to furnish proof of whatever else is necessary to enable the master to make the proper computation. Actual profits made by the infringement of the invention secured by the letters patent are the profits which the complainant is entitled to recover, excluding those made in the construction of such portions of the infringing machine as are not embodied in the patented mechanism. Viewed in the light of those suggestions, it does not seem necessary to give each of the five exceptions touching the allowances for general expenses a separate examination. Matters in dispute are chiefly questions of fact, in respect to which it will be sufficient to say, that the whole report in respect to the five exceptions has been carefully reviewed, and the court is of the opinion that the five exceptions upon that subject must be overruled. Expenses of the kind are such as are incurred in the conduct of business for the benefit of the same in all its branches, and not properly chargeable to any one particular branch of the same. They are incurred for the maintenance of the entire business, and not in the interest of any one part of it above another, but are necessary, convenient or customary for all, and, therefore, are properly apportionable to the several branches of the business, when the profits of either are to be separately stated. Hitchcock v. Tremaine [Case No. 6,539]; The Tremolo Patent, 23 Wall. [90 U. S.] 528. Tested by the principle there laid down, it is clear that all these expenditures were properly allowed, as they were needful for all the undertakings, and were incurred for the benefit of all.

(2.) Extras charged, being actual expenditures, were properly taken into the account by the master, and the exception is accordingly overruled.

(3.) Interest on profits was properly refused. Such a charge was allowed by the circuit court in Silsby v. Foote, 20 How. [61 U. S.] 387, for which ruling the decree of the circuit court was reversed. Mowry v. Whit-

ney, 14 Wall. [81 U. S.] 653. Argument upon that subject is unnecessary, as the question is definitely settled by the decisions of the supreme court. Littlefield v. Perry, 21 Wall. [88 U. S.] 229.

Certain exceptions are also taken by the respondents to the report of the master, which deserve a brief consideration. Charges for extra work and materials furnished were allowed in the account of the respondents, in consideration of which the master required the respondents to assign the charges for the same to the complainant. Enough appears to show that the arrangement was an equitable one, and that the reasons given in support of it are entitled to prevail. Respondents' exceptions 2 and 3 are overruled, for the reasons given by the master, without further discussion. Providence Tool Co. v. Norris, 2 Wall. [69 U. S.] 54; Trist v. Child, 21 Wall. [88 U. S.] 450. Nor is any discussion necessary to support the ruling of the master which is the subject of complaint in the fourth exception of the respondents. His reasons are sound and well supported. Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 803.

Exceptions of both parties overruled. Master's report confirmed.

[NOTE. For reversal of the final decree in this case by the supreme court, see note at end of Case No. 1,794.]

BRADY (BANK OF ILLINOIS v.). See Case No. 888.

Case No. 1,796.

BRADY v. CHICAGO.

[4 Biss. 448.] [1]

Circuit Court, N. D. Illinois. June Term, 1865.

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS—DEFECTIVE BRIDGE — DUTY OF PEDESTRIAN — DAMAGES.

1. It is incumbent upon a pedestrian, crossing a swing bridge, to use reasonable care and caution, even though the city was negligent; and if he fails to do so, his administratrix cannot recover damages for his death.

2. Under the Illinois statute, only the amount of the actual pecuniary loss can be allowed; nothing can be added for grief or loss of society.

At law. Action by Mary Brady, as widow and administratrix, for pecuniary loss caused by the alleged wrongful act of the city of Chicago, occasioning the death of her husband, John Brady.

The following is the statute of Illinois, under which the action was brought. (Laws Feb. 12, 1853; 1 Gross' St. 60):

"§ 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5,000,—provided, that every such action shall be commenced within two years after the death of such person."

DRUMMOND, District Judge (charging jury). It seems that on the evening of the 28th of November, 1864, the deceased, John Brady, with his fellow-laborer Peter Cole, after having finished their day's work on the South Side, in Chicago, were proceeding homeward to the north side of the river. They were on the east side of Clark street and on the east side of the bridge. The bridge was being opened. They stepped on the bridge, and that end of the bridge turned to the west, and it remained east and west for a vessel to pass, they remaining on the same side of the bridge. The bridge was then swung round to its position. Of course the north side of the bridge would first strike the abutment and enable a person on the bridge if he so chose, to get off from that side of the pivot bridge. Some conversation took place between Cole and Brady as to the actual condition of affairs at the time. It seems that Brady was anxious to proceed, and Cole stated to him that he had better not be in a hurry, or something like that, and referred to what was near being an accident to Brady on a former occasion. The night was dark, and the gas was not bright and did not shed much light upon that end of the bridge. Brady, it seems, was somewhat in advance of Cole, and as the east side of the north end of the bridge was swinging past what is called "the protection," running nearly parallel with the bridge, and some distance from it on the west side of the abutment, he sprang or steppped from the bridge on to this "protection," which consists of a series of piles driven at intervals, and fastened together by timbers,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

and planked over so as to constitute something like a walk, or what looks like one. While doing this, he was spoken to by Cole, and in the act of turning round he lost his balance and fell into a boat lying in the river below, and injured himself so much that he died in a very short time. These seem to be the principal facts.

The case proceeds upon the ground of negligence on the part of the city, and mainly, if not solely, because this protection, or planking on the protection, naturally has the appearance of a sidewalk, and it is insisted there should have been something there to prevent a person from stepping on it; and it is also claimed there was not sufficient light at the time to enable a person to judge between the protection and the actual sidewalk or pathway of the abutment to the bridge.

There must be negligence shown on the part of the city before the plaintiff can recover. It is contended by the counsel for the plaintiff that it was the duty of the city to have there the means to throw so much light upon the end of the bridge as to enable a person to see clearly where he was about to step as he passed from the moving part of the bridge on to the abutment or on to the protection. Not much controversy has been made upon this point by the counsel for the defense. Ordinances have been referred to which it is said make it the duty of the city to have the streets properly lighted. The testimony of Mr. Cole upon this point, seems to be strong to the effect that there was not sufficient light. He says that it was very dark, and that the protection looked like the sidewalk of the bridge. As I understood him, it was difficult to distinguish between them in consequence of the want of proper light. It seems, in point of fact, that subsequently, and perhaps in consequence of this accident, the city did place some reflectors there, which improved or increased the light. It is thus apparent that there was not as much light there as it was in the power of the city to produce.

As to the erection of a barrier upon the protection, I feel somewhat at a loss to give any instruction upon that point, because the witnesses have not been very fully interrogated about it, and there may be some reason for not placing it there which might not occur to us. But it was the duty of the deceased, admitting that there was negligence on the part of the city authorities, to exercise reasonable care and caution, all things being considered as they existed at the time, and unless he did so the plaintiff cannot recover in this case. The position of defendant is undoubtedly correct, that a different degree of care is requisite when it is dark or in the night-time from what ought to be exercised during the day. It is proper to consider the warning which was given him, in order to determine the issue, not that he was necessarily careless, in consequence, but as one of the elements to enter into the case, and to show whether he acted prudently and with reasonable watchfulness and vigilance. Also, of course, we must take into consideration the fact that the bridge was moving. I have sometimes thought that it was a serious question whether foot-passengers ought to attempt to cross until the bridge ceased to move, but I give you no instruction on that point, leaving it as a matter of fact to be found by you.

If you shall find, under the instructions the court has given you, and under the facts, that the plaintiff may recover, then the next question would be, what damages the plaintiff would be entitled to.

This action is given by virtue of an express statute of the state. It could not be maintained at common law. The action is brought to recover for the pecuniary loss which has been sustained—nothing more or less; nothing for sorrow or grief which have been occasioned by the death of the person; nothing for the loss of society. The action is to be brought by the representative of the party for the benefit of the heirs and legal representatives. This woman was the wife of the deceased; is his administratrix, and she brings the action for the benefit of herself and her child, and if you shall think that she is entitled to recover, the question is, what pecuniary loss have they sustained in consequence of the death of the husband and father?

He was a painter by trade. He was a young man, about twenty five or six years of age. He was the only support of his wife and child. The damage, of course, in cases of this kind it is difficult to fix definitely. It is only by an approximation that we can arrive at the pecuniary loss which has been sustained. Although he was a young man, and a man of average constitution, his life was uncertain. He might die very soon, or he might live long. He might be sick or well. He might earn much or little. These things depend upon a thousand accidents and contingencies of human life and providence. All that we can do in relation to them, of course, is to use our own experience and our own observation, with such light as the evidence may reflect upon the subject, and approximate as nearly as we can to the pecuniary loss. It cannot exceed $5,000, but of course it may be any amount less than that.

Verdict for plaintiff.

NOTE [from original report]. To maintain an action for negligence, there must be fault on the part of the defendant and no want of ordinary care on the part of the plaintiff. In proportion to the negligence of one party should be measured the degree of care required of the other. Where there are faults on both sides, the plaintiff may in some cases recover,—where his negligence is comparatively slight, and that of the defendant gross. Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255; Same v. Hazzard, Id. 373; Chicago & A. R. Co. v. Pondrom, 51 Ill. 333; Chicago & A. R. Co. v. Hogarth, 38 Ill. 370; Chicago, B. & Q. R. Co. v. Triplett, Id.

482; Same v. Payne, 49 Ill. 499; Chicago & N. W. R. Co. v. Harris, 54 Ill. 528; St. Louis, A. & T. H. R. Co. v. Todd, 36 Ill. 409. But see Aurora Branch R. Co. v. Grimes, 13 Ill. 585; Dyer v. Talcott, 16 Ill. 300. Negligence of the plaintiff will not bar a recovery for defendant's negligence, unless it directly contributed to the injury caused by defendant's negligence. Short v. Knapp, 2 Daly, 150; Thrings v. Central Park R. Co., 7 Rob. [N. Y.] 616. Therefore, where the plaintiff's negligence does contribute to the injury, he cannot recover. Spooner v. Brooklyn City R. Co., 36 Barb. 217; Owen v. Hudson River R. Co., 2 Bosw. 374, 35 N. Y. 516; Burke v. Broadway & S. A. R. Co., 49 Barb. 529. As to the rule of damages in this class of cases, see Barley v. Chicago & A. R. Co. [Case No. 997], and notes to that case.

Case No. 1,797.

BRADY v. The NEW PHILADELPHIA.

[19 How. Pr. 315.]

Circuit Court, D. New York. Oct. Term, 1859.[1]

COLLISION—DAMAGES—DEMURRAGE.

On exceptions, in a case of collision, the amount allowed a barge for demurrage, while undergoing repairs, was *held* erroneous, where it appeared by the proofs that fifteen days elapsed after the barge was raised, and the owner had notice of the fact before he began to discharge her of her cargo. The fifteen days' estimated service was not chargeable to the respondent. Also, a pro rata abatement for wharfage. A charge of $60 for clothes of the master lost in the vessel, *held* not chargeable to the respondent.

[See note at end of case.]

[On exceptions to commissioner's report.

[In admiralty. Libel by Patrick F. Brady, owner of the barge Owen Gorman, against the steamboat New Philadelphia, (the Camden & Amboy Railroad & Transportation Company, claimant), for damages sustained by a collision. The libel was dismissed in the district court, but on appeal to the circuit court, upon new proof, there was a decree in favor of libelant, and reference to assess the damages.] This is a motion to set aside the report of the commissioner on an assessment of damages. [Sustained in part, and overruled in part.]

Mott & Murray, for exceptions.

Burrill, Davidson & Burrill, in opposition.

NELSON, Circuit Justice. Among other exceptions, one is to the amount allowed the vessel for demurrage while undergoing repairs, because (1) the value of the use of the vessel, or what she could have been hired for on account of the demand for vessels of this class, as allowed, is too high upon the proofs in the case, and (2) the time for which the allowance was made is not warranted by the evidence.

In respect to the first ground, we are of the opinion that the evidence supports the allowance according to the principles governing this question, as laid down in the case of Williamson v. Barrett, 13 How. [54 U. S.] 106.

Upon the second ground we think the commissioner erred, as it was in proof that some fifteen days elapsed after the barge was raised, and the owner had notice of the fact before he began to discharge her of the coal, and we see no explanation or contradiction of this evidence. There was allowed for the use of the vessel $12 per day. There must be a deduction, therefore, from this item of $180.

There is also an exception to the allowance for the wages of the master of the barge, and for clothing lost in the vessel. His wages were $35 per month, and $12 per month for board. The aggregate, with some other expenses, is put at $175, and $60 for his clothes lost. This last item must be stricken out, as not an item belonging to the libelant, and a deduction must be made for the fifteen days' service not chargeable to the respondent. Also a pro rata abatement for wharfage. The counsel can agree on this.

The remaining exceptions we think are not well founded.

[NOTE. Libelant appealed to the circuit court, which reversed the decree of the district court. Thereupon claimants appealed to the supreme court, which affirmed the circuit court decree upon the grounds that the collision and sinking of the Gorman were the results of her having been brought, by the steamer's fault, into collision with the sloop and the fender which was put out to ward off an impending blow, and the heavy pressure upon her by the steamer and the loaded barges which she had at that moment in tow; that putting out the fender for such a purpose was no fault upon the part of the sloop, as at most it was the case of a third party sustaining an injury to his property from the co-operating consequences of two causes, libelant being entitled to compensation for loss from either one or both of the persons producing them, according to the circumstances of the incident, and particularly so from the one of the two who had undertaken to convey his vessel with care and skill to its destination; also on the further ground that libelant's testimony showed that the Gorman was tight, stanch, and strong at the time of the collision; that the interval of its happening and of the sinking of the barge did not exceed one hour; and that she sank in twenty minutes after she had been cast off by the steamer at her place of destination; and that there had been no other collision to justify a conclusion that the injury sustained had been occasioned otherwise than as described by the libelant. Camden & A. R. R. & T. Co. v. Brady, 1 Black (66 U. S.) 62.]

BRADY'S BEND IRON CO. (M. & M. NAT. BANK OF PITTSBURGH v.). See Case No. 9,018.

[1] [Reversed by the circuit court (case unreported), and decree of the circuit court affirmed by supreme court in Camden & A. R. R. & T. Co. v. Brady, 1 Black (66 U. S.) 62.]

Case No. 1,798.

BRAGDON v. The KITTY SIMPSON.

[37 Hunt, Mer. Mag. 709.]

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

SHIPPING — RIGHTS OF MINORITY OWNERS — FOREIGN VOYAGE — INTEMPERANCE OF MASTER.

[Intemperance of the master is a sufficient ground for a decree in admiralty requiring the majority owners of a vessel to give the dissenting owners a stipulation for her safe return from a proposed foreign voyage.]

[In admiralty. Libel by Samuel S. Bragdon against the Kitty Simpson. Decree for libelant.]

Before BETTS, District Judge.

The libelant alleged that the owners of the other three-quarters were going to send the ship to Australia, under the command of a master named Brown, whom he alleged to be unfit for such command, by reason of intemperance, and that he had dissented from such voyage. The answer of the claimants denied that Brown was intemperate, and alleged that the libelant had assented to the charter to Australia, but afterwards, when she was taking in cargo, expressed his dissent, on account of his allegation against Brown, and denied that he could withdraw his assent for that cause.

HELD BY THE COURT: That the majority owners have the right to employ the vessel in such voyages as they please, giving a stipulation to the dissenting owners for her safe return, if the latter, upon a proper libel, filed in admiralty, require it. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 183; Crabbe, 271; [Fox v. Paine, Case No. 5,014.] That this libel is in proper form to that end. Judgment that the majority owners must give security for the safe return of the ship.

*

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